

eSwatini

## Electronic Records (Evidence) Act, 2009

Act 6 of 2009

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## Electronic Records (Evidence) Act, 2009

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## eSwatini

# Electronic Records (Evidence) Act, 2009

## Act 6 of 2009

Commenced on 11 August 2009

*[This is the version of this document at 1 December 1998.]*

**An Act to provide for the legal recognition of electronic records and for the admissibility in evidence of electronic records as original records and for matters incidental thereto or connected therewith.**

### 1. Short title

This Act may be cited as the Electronic Records (Evidence) Act, 2009, and shall come into operation on the date of publication in the *Gazette*.

### 2. Interpretation

In this Act, unless the context otherwise requires—

“**computer system**” means a device, or a group of interconnected or related devices, including the internet, one or more of which pursuant to a computer programme, performs automatic processing of data or any other function;

“**court**” includes a tribunal, board and commission;

“**data**” means—

- (a) any representation of facts, information or concepts in a form suitable for processing in a computer system;
- (b) any information recorded in a form in which it can be processed by equipment operating automatically in response to instructions given for that purpose; or
- (c) a programme suitable to cause a computer system to perform a function;

“**electronic record**” means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device, and includes a display, printout or other output of that data;

“**electronic records system**” includes a computer system or other similar device by or in which data is recorded or stored and any procedures related to the recording or storage of electronic records;

“**electronic signature**” means a signature that consists of one or more letters, characters, numbers or other symbols in digital form incorporated in, attached to, or associated with an electronic document;

“**evidence**” includes all electronic records produced for the inspection of a court;

“**legal proceeding**” means a civil, criminal or administrative proceeding in a court;

“**secure electronic signature**” means an electronic signature that results from the application of technology or process prescribed by regulations made under [section 16](#).

### 3. Application

This Act applies to all legal proceedings in or before any court and to affidavits presented to any court or officer of any court.

#### 4. Derogation from rule of law on authentication and best evidence

This Act does not derogate from any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence which rules are derogated from in the manner provided for in sections 6 and 7, respectively.

#### 5. Admission and authentication of electronic records

- (1) Nothing in the rules of evidence shall apply to deny the admissibility of an electronic record in evidence on the sole ground that it is an electronic record.
- (2) A court may have regard to evidence adduced under this Act in applying any common law rule relating to the admissibility of records.
- (3) Notwithstanding section 244 of the Criminal Procedure and Evidence Act, 1938, in so far as it relates to the authentication of a copy of, or extract from, a book or record, as a true copy or extract, and subject to subsection (4), a person may seek the admission of such copies or extracts from a book or record and of entries in bankers' books, in electronic form, as evidence in any legal proceedings.
- (4) A person seeking to admit an electronic record in any legal proceedings as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is that which that person purports it to be, except that in the case of an electronic record generated outside the jurisdiction, it shall be sufficient if the record is authenticated in that jurisdiction.
- (5) Notwithstanding section 242 of the Criminal Procedure and Evidence Act, 1938, any public officer who has the custody or control of a record by virtue of that officer's office shall produce that record in an electronic form in any criminal or civil proceedings before any court, or before a magistrate on a preparatory examination upon the order of the Director of Public Prosecutions.
- (6) It shall be sufficient to produce an extract from a banker's book, in electronic form, and such extract shall be admissible in evidence before any court or before a magistrate holding a preparatory examination, as the original record.
- (7) Notwithstanding subsection (3), in so far as it relates to entries in bankers' books, and subsection (6), a person seeking to admit an electronic record as evidence of an entry in a banker's book shall comply with the proviso to section 245(1) of the Criminal Procedure and Evidence Act, 1938, as far as the giving of the notice is concerned.

#### 6. Evidence of electronic records

- (1) In this section, "approved process" means a process that has been approved in accordance with the provisions of any regulations made by the Minister, by a person or an organisation appointed by the Minister to be a certifying authority under such regulations.
- (2) Unless otherwise provided in any other written law, where an electronic record is tendered in evidence for any purpose, such record shall be admissible if it is relevant and it is produced in an approved process.
- (3) A certificate signed by a person holding a responsible position in relation to the operation or management of a certifying authority appointed under subsection (1) and purporting to identify the electronic records system including that part of the system that is relevant to the proceedings, shall be sufficient evidence of the integrity of the electronic records system.
- (4) Where an electronic record is obtained from an electronic records system and duly certified as such by a person holding a responsible position in relation to the operation or management of the approved process, it shall be presumed that it accurately reproduces the contents of the original record unless the contrary is proved.

- (5) With respect to subsection (2), a certificate signed by a person holding a responsible position in relation to the operation or management of the relevant electronic records system and—
  - (a) purporting to identify the system and describing the manner in which the electronic record was produced;
  - (b) giving particulars of any device involved in the processing and storage of the electronic record; and
  - (c) dealing with the matters mentioned in that subsection,shall be sufficient evidence of the matters stated in the certificate.
- (6) If the person referred to in subsection (5) did not have control or access over any relevant records and facts in relation to the production by the electronic records system of the electronic record, a supplementary certificate signed by another person who had such control or access and made in accordance with subsection (5) shall be sufficient evidence of the matters stated in the certificate.
- (7) If any person referred to in subsection (5) or (6) refuses or is unable for any reason to certify any of the matters referred to in those subsections, a certificate signed by another person who had obtained or been given control or access to the relevant records and facts in relation to the production by the computer of the electronic record and made in accordance with subsection (5) shall be sufficient evidence of the matters stated in the certificate.
- (8) For the purposes of subsections (3) to (7), it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.
- (9) Any electronic record tendered in evidence under this section and duly authenticated shall not be inadmissible as evidence of proof of the contents of the original record merely on the ground that—
  - (a) certain parts or features of the original record, such as boxes, lines, shades, colours, patterns or graphics, do not appear in the record if such parts or features do not affect the accuracy of the relevant contents; or
  - (b) it is secondary evidence.

## **7. Application of best evidence rule to electronic records**

- (1) The best evidence rule in respect of an electronic record is satisfied—
  - (a) on proof of the integrity of the electronic records system in or by which the data contained in the electronic record was recorded or stored; or
  - (b) if the electronic record contains a secure electronic signature that was added when the electronic record was first generated in its final form and that can be used to verify that the electronic record has not been changed since that time.
- (2) Notwithstanding subsection (1), in the absence of evidence to the contrary, an electronic record in the form of a printout satisfies the best evidence rule if, in any legal proceedings, the printout has been manifestly and consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

## **8. Admissibility of electronic signature**

- (1) Where a rule of law requires a signature, or provides for certain consequences if the record is not signed, an electronic signature satisfies that rule of law or avoids those consequences.
- (2) An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction, to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

- (3) 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 data, is met if an electronic signature is used.

## 9. Presumption of integrity

In the absence of evidence to the contrary, the integrity of an electronic records system by or in which an electronic record is recorded or stored is proven—

- (a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic records system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record and there are no other reasonable grounds to doubt the integrity of the electronic records system;
- (b) by the party tendering such record that there is no reasonable ground for believing that the electronic record is inaccurate because of improper use of the electronic records system and that no reason exists to doubt or suspect the truth or reliability of the electronic record;
- (c) if it is established that the electronic record was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; and
- (d) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party or who did not record or store it under the control of the party seeking to introduce it.

## 10. Standards, etc., may be considered

For the purpose of determining under any rule of law whether or not an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which the electronic records are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic record and the nature and purpose of the electronic record.

## 11. Proof by affidavit

The matters referred to in sections [7\(2\)](#), [9](#) and [10](#) may be established by affidavit.

## 12. Powers of court to call for further evidence

- (1) Where a court is not satisfied that the electronic record sought to be admitted in evidence under [section 5](#) accurately reproduces the relevant contents of the original record, the court may, in its discretion, call for further evidence.
- (2) Where further evidence is called for under subsection (1), such evidence may be produced by an affidavit made—
  - (a) by a person occupying a responsible position in relation to the operation or management of the certifying authority appointed under [section 6\(1\)](#);
  - (b) by any other person occupying a responsible position in relation to the operation of the electronic records system at the relevant time;
  - (c) by the person who had control or access over any relevant records and facts in relation to the production of the electronic record;
  - (d) by the person who had obtained or been given control or access over any relevant records and facts in relation to the production of the electronic record; or
  - (e) by an expert appointed or accepted by the court.
- (3) Notwithstanding subsections (1) and (2), the court may, if it thinks fit, require that oral evidence be given of any matters concerning the accuracy of the electronic record, and may call a deponent

of an affidavit under subsection (2) or any person responsible for a certificate issued under [section 6\(4\)](#), (6) or (7) for this purpose.

### 13. Estimating evidential weight of electronic record

In estimating the weight of any electronic record admitted under [section 5](#), the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the electronic record and, in particular—

- (a) whether or not the information which the electronic record reproduces or is derived from was supplied to the relevant electronic records system, or recorded for the purpose of being supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information, if such contemporaneity is relevant; and
- (b) whether the supplier of the information or any person involved in the processing of such information had any incentive or motive to conceal or misrepresent the information so supplied.

### 14. Proof of matters

- (1) Without prejudice to sections [12](#) and [13](#), whenever any electronic record is proved under [section 5](#), all matters may be proved in order—
  - (a) to contradict or to corroborate it; or
  - (b) to impeach or support the credibility of the person by whom it was made, or by whom the information was processed.
- (2) Evidence may not be given under subsection (1) of any matter of which, if the person had been called as a witness and had denied that matter upon cross-examination, evidence could not have been adduced by the cross-examining party.

### 15. Offences and penalties

Any person who, in a certificate tendered under [section 6\(2\)](#), (3), (5) or (6), in a court makes a statement which that person knows to be false or does not reasonably believe to be true commits an offence and is liable, on conviction, to a fine not exceeding two thousand emalangeni or to imprisonment for a period not exceeding six (6) months, or to both.

### 16. Regulations

The Minister may make regulations providing for any matter which under this Act is to be provided for by regulations or for the better carrying out of the purposes and provisions of this Act.