

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 28646/2020

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED:
18/9/2024	
DATE	SIGNATURE

In the matter between:

BROUGH CAPITAL (PTY) LTD

First Applicant

CHRISTIAAN LOURENS BOTHA

Second Applicant

And

LESTER CONNOCK COMMEMORATION FUND

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MAKUME, J:

- [1] On the 16th November 2023 I handed down judgment in favour of the Respondent in which I ordered that the Applicants pay the Respondent an amount of R3 100 000.00 plus interest and costs.

- [2] The order was a sequel to this Court having found the Applicants grossly negligent in handling of the financial affairs of the Respondent and that the exemption clause in the agreement did not protect the Applicants.
- [3] The Applicants now seek leave to appeal that judgement. From a reading of the grounds of appeal they crystallise into basically two or at most three grounds:
- i) The first is that this Court erred in finding that there was no contractual nexus between Momentum and the Respondent contrary to the provisions of clause 9 of the Investment Management Mandate.
 - ii) The second broad ground is that the Investment Management Mandate expressly exonerated the Applicant from liability which was ordinary negligence and not gross negligence.
 - iii) Lastly that this Court erred in not finding that the Applicants were not responsible for effecting payments to the Respondent as that function was with the knowledge of the Respondent outsourced to Momentum and that it was the latter who were responsible for processing, authenticating and release of all payments.

THE TESTS FOR LEAVE TO APPEAL

- [4] A party seeking leave to appeal a judgement is bound to satisfy the provisions of Section 17(1) (a) of the Superior Courts Act 10 of 2013 (the Act) which reads as follows:

“Leave to appeal may only be given either where:-

- a) The appeal would have a reasonable prospect of success. or

- b) there is some other compelling reason why the appeal should be heard including conflicting judgements on the matter under consideration.

[5] In the matter of **MEC for Health Eastern Cape vs Mkitha [2016] ZASCA 176** the Supreme Court of Appeal held as follows:

“Once again it is necessary to say that leave to appeal especially to this Court must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why it should be heard.

An Applicant for leave must convince the Court on proper grounds that there are reasonable prospects or realistic chance of success on appeal. A mere possibility of success an arguable case or one that is not hopeless is not enough. There must be a sound, rational, basis to conclude that there are reasonable prospects of success.”

[6] Leave to appeal is granted or refused at the discretion of the trial judge on proper examination of whether the grounds of appeal fall within the scope of section 17(1)(a). The Applicants have not proved that there is some other compelling reason why leave should be granted. This leaves me now with examining whether there are reasonable prospects of success and that another Court would arrive at a different ruling.

THE GROUNDS OF APPEAL INCLUDING THE TERMS OF THE MANDATE

[7] Before dealing with these two issues I need to point out that at the hearing of this application the Applicant’s legal representative sought to argue two issues that were raised in the hearing the first being that Momentum should have been joined as a party, secondly that if the Court finds gross negligence on the part of the Applicant such negligence should be shared with the Respondent because the Respondent was also to blame for not checking on the authenticity

of the emails. As I indicated to Counsel for the Applicant this Court, or a Court of Appeal will not be able to deal with such new evidence save under exceptional circumstances. However, it became clear that the Applicant concede ordinary negligence and not gross negligence and should therefore be excused from liability.

[8] I do not in this judgement want to repeat my reasons for finding in favour of the Respondent. It is clear that the Investment Mandate governed the relationship between the Applicants and the Respondent there is no mention of Momentum. All that the Respondent did was to entrust its financial management to the Applicants who on their own had a separate commercial agreement with Momentum. There is nowhere in that document wherein there is mention of what the Respondent should expect from Momentum. Momentum took instructions from Brough Capital and whatever they did was on the instructions of Brough Capital.

[9] The Applicant's heads of argument are replete with the point about the effects of clause 12.1 (the exemption clause). The Applicants contend that the indemnity or exemption clause if enforced limits the liability of the Applicants and its employees to those actions or conduct that is grossly negligent.

[10] The SCA in **MV Stella Tingas Transnet Ltd t/a Portnet vs Owners of the MV Stella Tingas 2003 (2) SA 473 (SCA)** was correct in saying:

"Gross negligence is not an exact concept capable of precise definition"

[11] I agree as a result each case must be looked into based on the available evidence and the type of conduct attributed to the party sought to be held liable.

[12] In this instance I found that Brough Capital and its sole director Mr Botha are strictly regulated by FA is as well as the General Code of Conduct for Authorised Financial Service Providers and Representatives. Those documents impose various legal duties on financial service providers.

[12] I am satisfied for the reasons stated in my judgment that the Applicants including Mrs Botha were grossly negligent as a result the indemnity clause does not absolve them from liability. The fake email surfaced during the time that the Rotary Club had already indicated to Brough that they are terminating the relationship. This on its own raises suspicions about the conduct of Brough Capital and Mrs Botha

[13] In the result I am not persuaded that there exists reasonable prospects that another Court would arrive at a different conclusion. This application must fail.

ORDER

1. The Application for leave to appeal is dismissed.
2. The Applicants are ordered to pay the Respondents taxed party and party costs which shall include the Costs of two Counsel.

Dated at Johannesburg on this day of September 2024



MA MAKUME
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the Applicants:	Adv. L Mbale
Instructed by:	LM & Company Attorneys
For the Respondent:	Adv. Morrison SC & Adv. T Scott
Instructed by:	White and Case Inc
Date of hearing:	16 September 2024
Date of Delivery:	17 September 2024