REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Numbers: 11440/2022 & 034964/2022

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

28 April 2026
DATE SIGNATURE

In the matter between:

KILLARNEY COUNTRY CLUB Applicant

and

MEDIA CAPITAL (PTY) LTD First Respondent

ANN ARBOR CAPITAL (PTY) LTD Second Respondent

PLANET EARTH PROPERTIES CC Third Respondent

COMMON GROUND DEVELOPMENT

FACILITATION (PTY) LTD Fourth Respondent

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY Fifth Respondent

CITY OF JOHANNESBURG PROPERTY

COMPANY SOC LTD Sixth Respondent

And

In the matter between:

KILLARNEY COUNTRY CLUB Applicant

and

THE GENERAL MANAGER: LEGAL OF THE CITY OF

JOHANNESBURG PROPERTY COMPANY (PTY) LTD First Respondent

CITY OF JOHANNESBURG PROPERTY

COMPANY SOC LTD Second Respondent

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY Third Respondent

THE OTHER OCCUPIERS OF THE

KILLARNEY COUNTRY CLUB PROPERTY Fourth to Further Respondents

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JUDGMENT

Mahosi J

Introduction

[1] Before this Court are two interrelated applications. The first is for an order declaring the sublease agreement concluded between the applicant, Killarney Country Club ("KCC"), and the first respondent, Media Capital (Pty) Ltd ("Media Capital"), null and void as having lapsed or cancelled; evicting Media Capital and any other entity under its supervision (relating to the advertising hoarding) from the subleased property; and directing it to remove its signage from the said property.

[2] Media Capital filed a notice to oppose the aforesaid application, but subsequently withdrew its opposition. The fifth respondent, the City of Johannesburg Property Company Soc Ltd ("JPC"), and the sixth respondent, the City of Johannesburg Metropolitan Municipality ("COJ"), opposed the application and filed a counter-application for an order evicting KCC from the property it occupies under the notarial deed of lease concluded between KCC and COJ ("the Lease").

[3] The second is brought by KCC in terms of the Promotion of Administrative Justice Act[1] ("PAJA") for an order to review and set aside the decision of the first respondent, the General Manager of Legal Services of JPC, to cancel the Lease. This application is opposed by JPC and COJ ("the respondents").

Background

[1] Act 3 of 2000, as amended.

[4] The dispute has a long history. On or about 13 March 1969, KCC, formerly known as the Transvaal Automobile Club ("TAC"), concluded the Lease with the City of Johannesburg Council, now the COJ, in respect of a portion of portion 145 of the Farm S[…] No. 5[…] ("the property"), which was registered on 03 December 1970. The Lease commenced on 01 August 1970, and it was for 50 years. It would have expired on 31 July 2020. However, in 1992, it was extended to 31 July 2040. The rent payable for the property is R2.00 per annum. The material terms of the said notarial deed provide, *inter alia,* as follows:

"5. (a) The CLUB shall use the property (in conjunction with the said portions of Lots 2381 and 2382 Houghton Estate referred to in clause 2 hereof) for the purpose of a Social and Sports Club, that is to say, for social, recreational and sporting activities of all kinds, customarily enjoyed by a Social and Sporting Club. In particular and without affecting the generality of the aforegoing, the CLUB shall have the right subject to compliance with any legal requirements to permit and allow and/or to promote or arrange;

(i) Amateur and/or Professional Exhibitions and competitive matches which entrance fees or other charges may be made, and coaching classes provided by amateurs and/or professionals;

(ii) Social functions and dancing;

(iii) Billiards and allied games;

(iv) Card games and indoor games generally;

(v) Cinema shows and exhibitions;

(vi) Stage performance and competitions among members;

(vii) Braaivleis and outdoor entertainments. In particular, the COUNCIL shall not unreasonably withhold sanction for any legally and socially acceptable activities of a club of its kind;

(b) No trade or business shall be carried on the property or the portions of Lots 2361 and 2382 of Houghton Estate referred to in clause 2 hereof, provided that this shall not apply to the supply by the CLUB, for payment and for consumption or use on the said properties by members and their guests, of meals, refreshments, cigars, cigarettes and tobaccos, and liquor, as well as sporting goods and equipment, nor to the supply to members and their guests of sporting goods, equipment and clothing such as are generally sold in the store of a Club's golf professional for use in connection with its permitted recreational and sporting activities, nor to the repair and servicing of any of the aforementioned;"

[5] Clause 6(i) reads:

> "Throughout the currency of the Lease the CLUB shall comply with all laws (including regulations and by-laws having the force of law) respecting the conduct of its activities upon the CLUB premises and in particular with the law relating to the sale of intoxicating liquor and with the terms of its licence and respecting such sale.

[6] In April 2017, KCC's then management committee concluded an agreement with Yanky and Rony's La Vie En Rose CC, which was converted on 04 October 2021 to a private company under the name Chance and Luna (Pty) Ltd and trading as La Vie En Rose ("La Vie en Rose"), granting it the occupation of a portion of the property in exchange for a monthly rent.

[7] On 15 June 2018, KCC agreed with the property development consortium ("the consortium") comprising of the second to fourth respondents (Ann Arbor Capital (Pty) Ltd, Planet Earth Properties CC and Common Ground Development Facilitation (Pty) Ltd), mandating them to, *inter alia*, secure rights in terms of KCC's lease agreement for the rights to erect protective nets in certain places along the M1 motorway, to prevent golf balls being hit into traffic, which could be branded with outdoor advertising and sold to third parties to generate income for KCC.

[8] The aforesaid mandate was amended by way of a written addendum on about 20 August 2019. In essence, the consortium is authorised to negotiate and conclude contracts with third parties (acting as agent for KCC) for the erection, sub-letting, and management of all structures, outdoor advertising and communication masts (including all existing outdoor advertising and communication masts) on the property, with revenue distributed as follows: KCC retains 65%, the consortium receives 25%, and the council obtains 10%. Further, the existing advertising revenue would remain exclusively with KCC until new agreements were approved, after which the

consortium may participate in revenue sharing. Any new advertising income would first cover the consortium's costs before any distribution occurs. The mandate requires all contracts to comply with legal standards, and the consortium is obliged to secure the necessary council approvals.

[9] On 17 October 2019, the consortium concluded a lease agreement granting Media Capital the right to use “the side of the signage infrastructure facing the M1 highway” (the “advertising lease”). Although the advertising lease and the mandate envisaged the COJ’s approval being obtained, such approval was not obtained prior to the erection of advertising signboards at the Property.

[10] The JPC, which manages the COJ’s immovable property, became aware of the breaches. As a result, the JPC’s Legal Manager issued a letter dated 01 June 2021, in which he informed KCC that the outdoor advertising signs on the property violated the lease agreement with COJ and demanded their removal within 30 days, or risk cancellation of the lease. In addition, on 30 June 2021, the City of Johannesburg's Department of Development Planning refused Media Capital’s application for a sign located near the M1 north highway, citing non-compliance with the COJ’s outdoor advertising by-law and instructed it to remove the sign within 60 days. Dissatisfied with the aforesaid decision, on 27 September 2021, Media Capital appealed the refusal, arguing that the decision was unauthorized, irrational, arbitrary, and based on an error of law since the cited by-law section did not exist.

[11] Subsequently, KCC and Media Capital exchanged various communications regarding a dispute over advertising signs on the property and the validity of a lease agreement. On 30 September 2021, Media Capital’s attorneys expressed concerns about a breach notice and alleged undue pressure from the JPC. KCC responded on 04 October 2021, stating that the sign was unlawful, asserting its obligation to comply with its main lease agreement, and set a deadline for Media Capital to remove the sign. Media Capital’s attorneys replied on 05 October 2021, challenging KCC's claims and indicating they would not remove the sign.

[12] On 22 June 2021, KCC issued a letter informing La Vie en Rose's attorneys that their client’s tenancy would expire at the end of June, with no renewal planned, and offered to allow them to remain in occupation for an additional three months to

find new premises. On 12 July 2021, KCC, in an email addressed to La Vie en Rose's attorneys, noted their client's refusal to accept an offer to extend their occupation until September 2021, indicated that their continued trading on the property constituted trespass, and threatened to institute an application for eviction if they do not respond within a week. On 16 July 2021, KCC reiterated that La Vie en Rose was unlawfully occupying the premises, requested confirmation of the date of vacating, and warned of eviction proceedings. On 18 November 2021, KCC initiated arbitration proceedings to evict La Vie en Rose from the property.

[13] On 29 November 2021, JPC issued a second notice of breach demanding that KCC cure its breach and cease carrying on a business through its arrangements with La Vie en Rose. Finally, on 08 April 2022, the JPC's Legal Manager issued a notice cancelling the lease.

[14] This prompted KCC to file an application for an order declaring the sublease agreement it concluded with the consortium null and void, evicting Media Capital from the property, and directing it to remove its signage from the property. Although KCC cited JPC and COJ, it sought no relief against them. However, the JPC and COJ opposed the application and filed a counterclaim seeking to evict KCC from the property. The Media Capital withdrew its opposition. KCC launched the application to review and set aside the COJ's decision to cancel the lease agreement.

KCC's eviction application against Media Capital

[15] In its founding papers, KCC alleges that the sublease lapsed or was breached because Media Capital failed to obtain the necessary approvals from the COJ within six months of the sublease's execution, as required by clause 4.2 of the sublease. That allegation is not disputed, and this application was unopposed. The sublease, therefore, lapsed under its own terms. As a result, Media Capital has no right to remain on the property. Despite numerous requests by KCC to remove its signage and vacate the property, Media Capital has refused to do so. Considering that it is occupying the property without any legal entitlement, KCC is entitled to an order for its eviction. It was for this reason that this Court granted the order as prayed for by KCC on the day of the hearing.

Review

Grounds of review

[16] KCC contends that the purported cancellation of the lease was invalid because at the time the second breach notice was issued, it had already remedied the breach by terminating its commercial relationship with La Vie en Rose. It further avers that the COJ's decision to cancel the lease constitutes an administrative action and is reviewable on three grounds.

[17] The first is that the JPC's Legal Manager lacked the requisite authority to cancel the lease on behalf of the COJ. The second is that the decision is procedurally unfair because KCC, its members, the members of the public who make use of its facilities, the residents of Killarney, Houghton and surrounding areas; and its employees (including those who reside at the Property); and the caddies who reside on the Property, but are not its employees ("the interested and affected parties") were not afforded a hearing or an opportunity to make representations before the decision was taken. The third is that the decision is irrational, unreasonable, and contrary to the public interest, as it undermines the very social and sporting objectives the lease was meant to promote.

Ground of opposition

[18] The COJ and JPC dispute these contentions. They contend that KCC had not remedied its breaches by the time of cancellation, because La Vie en Rose and Media Capital remained in occupation of the property. Regarding the grounds for review, they argue that the decision to cancel the lease was purely contractual, taken under the lease agreement, and is therefore not subject to public law review. In the alternative, it submits that if the decision is administrative, the JPC's Legal Manager was duly authorised to take it, and, having provided the KCC with notice of the breaches and an opportunity to remedy them, the procedure they followed was sufficient.

Issues for determination

[19] The issues for determination are whether:

(a) The decision to cancel the lease agreement was an administrative action, and if so, is reviewable?

(b) If so, whether a duly authorised official took the decision?

(c) If so, were the *audi alteram partem* principle applicable and complied with?

(d) Is the decision otherwise irrational or unreasonable?

(e) Should the eviction counter-application be granted?

Applicable law

[20] Section 1 of PAJA defines the administrative action as follows:

> 'In this Act, unless the context indicates otherwise-
> "Administration action" means any decision taken, or any failure to take a decision, by-
>
> (a) an organ of state, when-
>
> (i) exercising a power in terms of the constitution or provincial constitution; or
>
> (ii) exercising a power or performing a public function in terms of any legislation;
>
> …

[21] Section 6 provides for the judicial review of the administrative action and it reads:

> "(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
>
> (2) A court or tribunal has the power to judicially review an administrative action if—
>
> (a) the administrator who took it—
>
> (i) was not authorised to do so by the empowering provision;
>
> (ii) acted under a delegation of power which was not authorised by the empowering provision; or
>
> (iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair

(d) the action was materially influenced by an error of law.

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) The action itself—

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(old) the reasons given for it by the administrator;

(g) The action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.”

[22] Regarding the test for determining whether the conduct amounts to administrative action, the Constitutional Court in *President of the Republic of South*

Africa and others v South African Rugby Union and Others[2], said:

> "[141] In section 33 the adjective administrative not executive is used to qualify action. This suggests that the test for determining whether conduct constitutes administrative action is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute administrative action. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is administrative action is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.
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> …
>
> [143] A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and while the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis." [Footnotes omitted]

[23] The determination of whether an action is considered "administrative" should thus focus on the nature of the power being exercised rather than on the role of the individual performing it. In so doing, several factors, including the source of power, the subject matter, whether it involves the exercise of public duty, and how closely it is related to the implementation of the legislation, should be considered. Considering the complexity of defining administrative action, a detailed analysis aligned with

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[2] 2000 (1) SA 1 (CC).

constitutional principles is important to ensure efficient and ethical public administration.

The nature of the power exercised

[24] The central question in this matter is whether the COJ's decision to cancel the lease was an exercise of private or public power. The COJ and JPC contend that it is not, because it was a purely contractual decision taken under the terms of the lease. They rely on the term of the Lease, which provides that:

> "11 If the Club shall:
>
> (a) Commit any breach of a material term of the lease agreement and such breach cannot be remedied; or
>
> (b) Continue, after due warning from the COJ, in the commission of minor breaches of the lease and such breaches are not remedied; or
>
> (c) Continue in the commission of a continuing breach of any form of the lease for more than thirty days after receipt of a written notice from the COJ requiring discontinuance; or
>
> (d) Commit any breach of any term of the lease which is capable of being remedied and failed to remedy it within thirty days after the receipt of written notice from the COJ requiring it to do so -
>
> The COUNCIL shall have the right on written notice to declare this Lease cancelled without prejudice to any action for damages which it may have against the CLUB for breach of contract, and the COUNCIL shall thereupon be entitled forthwith to enter upon and take possession of the property."

[25] KCC argues that the power to cancel the lease was derived from the COJ's statutory mandate to provide municipal services and that the decision has a profound impact on the public interest. It relies on *South African National Parks v MTO Forestry (Pty) Ltd*[3] *(MTO Forestry)*, where Dambuza JA, writing for the majority, found that SANParks' conclusion of a lease agreement and the exercise of powers

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[3] 2018 (5) SA 177 (SCA).

under it was an exercise of public power, because the lease was the instrument through which it discharged its statutory mandate to manage protected areas. The SCA further stated that:

> "The conclusion of the lease agreement and the exercise of powers pursuant to it was clearly an exercise of public power. The lease agreement itself recognises the public nature of the lease agreement and the rights and obligations of the lessor that flows therefrom. Its obligation to consult the public is stipulated in clause 40 of the lease agreement…"[4]

[26] The source of the power to conclude the contract concerned is a key consideration in determining whether the exercise of a contractual right amounts to the exercise of public power. This is particularly so when the contract is simply the instrument through which the public body delivers upon its statutory mandate or exercises its statutory power.

[27] In the current matter, COJ is the successor in title to the City Council of Johannesburg, which had control and management of open spaces, gardens, parks, and other enclosed spaces set apart for the use and benefit of the public. It is common cause that the City of Johannesburg was mandated to establish and maintain recreation grounds on town lands and to "*erect, make, establish, maintain and carry on in connection with, or on recreation grounds established by the council, changing rooms, lavatories and other conveniences and other buildings or structures of any nature whatever ... and control of the* same *shall be vested in the council who may from time to time* - *(i) determine the charges to be made for the use thereof, or (ii) let the same or any portion thereof... to any person or club or other body of persons...".*

[28] It is apparent that the decision to conclude the Lease entailed the exercise of the Council's statutory power under the Ordinance to "let" "recreation grounds" and associated conveniences "to any person or club or other body of persons" and its mandate to provide services, including sporting and social amenities to the public. Therefore, it is a contract that was intended to serve a public purpose and advance

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[4] At para 22 ibid.

the public interest. Moreover, the rental payable by KCC is not market-related. It is nominal because the true *quid pro quo* is the provision of a public amenity to the local community. It enables KCC to operate and allows for sporting and social amenities to be made available to the public.

[29] In addition, COJ is an organ of the state within the local sphere of government. Section 4(2) of the Local Government: Municipal Systems Act[5] requires the council of the Municipality, within the municipality's financial and administrative capacity and having regard to practical consideration, to-

> "(a) Exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interest of the local community;
>
> …
>
> (f) Give members of the local community equitable access to the municipal services to which they are entitled."

[30] Section 156 of the Constitution[6], vests COJ with executive authority in respect of, and a right to administer, the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5, and any other matter assigned to it by national or provincial legislation. These include local amenities, local sports facilities, and municipal parks and recreation. Considering the above, the conclusion of the Lease and any purported exercise of rights thereunder are inextricably linked to the COJ's constitutional powers and obligations to provide sporting and social amenities to the public.

[31] In light of the above, the source of the COJ's power to contract in relation to its properties supports KCC's contention that the purported termination of the Lease amounts to the exercise of public power and is an administrative action in that the purported exercise of contractual rights cannot be divorced from the underlying source of the power. It is merely the instrument through which the COJ exercises its statutorily sourced power. There is a clear connection between the purported

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[5] Act 32 of 2000, as amended.

[6] Act 108 of 1996.

exercise of the contractual right and the COJ's statutory obligation to provide municipal services.

[32] The COJ and JPC argue that they derived the power to cancel the lease from the contract itself rather than from statute. But that is too narrow a view. The power to contract and the power to cancel a contract are two sides of the same coin. As the Court held in *Fourie Fismer Incorporated v Road Accident Fund*[7], when a contract is concluded in fulfilment of a constitutional duty, the exercise of rights under that contract remains subject to public law regulation. In the current matter, to the extent that the power to contract is sourced from the COJ's statutory mandate, then the exercise of rights under that contract, including the right to cancel, cannot be entirely divorced from that statutory foundation.

[33] Moreover, the COJ and JPC were not acting on an equal footing with KCC. The COJ is a large municipality with considerable resources and coercive powers. It is undisputed that before 1970, KCC (then known as TAC) occupied a nearby property. The move to the current site was necessitated by the construction of the N1 highway through the property. This prompted KCC to sell the property it previously occupied to the City Council of Johannesburg. To accommodate KCC's relocation, the City Council of Johannesburg acquired portions of the existing property from third parties, JCI Holdings Ltd., and African Realty Trust. The City Council of Johannesburg thereafter offered KCC the lease on the newly acquired properties as a replacement. This is not a relationship of equals. It is a relationship in which the state holds a position of superiority, which is a further factor in support of classifying the purported exercise of the COJ's contractual rights as the exercise of public power.

[34] The existence of the Lease affects the rights and interests of residents generally, and in taking action to manage the use of land that is an existing sporting and recreational amenity, the COJ can never be said to be acting for a purely private

[7] (25437/2021) [2021] ZAGPPHC 815 (3 December 2021).

purpose. It can have no legitimate private purpose in relation to its management of an existing public amenity. Consequently, any exercise by COJ of contractual rights under the lease is not a purely private matter between it and KCC.

[35] The decision to cancel the lease also affects public interest. KCC is not a commercial entity. It is a voluntary association of individuals to each of whom COJ owes a duty to provide municipal services, including sporting and social amenities and recreation facilities. It exists solely to facilitate its members' use of those services and to extend their availability to the public and has no meaningful existence separate from its occupation of the property. If the cancellation stands, KCC will effectively cease to exist. As a result, the public will lose access to the sporting and social amenities it provides, thereby impairing or negating rights that are currently realised. It cannot, therefore, be said that the Lease is purely commercial in nature. It is the instrument through which the COJ delivers upon its constitutional and statutory mandate to provide municipal services to the citizens of Johannesburg.

[36] The COJ and JPC have not identified any countervailing public interest that justifies this outcome. They have not suggested that they intend to replace KCC with another operator. They have not suggested that the property will be put to some other use that benefits the public. The only reason they have given for the cancellation is that KCC breached the lease. But the breaches were not of a nature that endangered the public purpose of the lease. They were attempts by a previous management committee to generate income to reduce membership costs and maintain the property. Besides, they have since been remedied, as will be seen hereunder.

[37] To the extent that the lease was for a specific public purpose, namely to facilitate a social and sporting club for community benefit at a nominal rental, it follows that the prohibition on sub-leasing and income generation was central to this public purpose. As such, the COJ’s decision to cancel was not merely to vindicate a contractual right, but also to enforce the public-oriented terms of the agreement and to protect a public asset from exploitation for private gain.

[38] For the above reasons, it is apparent that the decision to cancel the lease was not a simple commercial cancellation under the contract. It was a decision taken by an organ of state in the exercise of its statutory mandate, which adversely affected the rights of KCC and the public and had a direct external legal effect. Thus, it was an exercise of public function and qualifies as an administrative action as defined in the PAJA. It is subject to public law review.

[39] The conclusion that the decision is subject to public law review does not, however, automatically render it invalid. This Court must consider whether the decision was taken in accordance with the requirements of PAJA and the principle of legality. KCC raises three grounds of review: lack of authority, procedural unfairness, and irrationality and unreasonableness.

Authority

[40] The first consideration is the alleged lack of authority. The JPC's Legal Manager made the decision to cancel the lease. KCC contends that he lacked the authority to cancel the lease agreement because no council resolution existed authorising him to do so. The JPC argues that the Legal Manager's authority is granted through the "Special Power of Attorney" from the COJ dated 09 June 2002, and the "Delegations of Authority" within the JPC.

[41] Paragraphs 13.1 and 13.2 of the Special Power of Attorney expressly grant the JPC the power to enter into and cancel Use Agreements. Paragraph 3.1 equally expressly grants JPC the power to enter into lease agreements, and paragraph 3.3 authorises JPC to give notice of termination of the lease. However, paragraph 3 is silent about the power to terminate the lease. The specific inclusion of the words "give notice of", which is distinct from authorising the "cancellation of", denotes that paragraph 3.3 confers a different type of authority than that conferred by paragraph 3.1 and 13.2. This difference in wording, which forms the critical context against which paragraph 3.3 is to be interpreted, indicates that it is merely the delivery of the notice of termination, as distinct from the decision to terminate, that the JPC is empowered to perform under paragraph 3.3. KCC correctly contends that, to the extent that the COJ does not rely upon an alleged implied authority, their case is limited to the express authority provided for in the Special Power of Attorney.

[42] The Special Power of Attorney authorises the JPC to "give notice of termination of the lease". That is not the same as authorising the JPC to take the decision to terminate the lease. The distinction is significant. The decision to cancel a lease is a substantive exercise of power. The giving of notice is a ministerial act that gives effect to that decision. The special power of attorney does not, on its plain language, authorise the JPC to make the decision. Therefore, the written "Special Power of Attorney" does not give the JPC the power to take the decision to cancel a lease agreement. The JPC's powers under the Special Power of Attorney extend only to issuing the notice of termination where the COJ has properly taken the decision to cancel.

[43] The COJ relies on the "Delegation of Powers to the Managing Director" dated 05 October 2011. However, it does not identify any particular paragraph in the delegation that confers this authority on the Managing Director. Instead they refer to the document in general terms when contending that the decision was authorised. There is no paragraph in the "Delegation to the Managing Director" that deals specifically with the power to cancel lease agreements. The only paragraph that pertains to property matters is paragraph 17. However, this delegation only pertains to "properties in respect of which the COJ or a municipal entity, as the case may be, has instructed JPC to act and must not be exercised or performed contrary to such instruction". It does not include the power to take the relevant decision, but only extends to the signature of documentation pursuant to a decision already taken by the COJ. To the extent that the delegation to the Managing Director does not expressly authorise him to cancel leases, it does not cure this defect.

[44] In addition, COJ relies on the "Sub-delegation of Powers to the Senior Manager Legal by the Managing Director JPC" dated 14 September 2011. Paragraph 4 thereof empowers the Senior Manager: Legal to "*execute any document which was approved by you on behalf of CoJ or JPC and to execute any and all instruments and documents which are necessary to give effect to or arise out of any resolutions* …". This paragraph does not purport to delegate to the Legal Manager the power to decide to terminate a lease agreement, or even to execute a notice of termination. It authorises him to perform the formal act of execution of documents in respect of transactions that have been specifically approved by

resolution of the COJ or JPC. The JPC has not placed any such resolution before the Court.

[45] In light of the above, the delegation of powers and functions to the Legal Manager does not grant him the power to terminate a lease agreement. Instead, the delegated powers include procedural matters related to litigation, the representation of employees in civil and criminal proceedings, and the execution of documents. Neither the JPC nor the COJ showed any resolution, authorising the termination of the Lease.

[46] The absence of proper authorisation is a fundamental flaw. Public power can only be exercised by those who are authorised to do so. When an official acts without authority, the decision is invalid. This is a ground of review under section 6(2)(a)(i) of PAJA, and under the principle of legality. The decision to cancel the lease must be set aside on this ground alone.

The audi alteram partem principle

[47] Even if the Legal Manager had been authorised to take the decision, it would have been set aside on the grounds of procedural unfairness. The decision to cancel the lease affected KCC, its members, and the public. The COJ and JPC knew this. However, they gave KCC no opportunity to make representations before the decision was taken. The breach notices were not a substitute for a hearing. They were notices of alleged breaches, not notices of a duly contemplated decision to cancel the lease. Therefore, the decision to cancel was taken without any prior engagement with KCC regarding the consequences of cancellation or the possibility of alternatives. This was procedurally unfair and a breach of section 3 of PAJA.

Irrationality and unreasonableness

[48] Additionally, the decision to cancel the lease was not rationally connected to the purpose of the empowering provision. The purpose of the COJ’s power to contract was to provide municipal services to the public. Cancelling the lease would not further that purpose. Instead, it would end the provision of those services. The decision was also grossly disproportionate to the aims sought to be achieved. The alleged breaches were minor and had been remedied. The response was to destroy

a hundred-year-old institution that provides valuable public amenities. No reasonable decision-maker could have taken such a decision in these circumstances.

The breach

[49] Considering the conclusion that the decision to cancel the lease was invalid for the reasons set out above, it is strictly unnecessary to consider whether KCC had remedied its breaches. However, for the sake of completeness, this Court records that it is satisfied that KCC had remedied the breaches before the cancellation was purported to take effect.

[50] The first breach notice, issued on 01 June 2021, demanded the removal of outdoor advertising signs. But that notice did not identify the true breach: the subletting to Media Capital. It did not require KCC to cease its commercial relationship with Media Capital. It only demanded the removal of the signs. By the time the second breach notice was issued, KCC had demanded that Media Capital remove its signs and had ceased to receive any payment from the consortium. The breach was again remedied.

[51] The second breach notice, issued on 29 November 2021, demanded that KCC cease carrying on a business through its arrangements with La Vie en Rose. By that time, KCC had already informed La Vie en Rose that its right of occupation had ended. It had ceased to receive any rental from La Vie en Rose. It had demanded that La Vie en Rose vacate the property, and it had instituted arbitration proceedings for its eviction. The fact that La Vie en Rose remained in physical occupation does not mean that KCC was still in breach. The breach was the commercial relationship, not the physical presence. Once KCC terminated that relationship, the breach was remedied.

[52] The COJ and JPC argue that KCC cannot have remedied the breaches because La Vie en Rose and Media Capital remained in occupation. That argument confuses the breach with its consequences. The breach was KCC's conduct. Once KCC ceased that conduct, the breach was remedied. The fact that La Vie en Rose and Media Capital were trespassing does not mean that KCC remained in breach. For these reasons, even if the decision to cancel the lease had been validly taken, it would have been ineffective because KCC had already remedied the breaches.

Eviction application

[53] The COJ and JPC's counter-application for eviction must also fail, as it is based on the cancellation of the lease. Since the cancellation is invalid, the lease remains in force. KCC is entitled to remain in occupation of the property.

[54] Considering that the eviction application seeks the eviction of approximately 35 persons who reside on the property, the COJ and JPC have not complied with the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[8] ("PIE") as they have not joined these persons as respondents. In addition, they have not applied for an order authorising service of the notice required by section 4(2) of PIE, nor have they shown that alternative accommodation is available. In their heads of argument, they say that they are not persisting with the eviction of these persons "for now". However, that is not an answer to the clear requirements of the Act. For this further reason, the eviction application should be dismissed.

Costs

[56] The COJ and JPC have opposed KCC's application and pursued their counter-application without any proper basis. They have sought to destroy a valuable public institution over breaches that had already been remedied. They have acted without proper authority and without following a fair procedure. Their conduct has resulted in KCC incurring substantial legal costs. There is no reason why KCC should bear those costs.

[57] KCC seeks the costs of two counsel. Considering the complexity of the issues and the importance of the matter, this Court is satisfied that the employment of two counsel was justified.

[58] Accordingly, the following order is made:

1. The decision of the first respondent to cancel the Lease is declared unlawful and invalid in terms of sections 6(2)(e)(i), 6(2)(e)(iii),

[8] Act 19 of 1998, as amended.

6(2)(e)(vi), 6(2)(f)(ii) and 6(2)(h) of PAJA, and therefore reviewed and set aside.

2. The second and third respondents' counter-application to evict the applicant, Killarney Country Club, is dismissed.

3. The second and third respondents are ordered to pay the applicant's costs, including the costs of two counsel, on scale C.

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D. Mahosi
Acting Judge of the High Court
Gauteng Division, Johannesburg

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 28 April 2026.

<u>Appearances</u>

For the applicant:	Advocate AJ Lamplough SC and Advocate LM Spiller
Instructed by:	Mr. J. Weinberg of Telfer Incorporated Attorneys
For the second and third respondents:	Advocate M Gwala SC and Advocate H Salani
Instructed by:	Mr. L Ramatshila of Ramatshila-Mugeri Incorporated Attorneys