

Dispute Resolution & Real Estate Law

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SOUTH AFRICA

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A prudent question is one half of wisdom: The consequences of business email compromise on individuals | Part 2

Modern day technology has afforded people the luxury of convenience. However, with this increased convenience has come an upsurge in cybercrime attacks against law firms, banks, individuals and other institutions. The most common forms of attack are ransomware attacks, hacking and phishing scams. In the first part of this alert, titled *A prudent question is one half of wisdom: The consequences of business email compromise on banks and attorneys*, we discussed the case of *Hartog v Daly and Others* (A5012/2022) [2023] ZAGPJHC 40; [2023] 2 All SA 156 (GJ) (24 January 2023), in which an attorney fell victim to fraudsters who intercepted email communication and provided false banking details. This resulted in the attorney making payment into a fraudulent account without further questioning the change in the details, leading to a claim against him by the rightful recipients of the funds, which claim was upheld by a full court. In this article, we discuss the case of *Edward Nathan Sonnenberg Inc v Hawarden* (Case no 421/23) [2024] ZASCA 90 (10 June 2024), in which the Supreme Court of Appeal (SCA) considered the liability of a law firm in respect of a claim for pure economic loss caused by an alleged negligent omission.

In this case, Ms Hawarden purchased property from the Davidge Pitts Family Trust for the sum of R6 million. She made payment of the deposit in the amount of R500,000 to Pam Golding (Pty) Ltd, the real estate agent. This payment was made pursuant to an email from the estate agent, which contained a warning to Hawarden regarding the risk of cybercrime and advising her to verify banking details with the estate agent prior to making payment, and generally warning on the risks pertaining to email hacking, phishing and cyberattacks. Hawarden duly verified the banking details of the estate agent and effected payment of the deposit. ENS Africa was appointed by the seller as the conveyancing attorney. Prior to the payment of the balance in the amount of R5,5 million to ENS Africa, Hawarden's emails were intercepted, which resulted in the funds being paid by her to a fraudulent account. Hawarden failed to verify the banking details of ENS Africa in the manner she had done with the estate agent.

Amongst other things, Hawarden contended that ENS Africa owed her a legal duty to warn her of the danger of business email compromise and the increase in business email compromise fraud and alert her to the fact that criminal syndicates may attempt to induce her to make payments due to ENS Africa into bank accounts which do not belong to the firm and are controlled by criminals. Consequently, Hawarden pleaded that it was reasonable to impose a legal duty on ENS Africa and to hold it liable for the damages suffered by her due to the firm's breach of this legal duty.

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Claim for pure economic loss in delict

In this case, ENS Africa was appointed as the seller's conveyancer. Therefore, there was no attorney-client relationship between it and Hawarden. The claim was therefore founded in delict. Consequently, the question that the SCA had to answer was whether Hawarden had established the wrongfulness element for a delictual claim arising out of a wrongful omission by ENS Africa causing pure economic loss to her. The court answered this question in the negative. In this regard, the SCA confirmed the well-established position that, as a general rule, South African law does not allow for the recovery of pure economic loss. Further, it does not generally hold persons liable in delict for loss caused to others by omission.

Negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. Therefore, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such negligent omissions should attract legal liability for the resulting damages.

Hawarden had suffered loss as a result of hackers infiltrating her email account and fraudulently diverting her payment into the fraudster's account. The interference was therefore the proximate cause of the loss she suffered. In any event, Hawarden had been warned by the estate agent about the

danger of business email compromise and the fraud related thereto, and she had previously heeded the warning and verified the account details of the estate agent. However, she failed to verify ENS Africa's banking details in a similar fashion and no explanation was furnished as to why she failed to do so. The court therefore found that Hawarden had ample means to protect herself and could reasonably have avoided the risk by verifying the bank account details with ENS Africa.

Risk for creditors weighed

The SCA rejected the court a quo's reasoning that all creditors, in the position of ENS Africa, owe a legal duty to their debtors to protect them from the possibility of their accounts being hacked. The court found that the far-reaching consequences of such a finding, requiring creditors to protect their debtors against the risk of interception of their payments, would result in the risk of creditors being held liable for indeterminate amounts, for an indeterminate time to an indeterminate class.

Therefore, the SCA has upheld the first principle of the law of delict, that everyone has to bear the loss that he or she suffers. The courts are not inclined to extend delictual liability for pure economic loss caused by an omission unless public or legal policy considerations require that such omissions should attract legal liability for the resulting damages.

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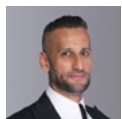
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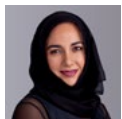
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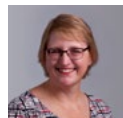
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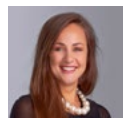
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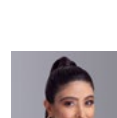
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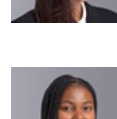
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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