

Digital signature on an Offer to Purchase - is it legally valid?

By [Leigh-Anne Kriel](#)

12 Jan 2021

Electronic signatures have been a relevant and current topic of conversation, with the legal stance on the validity of such signatures within the context of property sale agreements being clear up until recently.



Leigh-Anne Kriel

The case of *Borcherds and Another v Duxbury and Others*, heard by the Eastern Cape High Court in 2020, has clouded this clarity and created a degree of uncertainty regarding the use of electronic signatures in the context of sale of immovable property agreements. So, if you are buying or selling – best take note now.

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

The Electronic Communications and Transactions Act 25 of 2002 (ECTA) recognises electronically concluded transactions and allows for the use of electronic signatures.

The relevant exception in terms of ECTA, is that any agreement concluded in terms of the Alienation of Land Act 68 of 1981 (ALA) may not be validly signed by means of an electronic signature. Sale of immovable property agreements and long-term lease agreements fall under ALA, and as such, is required by law to be signed in wet ink in order to be valid and enforceable.



Electronic signatures in lockdown times

Carla Collett, Karl Blom and Fatima Ismail 2 Apr 2020



The *Borcherds v Duxbury* case

The issue before the court relevant to this discussion was the validity of an electronically signed sale of immovable property agreement. In this case, the seller used a mobile app DocuSign, which allowed him to sign the offer of purchase by attaching a stored signature of the user, which was created by capturing an image of a paper document with his wet ink signature.

The offer of purchase was then disputed based on the electronic signature, and the court found that the offer of purchase was valid and enforceable due to the signature satisfactorily representing intention to be bound to the agreement.

The judgment highlights the court's approach to signatures as having always been pragmatic, not formalistic. The judge considered whether the method of the signature used fulfils the function of a signature (which is to authenticate the identity of the signatory) rather than to insist on the form of the signature used. The judge stated that

“ 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 judgment provides clarity on the issue of using a digital signature to buy immovable property, it is advised that pre-existing, relevant law be considered.



Signature requirements of the ECT Act

4 May 2016



Conflict of Law

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

Schedule 2 of the 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. In contravening the ECTA, the judgement by default contravenes ALA, by giving force to an electronic signature for the sale of immovable property.

The court in *Borcherds v Duxbury* did not consider the ECTA, and if it had, they might have ruled differently.

Conclusion

In light of the conflicting law and uncertainty created by this judgment, it is advisable to ensure that all agreements for the

sale for immovable property are signed in wet ink - and not digital - until the legal position is finally clarified.

ABOUT THE AUTHOR

Leigh-Anne Kriel is a recent LLB graduate from Stellenbosch, working as a Candidate Attorney at SchoemanLaw Incorporated in Cape Town.

Email: [[enquiries@schoemanlaw.co.za]]

Website: [[www.schoemanlaw.co.za]]

Facebook: [[<https://web.facebook.com/SchoemanLawInc>]]

Linkedin: [[<https://www.linkedin.com/company/schoeman-attorneys-conveyancers-and-notaries-public/>]]

Twitter: [[<https://twitter.com/schoemanlawinc>]]

For more, visit: <https://www.bizcommunity.com>