IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **2025-172571**

In the matter between:

SHREE PROPERTY HOLDINGS (PTY) LTD **APPLICANT**

and

NATAL ENERGY AND COMMODITIES (PTY) LTD **RESPONDENT**

Coram: MOSSOP J

Heard: 20 October 2025

Delivered: 6 November 2025

ORDER

The following order is granted:

1. The respondent, and all those holding occupation by, through or under it, are directed, on or before the last day of November 2025, to vacate the property situated at 1[...] T[...] Road, Mobeni, Durban (the premises).

2. If the respondent or any person occupying the premises by, through or under it, fails to comply with the order in paragraph 1 above, the sheriff of the court, or his deputy, is authorised and directed to do all things necessary to eject from the

premises the respondent and any persons occupying the premises by, through or under it.

3. The respondent is directed to pay the costs of this application on an attorney and client scale, such to include the costs of two counsel where so employed.

4. The respondent's counter-application is dismissed with costs, such to be payable on the attorney and client scale, and to include the costs of two counsel where so employed.

JUDGMENT

Mossop J:

Introduction

[1] This matter was on my motion roll on 20 October 2025 as an urgent application. It is an ejectment application. The applicant is the owner of certain immovable property situated at 1[...] T[...] Road, Mobeni, Durban (the premises) where there is constructed, inter alia, a warehouse. The premises are situated in close proximity to a residential area. The respondent has leased the premises from the applicant (the lease agreement) and is presently in occupation thereof. The applicant has, however, terminated the lease agreement because the respondent has allegedly breached it by not paying the rental agreed upon. The respondent denies that the applicant is entitled to do so and resists its ejectment from the premises and has preferred a counter-application against the applicant.

[2] I first consider the preliminary issue of the urgency of the applicant's application.

Urgency

[3] I heard lengthy argument on the issue of urgency.

[4] The applicant contended that the matter was urgent for various reasons, including that it had two potential occupants of the premises who were interested in leasing them. The applicant could not lease the premises to either of these two

interested parties if the respondent remained in occupation after the lease agreement had been properly cancelled. Having cancelled the lease agreement, it was therefore vital for the applicant to remove the respondent from the premises as expeditiously as possible so that it could explore its options with the two interested parties. The applicant contended that while the respondent remains in occupation of the premises, it makes no payment for such occupation.

[5] The respondent claimed that the matter was not urgent and sought an order that the application be struck from the roll with costs. The respondent took strong exception to the fact that it had been given a mere five days to deliver its answering affidavit, asserting that this was a complex matter that required a detailed and thorough investigation by it, which it had not been able to do because of the time constraints imposed upon it by the applicant. Mr *Harpur SC*, who appeared for the respondent together with Mr *Bond*, lamented, repeatedly, that the applicant had 'rushed' to have the matter adjudicated upon and submitted that it was not ready to be argued.

[6] On the issue of urgency, it is settled that commercial urgency, while admittedly not dealing with life or death issues, may, nonetheless, be invoked to have a matter heard out of turn. In *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd*,[1] the court opined that:

'… the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6(12) no less than any other interests. Each case must depend upon its own circumstances.'

I agree with this.

[7] When urgency is claimed, the initial consequence of that urgency is the abridgement of the time limits prescribed by the rules and a departure from the prescribed filing times and, possibly, the prescribed sitting times of the court.[2] It is so, as Mr *Harpur* acerbically pointed out, that the applicant did not ask for condonation for departing from the prescribed forms and time limits in its notice of

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[1] *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586F-G; *Blue Crest Holdings (Pty) Ltd v Body Action Health Clubs (Pty) Ltd* [2020] ZAGPJHC 407 para 9; *Avis Southern Africa (Pty) Ltd and Others v Porteous and Another* 2024 (2) SA386 (GJ) para 21.

[2] *Luna Meubel Vervaardigers (Edms) Bpk V Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 136H.

motion, as it is customary to do. I am, however, satisfied that the certificate of urgency and the founding affidavit unequivocally alert the reader to the urgency of the matter. I consequently do not regard this omission as being fatal.

[8] A consideration of the brief history of this application reveals that the applicant's papers were issued on 23 September 2025, and the matter was heard almost a month later, on 20 October 2025. Both parties delivered affidavits and heads of argument in the application and the counter-application.[3] While not overlooking the fact that the respondent had not, however, delivered a replying affidavit in its counter-application,[4] I was of the view that the respondent had adequate time to ventilate whatever defence it intended raising. In fact, in my experience, it had been granted considerably more time than the average respondent in an urgent application is generally given.

[9] During the course of Mr *Harpur*'s submissions on urgency, it began to appear to me that what the respondent was actually seeking was an adjournment in order for it to acquire further evidence, to which need Mr *Harpur* made frequent and pointed reference. On enquiry from the court, Mr *Harpur*, however, initially said that he was not seeking an adjournment and continued with his argument relating to urgency. However, later, Mr *Harpur* indicated that he may seek an adjournment if I did not strike the matter from the roll, which was his preferred outcome of the matter. He confirmed that no formal application for an adjournment had, however, been prepared by the respondent and if such an application were to be made, it would have to be made orally from the bar by counsel.

[10] Ultimately, I did not strike the matter from the roll, as I found it to be commercially urgent, and I concluded, given the facts of the matter, that the applicant would not obtain substantial redress at a hearing in due course. I also did not agree with Mr *Harpur*'s submission that the applicant had 'rushed' the matter to court. Having made my ruling on urgency, Mr *Harpur* did not address me further on the need for an adjournment and both he and Mr *Stokes SC*, who appeared for the

[3] Initially, I did not have the respondent's heads of argument due to the vagaries of the recently introduced CourtOnline system in this division, but, over the course of the hearing, I managed to download them, and I have considered them carefully.

[4] The respondent had sufficient time to deliver its replying affidavit. The applicant's replying affidavit, which also served as its answering affidavit to the respondent's counter-application, was delivered on 10 October 2025.

applicant together with Mr *Aldworth*, collectively proceeded to address me on the merits of the application for several hours. At the very tail end of his argument on the merits, Mr *Harpur* stated that he assumed that I had dismissed the application for an adjournment when I had found the matter to be urgent. I did not do that, for the simple reason that Mr *Harpur* did not formally move an application for an adjournment after I found the matter to be urgent but proceeded to argue the merits of the matter.

The relief claimed by the applicant

[11] The applicant seeks the following relief in its notice of motion:

'1. The respondent, and all those holding occupation by, through or under it, are directed to vacate the premises occupied by it described as a warehouse, offices and yard area on the property described as Portion 1 of Erf 1[...], U[...], with physical address 1[...] T[...] Road, Mobeni, Mobeni, Durban ("the premises") forthwith.

2. If the respondent or any persons occupying the premises by, through or under it fail to comply with prayer 1 above, the Sheriff of the Court or his deputy is authorised and directed to do all things necessary to eject the respondent and any persons occupying by, through or under it from the premises.

3. The respondent is directed to pay the costs of this application on an attorney and client scale.'

The relief claimed by the respondent

[12] It may be prudent at this juncture to refer to the relief claimed by the respondent in its counter-application. The relief claimed is clearly intended to blunt, if not negate, the relief claimed by the applicant. What was claimed was the following:

'[1] Declaring that the purported cancellation of the lease agreement by the applicant on 14 July 2025 is unlawful and of no force or effect.

[2] Declaring that the Respondent is entitled to remain in occupation of the leased premises situated at 1[...] T[...] Road, Mobeni, Durban, until expiry of the lease on 30 April 2026, subject only to payment of a reduced rental.

[3] Declaring that the rental payable by the Respondent is reduced to such amount as is consistent with the impaired performance by the Applicant of its obligation to afford *commodus usus* of the leased premises.

[4] To the extent that the Applicant may wish to persist with any claim for such reduced rental against the Respondent the quantum of such reduced rental is to be proved by the

Applicant as landlord in an action to be instituted by the Applicant within a period of 30 days from the date of this order.

[5] To the extent that the Respondent may wish to persist with any claim for a refund of overpaid rentals, damages and interest in respect of the lease between the parties, the Respondent is directed to institute same by way of counterclaim in the said action by the Applicant or by way of a self-standing action within a period of 30 days from the date of this order.

[6] In the alternative to paragraphs [1] to [5] above that the Applicant is directed to make discovery under uniform rule 35 (13) within a period of 10 days from the date of this order and the Respondent is authorised to deliver a further affidavit/s dealing with the contents of that discovery within a further period of 10 days from the delivery of the Applicant's discovery affidavit and copies of documents discovered therein to the Respondent, whereafter the matter may be set down again on the opposed motion roll on a date to be arranged the determination of the relief set out in the said paragraphs [1] to [5] above.

[7] Costs of suit including the costs of senior and junior counsel on scale C.'

Common cause facts

[13] The premises are utilised by the respondent as a bonded warehouse. A bonded warehouse is a secure storage facility where shippers are able to store imported goods without needing to immediately pay the relevant import taxes and duties. When placed in the bonded warehouse, the imported goods are regarded as still being in transit to their ultimate destination and the taxes and duties only become payable once the goods leave the bonded warehouse.

[14] The relationship between the applicant and the respondent is governed by the lease agreement and other documents ancillary to it, to which reference will be made shortly. The lease agreement was concluded on 29 January 2021, and it was agreed that it would run between 1 May 2021 and 28 April 2026. Thus, at the time of the hearing of the matter in October 2025, it only has approximately six months of its life left to run.

[15] Some of the more significant terms of the lease agreement were that:

(a) The respondent was required, at its own cost, to establish the bonded warehouse;

(b) The respondent would be permitted to take occupation of the premises on 1 March 2021 to install its fixtures and fittings and would not be charged rental for the months of March and April 2021;

(c) The respondent would be required to pay the rental monthly in advance before the first day of each month;

(d) The respondent agreed that it would not be entitled to withhold the payment of any amounts due to the applicant in terms of the lease agreement;

(e) The applicant did not warrant or represent to the respondent that the premises were fit for any purpose, including the purpose for which the premises were let to the respondent;

(f) In the event of the respondent breaching the lease agreement, the applicant would be entitled to demand that the respondent pay to it all amounts then outstanding and to cancel the lease agreement;

(g) If the respondent continued to occupy the premises and the applicant disputed its entitlement to do so, the respondent was required to pay all amounts due to the applicant in terms of the lease agreement until the dispute was resolved and the respondent was, furthermore, required to comply with all of its obligations pending the resolution of that dispute; and

(h) The lease agreement constituted the whole agreement between the parties. They consequently could only rely on representations recorded therein and any variation to the lease agreement would only be effective if reduced to writing and signed by, or on behalf of, the parties.

[16] Subsequent to the signing of the lease agreement, the parties concluded three addenda to it. The first was concluded in February 2021 because there was a reasonable fear that the then occupant of the premises might not vacate timeously, and it was necessary to amend the lease and rental payment commencement dates. The second addendum was concluded during May 2024 and was designed to correct errors in the first addendum regarding the rent-free months of occupation afforded to the respondent. Finally, the third addendum was concluded in April 2025. It amended the day of the month by which the respondent was required to make its rental payments to the applicant.

[17] After signing the lease agreement, the respondent was given occupation of the premises by the applicant and conducted its business from there. It, rather swiftly, however, fell into arrears with its rental payments to the applicant. This was not a matter of any controversy: by signing three acknowledgement of debt documents in favour of the applicant, the respondent freely admitted its default on three separate occasions. There is thus objective evidence of the respondent's default.

[18] In the first acknowledgement of debt, dated 30 August 2023 (the first acknowledgement of debt), the respondent acknowledged that it had:

'… defaulted on its rental obligations in terms of the Lease and had accrued arrear rental in the amount of R714 785.92 as at 22 August 2023, after the Debtor paid R312 480.08 to the Creditor on 07 August 2023.'

[19] The respondent undertook to pay its arrears to the applicant and further acknowledged that it was truly and lawfully indebted to the applicant in the amount described in the extract narrated above.

[20] Almost nine months later, on 24 May 2024, the respondent signed a second acknowledgement of debt (the second acknowledgement of debt) in favour of the applicant, this time in a reduced amount of R431 121.06. Similar to the first acknowledgement of debt, the second acknowledgement of debt contained acknowledgements regarding the respondent's default, an undertaking by it to pay the arrears, and an acceptance by it that it was truly and lawfully indebted to the applicant.

[21] Five months later, on 27 November 2024, the respondent was again in arrears with its payments to the applicant. It accordingly signed a third acknowledgement of debt in favour of the applicant (the third acknowledgment of debt). The indebtedness on this occasion was the amount of R553 356.39, and the third acknowledgement of debt contained identical terms to those already highlighted in the first and second acknowledgements of debt.

[22] By May 2025, the respondent was again in arrears with its monthly payments to the applicant. Upon enquiry from the applicant as to why payment had not been made, a representative of the respondent replied that it was:

'… experiencing delayed payments from our clients, thus the cause for our delay.'

[23] As a consequence, a formal breach notice, as contemplated by the lease agreement, was directed to the respondent. A response was received in which the respondent's representative stated that:

'… for the last four years within our five-year contract we have diligently paid our rental in full and assure the lessor we intend to honour our obligations in terms of our lease.'

[24] A payment of R200 000 was then made by the respondent to the applicant, but no further payments were thereafter forthcoming. A meeting was consequently convened between representatives of the applicant and the respondent on 28 May 2025, in order to attempt to resolve the issue of the arrear rental. At that meeting, the respondent's representative mentioned that the respondent had experienced difficulties with the occupants of the residential properties neighbouring the premises, who allegedly restricted access to the premises. The applicant accordingly proposed alternate premises that were within its property portfolio and that were available at a lower rental. Ultimately, no agreement was reached on the applicant's proposal.

[25] The respondent then failed to pay its June 2025 rental, and a further breach letter was sent to it by the applicant's erstwhile attorneys. A response was received, indicating that the respondent had a:

'… 100% intention to settle all outstanding amounts.'

Despite the expressed good intentions, the breach was not, however, rectified and thus the applicant caused a letter cancelling the lease agreement to be sent to the respondent by its erstwhile attorneys on 14 July 2025 (the cancellation letter).

[26] After the dispatch of the cancellation letter, the applicant formed the view that the respondent disputed the validity of its cancellation letter and enquired from it, in writing, whether this was so. In response to this query, a letter dated 23 July 2025 was received from the respondent's attorneys in which the following was alleged:

(a) Because of the complaints made by the local community about the way the respondent conducted its business and the local community's conduct, the respondent had not had full use and enjoyment of the premises for the full period of the lease agreement;

(b) The applicant had failed to 'disclose material facts concerning the surrounding circumstances of the premises at the time of the conclusion of the lease agreement';

(c) Had the respondent known of the true state of affairs, it would not have concluded the lease agreement;

(d) The applicant knew of the issue that the respondent had with the local community but did not intervene and 'provide remedial action in specific performance of its duties'; and

(e) As a consequence, the respondent had a counterclaim against the applicant for:

(i) The amount of R19 543 006, in respect of the overpayment of rental;

(ii) The amount of R950 000, in respect of the overpayment of rates;

(iii) The amount of R2 157 258.18, in respect of 'installation costs'; and

(iv) The amount of R44 818 093, in respect of lost profits.

[27] None of this was accepted by the applicant and this application was always the inevitable response to the respondent's attorney's letter of 23 July 2025. There was, however, a further letter from the respondent's attorneys, dated 4 August 2025, when the respondent, according to Mr *Harpur*, raised the issue of fraud for the first time when it stated that:

'Evidence in our client's possession suggests that your client's omissions were deliberate, having had knowledge of the relevant issues spanning back several years, but failed to disclose them ostensibly to induce our client to agree to lease the premises on the terms offered.'

[28] The respondent's attorney further stated that:

'The upshot of the above is that through our client's discovery of your client's misrepresentation prior to the signature of the Impugned Lease Agreement, the terms contained in such agreement are not enforceable against our client as such agreement was improperly procured through material nondisclosure, and there was thus no meeting of the minds on such terms.'

The applicant's submissions

[29] The applicant's case is largely as set out in the discussion of the common cause facts. Each allegation made is meticulously established by a document recording the fact alleged.

[30] While the applicant appears to accept that the local community did object to the way in which the respondent conducted its business, the primary complaints being the excessive noise that the business generated at nighttime and the occlusion of the street leading to the premises by large trucks, the applicant submitted that it had no power over the local community or the manner in which the respondent conducted its business activities at the premises. It submitted that neither are issues that call upon it to do anything, nor could it do anything, particularly in the light of the fact that the parties agreed that the applicant gave no warranty to the respondent that the premises were fit for the purpose of conducting a bonded warehouse. If the respondent breached local nuisance by-laws, that, too, had nothing to do with the applicant. It had merely made available its premises to the respondent and that is where its involvement in what went on at the premises stopped.

[31] The applicant submitted that the respondent had no defence to the application and there were no material disputes of fact.

The respondent's submissions

[32] The respondent's approach to the applicant's allegations is neatly summed up at the commencement of its answering affidavit in the following sentence:

'The foundation of the Respondent's case is that the lease was induced by fraudulent misrepresentation and material non-disclosure on the part of the Applicant.'

[33] The consequence of this, according to the respondent, is that it is entitled to make an election whether to abide by the lease agreement or to repudiate it. In this regard, the respondent states that it:

'… has made its election: it abides the lease, but only upon terms that neutralize the fraud. In particular, the respondent is entitled to remain in occupation until the expiry of the lease in April 2026, but only liable for a reduced rental consistent with the true value of the impaired use of the premises.'

[34] The respondent explains that when the lease agreement was concluded, the applicant knew that previous tenants of the premises had come up against sustained opposition from the local Merebank community. To this, the deponent to the applicant's replying affidavit stated that:

'While I was aware that some of the applicant's previous tenants at the leased premises had issues with the local community surrounding the leased premises, such instances have been few. Those tenants which have conducted their business in compliance with the applicable municipal bylaws have faced minimal to no interruptions or issues from the local community. It is only those tenants which have conducted their businesses in contravention of the applicable municipal bylaws or in such a manner as to cause a direct nuisance to the local community that have experienced issues with the local community.'

[35] The respondent alleges that it was made clear to the applicant's representative at the time of the conclusion of the lease agreement that the respondent required, inter alia, access to the premises on a 24 hours per day, seven days per week basis and also stated that large container trucks would be required to access the premises 24 hours per day, seven days per week.

[36] However, so the respondent claims, approximately one month into the lease agreement, the local community commenced blocking roads, stoning vehicles and discouraging drivers from proceeding to the premises. Firearms were even produced and used to threaten truck drivers and the respondent's managers, although none of these managers has confirmed these events in an affidavit. The blockade of the approach road to the premises would occur:

'… in the hours leading up to 08h00 and 10h00 am (same varying on a daily basis) thereafter allow the passage of trucks up until approximately 16h00 and then return to continue to block access to the premises.'

[37] It is thus claimed that the lease agreement which eventuated was:

'… induced by either:

(a) the express representations made by Naidoo[5] in relation to the aforesaid criteria; *alternatively*

(b) Naidoo's silence when he ought to have corrected any misunderstandings in relation to the above criteria.'

[38] The respondent alleges that it had addressed formal correspondence to the applicant regarding the difficulties that it was experiencing. No such correspondence from the early moments of the existence of the lease agreement has, however, been put up. The only correspondence put up relates to the second half of 2025. When these issues were allegedly raised with the applicant soon after the lease agreement commenced, the respondent was allegedly advised by the applicant that if it intended to withdraw from the lease agreement, it would be liable for the full value of the rental in respect of the five years remaining on the lease period. The respondent apparently took legal advice on this issue and was advised by an unnamed attorney that any issues that concerned it could be raised at the conclusion of the lease agreement.

[39] As to the applicant's allegations that the respondent remains in occupation of the premises without paying rental, Mr *Harpur* submitted that the respondent had overpaid the applicant, and it is therefore not required to pay anything further to the applicant in respect of rentals. As regards the payment of utilities consumed whilst in disputed occupation of the premises, the respondent states that it employs a company that manages its utility charges but explains that that company:

'… refused to give the Respondent any of the relevant details including account numbers and reference numbers into which to make the payments and accordingly the Respondent has been unable to make any of those payments directly.'

[40] As regards its counter-application, the amounts that were mentioned in the respondent's attorney's letter of 23 July 2025, referred to earlier, are allegedly due to the respondent, inter alia, because it has not had full beneficial occupation of the premises. Despite declining to quit the premises, the respondent submits that it is not required to pay the agreed rental stipulated in the lease agreement, as read with the three addenda, and is, in fact, entitled to a remission of rental. How much that

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[5] Mr Naidoo was the applicant's representative.

remission of rental should be is not canvassed by the respondent. Indeed, it does not believe that it is required to make that calculation. This, so it submits, must be calculated by the applicant. It therefore asserts that if the applicant wishes to claim the reduced rental from it, the applicant should prove the quantum of that reduced rental in an action that the applicant is required to commence within 30 days of the date of an order granted in favour of the respondent in terms of its counter-application. The respondent concludes that:

'Once the Respondent establishes that the lease was induced by fraudulent misrepresentation, the onus shifts to the Applicant to establish what reduced rental, if any, is still fairly payable in light of the impaired performance. To hold otherwise would be to allow the fraud to operate for the full rental and unjustly enrich the Applicant.'

Analysis

[41] This application turns on the respondent's claim of fraud, for it forms both the basis of its resistance to the applicant's claim and the foundation of the counter-application.

[42] Where fraud is alleged, it is settled law that the onus of establishing it falls on the party claiming its occurrence[6] and, thus, in this matter, it is for the respondent to establish the fraud that it alleges.

[43] Mr *Harpur* mentioned several times in argument the well-known, and often repeated, words of Lord Denning in the English case of *Lazarus Estates Ltd v Beasley.*[7] Similar sentiments to those expressed by Lord Denning were also made by Williams J in the Australian case of *Farley (Aust) Pty Ltd v J R Alexander & Sons (Qld) Pty Ltd*,[8] where the learned judge stated that:

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[6] *Vivian v Woodburn* 1910 TS 1285 at 1287; *AMI Forwarding (Pty) Ltd v Government of the RSA (Dept of Customs and Excise) and Another* [2010] ZASCA 62; [2010] 4 All SA 347 (SCA) para 34.

[7] *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712, where the following was stated:
'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . .'.

[8] *Farley (Aust) Pty Ltd v J R Alexander & Sons (Qld) Pty Ltd* [1946] HCA 29; (1946) 75 CLR 487 at 493.

'Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction.'

[44] In this country, Cameron J likewise observed in *Absa Bank Ltd v Moore and Another* that:[9]

'Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.'

[45] Fraud, thus, does indeed unravel all but it is a difficult and daunting task to establish it in motion proceedings. As Seegobin J observed in *Commissioner for the South African Revenue Service v Sassin and Others*:[10]

'Our courts have consistently held that it would be unwise to decide a disputed issue of whether fraud was committed on motion proceedings without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses, and so forth.'

[46] Acknowledging this to be the case, Mr *Harpur* argued that the applicant had caused this difficulty for the respondent. The applicant had been told in the respondent's attorney's letter dated 5 August 2025 that the respondent accused it of fraud and yet, instead of commencing proceedings by way of summons, the applicant had chosen to proceed by way of motion proceedings, to the prejudice of the respondent. The complaint of Mr *Harpur* need not detain me. A party is entitled to assess the advantages, and risks, of proceeding by way of application and is not obliged to adopt a procedure that is beneficial to the intended respondent.

[47] What evidence is there of the fraud alleged? The respondent broadly pleaded that the misrepresentation was expressly made, alternatively made by silence, thereby covering all its bases. It appears to me that there was, contrary to what the respondent has pleaded, no express representation made by the applicant's representative. I come to this view from the respondent's own description

[9] *Absa Bank Ltd v Moore and Another* [2016] ZACC 34; 2017 (1) SA 255 (CC) para 39.
[10] *Commissioner for the South African Revenue Service v Sassin and Others* [2015] 4 All SA 756 (KZD) para 47.

of what occurred when its representative and the applicant's representative, the already mentioned Mr Naidoo, concluded the lease agreement. The following was stated in the answering affidavit:

'It was at that time that Mr Naidoo advised the Respondent that the property was zoned as noxious industrial and reference was made to nearby facilities which likewise dealt in heavy goods. To this end the property which is situated adjacent to the leased premises is an Illovo Sugar alcohol plant which produces chemicals and other bulk goods.'

[48] The respondent goes on to state that it advised Mr Naidoo of its requirements for the premises, which included round-the-clock access to them and the ability for large trucks to be able to access them. The respondent concludes that:

'Against such requirements Naidoo furnished the respondent with the lease agreement which has been created as annexure "FA2" to the founding affidavit.'

[49] From that narration of events, it is not suggested that Mr Naidoo said anything at all. There could therefore be no express representation. It can only be that the respondent relies on Mr Naidoo's alleged silence. It appears to be the respondent's case, having excluded the possibility of an express misrepresentation, that there was a duty on the part of Mr Naidoo to speak.

[50] In *Absa Bank Ltd v Fouche*,[11] the Supreme Court of Appeal considered the duty to speak in a pre-contractual setting. Conradie JA pointed out that the test for determining wrongfulness in this setting is the same as the general test in delict for omissions: in each case the court looks to the legal convictions of the community.[12] He observed that:

'[5] The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context - a non-disclosure - have been synthesised into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material. That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful. A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him "would be mutually recognised by honest men in the circumstances".

[11] *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA).
[12] Ibid para 4.

[6] Having established a duty on the defendant to speak, a plaintiff must prove the further elements for an actionable misrepresentation, that is, that the representation was material and induced the defendant to enter into the contract. In the case of a fraudulent misrepresentation, that must have been the result intended by the defendant.' (Authorities omitted.)

[51] In *Speight v Glass and Another*,[13] a decision of this division, Fannin J observed that:[14]

'There is in our law no general duty upon contracting parties to disclose to each other any facts and circumstances known to them which may influence the mind of the other party in deciding whether to conclude the contract . . . There is authority for the proposition that in Roman and Roman-Dutch law, and therefore in South African law, a seller who knows of the existence of defects in the thing sold, but deliberately refrains from disclosing them to the buyer, is guilty of fraud, justifying the cancellation of the contract by a buyer who is not aware of them . . . There is still some controversy as to whether mere silence is enough, or whether the silence must itself amount to a representation or be accompanied by some deliberate act of concealment . . . I have examined all the authorities which are cited or referred to in the foregoing cases. They all, without exception I think, deal with cases of the deliberate suppression or the calculated withholding of information regarding the subject matter of the sale, which is known to the seller and unknown to the buyer, and which might affect the buyer's mind . . . In none of them, save one, can I find any suggestion that, where the seller has not made any misrepresentation, express or otherwise, on the matter in question, the mere failure to disclose the relevant facts can found an action, or any statement that, in the case of a sale, there is a duty of disclosure such as is set out in the passages from *Spencer Bower* [Actionable Non-Disclosure]. The exception is the passage in *Norman* [*Purchase and Sale in South Africa* 2 ed] *op. cit.* at p. 84, where, dealing with fraud, the learned author says: -

> "Non-disclosure will always amount to fraud where there exists a duty to disclose the full facts, e.g.:
>
> (i) In contracts where a fiduciary relationship arises between the parties – contracts *uberrimae fidei,* such as insurance contracts, partnership and agency contracts,
>
> (ii) where the facts concealed are accessible only to the party concealing them."'

[52] There is accordingly no general common law rule that in the pre-contractual phase all material facts must be disclosed and that non-disclosure inexorably

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[13] *Speight v Glass and Another* 1961 (1) SA 778 (D) (*Speight*) at 781H-783B.
[14] Ibid at 781H-782G.

amounts to a misrepresentation by silence. The duty to speak only arises in the circumstances mentioned in the reference to *Norman's Purchase and Sale in South Africa* in the extract from *Speight* above. Loss caused by an omission can be actionable where there is a legal duty to act positively. 'But where the conduct complained of takes the form of an omission, such conduct is *prima facie* lawful.'[15]

[53] There is, moreover, no duty to speak:[16]

'… where matters are equally open to common observation, or ascertainable by ordinary diligence, or accessible to both parties alike …'

[54] In my view, the lease agreement is not the type of contract contemplated in *Speight* referred to above. Nor was the applicant required to inform the respondent that it was required to abide by municipal by-laws. Any information relating to the community's views and its alleged activism was accessible to the respondent.

[55] The respondent, however, appeared to me to have made a statement that indicated that it well knew of the views of the local community. It appeared in the following extract from the answering affidavit:

'At the time of contracting, the Applicant's representative was aware that previous tenants had faced sustained opposition from the Merebank community, resulting in restrictions on 24-hour access and threats to operations. These facts were knowingly and deliberately withheld from the respondent *despite express inquiries*. The fraudulent omission and misrepresentation strike at the root of the lease agreement.' (My emphasis)

[56] I found the reference to 'despite express inquiries' to be interesting and I asked Mr *Harpur* if what was intended by it was that the respondent had specifically asked the applicant about the existence of community protests. Mr *Harpur* denied this to be the case and suggested that I was considering the statement 'too narrowly'. I was never told what the 'express inquiries' were if they did not relate to community activism.

[15] *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) para 12. See also *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA).

[16] *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at 723G-H.

[57] The respondent claims that it told Mr Naidoo of its requirements. Surprisingly, those requirements are not mentioned in the lease agreement that the respondent admits signing nor are they mentioned in that section of the lease agreement where the applicant made certain warranties to the respondent.[17] Nor is there any correspondence put up by the respondent contemporaneous to, or prior to, the conclusion of the lease agreement that records these requirements, or provides any evidence that the applicant knew of them. All that the respondent puts up is a chronology that it prepared itself of telephone calls to the applicant, with no objective proof of what it states those calls dealt with. Moreover, the lease agreement recorded that neither party could rely on any representation not recorded in the lease agreement.

[58] In support of what it now claims, the respondent states that it has had discussions with three previous tenants of the premises. The previous tenants are named. None of them has put up a confirmatory affidavit. Each of them allegedly told the respondent that they could not work outside ordinary working hours due to community activism. Only two of them mentioned that they informed the applicant of this. None of them appeared to have blamed the applicant for this turn of events. In the absence of confirmation of this information under oath in an affidavit, the information is hearsay in nature and is inadmissible.

[59] There is, furthermore, a disturbing contradiction in the respondent's version in relation to the previous tenants. In its answering affidavit, the following is stated:

'In the time available the Respondent has not been able to yet obtain confirmatory affidavit (sic) from these persons but wishes to pursue this avenue of obtaining corroborative evidence…'

[60] However, in the respondent's attorney's letter dated 4 August 2025, when considering the likelihood of protracted legal proceedings stretching into the future in the absence of an amicable resolution of the matter, the respondent's attorney stated the following:

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[17] Clause 26.

'Furthermore, such proceedings will involve several disputes of fact which will necessarily call upon a process involving discovery and oral evidence being led (with our client intending to call prior tenants who have confirmed their position in writing).'

[61] The two propositions cannot be reconciled. If the previous tenants had confirmed their position in writing, why was that writing not put up?

[62] The basis for the allegation of fraud is not of long standing but only emerged recently. In fact, it was never mentioned at all during the first four years of the lease agreement. At all prior times during the existence of the lease agreement, the respondent acknowledged that it was the wrongdoer in not paying its rental obligations to the applicant and never suggested that the applicant had behaved dishonestly towards it. Had the applicant been set on fraud in order to unlawfully extract a benefit to which it may not otherwise have been entitled, as appears to be alleged by the respondent, a valid question to ask would be why it was prepared to engage with the respondent in order to find it cheaper premises within its own portfolio of properties. It is common cause that this is what happened and there are documents attached to the founding papers that deal with these negotiations. That these negotiations ultimately did not lead to the respondent moving to cheaper premises was as a result of a decision taken by the respondent, not the applicant. That does not appear to me to be the conduct of a fraudster.

[63] After a conspectus of all the evidence, I must conclude that no fraud has been established. That, in effect, puts an end to the respondent's opposition to the applicant's claim as well as its counter-application. However, if I am incorrect in that conclusion, I briefly consider the relief claimed in the counter-application.

[64] While there may be no material disputes of fact, there was a significant dispute between counsel as to what the legal position is on the remedies available to a party who has been fraudulently induced to enter into a contract. I am not certain why this should be the case, as the legal position is certain and clear. Mr *Stokes,* in his heads of argument, stated the position to be the following:

'It is an elementary principle of our law that a party discovering it was fraudulently induced into concluding a contract faces an election to uphold or rescind. Where the innocent party chooses to abide, it takes the contract on all its terms and must comply with all its terms. There is no provision in our law for the innocent party to abide on some qualified basis. This remedy allows that party to take the contract as it stands (subject to a separate damages claim) or to reject it. There is no halfway mark.'

[65] This submission is in accordance with the accepted legal position. In *Bowditch v Peel and Magill*,[18] Innes CJ stated that:

'A person who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission. (*Voet*, 4.3, secs. 3, 4, 7). It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception. And the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate.'

[66] Mr *Harpur*, on the other hand, submitted that the victim of a fraudulent misrepresentation is not bound to accept the contract as it is but may accept it on terms suitable to itself. His only authority for this proposition appears to be found in this extract from *Christie's The Law of Contract in South Africa*:[19]

'The innocent party who elects to stand by the contract may claim specific performance or damages for breach or whatever remedy may be appropriate, and the maker of the misrepresentation cannot rely on his own misrepresentation and argue that the innocent party ought to have rescinded. The election lies solely with the innocent party.' (Footnote omitted.)

[67] According to Mr *Harpur*, the words 'or whatever remedy may be appropriate' permit the respondent in this instance to accept the contract but subject to a reduced rental. The respondent thus submits that:

'The concern that a party cannot approbate and reprobate does not assist the Applicant. The Respondent has made its election: it abides by the lease. But that election does not bind it to pay the full fraudulent rental. The Respondent is entitled, consistently with its election, to remain in occupation on the basis of paying only the reduced rental, to be established by the Applicant. This is not a case of "cherry-picking" provisions; it is the proper application of the principle that fraud vitiates contractual rights and that public policy prevents a party from profiting from its own fraudulent inducement.'

[18] *Bowditch v Peel and Magill* 1921 AD 561 at 572-573.

[19] G B Bradfield *Christie's The Law of Contract in South Africa* 8 ed (2022) (*Christie's*) at 352.

[68] I am unable to agree with Mr *Harpur*. The position is unequivocal. The contract must be accepted as it stands. There is but one contract. For Mr *Harpur* to be correct, there would have to be a second contract, which there is not, nor can the court make one for the parties. If the respondent remains in occupation, it must adhere to the lease agreement, as concluded. What is proposed by the respondent seems to be a partial acceptance of the original lease agreement and a partial rejection of some of its terms. That the extract from *Christie's* relied upon by the respondent does not mean what it is claimed to mean, is evidenced by a further extract from *Christie's*:[20]

'So as a general rule there can be no such thing as partial affirmation and partial repudiation because a party who takes and retains any benefit under a contract must be deemed to have elected to abide by it, but the parties may agree to the contrary.' (Footnotes omitted.)

[69] It is clear that in this instance, there is no such agreement between the parties, nor has the respondent alleged such an agreement. The election that the respondent would have been required to make in the event that fraud was established was whether it wished to reject the lease agreement in its entirety or whether it wished to adhere to it in its entirety. It has chosen neither in advancing its counter-application. The counter-application could not therefore succeed, even in the event of fraud being established.

Conclusion

[70] There is no dispute that the respondent did not pay what it was required to pay to the applicant. The applicant was entitled to regard that as a breach of the lease agreement and when the breach was not remedied after the respondent was given the contractually agreed notice to do so, the applicant cancelled the lease agreement. It was entitled to do so, and its cancellation was valid.

[71] The defence of fraud appears to me to be a recent creation by the respondent in order to muddy the waters of what is, essentially, an extremely simple

[20] Ibid at 350.

dispute. Sir Winston Churchill, speaking of the duty of a democracy in wartime, said that its duty was to confuse by utilising: [21]

'… not the silence of the oyster serene in its grotto, but the smudge and blur of the cuttlefish.'

I detect the presence of the smudge and blur of the cuttlefish in the counter-application.

[72] Even if fraud had been established by the respondent, which it has not, the relief claimed by the respondent in its counter-application is not in accordance with the law and cannot be granted.

[73] In the absence of any fraudulent conduct on the part of the applicant, no defence of any kind has been raised to the application for ejectment. That application must consequently be granted and the respondent's counter-application rejected.

[74] The applicant has sought that the respondent be ordered to forthwith vacate the premises. That appears to me to be an unrealistic expectation given the nature of the business conducted by the respondent. I was not addressed on what a realistic time frame might be in the event that I found for the applicant. Despite this, I am confident, however, that there will be administrative and bureaucratic requirements to either shut down, or relocate, a bonded warehouse which may consume some time. This judgment will be handed down on Thursday, 6 November 2025. In my opinion, it would be fair, in the circumstances, to order the respondent to vacate the premises on or before the last day of November 2025.

Costs

[75] The applicant has sought costs on the attorney and client scale. Given the contrived defence and counter-application raised by the respondent, I am prepared to grant such an order. Both sides have employed two counsel to present their respective cases, and I can see no reason why the costs awarded should not include those costs.

Order

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[21] R M Langworth *Churchill's Wit: The Definitive Collection* (2009) at 146.

[76] I accordingly grant the following order:

1. The respondent, and all those holding occupation by, through or under it, are directed, on or before the last day of November 2025, to vacate the property situated at 1[...] T[...] Road, Mobeni, Durban (the premises).

2. If the respondent or any person occupying the premises by, through or under it, fails to comply with the order in paragraph 1 above, the sheriff of the court, or his deputy, is authorised and directed to do all things necessary to eject from the premises the respondent and any persons occupying the premises by, through or under it.

3. The respondent is directed to pay the costs of this application on an attorney and client scale, such to include the costs of two counsel where so employed.

4. The respondent's counter-application is dismissed with costs, such to be payable on the attorney and client scale, and to include the costs of two counsel where so employed.

MOSSOP J

APPEARANCES

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