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ELECTRONIC SIGNATURES ON A SALE AGREEMENT OF IMMOVABLE PROPERTY

Due to the ever-developing use of technology there is an increase of different apps which provide for and enable the use of the electronic signatures in contracts. Electronic documents and agreements are legal, however the most important exception is that a Deed of Alienation for the sale of immovable property still has to be in writing and signed physically in wet ink. These agreements cannot benefit from electronic signatures. In a recent case, *Borcherds and Another v Duxbury and Others*, the focus of the judgement was on the increased use of electronic agreements and signatures. The court found that the word 'signed' is not defined in the Alienation of Land Act and the approach that the court followed was that signatures are pragmatic and not formalistic, they focused on whether the method of signature fulfils the function of a signature, rather than insisting on the form. In the case *Borcherds* chose to sign the sale agreement electronically and then argued that his signature was invalid, the offer to purchase was emailed to the seller and he signed the documents by using DocuSign. DocuSign allows users to sign documents by attaching a saved signature.

The court held that it was clear that when the seller affixed his signature and initials to the sale agreement utilising the DocuSign application, the seller signed the sale agreement as envisaged in section 2(1) of the Alienation of Land Act with the intention of being bound to the sale agreement as seller. The sale agreement was declared valid and the court ordered that the parties give effect to the sale agreement. Unfortunately, the approach followed by the court was incorrect, as the provisions of ECTA confirm that the intention of the parties regarding the signature is irrelevant. ECTA confirms in section 4(4) that certain agreements may not be concluded electronically and agreements for the sale of immovable property falls within these exceptions. Therefore a sale agreement for immovable property as provided for in the Alienation of Land Act is excluded from the scope of ECTA and the electronic signature provisions cannot be applied to sale agreements of immovable property. An appeal on this decision is expected.