

✓ 22/12/2017  
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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number 6571/2016

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
DATE 22/12/17	SIGNATURE

In the matter between:

METRO LIFE STYLE CENTRE (PTY) LTD

First Applicant

BURAK INVESTMENTS (PTY) LTD LIMITED

Second Applicant

And

RAYHAAN HASSIM

First Respondent

ALCAPOLCO TRADE and INVESTMENT

(PTY) LIMITED

Second Respondent

AUCOR GROUP (PTY) LIMITED

Third Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Fourth Respondent

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## LEAVE TO APPEAL: JUDGMENT

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Molahlehi J

1. This is an application by Metro Lifestyle Centre (Pty) Ltd (the first applicant) and the second applicant Burak Investment (Pty) Ltd (the second applicant) against my judgment made on 3 August 20 17. The main finding in terms of that judgment was that the applicants had failed to make out a case for the existence of the *fiduciary* duty between him and the first respondent.
2. There is a typographical error in paragraph [44] of the judgment which is corrected as follows: the word "applying" is deleted and replaced by the way, "replying."
3. The applicants have raised eight grounds of appeal against the judgment which is the subject of this application. The main criticism of the judgment is that the court adopted an incorrect approach in finding that no *fiduciary* duty existed between the parties. I deal briefly with this criticism below. As concerning the rest of the criticism, I do not deem it necessary to repeat the same in this judgment as that appear on the record and have been dealt with fully in my judgment. In this

respect I have not been persuaded that another court “would” in terms of the test set out below arrive at a different conclusion than that reached by this court regarding those issues.

4. It is now accepted that the threshold in the test for leave to appeal as envisaged in s17 (1) of the Superior Court Act of 2013. (the Act) is higher than the previous test which simply required that it be shown that there are reasonable prospects of success on appeal. The test set out by the legislature contemplates some level of certainty that another court “would” reach a different conclusion to that of the judgment which is the subject of the leave to appeal.
5. The attack of the judgment about the existence of the *fiduciary* duty is that the court adopted an incorrect approach in dealing with that issue. The essence of the criticism is that the court overlooked the fact that *fiduciary* duty may exist even outside the contractual relationship of agency.
6. In considering the above criticism account should be taken of what is stated in the notice of motion in the main application, where it is amongst other things stated that:

"1. Declaring that the first respondent, as the agent of the first applicant, misappropriates the first applicant's corporate opportunity of purchasing the movable property.... Having unlawfully purchased the property... in the circumstances where the first respondent was negotiating as an agent for and on behalf of the first applicant."

7. The above cause of action is supported and referred to in several occasions in the founding affidavit. In the replying affidavit, the applicants sought to broaden the cause of action beyond the contractual relationship of agency. In this respect, they state at paragraph 5 of the replying affidavit that:

"Whether or not he was an agent... is irrelevant."

8. And, at paragraph 63 they state that:

"The applicant's case is not restricted to a contract of agency. The proper course of action is a breach of fiduciary duty. Agency is but one of the possible bases upon which such a duty exists." '

9. However, at paragraph 31 of the replying affidavit they state that:

"I shall demonstrate that Reyhaan acted as an agent..."

10. It is trite that in motion proceedings, the papers before the court constitute both pleadings and evidence. It is also trite that an applicant has to make out his or her case in the founding affidavit. In other words, the applicant is bound by the case pleaded in the founding affidavit. A cause of action made out in the replying affidavit is



unsustainable. In the present case, as stated earlier in this judgment the applicant sought to broaden their cause of action in the replying affidavit.

11. In any event, in my judgment, the applicant's complaint in these proceedings is unsustainable when consideration is had to all the facts and the circumstances of this case. In other words, the facts before this court did not support the proposition of the existence of a *fiduciary* duty between the parties irrespective of whether the broader or narrow approach is adopted in relation to the issue of *fiduciary* duty.
12. In light of the above and applying the test of leave to appeal as articulated above, I find that the applicant has failed to make out a case for leave to appeal.
13. In my view, the issues raised by the applicants both in their application for leave to appeal and submissions made during the hearing of this application are dealt with in my judgment and need no further attention in this judgment. I stand by the findings made in that judgment. In the circumstances, I am not persuaded that the applicants have made out a case for leave to appeal.

Order

14. In the premises, Applicant's application for leave to appeal is dismissed with costs

  
  
E Molahlhehi  
Judge of the High  
Court; Johannesburg

**Appearances:**

For the Appellant: Adv G M Ameer SC

Instructed by: NM Aboo attorneys

For the Respondent: Adv R Bhana SC.

Instructed by: Gattoo Attorneys Incorporated

**Heard on: 30 November 2017**

**Order on: 22 December 2017**