

What happens when your attorney pays your money to the wrong person?

Introduction

Cybercrime can be described as a criminal activity that involves a computer and the internet. Cybercrime involves many criminal activities and this article aims to explore cybercrime in the legal profession and the implications thereof by taking a look at the High Court case of *Fourie v Van der Spuy and De Jongh Inc. and Others*¹ (the “Fourie case”).

Cybercrime has been prevalent in the legal profession, more especially in the conveyancing field where property is bought and sold. In the conveyancing field, common practice dictates that the price of property is paid by the purchaser into the transfer attorneys trust account, pending the transfer of the property. The aforementioned is done in order to curtail instances in which monies are paid to the seller of the property prior to registration of the property being effected as a financial risk issue may present itself in the event that the transfer of the property fails or falls flat. Cybercrime has wide reaching repercussions and is not a new concept to the legal profession and the prevalence thereof has led to the Legal Practice Council issuing guidelines thereon.

***Fourie v Van der Spuy and De Jongh Inc and Others*²**

The High Court case of *Fourie* involves a property transaction wherein which the seller of a property was prejudiced by the transfer attorney due to the transfer attorney having made an erroneous payment of the proceeds of the purchase price of the property, to an unknown third party and fell victim to cybercrime. The transfer attorney rendered professional services to the seller of the property and was instructed to retain monies in their trust account up until such a time that the seller gave the transfer attorney instructions on what to do with the monies. The issue that was to be decided by the honourable court was who should take the knock between the client or the attorney in relation to the loss suffered by the client. Before exploring the abovementioned question, we seek to explore the attorney client relationship as well as trust money and trust property.

The attorney-client relationship

¹ *Fourie v Van der Spuy and De Jongh Inc. and Others* 2019 ZAGPPHC 449

² *Fourie v Van der Spuy and De Jongh Inc. and Others* 2019 ZAGPPHC 449

It is of importance to unpack the relationship between an attorney and a client which bears two legs, namely being that the said relationship emanates from contract (mandate between the attorney and client) as well as common law.

A relationship between the attorney and client is based on the contract of mandate where a principle-agent relationship is created between the parties, by virtue of common law. A mandate between an attorney and client gives birth to fiduciary obligations that in turns results in an attorney having to conduct their actions with the duty of care, skill and diligence of an average practicing attorney.

Trust money and trust property

A trust accounting practice may retain monies in trust for the benefit of the client. On the instruction of a client, a separate trust savings account or other interest-bearing account may be opened for purposes of investing the monies of client. The said trust assets do not however form part of the assets of the attorney or trust account or another person.

In the *Fourie case*, the transfer attorney raised a dispute regarding payment instructions, between those that were legally done and those that were illegally done through hacking and cybercrime. The court however held that there exists no dispute and stated that the facts are straightforward in that client held money in the transfer attorney's trust account. The court held it is common cause that the transfer attorney failed to pay over the balance due to client and as result thereof, they have failed to discharge their obligation to the client. Furthermore, it was held that the transfer attorney's omitted to confirm or verify the new banking details of the client and that no verification process was followed in that regard.

Conclusion

The court held that the transfer attorney was negligent and failed to exercise the requisite skill, knowledge and diligence expected of an average practicing attorney and thus failed to discharge the fiduciary duty to client by transacting via email whilst being fully aware that fraud is prevalent in the attorneys profession and despite that being so, not employing any measures to ensure that neither do they nor the client fall victim to the plague of fraud and cybercrime.

The court further held that the transfer attorney's defence that fraud occurred is no defence in law and that it would not release the transfer attorney from paying client their monies, due to the principal agent relationship being in existence. Due to the transfer attorney being the principal in the relationship, the transfer attorney had an obligation to account to the client for the funds and had failed to discharge those obligations.

Accordingly, the court granted judgment in favour of the client and awarded a cost order against the transfer attorney.

At SchoemanLaw, we can assist you in all your property related transactions and disputes. We are also ISO 270001 certified and have implemented various controls to avoid the above, many years ago.

