Can I sign my sale agreement with DocuSign?

According to its website, DocuSign is an American based company that allows you to electronically sign any document from “sales contracts and offer letters to account openings and invoices”. But can you use it to sign a sale agreement for your immovable property in South Africa?

Section 2 of the *Alienation of Land Act, 68 of 1981*, provides that alienation of land will be of no force or effect unless it is contained in a deed of alienation signed by the parties thereto.

In *Borcherds and Another v Duxbury and Others* the estate agent emailed a copy of the sale agreement to the sellers. The sellers received the email on their cell phone and used DocuSign’s mobile app to sign the agreement.

A while later, the sellers received a better offer which they wanted to accept. They, therefor, first had to terminate the existing agreement. One of the arguments they wanted to raise was that because they used electronic signatures to sign the initial agreement, the provisions of the *Electronic Communications and Transactions Act, 25 of 2002,* should apply, which would render the agreement invalid.

The court, however, referred to a textbook for its main authority: *Contract – General Principles by Van Huyssteen, Lubbe and Reinecke* which states that ” the requirement of signature may conceivably be satisfied by a so-called electronic signature, where a handwritten signature is digitised and attached to an electronic document, although this procedure is open to abuse”.

In this specific case, the court was convinced that the procedure was not abused. The court held that it was clear that when the sellers signed the agreement using DocuSign, it was signed as envisaged in section 2 of the *Alienation of Land Act*.

Unfortunately, the judgement does not elaborate on why the provisions of the *Electronic Communications and Transactions Act* was not considered by the court. This is particularly cumbersome because section 4 of the *Electronic Communications and Transactions Act* specifically provides that the Act does not

give validity to an agreement for alienation of immovable property as provided for in the *Alienation of Land Act*.

It would have provided us with some much-needed legal certainty had the court elaborated on the impact and enforceability of the provisions of the *Electronic Communications and Transactions Act*. All that we know for sure at this stage is that there exists authority in the form of *Borcherds and Another v Duxbury and Others* that an agreement for the sale of immovable property, signed by DocuSign, is valid.

The judgement was handed down by the Eastern Cape High Court – Port Elizabeth.

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