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CAUTION – AMENDMENTS TO EXISTING CONTRACTS BY MEANS OF ELECTRONIC COMMUNICATION AND WRITTEN CORRESPONDENCE

The recent judgment by the Supreme Court of Appeal in *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and another* [2015] JOL 32555 (SCA) has had far reaching consequences as regards the variation of contracts by means of an exchange of email correspondence.

A common clause which is contained in contracts is the non-variation clause, which clause provides that the agreement may not be varied unless agreed to and signed by the parties in writing. This clause is included to assist in promoting contractual certainty in respect of the specific terms and conditions agreed to between parties in relation to a specific or continuing transaction between the parties.

Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and another

In the Supreme Court of Appeal case of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and another* [2015] JOL 32555 (SCA) Wilberry (Pty) Ltd's ("Wilberry") business involved washing cars in the parking lots of shopping malls, office parks, hotels and hospitals, in terms of a written agreement concluded with the Spring Forest Trading 599 CC ("Spring Forest"). The agreement contained a non-variation clause which provided that no variation or consensual cancellation would be effective unless reduced to writing and signed by both parties.

When Spring Forest was unable to meet its rental commitments under the rental agreements, the parties discussed the way forward. One of the options discussed by e-mail was to cancel the agreements. The appellant chose that option and communicated its election by return e-mail, but continued operating its car washing business at the locations covered by the rental agreements, claiming that it was entitled to do so as both the master and rental agreements between it and the respondent had been cancelled.

The court noted that the Electronic Communications and Transactions Act 25 of 2002, as amended ("ECTA") distinguishes between instances where the law requires a signature and those in which the parties to a transaction impose this obligation upon themselves. In this case, the non-variation clauses were agreed upon by the parties and were not imposed by law. The court held section 13(1) to be inapplicable and section 13(3) to be applicable. Importantly the court held that the **typewritten names of the parties at the foot of the emails, which were used to identify the users satisfied the requirement of a signature and had the effect of authenticating the information contained in the emails.**

The court held that the e-mails stated unambiguously that once Spring Forest settled the arrear rental and returned the equipment it could walk away without any further legal obligation. The court held that as Spring Forest had complied with the requirements as set out in the non-variation clause, a consensual cancellation had occurred.

As a result of this recent development as to the interpretation and application of section 13 of ECTA it has become crucial for estate agents and contracting parties to be aware that proposals and counter-proposals exchanged by email correspondence may becoming binding on the parties once a proposal or counter proposal has been accepted even if the parties have a non-variation clause in place in their contract.

In terms of ECTA the conclusion of any agreement required to be signed in law (wills, suretyships and bills of exchange are other examples of such agreements) may not be concluded through electronic communication other than by means of an advanced electronic signature. In terms section 4(3) of ECTA section 13 (as well as section 12) does not apply to the Alienation of Land Act and as such the electronic signature provisions (including the advanced signature provisions) will not apply to the signature provisions contained in the Alienation of Land Act. However, as the Alienation of Land Act does not regulate the amendments, variations or cancellations of such agreements in our view the exclusion in section 4(3) of ECTA may not apply to variations, amendments or cancellations and is limited to in application to the conclusion of such agreements. Furthermore, in terms of section 4(4) read with the relevant Schedule, ECTA is not applicable in giving effect to the validity of certain transactions including long term lease and sale of immovable property agreements and as such there remains the possibility that ECTA and section 13 may be deemed to be applicable to variations, amendments or cancellations associated with such agreements (as the exclusions relates to the giving of validity of such agreements only).

As such, the following revised non-variation clause is proposed to be included in all contracts concluded between parties including sale of immovable property, sale of business agreements, sale of shares agreements, sale of member's interest agreements, lease agreements (both short and long term), mandate agreements, MOUs and term-sheets and any other contracts concluded between parties. In particular, this clause is essential in any agreement which involves a transaction in terms of which an ongoing exchange of correspondence between the parties is anticipated and/or where the nature of the transaction is such that it does not involve a once-off transaction between the parties (even in such instances the inclusion of a clause of this nature will be useful). **Please note that the parties, use of and capitalisation of certain terms may need to be varied in accordance with the terms used and defined in your agreement:**

"This agreement shall constitute the entire contract between the seller and the purchaser. The seller shall not be bound by any other preceding agreement, negotiations, terms or conditions, promises or statements, warranties or representations, express or implied made by the seller or any of its agents or any of its employees, or any other person purporting to act for or on behalf of the seller. No variation, amendment or consensual cancellation shall be of any force or effect unless reduced to writing and signed by the parties hereto by hand. For the avoidance of doubt the parties expressly agree that no variation, amendment or consensual cancellation shall arise pursuant to an exchange of "data" by means of an "electronic signature", or an "advanced electronic signature" (as envisaged in the Electronic Communications and Transactions Act 25 of 2002, as amended "ECTA"), or otherwise by means of electronic and/or written signed correspondence. Further the parties agree, to the extent allowed in law, that section 13 of ECTA 25 of 2002 shall not apply to this agreement. For the purposes of this agreement, the parties agree that the fact that their name or the name of the entity that they represent appears at or near the end of any email, electronic correspondence or other written correspondence shall not in any way be deemed or considered to be their signature or electronic

signature.”

This newsflash has been prepared for information purposes only and does not constitute legal advice, or a legal opinion, the practical application of the provisions of this newsflash will vary depending on the facts of each case.

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