

The Interpretation of Electronic Signatures: Pragmatic or Fickle?

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Borcherds and Another v Duxbury and Others 2021 (1) SA 410 (ECP)

INTRODUCTION

Generally, courts are flexible when interpreting signatures; any mark or symbol the signatory chooses as a representation of himself is usually deemed acceptable and sufficient. This flexibility applies to digital agreements as well, as Section 13 of the Electronic Communications and Transactions Act 25 of 2002, ('ECTA'), recognises and regulates electronic signatures (see also *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*¹). The following article explores the analysis and validity of the electronic signatures used in an agreement for the sale of immovable property as set out in the case of *Borcherds and Another v Duxbury and Others*².

BORCHERDS AND ANOTHER V DUXBURY AND OTHERS 2021 (1) SA 410 (ECP)

In the *Borcherds* case, the sellers sought to escape liability in terms of an agreement of sale for immovable property. The main issue in this case was whether the contract for the sale of immovable property had been validly executed. The sellers argued, *inter alia*, that the agreement of sale was invalid as it did not satisfy the signature requirement of section 2 (1) of the Alienation of Land Act 68 of 1981, ('ALA').

Section 2 (1) of the ALA provides that no alienation of land will be of any force and effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on the written authority.

The signatures in question, used by the sellers, were stored in the DocuSign application. It was submitted by the sellers that section 4(3) read with schedule 1 of the ECTA excludes section 12 and section 13 of the ECTA from applying to section 2(1) of the ALA. This means that electronic signatures may not be used in property transactions regulated by section 2(1) of the ALA.

The court considered the DocuSign signatures to be "digitised versions of the originally handwritten signatures and initials."³ Following the 'pragmatic' approach to interpretation, the court held that because the signatures used were written by hand as 'wet ink signatures' originally and then scanned electronically onto DocuSign, the sellers intended to be bound by the agreement of sale as envisaged in section 2 (1) of the

ALA. Therefore, the signatures were held to be valid and binding despite section 4(3) of the ECTA.

CRITIQUE

It should be noted that this judgement is not without criticism. As *Van Eck*⁴ notes, the question was not whether it was the intention of the parties to conclude the contract electronically, but rather whether the ECTA applied. The scanned wet ink signature meets the definitional elements of 'electronic signature' and 'data' in the ECTA; rendering the signatures as electronic and thus not applicable in the particular transaction.⁵ Furthermore, section 4(4) of the ECTA read with schedule 2 thereto expressly excludes an agreement of sale for immovable property from being signed electronically.

CONCLUSION

In its pragmatic approach to signature interpretation, the court's acceptance of the signatures in the immovable property transaction bypassed the formal legislative requirements and rules as regulated by section 2(1) of the ALA, and section 4(4) of the ECTA read with schedule 2 thereto. Ultimately, this sparks discourse around the definition of electronic signatures and the flexibility of the law in the digital age.

¹*Spring Forest Trading v Wilberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA).

²*Borcherds and Another v Duxbury and Others* 2021 (1) SA 410 (ECP).

³*Ibid* para 35.

⁴M. M. van Eck *The Use of Electronic Signatures in Property Transactions: Has the Law Changed? - Borcherds v Duxbury* 2021 1 SA 410 (ECP) 85 THRHR 422 (August 2022) at 425.

⁵*Ibid* at 426.



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