



CORPORATE & COMMERCIAL AND REAL ESTATE LAW ALERT

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INCORPORATING
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IN THIS ISSUE

Live, love, laugh, but don't use your electronic signature when selling your house

In recent years we have seen momentous breakthroughs in the realm of technology that have significantly enhanced many facets of life. The same is true in the context of commercial transactions, which have been expedited through the use of electronically generated agreements. Parties, thousands of miles apart, can instantly conclude binding contracts without having to physically meet.



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Although this should be welcomed with open arms, it is important that we also recognise the limitations of electronically generated agreements, specifically the signature thereof, as regulated by the Electronic Communications and Transactions Act 25 of 2002 (ECTA) and the Alienation of Land Act 68 of 1981 (ALA).

STATUTORY POSITION

Section 12 of ECTA recognises that the requirement that a document be in "writing" will be satisfied if that document is in the form of a data message (or digital contract) and section 13(1) recognises that the requirement that a document must be signed will be satisfied "only if an advanced electronic signature is used". Where parties themselves require a document to be signed electronically, section 13(3) provides that this may be satisfied through any means which (i) sufficiently identifies the person and their approval; and (ii) is reliable and appropriate for the purpose for which the information was communicated. From this it is clear that parties concluding an agreement may use electronic

signatures provided that the parties satisfy all contractual formalities required by statute. However, it is important for contracting parties to remain conscious of the nature of the commercial agreements being concluded and the limitations imposed on the use of electronic signatures by law.

Section 4(3), read with Schedule 1 of ECTA, expressly excludes the application of sections 12 and 13 from agreements contemplated by the ALA. Furthermore, section 4(4) read with Schedule 2 provides that ECTA should not be construed as giving validity to any agreements for the alienation of immovable property contemplated by the ALA. In other words, ECTA does not recognise an electronic signature as being capable of validating such agreements. This is in line with section 2(1) of the ALA which provides that no agreement to alienate land will be valid "unless it is contained in a deed of alienation and signed by the parties thereto".

Although it is clear that the general rule is that any agreements relating to the alienation of land will be

invalid if signed using any form of electronic signature, we have not seen uniformity in the judiciary when applying these provisions.

CASE LAW

In the case of *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another* [2015] (2) SA 118 (SCA), the Supreme Court of Appeal (SCA) had to determine whether an agreement between parties could be validly cancelled by email despite the contract requiring this to be done in writing and signed by both parties. The SCA acknowledged that when formalities are imposed by statute or by the parties themselves, ECTA generally allows this to be satisfied, "through electronic transactions". Before concluding that the emails exchanged between the parties satisfied the formalities imposed by the contract, the SCA remarked that "there are, however, exceptions where agreements may not be generated electronically. These are the agreements for the sale of immovable property."

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More recently, this reasoning was followed in the case of *Aarifah Security Services CC v Jakoita Properties (Pty) Ltd and Others* [2021] (5) SA 207 (GJ). Here, the South Gauteng High Court had to determine, in the context of pre-emptive rights, whether an offer to purchase immovable property, in the form of an email, complied with the formalities of the ALA. The court found that although a "normal" electronic signature that one finds at the foot of an email would satisfy a requirement in contract that a document must be signed, this would not suffice if such requirement arose in terms of statute. The court went on to state that "section 4(3) and (4) read with Schedules 1 and 2 of ECTA make it clear that its provisions can in any event not be employed to validate deeds of sale under the ALA".

However, the Eastern Cape High Court took a different approach to this issue in the case of *Borchards and Another v Duxbury and Others* (1522/2020) [2020] ZAECPHC 37. The High Court had to determine whether

an electronic signature generated by the application DocuSign could validate an agreement involving the sale of immovable property. The court focused more on whether the signature fulfilled its purpose – to authenticate the identity and intention of the signatory – rather than the form it was required to take. The court found that the word "sign", which is not defined in the ALA, should include any signature "by name or mark", (whether electronic or otherwise) provided the identity and intention of the signatory was adequately depicted.

Unfortunately, this judgment caused some uncertainty in the realm of electronically generated agreements as it was a stark departure from the current statutory position, which we briefly explain below.

CDH'S VIEW

In our view, the approach adopted in the *Spring Forest* and *Aarifah* judgments reflects the clear exceptions contained in Schedules 1 and 2 of ECTA and to go against this

would be to ignore one of the major aims of ECTA, which "is to promote legal certainty and confidence in respect of electronic communications and transactions".

Accordingly, any agreements relating to sales, donations and exchanges of "land" (as defined in the ALA), which includes any interest in land, sectional title units, undivided shares in land, servitudes, sales of property letting enterprises, as well as long-term leases in excess of 20 years in terms of the ALA, will be invalid if signed by any of the parties using any form of electronic signature, including by "advanced electronic signature" and parties should be careful not to use their electronic signatures in these circumstances to avoid any agreement being invalid.

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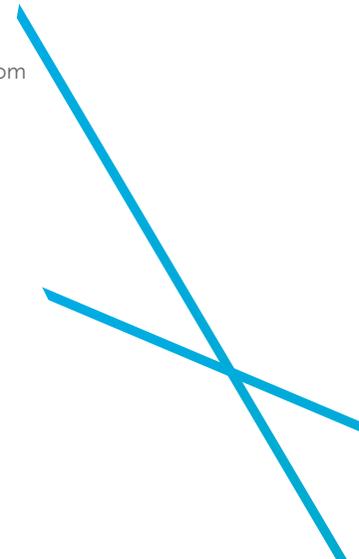
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

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