



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs from Gauteng Division of the High Court, Johannesburg (high court). The issue for determination on appeal was 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.

A brief background of the matter is that, 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. 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’. 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. The high court found in favour of Mr Fouché. The high court found that there had been a breach of the mandate and that consequently Global was liable

In the Supreme Court of Appeal (SCA), Global's main submission and defence to the claim was 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). Mr Fouché, on the other hand, submitted that the instructions did not bear his signature, whether manuscript or electronic. It was common cause that the instructions did not bear his signature, whether manuscript or electronic.

In the SCA, the appeal turned on the proper interpretation of the written mandate and whether Global acted in breach thereof. After considering the meaning of the word 'signature', the SCA held that 'signature' in every day and commercial context serves an authentication and verification purpose. The SCA held that the court below could not 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 high court correctly held that the funds were transferred without proper instructions and contrary to the mandate. The SCA went on to conclude that in the present case the emails 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 cannot be binding on Mr Fouché.

The appeal was dismissed with costs.