

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 1522/2020

Date Heard: 13 August 2020

Date Delivered: 22 September 2020

In the matter between:

JUANE GERALDO BORCHERDS	First Applicant
EDLYNNE RONIQUE TOU	Second Applicant
and	
JOHN CLINTON DUXBURY	First Respondent
KIM JERI-LEE DUXBURY	Second Respondent
JB KNOETZE	Third Respondent
N KNOETZE	Fourth Respondent
LYNETTE@LAW ATTORNEYS	Fifth Respondent
HUIZEMARK UITENHAGE	Sixth Respondent
JUST PROPERTY UITENHAGE	Seventh Respondent
THE REGISTRAR OF DEEDS	Eighth Respondent

JUDGMENT

RONAASEN AJ:

Introduction

- [1] On 28 July 2020, pursuant to an application brought on an urgent basis by the applicants, I granted an interim order, by agreement, in terms of which the first, fifth and eighth respondents were interdicted from taking any steps which would cause the sale or transfer of the immovable property known as erf 5829, Levydale, Uitenhage, situated at 22 Settlers Crescent, Levydale, Uitenhage ("the property") to the third and fourth respondents.
- [2] The interim order was to remain in effect pending the determination of the relief sought by the applicants in terms of part B of the notice of motion, namely that:
- 2.1. the first respondent be directed to sign all documents necessary to effect transfer and registration of the property to the applicants in accordance with a contract for the sale of the property ("the contract") concluded on 9 June 2020, within three days of the documents being presented to him by the conveyancer appointed to effect the registration of transfer;
 - 2.2. in the event of the first respondent failing to comply with the order sought in terms of paragraph 2.1, above the Sheriff of the High Court be authorised to sign the documents on his behalf;
 - 2.3. the fifth respondent be directed to pay the costs of the application, including the reserved costs attaching to the granting of interim relief *de bonis propriis* on the scale as between attorney and client, alternatively, that the first and fifth respondents be directed to pay the

costs of the application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

[3] As will be apparent from this judgment what was meant to be a relatively simple property transaction was escalated into an unnecessary and protracted dispute, necessitating expensive litigation to provide a resolution to the dispute. Underlying the dispute were the attempts by the fifth respondent to assist the first respondent to escape liability under the contract. The dispute was primarily precipitated by the conduct of the following persons:

- 3.1. the agent employed by the seventh respondent, who introduced the applicants to the property. Despite the seventh respondent being in line to earn a commission of R56 000.00 from the sale the agent merely sent the offer to purchase, which was accepted by the first respondent, to the first respondent by electronic means. Had the agent made an effort to earn her commission and taken the trouble to present the offer to the first respondent personally and obtain his signature and that of the second respondent, indicating her written consent to the transaction, this litigation could have been avoided or substantially reduced in its scope;
- 3.2. the director of the fifth respondent, Ms Volschenk, an attorney of this court. Her ill-advised conduct, at the outset, set into motion a train of events leading to the litigation. Had she taken time to properly consider the terms of the contract and advise the first respondent

correctly as to its terms the litigation could have been avoided. She was also the author of further efforts to assist the first respondent to avoid liability in terms of the contract.

The contract

[4] The contract came into being on 9 June 2020, when the applicants' offer to purchase the property was accepted by the first respondent. The property is registered solely in the name of the first respondent. He is, however, married in community of property to the second respondent and, consequently, her written approval of the contract was required in terms of section 15(2)(a) of the Matrimonial Property Act, 88 of 1984. Although there was some dispute as to whether this latter formality was complied with, I am satisfied that it was, as will appear later in this judgment.

[5] The following terms of the contract underlie the disputes I am called upon to decide:

5.1. clause 8, entitled "**MORTGAGE**", which reads as follows:

"This entire Agreement is subject to the Purchaser being able to obtain a Final Quotation (or any document with a similar effect, confirming an approval in principle of a loan, as well as an acceptable property assessment) from a registered financial institution by not later than 30 June 2020 confirming that a loan has been approved for the amount of R1 120 000.00 or such other amount agreed to by the purchaser in writing on security of a mortgage bond to be registered over the Property."

5.2. Clause 16, entitled "**72 HOUR RATIFICATION**", in the following terms:

"Prior to the fulfilment of the suspensive conditions in clauses 8, 13 and 14 the seller retains the right to continue marketing the property which is the subject of this agreement and in the event of the seller receiving a satisfactory written offer free of suspensive conditions (which shall be interpreted to include an offer in which all suspensive conditions have been fulfilled) from a third party, he shall notify the purchaser in writing, furnishing the purchaser with a copy of such written offer and giving the purchaser 72 hours (excluding Saturdays, Sundays and public holidays) notice to waive or prove fulfilment of the suspensive conditions aforementioned, and if the purchaser fails to give the seller written proof of such waiver within such 72 hour period the Seller shall be entitled to cancel this agreement forthwith by giving written notice to the purchaser to that effect."

[6] It is common cause that clauses 13 and 14 as they appear in the printed contract did not form part of the contract and were deleted by the parties.

The suspensive condition and its fulfilment

[7] On 17 June 2020 Ms Lynette Volschenk, a director of the fifth respondent, addressed an email to the applicants, in the following terms:

"We confirm that we have been instructed to attend to the transfer of the property, which you have also made an offer on through Just Property, and our instructions from the seller is as follows:

1. The seller has subsequent to receiving your offer, received a higher offer for R1 170 000.00, on which offer the purchaser's bond was approved on Friday.
2. We have also been notified that you have obtained a bond approval in principle, but your offer is less than the 2nd offer.
3. We attach hereto the Ratification notice, in terms of which take notice that the seller has received the 'more satisfactory offer' as required by the ratification notice clause in your offer to purchase (clause 16).
4. This notice therefore serves to advise you of the seller exercising his right to accept the more satisfactory offer and to grant you the opportunity to increase your offer and obtain your final bond approval within 72 hours of date hereof.
5. Kindly sign the attached notification and return to us via email as a matter of urgency.
6. Should you decide not to proceed with your offer, we request that you notify us accordingly.

Kindly contact our office should you have any questions.

- [8] The email was accompanied by an inelegantly phrased document entitled "NOTIFICATION OF THE 3 DAY CLAUSE" and essentially repeated what was set out in the email. The competing offer, which emanated from the third and fourth respondents also accompanied the email.
- [9] From the email and the notice it is clear that the first respondent required the following from the applicants, namely that they:

- 9.1. increase the purchase price they were prepared to pay for the property to at least meet the price offered by the third and fourth respondents; and
- 9.2. were to make their offer unconditional, i.e. free from suspensive conditions either by obtaining bond approval for the increased purchase price or waiving the benefit of the suspensive condition.

[10] It is apparent from the language of the email and the notice that the first respondent required of the applicants to do both of the things contemplated in paragraph 9 above.

[11] Clause 16 of the contract does not allow for the interpretation attached to it by the first respondent, on the advice of the fifth respondent. The clause does not allow for the first respondent, as seller, to call on the applicants, as purchasers to increase the price they were prepared to pay for the property to meet or improve on a subsequent offer. It only allows the seller to call on the purchasers to make their offer unconditional through the fulfilment or waiver of the suspensive condition.

[12] The first and fifth respondents, on discovering that the notice was ill-conceived, disingenuously, attempted to rely on the notice selectively by simply ignoring the fact that the notice had required the applicants to increase the purchase price they were prepared to pay for the property in conjunction with making their offer unconditional, rather than withdrawing the notice and issuing a fresh notice which complied with the provisions of clause 16 of the contract

[13] The notice, requiring of the applicants, to both increase their offer and make it unconditional, in combination, was thus invalid and of no force and effect. The first respondent cannot therefore rely on the applicants' alleged failure to comply with the notice as a ground to escape liability under the contract. They were not obliged to do so given the form in which the notice was couched.

[14] It is not disputed that the applicants had, in any event, timeously in terms of clause 16, entirely fulfilled the requirements of the suspensive condition by 22 June 2020. They thus satisfied the terms of clause 8 of the contract. That, however, is not the end of the matter as the first respondent, on advice of the fifth respondent has contended for the invalidity of the contract on a number of other grounds, which are considered, below.

Further grounds of alleged invalidity of the contract

[15] Section 2(1) of the Alienation of Land Act, 68 of 1981 ("the Act") provides as follows:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force and effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

[16] The first and the fifth respondents contend that the contract does not comply with section 2(1) of the Act in the following respects:

16.1. the requirement of signature has not been satisfied;

16.2. an employee of the seventh respondent, the first respondent's agent, completed various blank spaces in the printed document containing the contract after signature thereof by the first and second respondents. As a result and on the authority of *Fraser and Another v Viljoen* 2008 (4) SA 106 (SCA) at [6] it is contended that it cannot be said that the whole agreement between the parties was reduced to writing and is therefore rendered void; and

16.3. the second respondent, to whom the first respondent is married in community of property, was not identified as a party to the contract.

[17] I shall deal with the question of signature under a separate heading, below.

For purposes of discussing and deciding on the two other grounds of invalidity contended for by the first and fifth respondents I shall assume that the contract was validly signed by the first respondent.

[18] The first and fifth respondents allege that when the first respondent had signed the contract the following information had not been filled in on the printed form:

18.1. the place where and the date when the parties had appended their respective signatures to the contract;

18.2. the physical addresses of the parties;

18.3. the first respondent had not provided the identity of the conveyancing attorneys who would attend to the transfer of the property to the applicants;

18.4. the agent who had introduced the property to the applicants had not signed the contract.

[19] Not one of the pieces of absent information feature as a requirement to constitute a valid alienation of land in terms of section 2(1) of the Act. In fact, the absent information cannot be elevated to be described as terms of the contract, which had been omitted. No evidence has been adduced by the first respondent to show that the absent information was regarded as material to the contract and that there would be no valid contract if this information were not included in the printed form when it was signed by the parties. There was no evidence that for a valid contract of sale of the property the parties had to agree on the identity of a conveyancing attorney. Absent such an agreement it was solely within the discretion of the first respondent as to who would be appointed to attend to the conveyancing and he could vary the identity of the conveyancer at his will. The applicants cannot be penalised because the first respondent's agent incorrectly identified the conveyancer.

[20] This matter is therefore clearly distinguishable on the facts from *Fraser* where the terms subsequently inserted into the contract were material terms of the contract, namely the description of the property concerned and the names of the purchasers.

[21] It is common cause that although the property is an asset in the joint estate of the first and second respondents it is registered only in the name of the first respondent. In such circumstances all that section 15(2)(a) of the Matrimonial Property Act requires is that the second respondent was to provide her written consent to the transaction. There is no requirement in section 2(1) of the Act that in such circumstances the person in the position of the second respondent must be identified in the deed of alienation as a seller. The fact that she appended her signature (describing her as a seller) and her initials to the contract is confirmation of her written consent to the transaction. There is no evidence from the second respondent to indicate that by appending her signature and initials to the contract she did so with any intention other than to signify her written consent to the transaction in satisfaction of the requirement of the Matrimonial Property Act. She signed willingly, when asked to do so, to support the first respondent in concluding the sale of the property.

Signature of the contract by the first and second respondents

[22] It is undisputed that the first respondent signed the contract and initialled it where appropriate by utilising an application loaded on his cellular telephone called "*DocuSign*".

[23] The applicants' offer to purchase was sent to the first respondent by email by an employee of the seventh respondent. It was received by him on his cellular telephone and was then imported into the *DocuSign* application on his phone and signed and initialled by using the application which contained his sample

signature and initials. The second respondent, subsequently, signed the contract using the same application.

[24] It was not disputed in argument that the first and second respondent's sample signatures and initials contained in the *DocuSign* application had as their origin so-called "wet" signatures and initials of the first and second respondents, which were then photographed and imported into the application.

[25] It was submitted by the first and second respondents that by utilising the *DocuSign* application to sign the contract they had applied electronic signatures to the contract within the meaning of the Electronic Communications and Transactions Act, 25 of 2002 ("ECTA"). The provisions of ECTA, which allow for the electronic signature of documents, have no application in respect of transactions for the alienation of land in terms of the Act by virtue of the provisions of section 4(3) of ECTA read with Schedule 1 thereto. Consequently, so the argument goes, the contract is of no force and effect as it does not satisfy the signature requirement of section 2 (1) of the Act.

[26] No evidence was placed before me that the parties intended this to be an electronic transaction.

[27] The words "*sign*" or "*signed*" are not defined in the Act.

[28] The approach of the courts to signatures has always been pragmatic, not formalistic. They look to whether the method of the signature used fulfils the function of a signature - to authenticate the identity of the signatory - rather

than to insist on the form of the signature used. In the days before electronic communication, the courts were willing to accept any mark made by a person for the purpose of attesting a document, or identifying it as his act, to be a valid signature. *Spring Forest Trading v Wilberry* 2015 (2) SA 118 (SCA) at [25]-[26]. A "signature" is the person's distinguishing mark made with the intention to be identified as his mark. *PM Wulfsohn - Formalities in respect of Contracts of Sale of Land Act, 71 of 1969*, page 45-46.

[29] The following passage from *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (WLD) at 645E-F is apposite (case references excluded):

"... - signing is achieved by a mark or marks intended to represent the relevant person, if the making of the mark is done with the function of making the document and act of the writer, of signifying the assent of the party to that which is embodied in the document. An enquiry concerning assent must of course, not be into what the signatory subjectively planned but what his act signifies to the other party. If a party's signature does receive an unnecessary designation, the known inaccuracy of that designation does not cause the signature itself to be lacking (or void)."

[30] In ordinary usage the word "signature", used without qualification (as in the Act), means signature by name or signature by mark. *Harpur NO v Govindamall and Another* 1993 (4) SA 751 (AD) at 756I.

[31] The court in *Harpur* referred to the English judgment in *Goodman v J Eban Ltd* [1954] 1 QB 550 (CA) where the majority of the court found that a signature could be effected by means of a rubber stamp. The importance of this case lay

in the recognition in both the majority and minority judgments that the ordinary popular meaning of the verb “sign” means sign by name or sign by mark, which accords with the dictionary definition of sign. *Harpur* at 757E.

[32] In *Harpur* at 757I with reference to the word “signature” the following definition in *Black’s Law Dictionary* 5th edition at 1239 was cited with approval:

“The act of putting one’s name at the end of an instrument to attest its validity; the name thus written..... And whatever mark, symbol or device one may choose to employ as representative of himself is sufficient”.

[33] Counsel for the first, second and fifth respondents referred me to the judgment of the Supreme Court of Appeal in *Global & Local Investments Advisors (Pty) Ltd v N L Fouche* [2019] ZASCA. This judgment did not concern a transaction for the sale of land. The court referred with approval to *Harpur*, which it said was one of two cases which had given extensive and authoritative definitions of “signature”. It is clear from the judgment that the judgment in *Harpur* played a prominent role in its formulation. With reference to the judgment of *Da Silva v Janowsky* 1982 (3) SA 205 (AD) at 218-219C the court in *Global* at [13] approved the statement that in order for a party to be bound to a contract it is necessary that he appended his signature thereto with the intention of binding himself to such contract.

[34] In *Global* at [11], without any context being given, reference is made to the minority judgment in the English case of *Goodman* referred to above. The import of the majority and minority judgments in *Goodman* were placed in

proper context in *Harpur*, a judgment which was clearly followed and applied in *Global*. *Global* cannot therefore be read as limiting in any way the import of the judgment in *Harpur* by which the court in *Harpur* was in any event bound. The reference to *Goodman* in conjunction with *Harpur* serves to confirm that it is recognised that the ordinary, popular meaning of the verb "sign" is sign by name or sign by mark as stated in *Harpur* at 757E.

[35] As stated the signatures and initials of the first and second respondent as contained in the *DocuSign* application were digitised versions of originally handwritten signatures and initials. In this regard the work *Contract - General Principles by Van Huyssteen, Lubbe and Reinecke, 5th edition* at 5.32, page 163 states that in the context of statutory formalities such as the Act "*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*".

[36] In this matter there is no suggestion of abuse.

[37] On the application of the abovementioned authorities it is clear to me that by affixing their signatures and initials to the contract, utilising the *DocuSign* application:

37.1. the first respondent signed the contract as envisaged in section 2(1) of the Act with the intention of being bound to the contract as seller; and

37.2. the second respondent signed the contract with the intention of conveying her written consent to the transaction as required by section 15(2)(a) of the Matrimonial Property Act. In any event this Act does not preclude the use of an electronic signature to confirm the required written consent.

[38] There is no evidence to gainsay my abovementioned findings. The simple act of transmitting the signed contract to their agent confirms their intentions as described in the preceding paragraph. My findings in this regard are in accordance with the pragmatic approach adopted by our courts to the concept of signature as opposed to a formalistic approach.

[39] The first and second respondents are thus bound to give effect to the contract as prayed for by the applicants in part B of the notice of motion.

Costs

[40] There is no doubt that costs must follow the result in this matter.

[41] Undoubtedly this matter was largely precipitated by the over-zealous quest by the fifth respondent for the conveyancing fees attaching to the sale of the property and for securing a slightly more financially lucrative purchase price for the first respondent.

[42] The fifth respondent played an active role as a party to these proceedings. She deposed to the principal affidavits filed on behalf of the first respondent, even, quite improperly, deposing to facts which were not within her personal

knowledge and which required confirmation by the first and second respondents. The fifth respondent was the cause of these proceedings by way of the invalid notice in terms of clause 16 of the contract. Ms Volschenk caused the opportunistic moving of the defensive "goalposts" as reg dispute escalated.

[43] The applicants contend that I should award costs on a punitive scale. In my view that contention should be upheld, for the following reasons:

- 43.1. as stated, these proceedings were initiated by an invalid notice in terms of clause 16 of the contract;
- 43.2. when the invalidity of the notice was pointed out to the first and fifth respondents they persisted in relying on the invalid notice in support of the contention that the suspensive condition in clause 8 of the contract had not been fulfilled in the absence of a bank valuation of the property;
- 43.3. despite the first respondent clearly indicating his intention to be bound to the contract, as described above, he then, on the advice of the fifth respondent, embraced the "signature" defence to escape liability in terms of the contract;
- 43.4. the applicants have been put to considerable expense to enforce their rights in terms of an obviously valid contract. They should not be left out of pocket as a result.

Order

[44] I thus make the following order:

1. The first respondent is directed to sign all documents necessary to effect transfer and registration of the immovable property known as erf 5829, Levyvale, Uitenhage and situated at 22 Settlers Crescent, Levyvale, Uitenhage held by the first respondent under title deed T98018/2004CTN from the first respondent to the first and second applicants in accordance with the contract of sale and purchase dated 9 June 2020 concluded between the first respondent and the first and second applicants, within three days of the required documentation being presented to him by the conveyancer appointed to effect the registration of transfer of the said immovable property.
2. That in the event of the first respondent failing to comply with the order in
 1. above the sheriff of the High Court, Uitenhage is authorised and directed to sign such documentation on his behalf.
3. The first and fifth respondents are directed to pay the costs of this application, including the costs attendant on the obtaining of interim relief, as taxed or agreed, on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Adv L Ellis instructed by Lessing Heyns Keyter Van
der Bank Inc, Port Elizabeth

For 1st, 2nd and 5th

Respondents: Adv L R Kroon instructed by Lynette@Law c/o
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