

ELECTRONIC SIGNATURES ON SALE AGREEMENT OF LAND: GETTING IT WRONG

Borcherds and Another v Duxbury and Others (1522/2020) [2020] ZACPEHC 37 (22 September 2020)

With the constraints placed on transacting in this past year, many property practitioners battled with the provisions of the Electronic Communications and Transactions Act (ECTA). This was in part because signing a sale agreement of land electronically is prohibited in terms of ECTA. Taking a photograph of your signature and affixing it to an agreement electronically cannot overcome this exclusion contained in the ECTA. Even our courts get it wrong.

The Judgment can be viewed [here](#).

FACTS

In a judgment handed down in the Port Elizabeth High Court on 22 September 2020, one of the points raised related to the validity of the sale agreement of land and compliance with section 2(1) of the Alienation of Land Act (ALA). The ALA requires that an agreement for the alienation of immovable property must be in writing and signed by the parties or their duly appointed representatives.

What happened here was that the purchasers had signed the offer to purchase, in pen and ink, and the document was scanned to the seller who received it on his cellular phone. It was then imported into the DocuSign Application (App) on his phone and signed and initialed using the App. The App contained a sample signature and initial of the seller, having as origin the seller's "wet ink" signature and initials. This was then photographed and imported into the App.

HELD

- The Court reasoned that:
 - 1) No evidence was placed before it that the parties intended this to be an electronic transaction;
 - 2) The words "sign" or "signed" are not defined in the Alienation of Land Act; and
 - 3) The approach of the courts to signatures has always been pragmatic, not formalistic. They look to whether the method of the signature used fulfils the function of a signature - to authenticate the identity of the signatory - rather than to insist on the form of the signature used. In the days before electronic communication, the courts were willing to accept any mark made by a person for the purpose of attesting a document, or identifying it as his act, to be a valid signature.

CONCLUSION

Against this background, the Court held that the signatures were validly appended for purposes of the Alienation of Land Act.

Our further comments:

As much as one would want to agree to the practical reasonableness of the approach, it is unfortunately not correct.

- As to the first point above: There is no requirement in the Electronic Communications and Transactions Act 25

of 2002 (ECTA) that its provisions will apply in instances where parties intended that the transaction should be concluded electronically. Intention is not relevant.

- Furthermore, with regards to point 2 above, taking a photograph of the signature and using it in that format via the App, indeed constitutes an electronic signature. An **electronic signature or e-signature** covers all technologies and digital solutions that enable businesses and individual persons to create electronic signatures, including putting the image of a handwritten signature on a document, signing with pin codes, signing via ticking a checkbox, typing the name on an electronic document, or signing with an e-signature certification issued by a trusted service provider.
- The imported photograph of the signature into the APP is “data” as defined in ECTA, which states that “data” is “electronic representation of information in any form.” It constitutes “data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a **signature**.” Clearly, in this instance, the parties utilized an electronic signature on an agreement for the sale of land, rendering it void. This is because ECTA states in section 4(4) that certain agreements may not be concluded electronically. These exceptions, are:
 - agreements for the sale of immovable property;
 - long-term leases of land exceeding 20 years;
 - signing of a will; and
 - bills of exchange (such as a cheque).

In other words, agreements for the sale of immovable property as provided for in the Alienation of Land Act are excluded from the scope of ECTA and as such the electronic signature provisions (including even a so-called advanced signature) will not apply to the signature provisions contained in the Alienation of Land Act.

- The consideration in point 3 above therefore does not arise. Section 2(1) of the Alienation of Land Act provides that no sale of land will be of any force and effect unless it is contained in a written deed of alienation signed by the parties or their agents (under the parties’ written authority). An offer to purchase or agreement for the sale of immovable property are examples of such a deed of alienation. A verbal contract for the sale of immovable property is similarly unenforceable.
- Consequently, one can validly conclude a contract of sale for a TV, painting or vehicle electronically, but when it comes to the selling and purchasing of immovable property, the agreement must be reduced to writing and physically signed by hand, in pen, by the parties.
- Parties may still communicate terms of their agreements via email, WhatsApp or SMS. Execution of the Offer to Purchase shall, however, only be enforceable and valid once the agreement is signed by hand by both of the parties or their authorised agents. Therefore, a signature, for purposes of this transaction must be the act of physically signing by hand and does not include by way of data message.