

SOUTH AFRICA / JUDGMENT

Chance and Luna (Pty) Ltd and Others v Killarney Country Club (2022/018731) [2024] ZAGPJHC 432 (2 April 2024) [2024] ZAGPJHC 432

COURT

South Gauteng High Court, Johannesburg

BEFORE

RJ Moultrie

CASE / FILE NUMBER

2022/018731

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

Case

no: 2022/018731

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: NO

2

April 2024

In the matter between:

CHANCE
AND LUNA (PTY) LTD trading as La
Vie en Rose
First Applicant
MULLER,
RONY
Second Applicant
EZERZER,
MOMY
Third Applicant
EZERZER,
LIOR
Fourth Applicant
CITY
OF JOHANNESBURG PROPERTY COMPANY SOC LTD Fifth
Applicant
CITY
OF JOHANNESBURG METROPOLITAN MUNICIPALITY Sixth
Applicant
and
KILLARNEY
COUNTRY CLUB
Respondent

JUDGMENT

(LEAVE TO APPEAL)

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

MOULTRIE AJ

- [1] When this opposed application for leave to appeal was called for hearing, the applicants were represented by Mr Lusenga, their attorney. Mr Spiller appeared on behalf of Killarney Country Club.
- [2] Mr Lusenga commenced his address by referring to the unavailability of Mr Khaba, the applicants' preferred counsel and proceeded to request that the application be heard at 09h00 on either 23 April 2024 or 30 April 2024.
- [3] In response to my enquiries regarding this request, Mr Lusenga (i) confirmed that the parties had not taken advantage of the opportunity provided (undoubtedly for the convenience of counsel) in paragraph 11.3 of the Practice Manual to agree on three alternative dates for the hearing of the application, and that the date had therefore been duly determined unilaterally by the Court in accordance with the Practice Manual and directives; (ii) indicated that the applicants had not sought KCC's agreement to either of the now-proposed alternative dates for the hearing; and (iii) that no formal application for a

postponement had been delivered.

THE POSTPONEMENT APPLICATION

- [4] Mr Lusenga then proceeded to move an application for a postponement from the bar, noting that the applicants tendered KCC's costs in the event that it was granted. After hearing both representatives, I dismissed the application with costs and indicated that I would include the reasons for this in this judgment.
- [5] The principles applicable to such applications are well-established. They are usefully summarised in paragraph 28 of *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA), the facts of which were remarkably similar to those in the current matter. The postponement of a matter set down for hearing on a particular date cannot be claimed as of right and is an indulgence that lies in the discretion of the Court. A party opposing the postponement has a procedural right that the application (or appeal) should proceed on the appointed day. It is also in the public interest that there should be an end to litigation and a postponement cannot be secured by mere agreement between the parties. The applicant must show good cause for the postponement, taking into account a number of factors including: (i) whether the application has been timeously made; (ii) whether the explanation given by the applicant for postponement is "full and satisfactory" (i.e. whether there is "good and strong reason" for the postponement); and (iii) whether there is prejudice to any of the parties. In addition to good cause, the Court must also be satisfied that the postponement is in the interests of justice, even if the application is unopposed.
- [6] Notwithstanding the absence of any affidavits, a number of facts relevant to the determination of the postponement application emerge from the correspondence addressed by the parties' attorneys to the Court late in the week prior to the hearing and were either accepted as common cause by the parties' representatives or are incapable of being disputed. As will appear below, the notable exception in this regard are the facts relevant to the issue of prejudice.
- [7] The applicants served and uploaded the application for leave to appeal to Caselines on 22 December 2023. KCC's attorneys served a notice of intention to oppose on 11 January 2024, filed it on Court Online the following day and uploaded it to Caselines on 19 January 2024. They then made various attempts to secure a date for the hearing, including attending at the registrar's offices on 22 January 2024 to enquire about the allocation of a date and assisting the applicants' attorneys on 9 February 2024 to upload the application to Court Online, which the parties had been advised was a pre-requisite for the allocation of a date. KCC's attorneys attended at, made telephone calls to, and addressed correspondence to the office of the Registrar seeking the allocation of a date on numerous occasions between 15 February and 12 March 2024.[1] For their part, the applicants state that a "date requisition form" was uploaded, though they do not say when this was done, or by which party. I could not locate it on Caselines.

- [8] On 13 March 2024, I was requested to allocate a date for the hearing. I did so on the same day, directing that (since I was not aware of any attempt by the parties to propose or agree three convenient alternative dates for the hearing of the leave to appeal application) I had unilaterally determined that the application would be heard via MS Teams at 09h30 on Monday, 25 March
2024. As noted above, there is no dispute that this was in accordance with the relevant provisions of the Practice Manual and directives. The registrar's office immediately communicated my direction to the parties by means of an email at 10h45 on 13 March 2024, and by uploading it as a "widely-shared note" on Caselines.
- [9] Mr Lusenga stated from the bar that upon receiving this notification on 13 March 2024, he advised his clients of the date of the hearing and requested them to place him in funds. On the same day, he also contacted Mr Khaba, the counsel who had represented the applicants in the stay and eviction applications. Mr Khaba informed Mr Lusenga that he was owed outstanding fees and would not accept any further instructions until acceptable payment arrangements were put in place.
- [10] Significantly, Mr Lusenga informed the Court that he made no specific enquiries with Mr Khaba at this time as to the latter's availability to argue the leave to appeal application on 25 March 2024 should the necessary payment arrangements be made. Mr Lusenga thus recognised that, as early as 13 March 2024, there was a risk Mr Khaba might not be available to argue the leave to appeal application – even if the issue of his fees could be resolved. Mr Lusenga stated that despite being aware of this risk, he made no attempt to brief alternative counsel for the hearing.
- [11] Mr Lusenga advised his clients of the position and indicated that he was not able to instruct Mr Khaba unless acceptable payment arrangements were put in place. On 19 March 2024, Mr Lusenga informed Mr Khaba that payment arrangements had been made and, for the first time, enquired whether he would be available to argue the application. Mr Khaba advised that he was unavailable for the hearing as he was involved in an arbitration hearing in Namibia.
- [12] Mr Lusenga informed the Court that although he considered delivering a formal postponement application (and indeed had worked on one, although he did not state when), he had decided not to deliver such an application, and instead had resolved to "come and plead with the court" to hear the application on a date when Mr Khaba was available.
- [13] Two days later, on the afternoon of Thursday, 21 March 2024 (a public holiday), and without any prior notice to KCC's attorneys, Mr Lusenga irregularly addressed a letter to me via an email sent to the office of the registrar. The letter set out the unavailability of Mr Khaba and the difficulties experienced in obtaining "financial instructions", as a result of which it had been "impossible to proceed ... as instructed by our clients and secure Counsel". The letter requested the Court to hear the application on one of three dates when counsel would be available in May or June 2024, some 2 to 3 months hence. KCC's attorneys were copied, "to

confirm” their availability on the suggested dates. The letter contained no tender of costs or any reference to the issue of prejudice.

- [14] KCC’s attorneys responded on Friday, 21 March 2024 at 15h07. They (i) contended that since it was “inconceivable” that the applicants’ counsel was not available on any date prior to the proposed dates for a virtual hearing the application, the inference could be drawn that the real purpose of the request was an attempt “to use their counsel’s lack of availability as an excuse to further delay their eviction from the property”; (ii) stated that their client were prejudiced by the delays in prosecuting the application; (iii) explained the steps that they had taken to secure a date for the hearing; (iv) contended that the applicants had had more than adequate time since the date for the hearing had been communicated on 13 March 2024 to brief alternative counsel and for such counsel to prepare; (v) observed that if the applicants’ attorneys had indeed not been timeously placed in funds to prosecute the application for leave to appeal, they ought to have withdrawn immediately, rather than remain on record; and (vi) emphasised that no agreement had been reached regarding alternative dates.
- [15] When these letters were brought to my attention at 16h35 on Friday, 22 March 2024, I indicated to the registrar’s office that I would hear the parties’ respective submissions at the scheduled hearing.
- [16] Apart from the tender of costs, in advancing argument in support of the postponement, Mr Lusenga contented himself with elucidating the contents of his letter of 21 March 2024 regarding the difficulties experienced in obtaining payment from his clients and the circumstances under which it had emerged that the applicants’ chosen counsel was unavailable for the hearing. Despite the content of KCC’s attorneys’ letter, he made no attempt at that stage to address the issue of prejudice.
- [17] In opposing the application, although Mr Spiller emphasised that there was no sworn evidence before me that would justify a postponement, he argued the matter on the basis of the factual allegations set out in the applicants’ letter, as further elucidated in Mr Lusenga’s address. In my view, this was appropriate as it seems unlikely that KCC would be in a position to gainsay any of the factual allegations made by the applicants up to that point.
- [18] While I decline to make a definitive finding that the true reason for the postponement application was an attempt to delay the eviction (as opposed to the purported reasons therefore), the applicants failed to show good cause upon which I could exercise a discretion to allow a postponement in the face of KCC’s procedural right that the matter should proceed on the duly appointed date. Indeed, it is clear that the reasons advanced for the postponement were entirely of the applicants’ own making.

- [19] In the first place not only did the applicants fail to make a postponement applicant timeously, that failure appears to have been a conscious one. Although he contemplated doing so, Mr Lusenga chose not to deliver a formal postponement application as soon as possible after becoming aware of Mr Khaba's unavailability. Instead, he delayed two further days until the metaphorical eleventh hour on the afternoon of a public holiday and only one clear court day before the hearing before requesting the postponement by means of correspondence addressed to the Court, confidently proposing three alternative dates many months in the future for the hearing and expecting KCC's representatives simply to confirm availability. As noted above, a postponement involves seeking an indulgence from the Court, and cannot be claimed as of right, nor be obtained by agreement. It was only when this unorthodox approach failed to bear fruit that the applicants eventually sought, on the day of the hearing itself and from the bar, to apply for a postponement.
- [20] Secondly, in my view Mr Spiller correctly argued that the financial difficulties experienced by the applicants in paying their legal fees and the unavailability of their preferred counsel in the circumstances described by Mr Lusenga do not constitute a satisfactory explanation. It is evident that the applicants' attorneys declined the opportunity afforded by the Practice Manual to seek to agree upon dates for the hearing that would be convenient for their chosen counsel. As such, they would have been aware that the matter might be set down at any time without regard to his availability. The Court is also left entirely unenlightened as to the applicants' actual financial position and in particular whether their failure to put their representatives in funds was the result of impecuniosity or mere recalcitrance. The applicants and their attorneys would have been aware that funds would be required to prosecute the application for leave to appeal at the time that it was delivered on 22 December 2023. No information has been given as whether any steps were taken to secure (or even request) funds in the extended period that then elapsed between that date and 13 March 2024.
- [21] Even once the payment issue had been sorted out and Mr Lusenga had established on 19 March 2024 that Mr Khaba was not available (a risk that he had consciously assumed on 13 March 2024 when he failed to enquire about counsel's availability), there was still sufficient time to have briefed alternative counsel. He consciously elected not to do so.
- [22] I also agree with Mr Spiller that the explanation given for the applicant's predicament is deficient in that no information was given as to whether Mr Khaba had made any attempt to secure a later start of his arbitration hearing on the morning of 25 March 2024 so that he could argue the leave to appeal application on MS Teams, bearing in mind that such applications should ordinarily be disposed of in 30 minutes.
- [23] Finally, as to the issue of prejudice to KCC, this is neither common cause nor undisputed. The applicant's letter contained no averment that KCC would not be prejudiced by a postponement. Even though KCC cried prejudice in its letter of 22 March 2024, this important issue was then also ignored by Mr Lusenga in the oral argument he advanced in support of the application. It was only in reply that he deigned to address the issue for the

first time from the bar. There is no scope, in such circumstances, for a factual finding that the applicants have established that KCC would not be prejudiced by the postponement.

- [24] For the reasons set out above, the postponement application fell woefully short of what was required in every respect, and it fell to be dismissed with costs.

THE APPLICATION FOR LEAVE TO APPEAL

- [25] In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA) para 24, Wallis JA observed on behalf of the Supreme Court of Appeal that “the need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit”. In *Metropol Consulting (Pty) Ltd v City of Jhb Metropolitan Municipality* [2020] ZAGPJHC 207 para 2, Opperman J held that this dictum means that “a court should not grant leave to appeal, and indeed is under a duty not to do so, where the threshold which

warrants such leave has not been cleared by the applicant”.

- [26] The relevant threshold applicable to this matter is laid down in section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013, which provides that this Court may only grant leave to appeal if it is of the opinion that an appeal would have a reasonable prospect of success. Neither an “arguable case” on appeal nor a “mere possibility of success” is sufficient (*Mothuloe Inc Attorneys v Law Society of the Northern Provinces* [2017] ZASCA 17 para 18). Although paragraph 11 of the application contends that “it is in the best interest of justice that leave to appeal be granted”, this is not a recognised threshold for the grant of leave to appeal in section 17(1). Furthermore, as Mr Spiller noted during argument, the application contains nothing that could be understood as advancing the contention that “there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration” as envisaged in section 17(1)(a)(ii), and this assertion was not challenged by Mr Lusenga in reply, rightly in my view. There is also no suggestion (nor could there be) that subsections 17(1)(b) or (c) are of application.

- [27] The application for leave to appeal impugns a range of specific findings of fact and conclusions of law made in the judgment.[2] However, the bulk of these findings and conclusions are baldly disputed without explaining either why it is contended that they are not adequately supported by the reasons set out in the judgment or on what basis another court might come to different findings or conclusions. There is thus no basis for me to conclude that these grounds of appeal have any prospect of success. Mr Lusenga did, however, elucidate on three aspects in his oral submissions.

- [28] The first of these, which Mr Lusenga identified in argument as the applicants' "main point", is the contention that I "erred by not considering that the Property is currently in the control of the City of Johannesburg and the property will be advertised to either [KCC] or the [applicants] to bid on an open tender". The applicants' contention is that there is a reasonable prospect that another court would hold that it is in the interests of justice to grant the stay application on the basis of this alleged fact.
- [29] In considering this ground of appeal, it must be borne in mind, as Mr Spiller pointed out and as was recognised by the Constitutional Court itself in *Mokone v Tassos Properties* 2017 (5) SA 456 (CC) para 72, that the determination of the stay application involved the exercise of a "wide" discretion (also referred to as a discretion in the "strict" or "true" sense).[3] An appellate court would thus not consider whether the decision to dismiss the stay application was correct, but would "only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law."
- [30] While it does appear from the formulation of this ground of appeal (i.e. an alleged failure to consider a relevant alleged fact) that the applicants are alive to the higher standard applicable on appeal, paragraphs 17 to 19 of the judgment demonstrate that I did indeed properly consider this issue on the basis of the factual allegations and legal arguments advanced before me.
- [31] Furthermore, even if it were open to an appeal court to make the finding of fact contended for, the new argument advanced for the first time during the leave to appeal hearing as to the potential basis of such a finding is unsustainable. Mr Lusenga sought to persuade me that paragraph 2.5 of the City of Johannesburg's affidavit can only be understood to mean that a tender process for a lease will in fact be undertaken. He argued that this is because the City is obliged to follow such a process in terms of applicable procurement precepts (he referred to section 217 of the Constitution and the Municipal Management Finance Act, 56 of 2003). Mr Lusenga was however constrained to concede that if the City succeeded with its eviction application, it would be entitled to elect not to conclude a lease at all but rather to use the land including the restaurant premises for some other purpose altogether. There is thus no reason to think that an appeal court might find that the property will in fact inevitably be advertised for lease on an open tender.
- [32] The second ground argued by Mr Lusenga was that I incorrectly held that the conclusion of La Vie's sublease in breach of clause 15 of KCC's notarial lease merely rendered it voidable, and not void ab initio.

[33] The basis for this holding is contained in paragraph 29 of the judgment. Mr Lusenga did not refer me to any authorities contrary to those cited or identify any fault in the reasoning in that paragraph. Indeed, the application for leave to appeal itself states that KCC's notarial lease was "terminated" by the City of Johannesburg, and also that KCC "ceased to be a sub-lessee or exercise powers on the date of cancellation", both of which statements are inconsistent with the contention that La Vie's sublease was void ab initio.

[34] The final argument advanced by Mr Lusenga (albeit not contained in the application for leave to appeal) was that the current matter is distinguishable from *Mighty Solutions CC v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) because La Vie's sublease was a "verbal" one,[4] whereas the sublease (the operating lease) at issue in *Mighty Solutions* was a written one that contained express provisions requiring the sub-lessee (*Mighty Solutions*) to vacate the premises in the event

that the sub-lessor's (*Engen's*) own lease was terminated.

[35] This argument is not sustainable. As appears from paragraphs 47 and 48 of the Constitutional Court's judgment, the sublease in question only contained express provisions dealing with its termination, and in paragraph 49 the Court specifically observed that "[i]n none of these events was it expressly provided in the operating lease that *Mighty Solutions* would vacate the premises and restore vacant possession to *Engen*". But the Court held that this was unnecessary because "the implied terms of the contract obliged *Mighty Solutions* to do so, and entitled *Engen* to enforce those terms by way of eviction proceedings". I was referred to no authority suggesting that such implied terms only arise in terminated written leases and not in unwritten leases, and I can think of no possible reason why that would be the case. Mr Spiller referred me to *Cox v Horn* [2022] ZAGPJHC 524 paras 24 – 26 in which the rule in *Mighty Solutions* was found to apply to an oral lease.

[36] In the circumstances, the applicants have failed to persuade me that an appeal would have any reasonable prospect of success.

[37] The application for leave to appeal is dismissed with costs.

RJ MOULTRIE AJ

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

DATE HEARD: 25 March 2024

JUDGMENT:

2 April 2024

APPEARANCES

For the applicants: S Lusenga of Lusenga Attorneys Inc.

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

[1] I should record that, contrary to what is suggested in the timeline attached to KCC's letter, I was not requested by the

Registrar's office to allocate a date for the hearing at any point during this period.

[2] In two instances (paragraphs 4 and 6), findings not made in the judgment are purportedly impugned.

[3] S v Basson 2007

(3) SA 582 (CC) para 111. This kind of discretion has somewhat confusingly also been referred to as "a discretion in the narrow sense" (Fusion Properties 233 CC v Stellenbosch Municipality 2021 JDR 0094 (SCA) para 29, fn 16, referring to Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')

[1992] ZASCA 149; 1992 (4) SA 791 (A) at 800G-H). This should not be understood to mean a "narrow discretion" – quite the contrary.

[4] It appears to me that it was common cause that La Vie's sublease was a tacit one (judgment, para 7).

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