THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 71/2019

In the matter between:

GLOBAL & LOCAL INVESTMENTS ADVISORS (PTY) LTD **APPELLANT**

and

NICKOLAUS LUDICK FOUCHÉ **RESPONDENT**

Neutral citation: *Global & Local Investments Advisors (Pty) Ltd v Nickolaus Ludick Fouché* (71/2019) [2019] ZASCA 08 (18 March 2020)

Coram: NAVSA, SALDULKER, MAKGOKA and NICHOLLS JJA and MOJAPELO AJA

Heard: 24 February 2020

Delivered: 18 March 2020

Summary: Whether a financial services provider acted in breach of client's mandate by releasing funds upon receiving fraudulent email instruction – applicability of section 13(3) of the Electronic Communications and Transactions Act 25 of 2002

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Vorster AJ sitting as court of first instance):

1 The appeal is dismissed with costs.

JUDGMENT

Mojapelo AJA (Navsa, Saldulker, Makgoka and Nicholls JJA concurring)

[1] The issue for determination is whether the appellant, Global & Local Investments Advisors (Pty) Ltd (Global), a financial services provider, breached a mandate in terms of which it was authorised to invest and manage money entrusted to it by the respondent, Mr Nickolaus Ludick Fouché, by releasing funds in response to fraudulent emails, ostensibly sent by the latter. The Gauteng Division of the High Court, Johannesburg (Vorster AJ) found that there had been a breach of the mandate and that consequently the appellant was liable to be reimbursed in the amount of R804 000. The high court ordered Global to pay Mr Fouché's costs. It is against that conclusion and the resultant order that the present appeal is directed. The appeal is before us with the leave of the high court.

[2] The facts are largely common cause. On 23 November 2015 Mr Fouché, a mining consultant, gave a written mandate to 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 Mr Fouché. Global opened

the CCM accounts for its clients at Investec and then managed the accounts for a fee expressed as a percentage of the funds invested for the client in such accounts.

[3] In August 2016 fraudsters hacked the gmail account of Mr Fouché and utilising his authentic email credentials, sent three emails to Global on 15, 18 and 24 August 2016. 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 them had attachments. In response, Global paid out a total of R804 000 from Mr Fouché's CCM account to unknown third parties in three tranches as follows: R100 000 on 15 August 2016, R375 000 on 18 August 2016 and R329 000 on 24 August 2016. Subsequently, Mr Fouché became aware of this and notified Global that the emails had not been sent by him. Mr Fouché claimed payment of the amounts transferred to third party accounts on the basis that Global had paid out contrary to the written mandate.

[4] Global's main submission and defence to the claim is that it acted within the terms of the mandate, on instructions that emanated from the legitimate email address of Mr Fouché and that the typewritten name 'Nick' at the foot of the emails satisfied the signature requirement, when considered in the light of s 13(3) of the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act). At its core, the submission is that the instructions should be regarded as valid by virtue of the ECT Act because of the word 'Nick', which Global argues, is his electronic signature as it is the manner in which Mr Fouché 'ordinarily' ended his emails.

[5] 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.'

[6] Mr Fouché, on the other hand, submits that the instructions did not bear his signature, whether manuscript or electronic. It is common cause that the instructions did not bear the former.

[7] As stated earlier the high court found in favour of Mr Fouché. Vorster AJ stated that the mandate 'specifically required the signature of the plaintiff [Mr Fouché] for a valid instruction and not merely an email or fax message purporting to be sent. . .' The court below stated that this is not a case where the parties agreed to accept an electronic signature as envisaged by s 13(3) of the ECT Act. It went on to say 'it is a case where the parties required a signature. No more and no less.' Vorster AJ continued and said the following:

'Á simple mechanism to achieve that requirement would simply be to reduce the request to writing, to sign it and to forward it by e-mail or fax to the defendant as the recipient. That agreed mechanism is in my view in line with a purposive and practical interpretation of the provisions of the mandate in line with the probable common intention of the parties and aimed at avoiding precisely the unlawful activity which caused the damage to the plaintiff.'

[8] The court below held as follows:

'It is common cause that no signed instruction has been given to the defendant empowering it to transfer the amounts totalling R804 000.00 from the plaintiff's CCM account. Consequently, I find that such transfer was made unlawfully being in conflict with the terms of the mandate which required an instruction bearing the signature of the plaintiff. In the result the action of the plaintiff must succeed.'

[9] The appeal turns on a proper interpretation of the written mandate and whether Global acted in breach thereof. In construing the mandate, the context must be taken into account. In the commercial and legal world signatures serve established purposes. Signatures are used as a basis to determine authority and can be checked for

authenticity. When money is paid out on a cheque it is done on the basis of an authorised signatory whose signature can be verified.

[10] The Concise English Oxford Dictionary[1] defines ‘signature’ as ‘a person’s name written in a distinctive way as a form of identification or authorization.’ Black’s Law Dictionary (5th ed 1239) gives the definition of ‘sign’ and ‘signature’, which read together bring us close to the legal meaning of signature. ‘To ‘sign’, it explains, is 'to affix one's name to a writing or instrument, for the purpose of authenticating or executing it, or to give it effect as one's act; To attach a name or cause it to be attached to a writing by any of the known methods of impressing a name on paper; To affix a signature to . . . To make any mark, as upon a document, in token of knowledge, approval, acceptance, or obligation'. ‘Signature’ is defined as ‘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.’

[11] Lord Denning stated the following in *Goodman v J Eban Ltd* [1954] 1 QB 550 (CA) at 561 where the question was whether a signature by means of a rubber stamp was a good signature:

‘In modern English usage, when a document is required to be "signed by" someone, that means that he must write his name with his own hand upon it. It is said that he can in law "sign" the document by using a rubber stamp with a facsimile signature. I do not think this is correct . . . [A facsimile] is the verisimilitude of his signature but it is not his signature in fact.
If a man cannot write his own name, then he can "sign" the document by making his mark, which is usually the sign of a cross’.

[12] In *Van Vuuren v Van Vuuren* (1854) 2 Searle 116 at 121, the court held that: To sign a document means to authenticate that which stands for or is intended to represent the name of the person who is to authenticate. If an illiterate person is to sign, he would put a cross. If a person cannot use his hands as normal due to some disability, it will suffice to put the initial, in capital letters, of his name and surname.

[1] Concise English Oxford Dictionary 12 ed (2012) Oxford University Press.

[13] In *Da Silva v Janowsky* 1982 (3) SA 205 (A) at 218F-219C [1982] All SA 43 (A) and *Harpur NO v Givindamall and Another* 1993 (4) SA 751 (A) at 756–759 this Court gave extensive and authoritative definitions of 'signature'. In *Da Silva*, Diemont JA put it thus:

'Mr Jacobs, placed great reliance on the fact that in his plea the defendant had, not once but twice, made a clear and unequivocal admission that he had signed the mandate. But that is not enough. A signature does not refer merely to the written characters appearing on a document; it refers to the fact of signature in relation to the contents of the document on which it appears. The words of ROPER J reported in Sonfred (Pty) Ltd v Papert 1962 (2) SA 140 (W) at 145 are apposite:

''It is axiomatic that a person is not bound by the mere fact that his signature appears upon a document of debt. The chief significance of a signature to a document of obligation is that it is evidence of the fact of consent by the signatory, and in order that he may be bound it is necessary that he shall have affixed his signature with the intention of binding himself. When a defendant is sued upon a document, therefore, the cause of action is not his signature, but the acceptance of liability, of which the signature is evidence, and the cause of action must be proved by the plaintiff, as it is the foundation of the whole claim. When a man is called upon in a summons for provisional sentence to admit or deny his signature, therefore, there appears to be no reason in principle why he should be restricted to a denial that the written characters are his, and should not be entitled, while admitting that they are his, to deny that they were affixed to the particular document - why he should not say 'the signature is mine, but I never signed this document and never undertook the liability contained in it.'''(Emphasis added.)

[14] What is set out in the preceding paragraphs is especially pertinent in relation to instructions relating to transfers of money in the financial services sector. Turning to the mandate itself, it is significant that all instructions had to be sent by fax or by email to a specified fax number and email address but that there is no specified dispatching fax number or email that could serve as an authenticated source. The contention that the gmail dispatching address of Mr Fouché together with his name at the end of the email served an authentication purpose appears contrived. This is especially so since the mandate requires a 'signature' which in every day and commercial context serves an authentication and verification purpose. In order to be able to resort to s 13(3) of the ECT Act Global would have had to show that in terms of the mandate an electronic signature was required. The word 'electronic' is conspicuously absent from the

mandate. The court below cannot be faulted for concluding that what was required was a signature in the ordinary course, namely in manuscript form, even if transmitted electronically, for purposes of authentication and verification. The instruction was not accompanied by such a signature and the court below correctly held that the funds were transferred without proper instructions and contrary to the mandate.

[15] Global placed reliance on *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA. That case concerned 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.

[16] *Spring Forest* is distinguishable for the following reasons: The authority of the persons who had actually written and sent the emails was not an issue in that case as it is in the present case. The issue in that case 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 are fraudulent as they were written and dispatched by person or persons without the authority to do so. They are not binding on Mr Fouché.

[17] For the reasons set out above the appeal must fail. The following order is made:

The appeal is dismissed with costs.

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P MOJAPELO
ACTING JUDGE OF APPEAL

APPEARANCES

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