

# Due care and diligence still the standard even during Covid-19

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The nationwide lockdown and the resultant remote working implemented by employers may increase the liability exposure of financial and professional services firms - conveyancers, asset managers, intermediaries and bankers. Generally, the relationship between professional and financial advisors and their clients is governed by a written mandate which expressly sets out the terms of engagement. Historically, we have seen in court judgements that non-compliance with the mandate often results in financial loss for the defaulting party.



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In the recent Supreme Court of Appeal (SCA) judgement in *Global & Local Investments Advisors (Pty) Ltd v Nikolaus Ludick Fouché (71/2019) [2020]*, delivered on 18 March 2020, the court held that a transfer of funds, without a signed instruction having been given to the investment advisor empowering it to transfer the amounts from the client's investment account, was unlawful as it conflicted with the terms of the mandate which required an instruction bearing the signature of the client.

## Facts of the case

Fouché gave a written mandate to Global, a financial services provider, to act as his agent and invest money on his behalf. The written mandate stipulated that all instructions must be sent by fax or by email to specified recipients, with the client's signature.

Subsequently, Fouché's gmail account was hacked by fraudsters and, utilising his authentic email credentials, sent three emails instructing Global to transfer specified amounts to the accounts of named third parties. Two of the three emails containing the instructions to transfer the money ended with the words "Regards, Nick" while the third one ended with "Thanks, Nick". Pursuant to the instructions, Global complied and made the payments to the third parties' accounts. On becoming aware of the transactions, Fouché claimed payment of the amounts transferred to the third parties' accounts on the basis that Global had paid out the investment funds contrary to the written mandate.

Global's defence was that it had acted within the terms of the mandate in that the instructions emanated from the legitimate email address of Fouché and that the typewritten name "Nick" at the foot of the emails satisfied the signature requirement, having regard to section 13(3) of the Electronic Communications and Transactions Act 25 of 2002 (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 communicated; 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."

The SCA stated that under these circumstances, this was not a case where parties had agreed to accept an electronic signature as envisaged by section 13(3) of the ECT Act. It was rather a case where the parties required a signature. No more and no less. The court in delivering its judgement considered the legal meaning of "signature", as well as a line of authoritative cases, and held that Global's contention that Fouché's dispatching gmail address together with his name at the end of the email served an authentication purpose appeared contrived. More so since the mandate required a "signature" which in everyday language and commercial context serves an authentication and verification purpose. For Global to be able to resort to section 13(3) of the ECT Act, it would have to show that in terms of the mandate an electronic signature was required.

## Judgement

The court held that in the conspicuous absence of the word "electronic" in the mandate, what was therefore required was a signature in the ordinary cause, namely in manuscript form, even if transmitted electronically, for the purpose of authentication and verification. The instruction to Global was not accompanied by such a signature. For these reasons, the court concluded that the funds were transferred without proper instructions and contrary to the mandate. As a result, the appeal was dismissed with costs.

The judgement is timely and instructive in view of the Covid-19 outbreak. The judgement is a stark reminder that during these chaotic and stressful times, with heightened risk of cybercrime, the conduct of professionals in the financial and professional services sector must remain above reproach and be governed by their mandates with their clients.

As such, it is imperative that the reasonable standard of care, diligence, vigilance and circumspection still needs to be exercised regardless of the present circumstances. Anything short of that will inevitably culminate in a professional liability claim and resultant financial

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