

DIGITAL SIGNATURES – AN UPDATE ON WHETHER WE CAN RELY ON ELECTRONIC SIGNATURES IN THE SALE OF IMMOVABLE PROPERTY

May we use a stylus pen to sign an OTP, if we apply the signature on an electronic tablet?

The Electronic Communications and Transactions Act 25 of 2002 (the ECTA) defines an electronic signature in section 1 thereof as '*data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature.*' Section 13 goes further to state that "*Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used. (Advanced signatures are then defined with reference to Section 37 which does not help this present discussion at all). (2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.* The purpose of ECTA is to enable solutions to scenarios where the validity or authenticity of a signature can be achieved, without necessitating in person, the actual signature of a document.

However, ECTA expressly states that it does not apply to sales of immovable property under the Alienation of Land Act of 1981 (ALA).

The ALA again, requires all sale agreements of land to be signed.

The question that now arises regularly is whether a signature with a stylus pen, on an electronic tablet, is acceptable. Or does this amount to an electronic signature? With reference to the definition of an e-signature, you will have noted that we underlined some words in the definition above - *data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature.*

If you go onto ADOBE for example, type in your name and the computer then asks you to choose one of several pretty fonts to apply a signature which the computer generates, one cannot deny, that this is a "mark" you make using data, which is "intended" to serve as a signature. But where you apply your actual signature to a document using a tablet - this remains your actual signature, doesn't it?

Several High Court and Appeal Court decisions up until now, have consistently held that a signature for the sale of immovable property, means a "*wet ink*" signature. This means your hand has to actually hold a pen or pencil to make a signature. Even a thumb print or an "X" can serve as a signature, but can one argue that the application of a "stylus" signature on an electronic tablet, which is then transmitted to a document, is tantamount to a "*wet ink*" signature?



A signature is nothing more than your “chosen mark”. A tablet signature is after all your actual signature. You just choose to attach it, using electronic means, instead of using actual “wet ink”. There was a decision in the Eastern Cape recently which held that it was acceptable for a signatory to use a mobile phone app, to apply a photo of his actual signature, onto a sale agreement for land. The court was satisfied that if that is how he chose to apply his actual signature, that he was free to do so, given that it was still his actual signature - and not a computer generated, image, “*intended to be*” his signature. The door therefore appears to have been opened to argue this point, but, because this was a single judge judgment (which was not appealed against to our knowledge) it is not entirely authoritative.

To answer the question - tread lightly for now and stick to wet ink as far as possible until we have more case law on this topic!