

## PAY OUT ON MY SIGNATURE'S SAY-SO IN THE ELECTRONIC COMMUNICATION ERA

### Global & Local Investments Advisors (Pty) Ltd v Fouché (71/2019) [2019] ZASCA 08 (18 March 2020)

*This matter deals with a financial services provider that wrongly paid out client funds after it received an email, thought to be from the client, to this effect. The email appeared legitimate and the client "signed" it each time with "Regards Nick", and other salutations to that effect. The question for determination was whether this constituted a "signature" as required in the mandate between the parties and as understood in the Electronic Transactions and Communications Act. The Court found that in these circumstances it did not. The reasoning why is important, to distinguish it from instances where similar email communications would be considered to bear the "signature" of each of the parties in the communication.*

The Judgment can be viewed [here](#).

### FACTS

In November 2015, Nicholas Fouché gave a written mandate to Global & Local Investments Advisors (Pty) Ltd (Global) to act as his agent and invest money with Investec Bank on his behalf. The written mandate stipulated that 'All instructions must be sent by fax to 011 486 2915 or by email to monique@globallocal.co.za with client's signature.' The money was to be invested in a Corporate Cash Manager (CCM) account in the name of Fouché.

Global opened and managed the CCM accounts at Investec as per the mandate.

In August 2016 fraudsters hacked the gmail account of Fouché and, utilising his authentic email credentials, sent three emails to Global on 15, 18 and 24 August 2016 respectively. In the emails, Global was instructed to transfer specified amounts to accounts of named third parties at First National Bank (FNB). Two of the three emails containing the instructions to transfer money ended with the words 'Regards, Nick', while the third ended with 'Thanks, Nick'. None of the emails had any attachments.

In response, Global paid out a total of R804,000 from Fouché's CCM account to unknown third parties. When Fouché became aware of this, he notified Global that the emails had not been sent by him. Fouché claimed payment of the amounts transferred to the third party accounts on the basis that Global had paid out contrary to the written mandate. The High Court found in favour of Fouché, holding that there had been a breach of the mandate and that Global consequently was liable.

Global appealed and argued, in the Supreme Court of Appeal, that it acted within the terms of the mandate, on instructions that emanated from the legitimate email address of Fouché *and that the typewritten name 'Nick' at the foot of the emails satisfied the signature requirement*, when considered in the light of section 13(3) of the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act).

Section 13(3) of the ECT Act reads as follows:

'Where an *electronic* signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if -

- a) A method is used to identify the person as to indicate the person's approval of the information communication; and
- b) Having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.'

Global argued that it had acted within the terms of the mandate on instructions that originated from Fouché's legitimate email address and that the typewritten name 'Nick' at the foot of the emails satisfied the signature requirement. It said this is in consideration of section 13(3) of the ECT Act.

Fouché, on the other hand, submitted that the instructions did not bear his signature, whether manuscript or electronic, which was what the mandate required. The instruction to pay out therefore did not bear his "signature" as meant in the mandate, whether manuscript or electronic.

### HELD

- The appeal turned on the proper interpretation of the written mandate and whether Global acted in breach thereof.
- The word 'signature' in every day commercial context serves an authentication and verification purpose.
- The ECT Act says, in essence, that when an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if:
  - A method is used to identify the person as to indicate the person's approval of the information communication; and
  - Having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.
- The High Court was correct in finding that, *in the circumstances*, what was required was a signature in the ordinary course, namely in manuscript form, even if it was transmitted electronically, for purposes of authentication and verification. The instruction was not accompanied by such a signature and the High Court correctly held that the funds were therefore transferred without proper instructions and contrary to the mandate.
- It was important to distinguish the judgment in *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another* with the present matter. The former was concerned with the validity of the cancellation of agreements by way of exchange of emails. Each of the agreements in question contained a non-variation clause, which required consensual cancellation to be reduced to writing and signed by both parties. The real dispute between the parties in that case was whether or not the names of the parties at the bottom or foot of each email constituted the required consensual cancellation of the agreement, It was found that it did. This judgment was however not applicable to the present case because the authority of the persons who had actually written and sent the emails was not an issue in *Spring Forest* as it is in the present case. The issue in *Spring Forest* was whether an exchange of emails between the contracting parties could satisfy the requirement imposed by them in the contract that 'consensual cancellation' of their contract be 'in writing and signed' by the parties. There was no dispute regarding the reliability of the emails, accuracy of the information communicated or the identities of the persons who appended their names to the emails. In the present case, the emails in issue were in fact fraudulent. They were not written nor sent by the person they purported to originate from. They were fraudulent as they were written and dispatched by a person or persons without the authority to do so. They are not binding on Mr Fouché.

### CONCLUSION

The appeal failed.