

Legal update 6 of 2023: Case law on cybersecurity matters

Introduction

This update deals with cases relating to whether failing to warn clients about cybersecurity risks can result in a claim for damages and whether failing to take extra care in making electronic payments to a certain bank account can result in liability for an incorrect payment.

Summary

Case 1: *Hawarden v Edward Nathan Sonnenbergs Inc* (13849/2020) [2023] ZAGPJHC 14 (16 January 2023)

Do institutions have a duty of care to warn clients of cybersecurity risks and to take precautions when communicating sensitive information?

- **The finding:** Yes, communicating sensitive information through emails is dangerous and it is wrong of institutions not to warn clients of prevalent cyber fraud concerning the communication of sensitive information.
- **Practical application:** Failing to sufficiently warn clients of cyber fraud can result in a claim for damages for their loss.

Case 2: *Hartog v Daly and Others* (A5012/2022) [2023] ZAGPJHC 40 (24 January 2023)

Does a conveyancing attorney have an extra duty of care when making payments on behalf of clients so as not to make payments to the wrong accounts?

- **The finding:** Yes, if the attorney does not take extra care and payment is made to the wrong account, he will be liable for breach of mandate and payment of the stolen amount.
- **Practical application:** Business email compromise (BEC) is a fraudulent activity that has been on the rise, especially in conveyancing transactions. Attorneys working with these transactions should be extra careful when dealing with banking details sent via email and must verify the details before making payments.

More details on case 1

Case 1: *Hawarden v Edward Nathan Sonnenbergs Inc (ENSAfrica Attorneys)* (13849/2020) [2023] ZAGPJHC 14 (16 January 2023)

- **The facts**

The plaintiff in this matter was Ms J Hawarden (client) and the defendant was a law firm, Edward Nathan Sonnenbergs Inc (lawyers).

The client purchased an immovable property from a third-party seller who appointed the lawyers as the conveyancer for this transaction. The client paid the balance of the purchase price into what she believed was the lawyers' account as the details were emailed to her in a PDF document by what appeared to be a conveyancing secretary employed by the lawyers. The client was unaware that her email account was hacked and the email containing the lawyers' account details was intercepted by an unknown fraudster who altered the PDF document to reflect the fraudster's banking details. The client sued the lawyers for the amount she paid into the fraudster's bank account.

The evidence at the trial established that the lawyers were aware of the risk of business email compromise (BEC) prior to the fraudulent incident, but failed to warn the client of such known risk before she made the payment. It was also not in dispute that BEC incidents are rife in the conveyancing environment. Additionally, the lawyers had control over how their account details were conveyed to the client and they opted for the riskiest method while the options of a password protected document and multi-channel verification were available to avert cyber fraud.

The client argued that a duty of care exists between a purchaser in a conveyancing transaction and the conveyancing attorneys to warn clients of the dangers of cyber hacking and spoofing of emails. She added that as experienced conveyancers, the lawyers understood the risks inherent in conveyancing transactions as they were aware of the dangers of BEC.

The client explained that there was nothing in the fraudulent emails that could have alerted her to the BEC fraud. She believed the emails were genuine. She conceded that she had, during and after her divorce, dealt with large amounts of money and in dealing with the estate agent Pam Golding Properties during this time heeded the warnings in their correspondence, but said she trusted the lawyers implicitly and 'assumed they would take care of anything that was not safe'.

The lawyers argued that the client was equally negligent as she failed to exercise reasonable care to ensure that it was safe to pay the balance of the purchase price by EFT. Also, she failed to take reasonable care to make sure that the number of the account to which she transferred the balance of the purchase price was correct. They further argued that she did not ask the lawyers or her own bank whether it was safe to pay the balance of the purchase price into the account of which she received the details via email. Additionally, the lawyers claimed that they were not aware that PDF documents could be manipulated until this incident.

- **The finding**

The court found that in the instance of Pam Golding Properties, all email communication concerning payment contains a warning to confirm all banking details telephonically before any payments are made. The lawyers failed to do this. Additionally, after the fraudulent activity, the lawyers continued to forward more documents to the client via email for the investment mandate.

Only these subsequent emails contained adequate warning of the risks and dangers of BEC. The court added that the evidence shows that BEC attacks are rife, especially in the conveyancing industry and the lawyers had control over the way their bank account details were sent to the client. They chose to send this information through an unprotected email attaching their bank account details in a PDF document, which can be easily manipulated. The lawyers also failed to safely communicate their bank details using technical safety measures, while the client depended on the lawyers to act professionally and she could not be faulted for that.

The court emphasised the fact that most businesses sent their banking details by emails did not absolve the lawyers from the consequences of unsafe business practices and their failure to take reasonable precautions. It added that the lawyers' banking details were financially sensitive information and needed to be treated as such.

The court granted an order against the lawyers for R5.5 million.

More details on case 2

Case 2: *Hartog v Daly and Others* (A5012/2022) [2023] ZAGPJHC 40 (24 January 2023)

- **The facts**

This matter is an appeal against the decision of a single judge, in which the appellant, a conveyancer (Mr Hartog) was held liable to make payment to the first and second respondents, (Mr and Mrs Daly) who were joint owners of a property. Standard Bank was the third respondent.

Mr Hartog was appointed as the conveyancer for the sale and was instructed to pay R100 000 into Mrs Daly's bank account and pay the balance of R1 421 228.06 into a Standard Bank account.

A fraudster intercepted the emails between Mr and Mrs Daly and Mr Hartog and provided fraudulent banking details. Mr Hartog had requested confirmation of the banking details by email and when he received alternative banking details after the initial confirmation, he did not question the change. Instead, he paid the funds into the alternative bank account. The funds were immediately withdrawn after payment was made.

Mr and Mrs Daly sued Mr Hartog for breach of contract by failing to pay the remaining balance of the sale price into their nominated bank account.

- **The finding**

The court found that the parties did not agree on the method of providing the banking details to Mr Hartog. Instead, he requested that Mr and Mrs Daly send him their instructions and bank details via email. It could be assumed that he expected them to respond using the same mode of communication. From there onwards, most of the remaining instructions to Mr Hartog were sent by email.

The court explained that the parties had not expressly agreed to use emails as a means of communication and that all parties used this method. The question was therefore who bears the risk for the loss as a result of a fraudulent email sent to Mr Hartog resulting in him making payment into the incorrect bank account.

The court emphasised that it was Mr Hartog who invited Mr and Mrs Daly to send instructions and bank details using email. The fact that a fraudster intercepted the emails could not be used to support the existence of an 'implied' term in the mandate which, as Mr Hartog alleged, placed a duty on Mr and Mrs Daly to exercise utmost caution and to do all that was reasonably possible to ensure the emails were not tampered with.

The court found that Standard Bank had conducted all required checks in terms of the Financial Intelligence Centre

Act (FICA). The bank verified the identity of the fraudster and his proof of residence was obtained. Standard Bank therefore had no reason to suspect that the account was going to be used for fraudulent activities. The court further found that the fraudster was not an anonymous client and there was no evidence that the bank should have conducted additional due diligence on the account or prevent the receipt of the funds into that account. Standard Bank had met the FICA requirements and its conduct was not wrongful or negligent.

Mr Hartog's appeal was dismissed with costs.

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