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SIGNATURE OF DOCUMENTS DURING COVID-19 LOCKDOWNS

Introduction:

Requiring original signatures during the transfer and bond registration process has become an important one during the COVID-19 lockdown that has been implemented around the world since late January 2020. This document attempts to give a brief overview of the signature of agreements and documentation required by SARS and the Deeds Office, amongst others, in a time when most people and businesses operate from home and are not able to provide originally signed documents commissioned and authenticated as required by law.

Deeds of Sale and Addenda to Deeds of Sale:

In terms of the Alienation of Land Act, Act 68 of 1981, the sale of immovable property must be recorded in writing and signed by both parties to be valid. This is a formality requirement. The signature cannot be an electronic one. This does not imply that each page must be initialed neither does it require signatures and initials from two witnesses although both will come into play for evidentiary purposes. It is therefore advisable to adhere to these signature practices.

The Alienation of Land Act does not govern amendments to Deeds of Sale of Immovable Property. However, most Deeds of Sale include non-variation clauses which read that no amendments to such agreements are valid unless reduced to writing and signed by both parties. This requirement in certain instances has been lightened by the *Spring Forest Trading 599 CC vs Wildberry (Pty) Ltd t/a Ecowash and Another (2015) JOL 32555 (SCA)* ("Wildberry Case") in which it was found that your name at the bottom of an e-mail could in many instances be seen as a signature in terms of the Electronic Communications and Transactions Act 25 of 2002 ("ECTA") for purposes of amending agreements. This resulted in more extensive non-variation clauses to deal with the amendments post the Wildberry Case so in each instance one needs to familiarize yourself with the specific non-variation clause in the agreement before determining the process of amending same. It is however clear that people sitting at home can sign Offers to Purchase which will become a Deeds of Sale once accepted e-mailed to them and scan and send it back without witnesses co-signing.

SARS documents:

The documents signed for and on behalf of the South African Revenue Services ("SARS") to obtain transfer duty receipts and exemptions are kept on file for the required 5-year period by the Conveyancer. The originals must be filed and kept on behalf of SARS, although the same is not required for e-filing applications. There are no restrictions with regards to advanced electronic signatures that comply with the ECTA. However, mere copies of originally signed documents will not be enough for filing purposes. Therefore, the Conveyancer can have the documents signed and sent back electronically pending the originals being received before registration of transfer as it is too risky to register in the absence thereof.

Affidavits and Resolutions:

Conveyancers require affidavits for FICA information (which includes SARS information, identity and foreign identity information), marital status information and insolvency information. The reason why this information is contained in the format of an affidavit, is in the first instance to establish the true identity and status of the parties involved, and secondly to protect the Conveyancer against personal liability in the event of a third party being excluded from the transfer process. This could result in financial or other forms of damages due to a party to the transfer process hiding information from the Conveyancer allowing a transfer to go through without the required consents.

It is always up to the Conveyancer to determine the authenticity of the information supplied and as such a Conveyancer can do away with requiring either original documentation or affidavits if the circumstances allow them to do so without running up such liability. Resolutions contain the required consent of the current Trustees / Directors / Members of a Juristic person for the registration of a transfer which can include the signature of a Deed of Sale and / or transfer documents and no formality requirements regarding the format of the signatures or the originality of the document exists. Conveyancers are generally very cautious when accepting resolutions for the specific reason that the necessary consent might be absent, or the necessary signature may have merely been added without the relevant person's knowledge.

Powers of Attorney:

Now this is where the problem lies. Pending the finalisation of the electronic deeds registration system as required by the Electronic Deeds Registrations Systems Act 19 of 2019, South African Deeds Offices require an original Power of Attorney signed in the Republic if South African before two witnesses or a commissioner of Oaths to be lodged in the Deeds Office.

If signed abroad, the Power of Attorney must be signed in terms of Rule 63 of the Uniform Rules of Court at a South African Embassy or Consulate or a British Embassy or Consulate, in front of a Notary if signed in the United Kingdom, Northern Ireland, Botswana, Lesotho or Swaziland or in front of a Notary whose signature are to be

authenticated in terms of the Hague Convention if signed in any other country than the ones referred to. This has caused major issues during the COVID-19 lockdowns as most Embassies and Consulates, Notaries and State Institutions involved in the authentication of signatures have been closed, neither have people been able to leave their homes to attend to the signature of these documents at these institutions if they were open.

Bond Documents:

Although some bond documents are signed electronically these days through advanced devices in the presence of Attorneys and / or Conveyancers, the documents that are lodged in the deeds office are still signed in the original especially as it also contains a Power of Attorney to register a Mortgage Bond or to execute a Sectional Title Bond in front of a Conveyancer. As such, the signature of bond documents is in the same boat regarding the necessity of original signatures and authentication as referred to under Powers of Attorneys in the previous paragraph.

Conclusion:

The transfer of properties in South Africa cannot take place without receipt of Original Powers of Attorneys duly authenticated and signed in terms of the Uniform Rules of Court. Most of the processes can continue pending certain original documents being received by the Conveyancer before lodgment and in some instances before registration in the Deeds Office. As such, we eagerly await the development and finalisation of the electronic deeds registration system which will most certainly be impacted by the lessons we have learnt as a result of the COVID-19 lockdowns we have all been experiencing in 2020.

dvh Going Beyond

The DVH group is a national group of attorney practices with offices situated in the Western Cape, Gauteng, and Kwa Zulu Natal.

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