



WHAT AMOUNTS TO CONTRACTUAL CAPACITY

IN TERMS OF LEGISLATION:

Section 2 of the Alienation of Land Act 68 of 1981 states that an alienation (sale) of land must be in writing and signed by the parties or their agents.

Schedule 2 of the Electronic Communications and Transactions Act 25 of 2002 excludes electronic signatures when it comes to property sale agreement.

COURT DECISION ON THE ALIENATION OF LAND ACT VS THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT (ECTA)

- In the Eastern Cape High Court case of *Borchers and Another v Duxbury and Others* (1522/2020) [2020] ZACEPHC 37; 2021 (1) SA 410 (ECP) (22 September 2020, the court looked at the meaning of 'signature' rather than 'electronic signature'.

FACTS

- The Seller had an image of his wet ink signature saved and by using a DocuSign application on his phone appended that image to an agreement for the sale of land as his signature.
- The Seller then submitted (with the intention of having the sale agreement declared invalid) that the aforementioned signature constituted an 'electronic signature' that is subject to the provisions of the ECTA,
- THEREFORE, there was no compliance with Alienation of Land Act (i.e., sales of immovable property being excluded from the provisions of ECTA).

LEGAL QUESTION

- The question was whether this was an electronic signature in terms of ECTA and whether the agreement was signed as required by the Alienation of Land Act.

COURT DECISION:

The court recognized that in our law we have historically accepted any kind of mark as a signature, as the purpose of the mark is to

authenticate the identity of the signatory and there are no formalities for the making of a mark.

In this case the party had intended to be bound by the agreement and the fact that the Seller had used an image of his wet ink signature was enough for the court to determine that it was a signature in the pure sense.

The fact that the party had used an image of his actual wet ink signature and not another form of electronic signature, was sufficient to fulfil the requirements of the Alienation of Land Act, notwithstanding that it was appended electronically. The court noted that the requirement of a signature could conceivably be satisfied in this manner.

IMPORTANT TO NOTE:

The above case is only binding in Eastern Cape, and for it to be accepted beyond the Eastern Cape it would need to be upheld by a higher court or a court of the same standing in other jurisdictions.

The signature used was in this case an image of an actual signature versus an electronic signature. The ECTA specifically excludes electronic signatures for the sale of immovable property agreements. We strongly suggest that in order to avoid any potential disputes, the property sale agreements must be signed in wet ink.

REFERENCES:

The Alienation of Land Act 68 of 1981

The Electronic Communications and Transactions Act 25 of 2002

To read the full case law, please visit: South African Government | Let's grow South Africa together (www.gov.za)

Issued by:

PROPERTY SECTOR RESEARCH CENTRE

PROPERTY PRACTITIONERS' REGULATORY AUTHORITY