

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 004567/2022

DATE: 13-04-2023

<p><b>DELETE WHICHEVER IS NOT APPLICABLE</b> <b>(1) REPORTABLE: YES / NO.</b> <b>(2) OF INTEREST TO OTHER JUDGES: YES / NO.</b> <b>(3) REVISED.</b> <b><u>DATE</u></b> <b><u>SIGNATURE</u></b></p>
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10 In the matter between

NORTHCLIFF RIDGE HOMEOWNERS

ASSOCIATION & ANOTHER

Applicant

and

RETIEF SWART N.O. & OTHERS

Respondents

**Neutral Citation:** *Northcliff Ridge Homeowners Association & Another v Mercia Avon Larry* (Case No. 4567/2022) [2023] ZAGPJHC 387 (24 April 2023)

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**J U D G M E N T**

**LEAVE TO APPEAL**

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**STRYDOM, J:** This is an application for leave to appeal against this court's judgment delivered on 10 March 2023,

against the whole judgment and the cost order. This application was opposed on behalf of the successful party, which I will refer to as the respondent in this application. Leave to appeal may only be granted where the Judge or Judges concerned are of the opinion that the appeal would have a reasonable prospect of success. This court should thus consider whether there is a reasonable prospect of success in this matter.

It was argued on behalf of the applicant that the  
10 court went wrong on various of its decisions and ultimately the order. It was argued that the respondent relied on a set of rules, annexure FA11 to the founding affidavit, but in reply to an allegation by the applicant that the rules were not those contained in annexure FA11 but rather annexure AA2 to the answering affidavits as Annexure AA2. Respondent then introduced a third set of rules in reply. It was then argued that the respondent's case was, as far as the applicable rules are concerned, made out in reply.

Considering that the applicant, in the answering  
20 affidavit, stated that there are different rules applicable than those which were referred to in the founding affidavit, it called for a reply. That is when respondent introduced the rules referred to as annexure RA2. The court then made a factual finding on the papers as it stood that the HOA rules attached to the replying affidavit were finding in fact the

applicable rules. So that was the first point raised.

It goes further, if there is a dispute about the rules there will be a dispute, what was required and when will there be non-compliance with such rules. Obviously if certain requirements are set out in one set of rules which is not repeated in the other. This will change the whole departure point to consider these rules.

It was argued that another court may differ from this court in its finding, the factual finding, which rules would  
10 apply and following on this whether there was non-compliance with these rules which entitled the applicant from withholding a clearance certificate or not.

I am of the view that another court may differ from my factual findings pertaining to the set of rules which would apply, which would then mean that another court, if it finds that I was wrong on this aspect, will have to apply different criteria to see whether there was non-compliance with these rules.

In the light of this I am of the view that there is a  
20 reasonable prospect that another court may come to a different finding and that being the case leave to appeal should be granted.

The following order is made. Leave to appeal is granted to the Full Court of this Division against my judgment and order in this matter, including the cost order;

the costs of this application to be costs in the appeal.

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**STRYDOM J**

**JUDGE OF THE HIGH COURT**

**DATE:** .....

10	Counsel for 1 <sup>st</sup> Appellant:	Adv. E. Coleman
	Instructed by:	McCarthy Cruywagen.
	Counsel for the Respondents:	Adv. J.W. Steyn
	Instructed by:	Bento Incorporated
20	Date of Hearing:	13 April 2023
	Date of Judgment:	13 April 2023