JUTA
POPIA PORTAL

ISSUE NO 17 • WHAT WE THINK ABOUT ... *HAWARDEN V EDWARD NATHAN SONNENBERGS INC* • MARCH 2023

WHAT WE THINK ABOUT ... *HAWARDEN V EDWARD NATHAN SONNENBERGS INC.*

1. OVERVIEW

Recently (in January 2023), the South Gauteng High Court handed down a very interesting judgment relating to liability for pure economic loss caused by insufficient or inadequate cybercrime security safeguards. To be precise, in the judgment of *Hawarden v Edward Nathan Sonnenbergs Inc,* the judge had to deal with:

> 'the vexed question of whether or not to impose liability for pure economic loss sustained by the plaintiff who fell victim to cyber-crime through business email compromise ("BEC") as a result of the defendant's negligent omission to forewarn the plaintiff of the known risks of BEC and to take the necessary safety precautions that are designed to safeguard against the risk of harm occasioned by BEC from eventuating.'

These are our immediate thoughts on the issues raised in this case.

Photo: Taha Samet Arslan/Pexels

2. WHY IS THIS CASE RELEVANT TO DATA PRIVACY COMPLIANCE?

Photo: stock.adobe.com

While this case does not mention POPIA, it deals with a topic very central to Condition 7 of POPIA ('Security Safeguards). While most responsible parties worry about being fined by the Information Regulator if they have a data breach, this case highlights the delictual liability risks which also exist.

3. SO, WHAT ACTUALLY HAPPENED?

Photo: stock.adobe.com

Hawarden (who brought the legal action) and a secretary in the conveyancing department of law firm Edward Nathan Sonnenbergs ('ENS') had been emailing back and forth about a property that Hawarden was purchasing. ENS was representing the seller of the property. To finalise the transaction, Hawarden had to EFT a large sum of money (R5.5 million) into the ENS's attorney trust account. Unfortunately, Hawarden's email inbox was compromised by cybercriminals. The cybercriminals impersonated the ENS legal secretary by creating an email address that was exactly the same as the ENS legal secretary's but for the word 'africa', which was replaced with 'afirca'. The cybercriminals attached a PDF with the details of a bank account which was supposedly ENS's attorney trust account.

Consequently, Hawarden paid the amount she owed on the property into the wrong bank account. By the time the mistake was detected, the cybercriminals had already drained the funds from the bank account they had set up. Hawarden then claimed that ENS owed her a duty to exercise sufficient care in the conduct of the transaction, to warn her of the dangers of Business Email Compromise ('BEC'), and to communicate its banking details to her in a safe manner. Because ENS had failed in this duty of care, Hawarden claimed the defendant was liable to her in delict for the pure economic loss she had suffered.

4. WHAT DID THE JUDGE DECIDE?

Photo: Ekaterina Bolovtsova/Pexels

The judge ultimately held that ENS is delictually liable to Hawarden for the pure economic loss she suffered, on the basis of the following:

- A duty of care did exist between ENS as the conveyancing attorney handling the transaction and Hawarden as the purchaser, for ENS to 'prevent harm resulting from the conveyancer's failure to warn the depositor of the dangers of cyber hacking and spoofing of emails or of the fact that PDF attachments to emails containing sensitive information such as bank account details are not invulnerable to BEC'; and
- Given ENS's status as a well-recognised law firm, ENS was well-positioned to foresee the risk of BEC occurring. Consequently, the risk was foreseeable in these circumstances, and ENS's omission to discharge its duty of care was negligent.

5. WHAT DO WE THINK ABOUT THIS?

5.1. IN GENERAL

We think this case has set quite a dangerous precedent in terms of what organisations or persons can be held delictually liable for when any security safeguards fail. ENS's security safeguards did not physically fail. Instead, ENS's employee was impersonated due to cybercriminals compromising Hawarden's email inbox. Hawarden's security safeguards are actually the ones that failed.[1]

Extending ENS's duty of care to include risks that Hawarden's own security safeguards may fail seems (to us) like a broad overreach and highly burdensome on ENS. Given how many property purchasers the ENS (and other conveyancing attorneys) must send their attorney trust banking details to daily, to say their duty of care extends this far is a dangerous precedent to set.

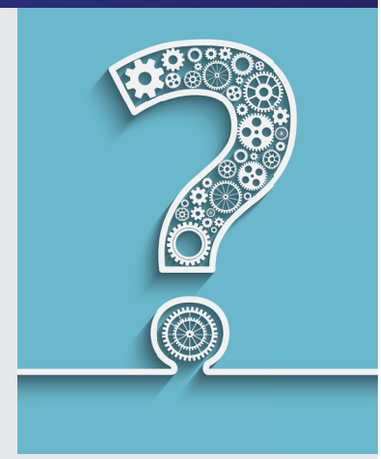

Photo: stock.adobe.com

5.2. UNDER POPIA

We do not think that this legal case would have held water if it had been brought in terms of POPIA. For example, from our interpretation of sections 19 and 20 of POPIA,[2] a responsible party's duty to take 'appropriate, reasonable technical and organisational measures' to secure the integrity, availability and confidentiality of personal information only encompasses 'personal information in its possession or under its control'. Holding the responsible party delictually liable for the security of personal information which has left the responsible party's possession or control (and is now possessed by another independent, responsible party) reaches further than the duty imposed by sections 19 and 20 of POPIA on a responsible party.

Additionally, while section 93(1) of POPIA provides that a data subject or the Information Regulator on behalf of a data subject can institute a civil action for damages against a responsible party for a breach of POPIA, POPIA does not make provision for an independent responsible party initiating a civil action for damages against another independent responsible party for a breach of POPIA.[3]

4. FURTHER READING

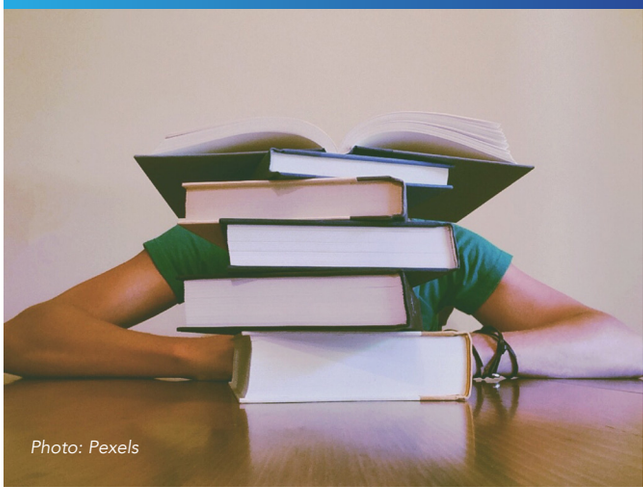

Photo: Pexels

We discuss the relationship between separate responsible parties sharing personal information (and, while not mandatory, why sometimes concluding a data processing or data sharing can be a good idea to mitigate risks in these scenarios) in **Chapters 4** and **13**.

We discuss the duties of a responsible party concerning implementing security safeguards for protecting personal information in **Chapter 5**.

We discuss civil liability for damages under POPIA in **Chapter 19**.