

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 2022/018731

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Signed: Date: 11 December

In the matter between:

KILLARNEY COUNTRY CLUB

Applicant

and

CHANCE AND LUNA (PTY) LTD trading as La Vie en Rose

First Respondent

MULLER, RONY

Second Respondent

EZERZER, MOMY

Third Respondent

EZERZER, LIOR

Fourth Respondent

CITY OF JOHANNESBURG PROPERTY

Fifth Respondent

COMPANY SOC LTD

CITY OF JOHANNESBURG METROPOLITAN

Sixth Respondent

MUNICIPALITY

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines.

MOULTRIE AJ

[1] In the first of two opposed motions argued before me in the week of 13 November 2023, Killarney Country Club seeks the eviction of the first to fourth respondents from premises at which they are operating a restaurant known as “La Vie en Rose” on the property that KCC occupies pursuant to various notarial leases that it concluded with the City of Johannesburg, but which the COJ purports to have validly cancelled. KCC also seeks payment of amounts allegedly owing to it in respect of utility charges arising out of La Vie’s use of the restaurant premises.

[2] The questions for determination in that application are (i) whether the only defence raised by La Vie, which is based on the COJ’s purported cancellation of KCC’s notarial leases, is a cognisable basis to refuse to grant the eviction despite the common law rule confirmed by the Constitutional Court in *Mighty Solutions*¹ to the effect that a lessee may not dispute the lessor’s “title” to occupy a property; and (ii) whether the dispute as to payment of utility charges should be referred to oral evidence or whether it should be determined in favour of La Vie on the basis of the *Plascon Evans* rule, given the material disputes of fact that have arisen in relation to the amount said to be owing.

¹ *Mighty Solutions CC v Engen Petroleum Ltd* 2016 (1) SA 621 (CC).

[3] In the second application before me, La Vie seeks an order staying the eviction and payment application pending the outcome of two further applications which are due to be heard together but which I am not called upon to determine. These two further applications are “the COJ’s eviction application”, in which the COJ seeks the eviction of KCC and “any persons occupying and claiming occupation under or through it” (i.e. including La Vie) from the property; and “the review application”, in which KCC seeks orders reviewing and setting aside the COJ’s purported cancellation of the notarial leases and declaring that it is entitled to remain in occupation of the property subject to the terms of those leases.

[4] At a pre-hearing conference convened by the Court on 10 November 2023, it was agreed by the parties that I should hear argument on both KCCs’ eviction and payment application and La Vie’s stay application together, but that I should determine the stay application first and, in the event that I were to conclude that the relief sought therein should be granted, I would not determine any of the relief sought in the eviction and payment application.

BACKGROUND FACTS

[5] The two applications fall to be determined in view of the following facts.

[6] In the late 1960s, the land then occupied by KCC was earmarked by the City of Johannesburg for the purposes of constructing its main arterial highway. It was agreed that KCC would relocate to five nearby erven which the COJ purchased, and which together comprise the property that is the object of the parties’ dispute. This led to the conclusion of various notarial long leases and extensions thereof, in terms of which the property so acquired was leased by

the COJ to KCC until 31 July 2040. Of relevance is that clause 5 of KCC's notarial leases provided that the property would be used exclusively for the purposes of a social and sports club, and that "no trade or business shall be carried on at the property" save for the supply of goods and services to KCC's members or their guests. In addition, clause 15 provided that KCC "shall not have the right to sub-let the whole or any portion of the property ... without the prior written consent" of the COJ "which consent shall not be unreasonably withheld". Clause 11 entitled the COJ to cancel the notarial leases under certain specified circumstances, one of which was if KCC failed to remedy a breach within thirty days after the receipt of written notice from the COJ requiring it do so.

- [7] During April 2017, KCC concluded a transaction with the first, second and fourth respondents for the purposes of enabling them and the third respondent to operate La Vie en Rose as a publicly accessible restaurant from premises at the KCC. The parties' joint practice note records that it is common cause that "the true nature and effect of [the transaction] was a lease" and that La Vie's "right of occupation" thereunder "expired in June 2021". It is also common cause that the conclusion of La Vie's sublease constituted a breach of KCC's notarial leases with the COJ. Although KCC declined to agree to La Vie's request for an extension of its sublease when it expired in June 2021, La Vie remained in occupation of the restaurant premises and did not cease its operations despite La Vie's demand that it vacate.
- [8] On 29 November 2021, the COJ issued a breach notice to KCC alleging that it was in breach of clauses 5 and 15 of the notarial leases and calling upon it to

stop carrying on trade or business on the property through the transaction concluded with La Vie, alternatively to cancel the La Vie sublease and ensure that La Vie vacated the property within 30 days, failing which the COJ would “regard your breach of contract as final, and shall be entitled to cancel [KCC’s notarial leases] and take any further steps we deem necessary”.

- [9] On 7 April 2022, the COJ purported to cancel KCC’s notarial leases, *inter alia* on the basis that KCC had failed to rectify the breaches set out in the breach notice referred to above. On 10 June 2022, the COJ launched the COJ’s eviction application (albeit as a counter application in another application that KCC had brought seeking the eviction of certain other sublessees of advertising billboards on the property and which also formed the basis of the COJ’s cancellation) for orders confirming the purported cancellation of KCC’s notarial leases and for the eviction of KCC and La Vie from the property. Although the COJ indicated that it would in due course seek the joinder of La Vie, this joinder has yet to be sought or effected. In opposing the COJ’s eviction application, KCC contends that it had in fact remedied its breach prior to the issuing of the COJ’s breach notice, *inter alia* because the La Vie sublease had by then already expired and KCC had declined to extend it and demanded that La Vie vacate the restaurant premises. In addition, on 11 October 2022, KCC launched the review application in which it contends that, even if the COJ did have the right to cancel KCC’s notarial leases, the exercise of that right falls to be reviewed and set aside under the Promotion of Administrative Justice Act, 3 of 2000 or the doctrine of legality because (i) the Legal Manager who made the decision was not duly authorised to do so; (ii) it was procedurally unfair and procedurally irrational; and (iii) it was

unreasonable, irrational and failed to take relevant considerations into account.

[10] On 23 February 2023, KCC delivered its eviction and payment application. After all the papers and the heads of argument had already been filed, and after the application had already been set down for hearing in the week of 13 November 2023, La Vie launched the stay application, seeking to enrolled it on the urgent court roll during the week of 7 November 2023 (i.e. the week before KCC's application was due to be heard). Despite this, the stay application was ultimately not moved before the urgent court and instead, as noted above, it was agreed that the two applications would be argued together before me. To the extent that it is necessary, I condoned the late delivery of the parties' answering and replying affidavits in the stay application, and I have considered all the papers that have been delivered in that application.

[11] One of the bases advanced by La Vie for the relief it seeks in stay application is the contention that the doctrine of *lis alibi pendens* is applicable. In its answering affidavit, KCC sought to take the point that this had not been raised as a defence in the eviction and payment application. This in turn prompted La Vie to deliver a further interlocutory application seeking to supplement its answering affidavit in the eviction and payment application so as to formally raise that defence. Although the supplementation application was opposed by KCC on the basis that it constituted "a desperate attempt to derail the eviction application ... by rendering the eviction application a procedural mess through numerous interlocutory applications" and a strategy to avoid its determination in the week of 13 November 2023, it was also agreed at the pre-hearing

meeting that the supplementation of La Vie's answering affidavit should be allowed, with only the question of the costs of the supplementation application remaining for determination.

THE STAY APPLICATION

[12] La Vie's founding affidavit in the stay application sets out four grounds upon which it seeks the stay of the eviction and payment application. They are as follows: (i) "the importance of the matter" to La Vie and its employees; (ii) KCC's eviction and payment application is premature since La Vie has "started negotiations" with the COJ to conclude a direct lease for the restaurant premises; (iii) the question of KCC's *locus standi* is "unclear" given that La Vie has been advised by its legal representatives that the facts of this matter distinguish it from *Mighty Solutions*; and (iv) because the doctrine of *lis alibi pendens* applies since the same relief (i.e. La Vie's eviction) is sought in the COJ's eviction application.

[13] The only authorities referred to by La Vie in support of its contention as to the existence of a general discretion to stay legal proceedings are decisions of the Labour Court in which it has exercised its statutory power to stay the execution of an arbitration award pending the outcome of a review application in terms of section 145(3) of the Labour Relations Act, 66 of 1995.² These judgments have in turn have applied the jurisprudence applicable to Uniform Rule 45A, which empowers a court to grant an application to "suspend the operation and execution of any order for such period as it may deem fit",³ and

² *Passenger Rail Agency of South Africa Soc Ltd (PRASA) v Sheriff for the District of Goodwood and others* [2019] JOL 40989 (LC) para 12; *Chillibush Communications (Pty) Ltd v Gericke & others* [2010] JOL 24799 (LC) para 18; *Robor (Pty) Ltd (Tube Division) v Joubert & others* [2009] JOL 23568 (LC) paras 9 to 11.

³ *Erasmus v Sentraalwes Kooperasie Bpk* [1997] 4 All SA 303 (O); *Road Accident Fund v Strydom*

the courts' similar inherent powers under the common law.⁴ Although some of these cases observe that the court should in the exercise of its discretion consider the factors usually applicable to interim interdicts, a similar threshold requirement applies in all these instances: namely whether the applicant has demonstrated that “real and substantial justice” requires the stay or that “injustice would otherwise be done”.

[14] While it seems to me that I do have such a discretion on grounds dictated by the interests of justice,⁵ I am of the view that none of the four grounds relied upon by La Vie in the current matter sustains its contention that the determination of the eviction and payment application would result in injustice.

Importance of the matter to La Vie

[15] La Vie alleges that it and its employees will face economic hardship if they are evicted. While I do recognise the importance of the matter to them in this sense, this contention in and of itself (i.e. shorn of the remaining allegations, with which I deal below), boils down to nothing more than a plea *ad misericordiam* for a delay of the inevitable application of the law.

[16] In other words, unless I find that there is doubt about the lawfulness of La Vie's eviction, I cannot see how the fact of the economic hardship that their eviction would cause could constitute a basis for a finding of injustice justifying a stay of the eviction and payment application.

2001 (1) SA 292 (C).

⁴ *Strime v Strime* 1983 (4) SA 850 (C) at 852A; *Santam Ltd v Norman* 1996 (3) SA 502 (C) at 505E-F.

⁵ *Mokone v Tassos Properties CC* 2017 (5) SA 456 (CC) paras 66 – 69.

Alleged negotiations between La Vie and the COJ for La Vie to remain in occupation

[17] Regarding the allegation that La Vie had “started negotiations” with the COJ to conclude a direct lease for the restaurant premises, this turns out to have been somewhat of an overstatement. The COJ filed an affidavit in response to this allegation indicating that, in actual fact, it is not in negotiation with La Vie “or any entity for that matter” in relation to the occupation of the restaurant premises at KCC. In reply, La Vie concedes that all it had done was to send a letter to the COJ “with the intention of having a direct lease”, and that no response had been received. This could hardly be described as constituting the commencement of “negotiations” for the conclusion of a lease.

[18] The COJ also stated that “in the event that” it were to consider concluding a lease for the restaurant premises, that “ought to go out on a tender or procurement process” but that “that process has not started yet”, and “once it is open a public tender will ensue”. Although La Vie appears to read into this that a tender process is “due”, there is no evidence that such a process is even being planned by the COJ, let alone that it is imminent.

[19] This factual basis for the contention that the eviction and payment application is “premature” for this reason is therefore abstract and speculative at best and is in my view an insufficient basis to grant the stay that La Vie seeks.

KCC’s *locus standi* and the issue of *lis alibi pendens*

[20] Implicitly recognising the weakness of the foregoing two grounds for the stay application, La Vie’s counsel submits in his heads of argument that “the purpose of the stay application is to resolve two defences that La Vie has

raised against the eviction sought by KCC, being the issue of *locus standi* and *lis pendens*” and that if that application is heard before the COJ’s eviction application and the review application, an “injustice will be carried out” against La Vie because “there are good prospects that the ... termination of [KCC’s notarial leases] will be upheld thereby making the standing of [KCC] in this application moot as there would have been no basis for [KCC] to evict [La Vie] instead of the [COJ]”.

[21] It is convenient to consider these arguments together in the context of the stay application even though La Vie itself notes in its founding affidavit in the stay application that they are both (especially in view of the agreed supplementation) intended to be raised as preliminary issues in the eviction and payment application, and would thus *ex hypothesi* only arise for determination in the event that the stay were to be refused and I were to proceed to determine the eviction and payment application.

[22] Starting with the *locus standi* argument, the deponent to the founding affidavit in the stay application candidly states that when La Vie requested its new attorneys in September 2023 for advice on its prospects of success in the eviction and payment application, it was furnished with an opinion which had been “confirmed by counsel” advising that, in view of the decision in *Mighty Solutions* “the preliminary point raised by [its] erstwhile attorneys on the answering affidavit was insufficient to resist the eviction on the basis that the landlord does not have title or lawful occupation of the Property”.

[23] This advice was undoubtedly correct. The Constitutional Court in *Mighty Solutions* expressly held that the common law rule preventing a lessee from

disputing the title of the lessor to evict on the basis that it has no right to occupy the premises applies even if, as a matter of fact, the lessor no longer had such a right when it moved to evict the lessee.⁶

[24] La Vie's deponent however states that the opinion went on to indicate that "there are exceptions to the general application of the common law rule and this matter is one of those matters in terms of which the exceptions apply". This is evidently a reference to paragraph 55 of *Mighty Solutions*, where the Constitutional Court observed that "there may well be ... scenarios where the rule should not apply". The only hint in the founding affidavit in the stay application itself as to what the particular "exception" in the current matter might be is the statement that KCC's *locus standi* is "unclear" because KCC does not have a "contractual right" to evict La Vie because "the existence of [KCC's notarial leases] empowering [KCC] to launch the eviction proceedings has already been cancelled and KCC has instituted [the review application which] is currently pending ... for determination together with the [COJ's eviction application]". The hint is the use of the words "existence" and "empowering".

[25] Slightly different language is employed in reply, where La Vie's deponent states that:

"the facts are different in that in the *Mighty Solutions* ... case the validity of the sub-lessor's authority to sublease was not in question and therefore the lease was binding. In the [COJ's eviction

⁶ *Mighty Solutions* (above) para 31. For the same reason, I am unmoved by La Vie's protestations that the KCC acted improperly in failing to refer in its founding affidavit in the eviction and payment application to the fact that COJ had purportedly cancelled its notarial leases before the application was launched.

application, COJ has] challenged [KCC's] authority to sublease. In this instance therefore without their authority to sublease being confirmed, this Honourable Court cannot make an order of eviction."

[26] La Vie's contention was further clarified in its heads of argument and by its counsel during the hearing. In essence, La Vie now seeks to distinguish *Mighty Solutions* not merely on the basis that KCC's notarial leases were cancelled, but on the contention that the La Vie sublease was void *ab initio*. La Vie's heads of argument in the eviction and payment application say the following:

"The lease that existed between COJ and KCC did not empower KCC to enter into any subletting agreements with any entities; ... By virtue of the fact that KCC was never empowered to conclude this agreement in terms of the main lease, the sublease is null and void *ab initio* [sic]; ... As such KCC has no direct and substantial interest in this matter and the party empowered to initiate any eviction proceedings is only COJ being the entity that holds the title to the property."

[27] A similar argument is advanced in its heads of argument in the stay application:

"the purported verbal agreement to sub-lease the property was unauthorized by the City and therefore unlawful, in essence there was no sub-lease agreement between the parties, other than the other suite of agreements between the parties. There was no terms between the parties that authorises KCC to evict the La Vie en Rose,

at best KCC should be arguing that the Loan Agreement and Employment agreement were terminated, simply stated KCC has no sub-lessor rights towards La Vie en Rose.”

[28] In my view, the common cause fact that KCC’s conclusion of the La Vie sublease was in breach of clause 15 of KCC’s notarial lease does not in itself render the La Vie sublease void *ab initio*, non-existent, “unlawful” or otherwise unenforceable as between KCC and La Vie.

[29] This contention faces two independent difficulties, each of which is insurmountable in its own right:

(a) In the first place, the issue is in my view simply not a matter of “authority” or “power”. La Vie’s contention that KCC did not have the “authority” to conclude the La Vie sublease, or that it was not “empowered” do so appears to me to be a misguided attempt to apply (incorrect) public law principles to the private law relationship between those parties. And indeed, the Constitutional Court in *Mighty Solutions* approved venerable authority to the effect that even a public authority lessee that had no power to lease the property from the main lessor in the first place may seek the ejectment of its putative sublessee, who may not raise the public authority’s absence of such power to resist ejectment.⁷ Furthermore, clause 15 of the KCC notarial leases specifically contemplated that KCC indeed had the “power” to sublease – a power which it could exercise as long as it obtained the prior written consent of the COJ. In those

⁷ *Kala Singh v Germiston Municipality* 1912 TPD 155 at 159 – 160, approved in *Mighty Solutions* (above) para 29.

circumstances, it seems to me that the fact that KCC purported to exercise its power of subleasing without obtaining prior written consent from the COJ would (at best for La Vie) render the agreement voidable, not void *ab initio*.⁸

- (b) Secondly, a contractual prohibition on subleasing in a lease only affects the validity of a sublease concluded in breach of that prohibition if the main lessor chooses to enforce that prohibition against the lessee. Since the main lessor has no contractual relationship with the sublessee,⁹ the enforcement of the main lessor's rights is a matter strictly between it and the lessee and will depend entirely on the approach that the lessor takes to the lessee's breach. In particular, the lessee's breach of such a prohibition will only affect the "validity" of the arrangements between the lessee and the sublessee if the lessor chooses to uphold its lease with the lessee and claim specific performance in the form of an order requiring that the sublease be cancelled by the sublessee and/or declared null and void.¹⁰ But that is not what has happened here: it is common cause that the COJ is not seeking to uphold KCC's notarial leases and claim specific performance thereof: instead, it has purported to cancel them and seeks no relief requiring KCC to comply with them.

⁸ Compare *Gründling v Beyers and Others* 1967 (2) SA 131 (W) at 139H–140 and 145B–C, applying *Mine Workers' Union v Prinsloo* 1948 (3) SA 831 (A).

⁹ There is no *vinculum iuris* between them: *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd* 1999 (1) SA 796 (W) para 6.

¹⁰ This was effectively the situation that arose in *Ummi Properties (Pty) Ltd v Cowsta Beleggings (Pty) Ltd & another* [2010] JOL 25103 (ECP), to which La Vie's counsel referred me. In any event, even if the COJ had taken that approach, it is not obvious to me that a declaration of nullity would necessarily be retrospective or render the sublease void *ab initio*. In my view, it such an order would more appropriately be prospective only, but I am not required to decide this issue.

[30] There is some suggestion in La Vie's heads of argument that the current matter is also distinguishable from *Mighty Solutions* on the basis that the sublease in question in that case contained express provisions obliging the sublessee to restore vacant possession and affording the lessee a contractual right to demand the ejectment of the sublessee at the end of the contract. It seems to me that this is a misreading of paragraphs 26 and 46 of the Constitutional Court's judgment, which refer to these as "natural incidents" or "implied terms" of leases. The only potential difference between this case and *Mighty Solutions* is the fact that it is common cause that La Vie's sublease was concluded in breach of KCC's notarial leases, and which I have already found above does not mean that it never existed or was void *ab initio*. I thus conclude that La Vie has identified no facts that can distinguish this case from *Mighty Solutions*.

[31] As to the issue of *lis alibi pendens*, neither the COJ nor KCC seek to contend in the COJ's eviction application or in KCC's related review application that La Vie's sublease was null and void *ab initio*.

[32] Although paragraph 11 of the affidavit filed by COJ in support of its eviction application states somewhat cryptically that KCC is "not competent" to act as principal lessee of the property given that the KCC notarial leases had been cancelled, it is apparent that the COJ does not seek to impugn La Vie's sublease at all, but rather founds its case for eviction squarely on the purported cancellation, which COJ seeks to have "confirmed" by order of the Court. Furthermore, to the extent that it involves KCC's conduct in relation La Vie, the COJ's eviction application is based on KCC's alleged failure to comply with the breach notice delivered by the COJ on 29 November 2021

which alleged that KCC (i) was carrying on trade or business on the property in contravention of clause 5 KCC's notarial lease through an "arrangement / agreement / simulated transaction" with La Vie; or (ii) alternatively that KCC was in breach clause 15 of KCC's notarial lease by subletting and/or ceding some of its rights thereunder to La Vie. As a result of this conduct COJ demanded that KCC should "stop carrying on any trade or business contrary to [KCC's notarial lease] alternatively cancel the subletting agreement with La Vie en Rose and ensure that they vacate the property within 30 (thirty) days from date of receipt or this letter". Paragraph 61 of the COJ's affidavit makes it clear that, in effecting the cancellation, it relied on the application and operation of the breach and cancellation clause contained in clause 11 of KCC's notarial leases because KCC had failed to "cure the breaches complained of in the second breach notice" within 30 days. In paragraphs 71 and 72, the COJ alleges that it seeks the eviction of La Vie together with that of KCC on the basis that the cancellation of the KCC notarial leases "automatically terminates all subleases", and that La Vie "derived their right to occupy from [KCC] which right has been terminated" alternatively, if there is no sublease, on the basis that La Vie's occupation was (and remains) unlawful. It is thus apparent that the COJ does not contend that the La Vie sublease (the existence and termination of which is common cause before me) was void *ab initio*.

[33] As for KCC, although it does appear that at some point in the past it contended that the La Vie sublease was void *ab initio*, it did not do so on the basis that it was concluded in breach of the notarial leases, and that is not its contention before me. More importantly, however, KCC does not persist with

that contention in resisting the COJ's eviction application or advancing the review application. Its defence is set out in paragraphs 8 to 12 of its answering affidavit and is as follows:

- (a) Firstly, on the basis that the COJ's decision to cancel KCC's notarial leases was unlawful on the grounds set out in the review application, namely that (i) the Legal Manager who made the decision was not duly authorised; (ii) it was procedurally unfair and procedurally irrational; and (iii) it was unreasonable, irrational and failed to take relevant considerations into account.
- (b) Secondly, because "to the extent that KCC had breached the [KCC's notarial leases], KCC remedied that breach within thirty days of the receipt of COJ's notice of breach"; and
- (c) Thirdly, because 18 employees of KCC and their families and 17 caddies reside at the property, and the COJ had failed to comply with the provisions the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998.

[34] It is thus apparent that neither the COJ nor KCC are alleging that the lease agreement was void *ab initio* in either the COJ's eviction application or the review application. It is simply not an issue that will arise for determination in either of those cases.

[35] As such, I conclude that the defence of *lis alibi pendens* does not avail La Vie because (even on the most relaxed application of that principle) the COJ's eviction application and the review application will not involve determination of

the central question that La Vie seeks to have decided in the present case,¹¹ namely whether the La Vie sublease was void *ab initio* on the basis that it was concluded in breach of the KCC notarial leases.

[36] Finally, even assuming that La Vie were to “formally join the proceedings and file a substantive affidavit”, and that it were to successfully argue that its sublease is void *ab initio*, either on the grounds which I have rejected above or on any other basis, that would be entirely irrelevant. This is because there is no question whatsoever of the COJ’s right to seek La Vie’s eviction in the event that the cancellation of KCC’s notarial leases is upheld: indeed that is precisely what the COJ seeks to do.

Conclusion and costs in relation to the stay application

[37] For the reasons set out above, I am of the view that there is no merit in the stay application and that it falls to be dismissed with costs. An order to this effect will issue.

[38] KCC seeks a punitive costs award in the stay application on the basis that the notice of motion sought to set it down on the urgent roll in the week prior to the hearing of the eviction and payment application. There is some superficial force in KCC’s contention that this may have been intended to draw an urgent judge who would not be able to consider the matter carefully: it has certainly exercised my mind, and it has only been on careful and mature consideration¹² that I have been able to reach the conclusion that it is misguided and should not be granted. However, as early as 19 October 2023,

¹¹ Harms, *LTC Amler’s Precedents of Pleadings*. 9 ed. (2018, LexisNexis) p. 251, referring to *Nestlé (SA) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA).

¹² Cf. *Minister of Justice & Constitutional Dev v SA Litigation Centre* 2016 (3) SA 317 (SCA) para 107.

La Vie's counsel informed KCC's attorneys that he was of the view that their earlier proposal of 1 October 2023 that the stay application should be heard at the commencement of the eviction and payment application on the ordinary opposed roll during the week of 13 November 2023 was a sensible one. Although this was only confirmed by La Vie's attorneys on 24 October 2023, KCC's attorneys had already withdrawn their proposal earlier that day. An agreement was only ultimately formally reached at the pre-hearing conference convened by the Court on 10 November 2023. In the circumstances, although I am of the view that the stay application was misguided and cannot succeed, I am not convinced that it constituted an abuse that justifies the award of punitive costs.

THE EVICTION AND PAYMENT APPLICATION

The eviction relief, the appropriate order and costs

[39] Given that the only defences raised by La Vie against its eviction are its contentions in relation to *locus standi* and *lis alibi pendens* that I have found are unavailing, the inevitable result is that KCC is entitled to the ejection order that it seeks and that it should be awarded its costs. KCC did not, however, make out any case for the order it seeks specifically "authorising the sheriff to enlist the services of the South African Police Services or the services of a private security service provider to assist in the eviction of the unlawful occupiers, if necessary", and I see no reason why such an order should be granted as a matter of course in what KCC itself refers to as a "stock standard" commercial eviction. In addition, KCC made out no case for an interdict prohibiting La Vie from entering or regaining occupation of the

property subsequent to the eviction: there was no evidence whatsoever before me of the existence of any reasonable apprehension that the respondents might act in contempt of a court order in this manner.

[40] As to costs, I am again unpersuaded that a punitive costs order is appropriate. While the defences raised by La Vie were misguided, they were not *per se* abusive. Furthermore, although KCC's counsel specifically sought a punitive costs order in relation to the supplementation application, it seems to me that La Vie delivered that application only because KCC had taken the technical point in its answering affidavit in the stay application that La Vie had not formally raised the defence of *lis alibi pendens* in its answering affidavit in the eviction and payment application. As KCC points out, no additional facts of any significant relevance to the defence were raised in the supplementary answering affidavit, and it was therefore not strictly necessary for KCC to have opposed the supplementation application with the vigour that it did.

Referral of the utility charges dispute to oral evidence

[41] Although it is common cause that La Vie is liable to KCC in respect of the consumption of electricity and water at the restaurant premises and in respect of municipal sewerage charges applicable thereto, I am satisfied that a factual dispute has arisen on the papers with regard to the amount, if any, that is due owing and payable by La Vie in this regard.

[42] I am furthermore satisfied that KCC could not reasonably have anticipated this factual dispute. Although the answering affidavit and the annexures annexed thereto show that La Vie had during the period between June and October 2021 raised "concerns" and demanded "documentary proof" of the utility

charges claimed by KCC, its main complaint related to its liability for a proportionate share of “service and demand charges” levied by the COJ which KCC sought to pass on after May 2021. It is apparent that by October 2021, La Vie’s contention had crystallised into an allegation that it had been overcharged an amount of R39,716.98. No allegation is made in the answering affidavit that KCC is claiming any incorrect utility charges for the period after October 2021, or that La Vie raised any further disputes in respect of such charges between October 2021 and the date upon which this application was launched.

[43] KCC explains in its replying affidavit that its calculation of the amount claimed (as set out in annexure FA13) was undertaken on the basis that La Vie’s earlier contentions that it was not liable for a proportionate share of the service and demand charges levied by the COJ, and that it had been overcharged were all correct. KCC furthermore alleges that the schedule prepared by La Vie and annexed to its answering affidavit setting out the amounts allegedly overcharged (annexure LC10) either fails to recognise that the alleged overcharges have already been accounted for in FA13 or raises disputes that had not been raised by prior to the launch of the application.

[44] While La Vie’s counsel correctly observes that there is “clearly a material dispute” regarding the utility amounts, it is simply reiterated that annexure “LC10” should be accepted as correct and submitted that had KCC been “acting in good faith”, it would have pursued its claim by way of action proceedings. This does not, however, address what appears to me to be KCC’s cogent explanation in reply as to why it could not have anticipated the factual dispute. In the circumstances, I am of the view that it is appropriate

that this issue should be referred to oral evidence, as KCC requests.

[45] The relief sought by KCC in relation to the utility charges dispute in its proposed draft order is framed as follows: “[t]hat the relief set out in paragraph 6 of the Notice of Motion in the Eviction Application be referred to oral evidence”. In my view, this is inappropriately broad, and would be akin to a referral to trial. In a referral to oral evidence, the affidavits stand as evidence save to the extent that they deal with disputes of fact and once the specific disputes have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.¹³ The dispute of fact that has arisen in the current instance is not about the availability of the relief *per se*, but about the amount due, owing and payable by La Vie to KCC in respect of utility charges, if any. I have thus formulated the order in a form recently approved by the Supreme Court of Appeal.¹⁴

ORDER

[46] The following order is issued:

1. All parties’ non-compliances with the rules of court relating to time periods and manner of service in relation to the stay application dated 27 September 2023 are condoned.
2. The stay application launched on or about 28 September 2023 is dismissed.
3. The first to fourth respondents are granted leave to supplement their

¹³ *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) para 32.

¹⁴ *EFF v Manuel* 2021 (3) SA 425 (SCA) para 133.

answering papers in the form of “Annexure A” in the supplementation application dated 23 October 2023.

4. It is declared that the first, second, third and fourth respondents have no right of occupation in respect of the following erven (collectively referred to as “the Property”):
 - a. Erf [...] Houghton Estate;
 - b. Erf [...] Houghton Estate;
 - c. Portion [...] of the Farm Syferfontein, No [...], IR;
 - d. Erf [...] Melrose Estate; and
 - e. Erf [...] Melrose Estate.
5. The first, second, third and fourth respondents and any other persons occupying through them are ejected and ordered to vacate the Property.
6. In the event of any of the ejected parties failing and/or refusing to vacate the Property as aforesaid, the sheriff is authorised to enter the Property and to take all steps necessary to give effect to paragraph 5 above.
7. Save for the costs reserved pursuant to paragraph below, the first to fourth respondents are ordered to pay the applicants costs, including its costs in the stay and supplementation applications, jointly and severally, the one paying the others to be absolved.
8. The determination of the amount due owing and payable by the first respondent to the applicant in respect of utility charges, if any, is referred

to oral evidence and the costs in relation to that determination are reserved.

RJ MOULTRIE AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 16 November 2023

JUDGMENT: 11 December 2023

APPEARANCES

For the applicant: LM Spiller instructed by J Weinberg of Telfer Inc.

For the 1st to 4th respondents: TM Khaba instructed by S Lusenga of Lusenga Attorneys Inc.