✓10/11/17

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

10/11/2017
DATE

SIGNATURE

Case Number: 54391/2017

In the matter between:

J F VAN SCHALKWYK	1ST APPLICANT
A L LARSEN	2ND APPLICANT
A SESIAH	3RD APPLICANT
N JOEMATH	4TH APPLICANT

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	1ST RESPONDENT
THE INFORMATION OFFICER, DEPARTMENT OF JUSTICE	2ND RESPONDENT
THE SECRETARY OF THE MAGISTRATES COMMISSION	3RD RESPONDENT

Coram: HUGHES J

REASONS

HUGHES J

[1] This is an application for leave to appeal against the whole of my judgment and order handed down on 01 August 2017.

[2] The legislation dealing which deals with the circumstances upon which leave to appeal may be granted is set out in section 17 (1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). What is specifically relevant in this case, is section 17 (1) (a). I set out section 17 (1) in its entirety below:

"Section 17(1)

(1) *Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a);and

(c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."* [My emphasis]

[3] The test which was applied previously in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion. See **Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 890B.** What emerges from section 17 (1) is that the threshold to grant a party leave

to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words '*only*' used in the said section. See **The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para [6]**, Bertelsmann J held as follow:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see ***Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H.*** *The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."* [My emphasis].

[4] The grounds for leave to appeal are to a large extent factual asserting that this court's reasoning was erroneous and that I failed to take into consideration or give sufficient weight to other factors.

[5] What I do not propose to do is to set out the exhaustive grounds of appeal again or repeat that which is set out in my judgment, in as much as that which was relevant was dealt with in the judgment. I am mindful of the fact that an appeal is solely aimed at an order of a court and not its reasoning.

[6] The applicant argue that in terms of section 17 (1) (a) they should be granted leave to appeal on the grounds set out in their notice for leave to appeal as their appeal ' would have a reasonable prospect of success' in another court.

[7] Firstly, what constitutes reasonable prospects of success? This was dealt with in **Smith v S 2012 (1) SACR 567 (SCA) at para [7]** where the court held:

"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as

hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal." [My emphasis]

[8] The crux of the applicant argument was that there was no record of recommendations having been made and I erred in finding so. In addition I erred in finding that the Regulations and the Code of Conduct was promulgated in terms of section 16(1) of the Magistrate's Act and lawful.

[9] I am of the view that I have dealt with this extensively and conclusively in my judgment under the heading *"Do the minutes of 2 December 1993 delineate that a recommendation was made to the Minister?"*

[10] What I am basically faced with in this leave to appeal, in my view, is submissions and contentions being made of what I should have found, should have considered critically, should have considered certain probabilities and erred in not considering factors and erred in not taking certain factors into account.

[11] In my view, the conclusion that I have reached from an analysis of the proven facts could only be that which is apparent from my judgment. I am fortified in my view that on the facts of this case the applicant does not have prospect of success before another court.

[12] Consequently the following order is made:

[12.1] The application for leave to appeal must fail and is dismissed with costs.

W. Hughes
Judge of the High Court Gauteng, Pretoria