In this Issue

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Home Buyer loses R5.5m in Phishing Scam – Don't Make the Same Mistake!

"[The buyer] must in the circumstances take responsibility for her failure to protect herself against a known risk" (extract from judgment below)

Cybercriminals absolutely love targeting property transactions because they provide the perfect mix of large money deposits, heavy reliance on email communication from trusted parties like attorneys, banks and estate agencies, and deadlines creating a sense of urgency and lack of attention to detail.

Let's consider just one recent example of a high-value BEC (Business Email Compromise) attack on the purchase of a house.

A textbook case costs a pensioner R5.5m

- A woman describing herself as "an elderly divorced pensioner without the knowledge, experience or resources to protect herself against sophisticated cybercrime of which she had no knowledge or experience" purchased a house for R6m.
- She paid a R500k deposit to the estate agents, and then after an exchange of emails with her appointed conveyancers, she paid the balance of R5.5m into what she believed to be the conveyancing firm's account.
- In fact, her email system had been hacked and the criminals were intercepting and altering both her incoming and outgoing emails. In a typically sophisticated operation,

they ensured that the mails and attachments looked genuine, deceived the buyer into paying the R5.5m into their fraudulent account, and then, via a further chain of back-and-forth emails, delayed detection of the fraud for long enough to give them time to withdraw the funds and disappear.

- The buyer sued the conveyancers for her R5.5m loss, arguing that they had a legal duty to protect her from the BEC. The High Court agreed and ordered the firm to pay her back, but that was reversed on appeal to the SCA (Supreme Court of Appeal).

- Critically, the SCA held that in cases of "pure economic loss", creditors have no general legal duty to protect their debtors from the interception of payments, and there is no inference of "wrongfulness". So, it is up to the client in such a claim to prove not only negligence by the business, but also wrongfulness.

- In this particular case the Court found that the buyer had "ample means to protect herself". It was not the conveyancers but the compromise of her email account that enabled the criminals to intercept her emails. She could have paid by bank guarantee but chose to pay in cash. Moreover, she had been warned by the estate agency about this very risk and had heeded the warning and verified the agency's banking details before paying in the deposit. She could, and should, have taken the same precaution before paying the conveyancers.

- Bottom line – the buyer "must in the circumstances take responsibility for her failure to protect herself against a known risk" and must bear her R5.5m loss herself.

How to protect yourself – 5 steps to take immediately

1. Whether you are business or client, protect your systems from being hacked. Constantly update all your software and anti-virus/anti-malware programs. Use 2FA (two factor authentication) on your accounts. If it is your email system that is hacked and causes the loss, you have a problem! As a business you could also be in trouble for breaching POPIA (the Protection of Personal Information Act).

2. Constantly warn everyone about the risks of email interception and fraud and remind them never to accept any change of banking details notifications without checking.

3. Protect all attachments from alteration (including PDFs!).

4. Before making deposits, phone to confirm all banking details you are given via email. Make sure to phone a number you have confirmed to be genuine – criminals regularly provide fake contact numbers in intercepted emails and documents.

5. Carefully check all email addresses as scammers often make subtle changes – in this case for example the buyer failed to notice that the word "africa" in an email had been changed to "afirca". Other common dodges are changing numerals or adding/removing hyphens.

Above all, treat all email communications as inherently unsafe and don't let your guard down for a second!

Brand-New Car Giving You Nightmares? CPA to the Rescue

"The Consumer Protection Act 68 of 2008 (CPA) establishes a broad and comprehensive scope for consumer protection. Its purview includes developing and maintaining a consumer market in such a way as to ensure fairness, accessibility, effectiveness, sustainability and responsibility for the benefit of consumers" (Extract from judgment below)

You drive your brand-new car home, eager to take the family out for a first spin. Happiness! Until suddenly the car won't start, or you notice a funny rattling noise, or you notice rust, or … it could be anything, because although "brand new" should in theory mean "free of defects", that's not always so in the real world.

You return to the dealership and demand a refund, or a replacement, or at least a courtesy car and a repair. "Nope, sorry" says the dealership, "there's nothing wrong with it/the warranty doesn't cover it/it's not our problem/blah blah blah" – what can you do?

Step One: Exhaust the CPA's dispute resolution processes

- A motorist's brand-new VW Polo Vivo wouldn't start after it was delivered to her. It was towed to the dealership which reported that it was in working order and not defective.
- A few days later it again wouldn't start, instead making a "clack clack noise". The problem was diagnosed as a loose fuse pin and fixed, but the buyer refused to take the car back and gave notice of cancellation of the sale.
- She then lodged a complaint with the Motor Industry Ombudsman of South Africa, which said it couldn't support her expectation that the supplier must cancel the deal. Off to the High Court went the buyer.
- The Court refused her application for a new car or a refund on the basis that she hadn't first exhausted all "internal remedies" before approaching a court. Specifically, she should have followed the comprehensive dispute resolution mechanisms set out in the Consumer Protection Act (CPA) – sure, she had approached the applicable industry Ombud, but she hadn't lodged a complaint with the National Consumer Commission, nor had she approached a

Consumer Court, the National Consumer Tribunal or an authorised alternative dispute agent.

- **The lesson: Exhaust all other remedies as set out in the CPA *before* going to court!**

Step Two: Heigh Ho Heigh Ho It's Off to Court We Go

Finding extensive rust in his brand-new Ford Everest, the buyer demanded that the dealership repair it. The dealership refused, claiming that the buyer had spilt pool acid in the car. After unsuccessfully approaching the Motor Industry Ombud (unsuccessful because the dealership declined to cooperate with the Ombud's investigation), the buyer ended up before the National Consumer Tribunal, which ordered the dealership to remove the rust.

In this case it was the dealership and not the buyer that went to court, with the dealership appealing the Tribunal's order in the High Court.

The Court rejected the appeal and upheld the Tribunal's rust removal order on the basis that –

- The CPA gives every consumer the right to receive goods that "are of good quality, in good working order and free of any defects".

- The vehicle was defective at date of sale, and it was irrelevant that the vehicle was still functional and fulfilling its intended purpose of transporting the buyer "from Point A to Point B"– which it had successfully done for 3 years and 170,000 km before this case reached court. As the Court put it, "it is not meant to have a rusting or corrosion on any of its parts as a new vehicle … one can say that the vehicle is less acceptable and unsafe than people generally would reasonably be entitled to expect from the goods of that type, a brand-new car. This indicates a defect in the vehicle."

- It is for you as buyer in such a case to prove that the defect existed at the time of the sale and that you were unaware of it. In this case, the rust was a latent defect (being hidden under a carpet) and as the buyer was no car expert, it was irrelevant that he had signed a pre-delivery inspection form confirming that there was no problem with the car.

- The Court accordingly found that the buyer had succeeded in proving what he needed to, and the dealership must "remove the rust and repair the Respondent's car back to the standard it should have been if there was no rust".

Insist that your brand-new car is free of defects and remember we can help you with specific advice and assistance if it isn't.

The New Cannabis Act: Here's What You Will and Won't Be Allowed to Do

"It's high time they legalised cannabis" (Anon)

Much excitement has greeted the signing into law of the Cannabis for Private Purposes Act, which will formally regulate the cultivation, possession, and use of cannabis by adults in a private setting and, says the Presidency, lays the groundwork for regulatory reforms "to allow for the industrialisation of the cannabis sector."

But although the new Act has been widely reported in the media as though it is already in force, this is not correct – **it will only come into effect when its commencement date is gazetted**. It is not clear at date of writing when we can expect this to happen, but it could be a lengthy process. Until then the rather vague parameters for private and personal use, possession and cultivation set by the Constitutional Court in 2018 will presumably remain in place.

In the interim, here are some highlights of the Act –

What is "cannabis" in the new Act?

"Cannabis" is defined for the purposes of the Act as meaning "the flowering or fruiting tops of a cannabis plant and includes products made therefrom" (i.e. "buds", extracts, oils and the like) but the definition excludes "any seed, seedling, the stalk, leaves and branches."

What you will be able to do, and what you won't

In a nutshell, it will be legal within prescribed limits to grow, possess, use and share cannabis in private, but not to sell it. More specifically, and with the general requirement of "private purpose" –

- **In private:** Any adult (18 or over) will be able to cultivate, use, possess and share cannabis "in a private place for a private purpose". But not in the presence of a child or non-consenting adult, and not "if it is likely to cause a disturbance or nuisance to any person" in a nearby public place. Note that when it comes to sharing (supplying or obtaining), there cannot be any exchange of "consideration" defined as "any form of compensation, gift, reward, favour or benefit" (i.e. sale for recreational as opposed to medical use will remain prohibited, even for private purposes). The prescribed "maximum amounts" (see below) will apply in private as well as in public places.

- **In public:** An adult will be able to possess (subject to prescribed maximum amounts), but not to use, cannabis in a public place.

- **Protections for children:** No child (person under 18) can be given cannabis or any cannabis product, nor be allowed to possess or use it without a medical prescription, nor can they be used to deal in it. Importantly, any adult "who is in possession of cannabis must take reasonable measures to ensure that such cannabis is inaccessible to a child whether that child is under the authority, supervision or care of that adult person or not."

Maximum amounts will be prescribed, and transport will be regulated

Regulations will prescribe –

- The maximum amounts allowed for cultivation, possession and transport of cannabis.

- "Conditions, restrictions, prohibitions, obligations, requirements or standards regarding the transportation of cannabis, by the person transporting cannabis as well as in respect of the passenger in such transport."

Current speculation (i.e. you can't hold us to this!) is that the prescribed amounts will be based on those proposed in a version of the Bill which was not incorporated in the final Act. That Bill proposed that adults would be able to –

- Possess unlimited seeds and seedlings.

- Privately cultivate four flowering cannabis plants per person (or eight per household occupied by two or more adults).

- Privately possess 600 grams of dried cannabis per person (or 1,200 grams per household occupied by two or more adults).

- Publicly possess 100 grams of dried cannabis or one flowering cannabis plant.

- Provide/obtain for personal use 30 seeds/seedlings, 1 flowering cannabis plant, 100 grams of dried cannabis.

Note however that the 2020 Bill's structure is different to that of the final Act, so **wait for the final Regulations before relying on any of these speculated limits!**

Criminal records to be expunged

Convictions for possession and use of cannabis (dagga) will be automatically expunged, as will convictions for dealing based on legal presumptions rather than actually dealing. Where records have not been automatically expunged, they will be expunged on application.

Can You Sign an Affidavit Over Zoom?

"These technological developments would have seemed far-fetched and science fiction a brief few years ago." (Extract from judgment below)

It's an important question – the invalidity of an affidavit could sink even the strongest case, so it's vital to get this right. Of course, it's always tempting to cut corners where you can on the commissioning side, and perhaps you urgently need to sign an affidavit but are far from a commissioner of oaths or perhaps for some reason you just can't visit a commissioner physically.

That of course became a commonplace scenario during the Covid-19 restrictions on personal contact and the pandemic accelerated the need for our laws to evolve in step with all the new "science fiction made real" technologies enabling meetings to be held virtually, documents to be signed electronically, and secure online handling and storage of information generally.

Whilst legislation and our courts have made important strides in this regard, some areas of uncertainty remain. One of them is the question of whether or not affidavits can be commissioned remotely.

The problem – what does "in the presence of" mean?

For an affidavit to be valid, the relevant Regulations require that it be signed "in the presence of" a commissioner of oaths. And as much as we might think that we are for all practical purposes "in the presence of" everyone else in a virtual meeting or family chat session, it's not clear yet to what extent virtual presence will be considered sufficient compliance with the Regulations.

Let's look at three recent High Court decisions with differing outcomes –

1. **Case 1: An affidavit validly commissioned by Zoom from Italy:** A commissioner of oaths in South Africa commissioned affidavits in a Zoom video call with deponents in Italy. The Court allowed the affidavits to stand, agreeing with previous judicial comments that "…Courts must adapt to the requirements of the modernities within which we operate and upon which we adjudicate…" and concluding that there had been "substantial compliance" with the requirements of the Regulations. However, the

Court also cautioned against the idea that courts can "willy nilly accept non-compliance with acts and regulations."

2. **Case 2: An application for a general declaration refused:** A global publishing company asked the High Court for an order declaring that "in the presence of" is to be broadly interpreted to include the administration of an oath or affirmation "by means of live electronic communication, consisting of simultaneous audio and visual components". The Court dismissed the application, distinguishing this case from the one above and commenting that, although the argument that "the object of the Act and the Regulations can be achieved by virtual means is tempting", it could not ignore "the clear meaning of the words in the Regulations" and "It is not for a Court to impose its view of what would be sensible or businesslike where the wording of the document is clear".

3. **Case 3: Courts have a discretion only if normal commissioning is impossible:** A bank's property valuation affidavits had been signed electronically in the absence of the commissioner of oaths. The Court agreed that a court has a discretion to accept such affidavits "if it finds that that there has been substantial compliance with the regulations" - but only where physical commissioning is not possible. Thus, in a previous matter, a court had exercised its discretion to allow an affidavit's remote commissioning as a result of "the impossibility of the oath being administered normally because of the Covid restrictions against personal contact". That, said the Court, "does not mean that a party may deliberately set out to achieve substantial compliance with such regulation rather than comply with its requirements." In other words, you can't elect to commission remotely just because it suits you. The valuator's affidavits were rejected.

Err on the side of caution

There are some important grey areas there, and clearly remote commissioning will not be allowed as a matter of course. You'll have to justify it.

So, regardless of how inconvenient it may be, unless and until new legislation (or perhaps a definitive ruling from the Supreme Court of Appeal) brings the Regulation's wording up to speed with technology, the only way to be sure that a court will accept your affidavit as valid is to err on the side of caution and visit a commissioner of oaths physically whenever possible.

Legal Speak Made Easy

"Rouwkoop"

Mostly found in property sale agreements, a "*rouwkoop"* (literally, "regret-purchase") clause sets out how much a party who wants to pull out of the agreement without breaching it agrees to pay the other for the privilege. The concept is sometimes confused with that of a "forfeiture of deposit" or "penalty"

clause which applies only if the sale agreement is breached. The distinction is subtle but if you see the word "*rouwkoop*" in an agreement, be on your guard. Whilst only penalties that are proportional to the loss suffered are allowed by our law, you could inadvertently be agreeing to something you will regret later on.