

How lawyers have become the targets of scamsters

Crooked lawyers make the headlines so often that it's easy to overlook a different truth: by far the majority of the profession are decent people, dedicated to the law and to helping people negotiate their way through its labyrinths.

In fact, some are themselves victims of criminal scams related to their profession.

This week I found a new High Court judgment illustrating the kind of serious problem lawyers may face through no fault of their own. In this case, the lawyers fell victim to a scam that has been operating in South Africa for a few years, but seems at the moment to be centred around the busy Eastern Cape city of Port Elizabeth.

Though police investigating these and similar frauds do not seem to have achieved much, this time the scam and the way it plays out has nevertheless been exposed inside a court room. Not by way of a criminal charge, but through civil action brought against an attorneys' firm by clients whose money disappeared into the deep pockets of the fraudsters.

The story concerns Dr JA Lochner, the seller of some property. He instructed Schaefer Incorporated, a firm of attorneys in Port Elizabeth, to see to the transfer of the property from his name to that of the new buyer, and to deposit the proceeds of the sale into his (Lochner's) account.

There was nothing unusual about the arrangement or the agreement. Early on, Lochner told the firm to communicate with him via his wife's e-mail address, after which the lawyers were in regular communication with him and his wife by way of this e-mail address and by cellphone calls. One of the issues dealt with while the parties were waiting for transfer, was what was to happen with the funds once they were released at transfer: the Lochners instructed the firm to pay the proceeds of the sale into an Investec account.

On 5 August 2016 the transfer documents were lodged in the deeds offices and the attorneys were informed by sms. On 10 August the Lochners asked for a progress report and the lawyers replied that transfer should be registered the following day.

On 16 August the lawyers received what turned out to be the first of several crucial e-mails. It appeared to come from the Lochners and it asked for an update on the transfer. The following day it was followed by another e-mail giving details of a different account, at First National Bank this time, for the deposit of the funds once they were available.

The lawyers replied by sending a blank document to be completed, giving them power of attorney to transfer the funds into the FNB account. This form was returned to the lawyers with what looked very much like Lochner's signature in the relevant places.

On the same day, 17 August, transfer was registered and the parties were told via sms that payment would be made within two to three business days. The day after that, 18 August, the total amount due – R512 720 – was transferred from the law firm's trust account into the FNB account. The firm then sent an sms and an e-mail to the Lochners informing them of the deposit and giving them a final reconciliation.

On 19 August the Lochner's called to ask whether the funds had been paid in. Indeed, was the reply, the funds were yesterday deposited into your FNB account, as you requested. The horrified Lochners replied that they had no FNB account, and at that point, when the lawyers looked more closely at the e-mails from 16 August onwards, instructing them to pay into an FNB account, they saw that the messages came from an address almost identical to that of Ms Lochner, but with one letter added.

The lawyers immediately contacted FNB's fraud division to block the account. So did the lawyer's bank, Absa, and so did the Lochners. All were assured during the contact they made that day, 19 August, that the account would be blocked immediately, and, by the end of the day, they were informed that the account was indeed blocked.

But it turned out this was not so. A number of smaller withdrawals totalling R12 000 were made from that account between 18 and 22 August, while a large withdrawal was made on 23 August, four days after FNB claimed to have blocked the account. The balance was saved.

So much for the evidence in court of how the scam had gone down. The Lochners, having lost R268 348 from the fraudulent FNB account, asked for summary judgment in this amount against the firm. The Schaeffers, however, say they have a *bona fide* defence to the claim: they were not negligent in the performance of their mandate given the circumstances of the fraud.

When the case came to the High Court, it was clear that the only issue to be decided at this stage was whether the firm of attorneys raised a *bona fide* defence to the Lochner's claim. As far as the Lochners are concerned there could be no dispute: in their view all that had to be proved was that the mandate was not carried out.

Judge Clive Plasket, however, held otherwise. In his opinion, the Lochners would also have to prove 'fault' on the part of the lawyers. It was not correct to say that they were liable simply because they did not carry out the mandate as agreed.

So, was there indeed 'fault' on the part of the attorneys? Had the firm been negligent, as the Lochners argued? The judge said he was not prepared to make a finding on this issue based merely on the papers in court. 'That is a matter that can only properly be determined after evidence has been led and tested by cross-examination. I am satisfied, however, that the defendants have raised a *bona fide* defence – (namely) that despite not having executed the mandate, their failure was not due to their negligence.'

All of which means resolution of the matter has to be held over until the case is properly argued. Leaving aside the question of whether the legal firm was negligent, I wonder what the courts will make of the actions of FNB, and how the bank will explain the withdrawals made after assurances were given that the fraudulent account had been

blocked.

The sting in this case was very similar to that experienced elsewhere in South Africa ever since the first report of this style of scam surfaced in about 2013. To an onlooker one particularly telling detail is that the letter naming a new account into which the funds are to be paid, is always sent in the crucial few hours just as the money is about to be released from the attorney's trust fund – a fact that suggests a particular kind of insider information.

Initially the scam was limited to Nedbank clients, but now it seems to be spread throughout the banking system and for the moment at least to be centred in Port Elizabeth. According to *The Daily Dispatch*, for example, since January 2015 some R8.4m has been stolen in 19 cases reported by conveyancing firms in and around the city. In all these cases instructions were received about a different bank account just as funds for a sold property were about to be released. Another report suggests R13.5m was lost in 11 recent separate cases, while an article in November 2016 claimed that nine such cases were reported in Port Elizabeth between August and October 2016.

Against those troubling statistics bear this in mind: the Attorneys Insurance Indemnity Fund issued a statement last year that it would no longer cover 'cyber crimes' with effect from July 2016. With that threat hanging over the heads of attorneys and their clients, it's obviously imperative that lawyers be more vigilant than ever – and that somehow, warnings about this scam be circulated to every member of the profession.

– CARMEL RICKARD

Judgment