

8 DECEMBER 2020

REAL ESTATE ALERT



IN THIS ISSUE

Where do we stand on sale of immovable property agreements signed electronically?

Electronic signatures have become a topic of broad and current interest. The legal stance on the validity of the use of electronic signatures in the context of sale of property agreements was clear in the past. The recent case of *Borcherds and Another v Duxbury and Others* (1522/2020) [2020] ZAECPEHC 37 (22 September 2020) heard by the Eastern Cape High Court has created a degree of uncertainty regarding the use of electronic signatures in the context of sale of immovable property agreements.

Where do we stand on sale of immovable property agreements signed electronically?

The issue before the court relevant to this discussion was whether an electronically signed sale of immovable property agreement was valid or not.

Electronic signatures have become a topic of broad and current interest. The legal stance on the validity of the use of electronic signatures in the context of sale of property agreements was clear in the past. The recent case of *Borcherds and Another v Duxbury and Others (1522/2020) [2020] ZAECPEHC 37 (22 September 2020)* heard by the Eastern Cape High Court has created a degree of uncertainty regarding the use of electronic signatures in the context of sale of immovable property agreements.

The ECTA and the legal position prior to the *Borcherds v Duxbury* case

The Electronic Communications and Transactions Act 25 of 2002 (ECTA) gives recognition to transactions concluded electronically. The ECTA facilitates electronic communications and transactions and allows for the use of electronic signatures.

In terms of ECTA, any agreement concluded in terms of the Alienation of Land Act 68 of 1981 (the Alienation of Land Act) may not be validly signed by means of an electronic signature. The category of agreements that fall under the ambit of the Alienation of Land Act include sale of immovable property agreements and long-term lease agreements. It was trite law that a sale of immovable property agreement is required to be signed in wet ink in order to be valid and enforceable.

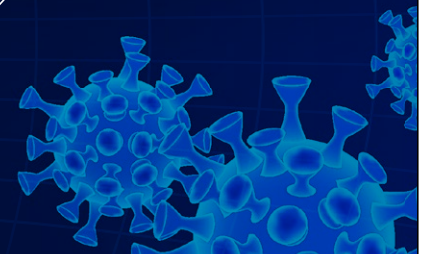
The *Borcherds v Duxbury* case

The issue before the court relevant to this discussion was whether an electronically signed sale of immovable property agreement was valid or not.

In this case the estate agent emailed a signed offer to purchase to Duxbury (the Seller). It was received by the Seller on his cellular telephone and was then imported into an application known as DocuSign.

CDH'S COVID-19 RESOURCE HUB

Click here for more information 



Where do we stand on sale of immovable property agreements signed electronically?...continued

The Seller submitted that the provisions of ECTA, which allow for the electronic signature of documents, have no application in respect of transactions for the alienation of land in terms of the ECTA by virtue of the provisions of section 4(3) read with Schedule 1 thereto.

DocuSign is a mobile app. DocuSign allows users to sign and annotate documents by attaching a stored signature, which may be created in graphic design software, captured from an image of a paper document or selected from a variety of prefabricated signatures based on the user's legal name. The saved signature can be applied to PDFs, word processing documents and images. To complete a document, participants apply their signatures and send completed documents to cloud storage for review.

The Seller signed the offer to purchase by attaching his stored signature which was created by capturing an image of a paper document with his wet ink signature. It was submitted by the Seller, whose intention it was to have the sale agreement declared invalid, that the aforementioned signature constituted an electronic signature that is subject to the provisions of the ECTA. The Seller submitted that the provisions of ECTA, which allow for the electronic signature of documents, have no application in respect of transactions for the alienation of land by virtue of the provisions of section 4(3) read with Schedule 1 thereto. It was therefore

submitted that the offer to purchase is of no force and effect as it does not satisfy the signature requirement of section 2(1) of the Alienation of Land Act.

The judgment highlights that 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.

It was common cause that the signatures and initials of the Seller as contained in the DocuSign application were digitised versions of originally handwritten signatures and initials. The learned Judge referenced the work *Contract – General Principles* (by Van Huyssteen, Lubbe and Reinecke, 5th edition at 5.32, page 163) which states that in the context of statutory formalities such as the Alienation of Land Act "the requirement of signature may conceivably be satisfied by an electronic signature, where a handwritten signature is digitised and attached to an electronic document, although this procedure is open to abuse". The judge ruled that the facts of this case are such that there is no suggestion of abuse.

CDH's Real Estate practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Lucia Erasmus is ranked as a Leading Individual in Real Estate in THE LEGAL 500 EMEA 2020.

William Midgley is ranked as a Leading Individual in Real Estate in THE LEGAL 500 EMEA 2020.

John Webber is recommended in Real Estate in THE LEGAL 500 EMEA 2020.

The
**LEGAL
500**
EMEA



Where do we stand on sale of immovable property agreements signed electronically?...continued

This judgment conflicts with the legal position set out in ECTA. This judgment does not refer to section 4(4) of the ECTA. This section provides that *"this Act must not be construed as giving validity to any transaction mentioned in Schedule 2"*.

The court held that it is clear that by the Seller affixing his signature and initials to the offer to purchase utilising the DocuSign application, the Seller signed the contract as envisaged in section 2(1) of the Alienation of Land Act with the intention of being bound to the contract as seller. The offer to purchase was declared to be valid and the court ordered that the parties give effect to the contract.

Conflict of Law

This judgment conflicts with the legal position set out in ECTA. This judgment does not refer to section 4(4) of the ECTA. This section provides that *"this Act must not be construed as giving validity to any transaction mentioned in Schedule 2"*.

Schedule 2 of ECTA sets out categories of transactions that may not be signed electronically. These include agreements for the sale of immovable property; long-term leases of land exceeding 20 years; a last will and testament and Bills of exchange.

It is interesting to consider whether the court would have ruled differently if it had taken this provision of the ECTA into account when making its judgment.

It is advisable to ensure that all agreements for the sale for immovable property are signed in wet ink until the legal position is further clarified.

John Webber and Nabeela Edris



OUR TEAM

For more information about our Real Estate practice and services, please contact:



Muhammad Gattoo
National Practice Head
Director
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com



Bronwyn Brown
Director
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



Nayna Cara
Director
T +27 (0)11 562 1701
E nayna.cara@cdhlegal.com



Mike Collins
Director
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com



Werner de Waal
Director
T +27 (0)21 481 6435
E werner.dewaal@cdhlegal.com



Lucia Erasmus
Director
T +27 (0)11 562 1082
E lucia.erasmus@cdhlegal.com



Simone Franks
Director
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Daniel Fyfer
Director
T +27 (0)21 405 6084
E daniel.fyfer@cdhlegal.com



Fatima Gattoo
Director
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Andrew Heiberg
Director
T +27 (0)21 481 6317
E andrew.heiberg@cdhlegal.com



Simone Immelman
Director
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



William Midgley
Director
T +27 (0)11 562 1390
E william.midgley@cdhlegal.com



Muriel Serfontein
Director
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com



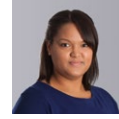
John Webber
Director
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



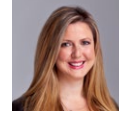
Kelsey Biddulph
Senior Associate
T +27 (0)11 562 1417
E kelsey.biddulph@cdhlegal.com



Natasha Fletcher
Senior Associate
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



Robyn Geswindt
Senior Associate
T +27 (0)21 481 6382
E robyn.geswindt@cdhlegal.com



Samantha Kelly
Senior Associate
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com



Janke Strydom
Senior Associate
T +27 (0)11 562 1613
E janke.strydom@cdhlegal.com

Joloudi Badenhorst
Associate
T +27 (0)11 562 1272
E joloudi.badenhorst@cdhlegal.com

Nabeela Edris
Associate
T +27 (0)11 562 1740
E nabeela.edris@cdhlegal.com

Shanita Goven
Associate
T +27 (0)11 562 1586
E shanita.goven@cdhlegal.com

Lutfiyya Kara
Associate
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com

Sune Kruger
Associate
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com

Aaron Mupeti
Associate
T +27 (0)11 562 1016
E aaron.mupeti@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2020 9197/DEC

