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Attorneys, Notaries and Conveyancers

WITH COMPLIMENTS

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Beware of Property Cyber Scammers

"Forewarned is Forearmed!" (Wise old saying)

Why yet another warning about cyber-scams in the property industry? It's

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Your Website of the Month: Living Overseas and Benefitting from a Will in South Africa?

because the hard fact is that the criminals are winning this war. In fact we are now reportedly the "second most targeted country in the world with regard to cyber-attacks" (Law Society of South Africa).

Hence, no doubt, the Legal Practitioners Indemnity Insurance Fund report of "**over 110 cybercrime related claims with a total value of R70m**" in the period July 2016 to August 2018.

The scammers are using more and more sophisticated techniques to lull their victims into complacency, and your best protection is your own vigilance – forewarned is definitely forearmed!

And remember that property transactions will always remain a firm favourite with online fraudsters for two simple reasons –

- Property sales usually involve large amounts of money.
- Electronic communication between attorneys and clients is a fertile ground for interception and deception.

How your money gets taken – 2 main scenarios

Cyber criminals are resourceful, creative and constantly updating their methods so this is by no means an exhaustive list of your risk areas. To date however the two main categories of scam remain –

1. **Your attorney's payments to you:** As a seller, when you give the transfer instruction to your attorney you will nominate a bank account – account A in this example - to receive the sale proceeds. Before transfer however (often at the very last minute) the conveyancing firm receives a genuine-looking email "from you" changing your banking details to "my new account, account B". Your emails to and from your attorney have been intercepted, and your details cleverly spoofed. Your money is gone – forever. **Of course if you chose the right attorney to attend to your transfer in the first place this shouldn't happen to you – but, as we shall see below, the scammers are so sophisticated now that you can never ever let your guard down, no matter how trustworthy the firm.**

2. **Your payments to the attorney:** The main risk here is to the buyer paying the whole or a large portion of the purchase price to the transferring attorney. Of course transfer duty and other costs of transfer can also add up to a tidy sum, whilst as a seller you will be paying for things like bond cancellation costs, rates, agent's commission and so on.

   The scam here is that once again emails are intercepted, and this time you receive an authentic-looking but entirely fraudulent email asking you to pay into "account C". The email appears to come from the conveyancing firm but of course it is again a clever (often very sophisticated) impersonation, this time of the firm's branding, details and email address.

   The false account details might be in the email itself or in a falsified attachment – nothing is safe. The email may be in the form of a "we've changed our banking details" notification, or the criminal may work on the basis that you just won't notice the change. And of course account C isn't the conveyancer's trust account at all, and the minute you make a payment into it your money is - once again - gone forever.

Who can you recover your loss from?

By the time you realise you have been duped, the criminals are long gone and your chances of catching up with them are remote to say the least.

So could the attorney possibly be liable? A recent High Court judgment deals with that very issue…

Court: Attorney negligent, must pay

In this case a transferring attorney was ordered to pay her client damages of almost

R1m for negligence.

In a nutshell, the attorney had attended to a property transfer for the sellers, and a scammer intercepted emails between the sellers and the attorney's secretary. This was a classic "Scenario 1" operation, and seemingly a sophisticated one – the scammer persuaded the secretary to accept an emailed "my bank account details have changed" instruction and to pay the proceeds into the scammer's account.

The sellers sued the attorney for damages, the attorney denied any negligence whatsoever, but the Court found that she had indeed failed to carry out her mandate with the "due care, skill and diligence expected of a reasonable attorney and a conveyancer in the circumstances."

What is important for you is that the Court reached this conclusion **on the particular facts of this matter**. There were specific factors present here such that a "diligent, reasonable attorney" would, said the Court, have taken steps to verify the information in the fraudulent emails.

That suggests that there are many possible sets of facts which would have left the seller unable to prove any failure of duty by the attorney. **Your risk is that if you try to hold the attorney liable you will have to prove that your loss resulted from his/her fault and not from yours – that's never going to be easy and if you fail, you are left high and dry.**

Protect yourself. Be vigilant!

So prevention really is much better than cure here. Litigation will be expensive and risky, and even if you succeed in your damages claim the attorney's normal indemnity insurance excludes these types of claims so your victory could be a hollow one.

Fortunately there are several common sense steps you can take to minimise your risk -

- If you have the choice of transferring attorney (which you normally would have if you are the seller), **choose an attorney you trust to do the job properly, carefully and professionally.**
- Having said that, no matter how much security your attorneys have put in place on their side, if it is your system that is vulnerable that is what the criminals will exploit. So keep all your anti-virus, anti-malware and other security software updated, learn all about protecting yourself from malware/spyware/phishing attacks, and generally treat all electronic communications with caution – **even those appearing to come from a trusted source like your attorney.**
- Read "Is That Sender For Real? Three Ways to Verify the Identity of An Email" on FRSecure's blog. All the tips given there are important, but at the very least use the methods given to find out where the email really comes from. Then check back to see that it matches in every detail the email address you were given at the start of the transfer process.
- Be suspicious if anything in an email just feels "not-quite-right" – perhaps only a cell phone number is given, or a free generic email address (like Gmail) is used, or the wording is somehow "off". If the email makes you even the slightest bit uneasy, err on the side of caution and investigate further.
- **Most importantly, never accept notification of any supposed change in your attorney's banking details without visiting or phoning your attorney to check all is in order (don't of course use the contact details given in the suspicious email, they could also have been doctored!).**

Can Your Bank Take Your Money Without Permission?

"A bank is a place that will lend you money if you can prove that you don't need it" (Bob Hope)

A recent High Court decision has settled the knotty question of whether your bank can take money it holds for you in one account to cover your debt to it in another, without your permission and without notice to you.

Firstly, what is "set-off"?

To understand how important this new decision is, we need to go back to our common law (unwritten law) principle of set-off. In simple terms, common law set-off allows one debt to be cancelled out by another. So if for example I owe you R1,000 and you owe me R900, I am both your creditor and your debtor, and vice-versa. If we come to blows, I can then set the one debt off against the other with the net effect that I owe you R100.

Credit-lenders, and in particular banks, used to make extensive use of this to collect debt. If for instance you fell behind in your mortgage bond or credit card payments, your bank could, if it was so inclined, take the arrears out of your current account as soon as your salary was paid into it – without your consent and without notice to you.

Banks have always argued that this ability has made it easier for them to lend money to us when we ask for it, as it reduces their risk by giving them more security if things go wrong. Giving notice or asking for consent would, they argue, allow a recalcitrant debtor to quickly withdraw the funds and frustrate the debt collection. But the other side of the coin of course is that you could suddenly find yourself without money to live, let alone to service your other debt payments – a situation particularly hard on lower earners and those struggling with mountains of debt.

Enter the NCA (National Credit Act) in 2005…

How the NCA changed things

In broad terms, the NCA (when it applies – see next paragraph) restricts set-off in such a way as to give the consumer the right to choose whether or not to consent to set-off, which accounts it may be applied to, in respect of which amounts, when it is to be applied, and in respect of which debts.

But does the NCA apply to your particular debt? In most cases, yes. In a nutshell (there are some "ifs" and "buts" here so ask your lawyer for specific advice) the NCA applies to most personal loans, home loans, overdrafts, credit card debt, asset finance agreements, lease agreements and so on. It covers consumers who are individuals and some – not all - "juristic persons" (companies and the like - take advice for details).

Which brings us to the High Court…

Nevertheless at least one bank (which is unlikely to be alone in this practice) has continued until now to apply common law set-off without consent, in other words they would take money from a customer's account to cover the customer's debt on a separate credit agreement. The bank argued that the NCA's set-off restrictions did not apply on its interpretation of the NCA, in its circumstances and to its credit agreements. Importantly, its agreements omitted any mention of set-off (where an agreement does mention set-off, there is no argument - the NCA restrictions definitely apply).

Having received complaints from consumers to this effect, the National Credit Regulator asked the High Court to interpret the NCA's provisions and to rule on the legality of the bank's practice.

The High Court's decision

Common law set-off without your consent as above cannot happen if the NCA applies to your credit agreement.

In a nutshell – you have the choice! Banks and other credit-lenders must ask you before taking money from one account to cover your debts in another.

How to Stop Vital Evidence Being Destroyed

"Surprise the enemy" (Sun Tzu in 'Art of War')

You suspect that someone you are suing (or about to sue) will destroy or hide vital evidence in their possession. Perhaps by shredding documents or deleting electronic records supporting your case, or perhaps by spiriting away computer hard drives full of incriminating information. You fear that if they get away with it your case will be dead, or at least compromised.

Fortunately our law has a strong and quick remedy for you - the "Anton Piller" order, by means of which the High Court can authorise a search for, and a seizure into safekeeping of, the relevant evidence until trial.

Surprise raids and fishing expeditions

This is a drastic and draconian remedy. For obvious reasons this is a "surprise raid" on the other party – giving advance notice to the other party of your court application would defeat the whole object.

Which means that the other party suffers an unannounced and substantial invasion of its privacy, leading to all sorts of disruption and potential damage to its business.

Which is why our courts have laid down strict requirements that you must comply with before you will be granted an order. A recent Supreme Court of Appeal (SCA) decision illustrates –

1. A developer and seller of computer software wanted to sue a company it had dealt with for damages on the basis of alleged breaches of contract and for unlawful competition. It obtained in the High Court an Anton Piller order giving access to the Deputy Sheriff, independent attorneys and forensic specialists to search and seize "documents specified in the order, computer equipment or any other storage devices". This order was subsequently set aside and the developer, attempting to have the order re-instated, approached the SCA for leave to appeal.

2. The Court in refusing leave to appeal analysed and applied the requirements for an order to preserve evidence under three main headings. You must establish (*prima facie*, in other words "on first appearance" but not definitively at this stage) the following –

    - That you have a cause of action against the other party, which you intend to pursue. The developer had, said the Court, established this.

    - That the other party has in its possession "specific documents or things which constitute vital evidence in substantiation of [your] cause of

action…" This, said the Court, required the developer to "identify the documents it sought to preserve with the necessary degree of specificity". A "blanket search for unspecified documents or evidence, which may or may not exist, is not permitted". **You have to be specific**.

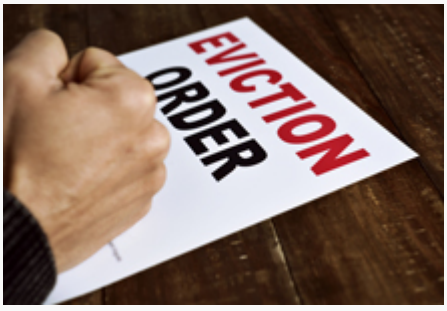
The major flaw in the developer's case was, said the Court, its failure in its affidavits to identify or specify which vital information was in possession of [the other party] that needed to be preserved. It proposed a "keyword" search to be used in searching the whole of the other party's data base that was "invasive and a trawling expedition through every aspect of [the other party]'s business" including sensitive and confidential information to which it could not be entitled.

- That you have a "well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial…" But in this case, said the Court, the developer had failed to show that the other party was untrustworthy or dishonest, plus it had "failed to set out any factual basis for an objective conclusion to be reached of the well-founded and reasonable apprehension that evidence would be concealed."

3. This particular order, held the Court, "involves a departure from the basic premise upon which Anton Piller orders are granted, namely that they are **to preserve evidence, not search for it**", whilst its execution was "**nothing but a fishing expedition**" (emphasis added). The software developer could not succeed in re-instating its Anton Piller order.

Unlawful Occupiers: Eviction Is Possible, but Neither Quick nor Easy

"It is only once the court concludes that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order that it is obliged to grant that order" (Extract from judgment below)



"Buy land" said Mark Twain, "they're not making it anymore." With the first green shoots of a property market recovery supposedly now showing through perhaps this is indeed the time to take his advice.

Just be sure, if the property you have your eye on is occupied by anyone, to seek proper legal advice on the occupiers' legal position before you put pen to paper.

We all know that unlawful property occupiers enjoy substantial constitutional and statutory rights, and a recent High Court case provides a good example of the fact that whilst it is certainly possible to evict unlawful occupiers, it could well be neither quick nor easy.

The family that lived rent free for two years

- A buyer bought an apartment from the previous owner's liquidators and took transfer on 31 March 2017.

- The new owner advised the family occupying the apartment that it must vacate

by 14 April or face eviction proceedings.

- The family refused to budge, and the owner, after complying with the many formalities required of it by PIE (the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act), applied to the High Court for an eviction order.

- The family defended the application, firstly on the basis that it was, it said, in lawful occupation in the form of a lease agreement. The Court rejected this defence, finding that the family was in unlawful occupation even on its own version of the facts, because the "lease" (which the owner denied was ever validly entered into) had lapsed at the end of May 2017. The family's attempt to persuade the Court that the lease had been "tacitly" renewed was doomed to failure because of the owner's unrelenting insistence that the family's continued occupation was unlawful.

- Secondly the Court considered the all-important question "**Is it just and equitable to evict?**"

  Per a 2017 Constitutional Court judgment which dealt extensively with the constitutional and statutory rights of unlawful occupiers, the High Court's starting point was this: "that no one may be evicted from their home without an order of court made, after considering all the relevant circumstances", having regard to the interests and circumstances of the occupier/s, and paying "**due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result**" (emphasis added).

  This is where questions of indigence and the risk of homelessness arise, and this is the hurdle at which many a property owner has stumbled in the past.

  In this case however, the owner triumphed, the Court finding on the facts that the family was financially able to pay rental but had paid nothing whilst enjoying free occupation for over two years. It had also had legal representation and could not be regarded as economically vulnerable or unable to obtain alternate accommodation.

  Critically, perhaps, the Court commented that the father (in whose name the eviction application was brought and fought) "has known of the real risk of eviction for a period in excess of two years and as such, he ought reasonably and responsibly to have made contingent plans in the event that an eviction order is granted … The professed risk of homelessness is not borne out by the undisputed facts of the matter and [the father] cannot be characterised as indigent by any means".

- Finally, the Court, having decided to grant the eviction order, had to consider when to make the order effective from. It's an important enquiry because as an owner you could find yourself successfully holding an eviction order, but with an expensive delay before being able to implement it. The Court must consider "what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere."

  Fortunately for the property owner in this case the Court did not provide for too long a delay, giving the family eight weeks to vacate (slightly longer than requested because a minor child's interests were involved).

  The family also has to pick up the tab for all the legal costs.

Buyers – some final advice

First prize is always to have a solid agreement in place with any occupiers before you

buy an occupied property.

So sign nothing – not an offer to purchase, nor a lease, nor any form of occupier contract – until you have your lawyer's advice!

Your Website of the Month: Living Overseas and Benefitting from a Will in South Africa?

What happens if you want to access a South African bequest overseas?

BizNews gives you a step-by-step breakdown of how to go about it, depending on whether you are –

- Non-resident,
- Financially emigrated, or
- A South African resident temporarily abroad.

Read also the section on taxation.

Bear in mind that of necessity an article like this can only give you an overview of some general principles, and that getting anything wrong could cost you dearly. **Professional advice on your specific circumstances is a no-brainer here!**
