IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 2025-124775

In the matter between:

JONNY RUNNER INVESTMENTS (PTY) LTD **APPLICANT**

and

DEVLAND CASH AND CARRY (PTY) LTD **RESPONDENT**

REASONS FOR ORDER

E Bezuidenhout J:

Introduction

[1] On 5 December 2025, I granted the following order with reasons to follow:

'1. The Applicant's cancellation of the lease agreement concluded between the applicant and the respondent, in respect of the property known as Erf 1[…] and Erf 1[...] N[...], KwaZulu-Natal, in extent of 4 431m^2 and 4 047m^2 respectively, held by the Applicant under Deed of Transfer T25581/2009 ("the property") is hereby confirmed.

2. The Respondent and all other persons and/or entities who occupy the property under or through the respondent, is hereby evicted from the property.

3. The sheriff of this court is hereby authorised and directed to carry out the aforesaid eviction in the event of the respondent and / or any other person or entity occupying the property under or through it, failing to vacate the property on or before 31 January 2026.

4. The respondent is directed to pay the applicant's costs on the scale as between attorney and client…'

These are the reasons.

[2] This matter came before me as a special opposed motion on 14 November 2025. Prior to this date, only the applicant, Jonny Runner Investments (Pty) Ltd, had filed heads of argument and a practice note. On the morning of the hearing, it emerged that the respondent, Devland Cash and Carry (Pty) Ltd's erstwhile attorney of record, had filed a notice of withdrawal as attorney of record shortly before the hearing. A new attorney was appointed and counsel for the respondent, Mr *Z Khan*, appeared before me, having been briefed the previous evening. He requested an adjournment from the bar for the respondent to file a supplementary answering affidavit, having realised that the answering affidavit on record was somewhat lacking in certain respects. He indicated that the sole shareholder of the respondent, Mr Gathoo, was now aware of the matter and wanted to participate in the matter. His son, Mr Yoosuf Gathoo, was the deponent to the answering affidavit. Mr *Khan* also requested an opportunity to file heads of argument. He tendered the wasted costs on the attorney and own client scale.

[3] Mr *Pretorious SC*, appearing for the applicant, voiced his opposition to the adjournment, but I indicated to him that I was inclined to grant the adjournment but that I would be setting very short time periods for the further papers to be filed. I also indicated that I would adjourn the matter to 20 November 2025 for argument and an order was later presented to me, setting out the relevant time frames for the filing of further affidavits, as well as the costs order.

[4] The further papers were filed as specified, save for the respondent's heads of argument, which were only filed on the Thursday morning before the hearing. At the hearing, Mr *Potgieter SC* now appeared for the respondent, having also only been briefed the evening before. He indicated to me that he was not the author of the heads of argument and that he would only be addressing me on a few issues.

[5] The applicant sought an order confirming that the lease agreement entered into between it and the respondent has been cancelled. The respondent was renting

the applicant's property known as Erf 1[…] and Erf 1[...] N[...], KwaZulu-Natal (the property). The applicant also sought an order evicting the respondent from the property. The relief sought in the notice of motion was almost identical to the order I had granted, save for the date by which the respondent had to vacate the property.

Background facts

[6] Mr *Pretorius* set out the background of how the lease came about, as well as the relevant clauses of the lease agreement, all of which are common cause, in his long heads of argument, from which I intend to borrow liberally and for which I express my appreciation.

[7] In June 2010, the applicant concluded a lease with Brett Four (Pty) Ltd (Brett Four) in respect of the property. Later in the same month, the applicant and Brett Four concluded an addendum to the lease to include a liquor outlet. In April 2023, Brett Four ceded its rights and delegated its obligations arising from the lease and addendum to Cambridge Food (Pty) Ltd (Cambridge). In September 2017, Cambridge and the applicant concluded a further addendum, and in April or May 2019, Cambridge and the applicant concluded a third addendum formalising the name change of the lessee from Brett Four to Cambridge.

[8] During or about September 2019, Cambridge and the applicant concluded a fourth addendum in terms of which they explicitly recorded the commencement date of the lease, being 1 December 2020. During February 2021, pursuant to Cambridge having changed its name to Massmart Retail (Pty) Ltd (Massmart Retail), the applicant and Massmart Retail concluded a fifth addendum and a renewal of the lease.

[9] In terms of a letter dated 6 December 2023, Massmart Retail introduced the respondent as its preferred successor, suitable tenant and nominated assignee to the lease agreement. This gave rise to the conclusion between the applicant, Massmart Retail and the respondent of a cession and an assignment of lease agreement. The material terms of the assignment agreement relevant to this matter are the following:

(a) Massmart Retail recorded a written sale of its business agreement with *inter alia* the respondent (or a wholly-owned subsidiary nominated by the respondent), who purchased the business from Massmart Retail, and which is operated and/or undertaken from, *inter alia,* the property.

(b) Massmart Retail and the respondent would notify the applicant of the date upon which all conditions precedent in the sale agreement would be satisfied, waived or otherwise fulfilled, once known (the closing date).

(c) Massmart Retail would cede all its rights and delegate all its obligations under the lease agreement to the respondent, with effect from the closing date.

[10] The applicant granted its consent to the assignment by Massmart Retail of its rights and obligations under the lease agreement to the respondent, with effect from the closing date, subject to the following further conditions, namely:

(a) Should the respondent not purchase the business from Massmart Retail, but nominate a wholly-owned subsidiary of the respondent, the respondent would notify the applicant with the full particulars of its nominee on the closing date;

(b) The nominee would co-sign and ratify the acceptance of the assignment on the closing date;

(c) The respondent would sign a deed of suretyship, together with the nominee, in favour of the applicant for the fulfilment of the nominee’s obligations arising from the lease agreement; and

(d) The respondent would confirm the closing date.

[11] The respondent was placed in occupation and possession of the property by virtue of the assignment agreement. The applicant contended that the respondent failed to comply with the following obligations. In the event that it was not the purchaser of the business from Massmart Retail, the respondent was obliged to advise the applicant of who it nominated as the purchaser on the closing date. The purchaser had to be a fully-owned subsidiary of the respondent. The respondent had to sign a deed of suretyship, together with the nominated subsidiary, in favour of the applicant. The nominated subsidiary would also co-sign and ratify the assignment agreement on the closing date.

[12] Massmart Retail only notified the applicant of the closing date on 27 January 2025. The closing date was determined as 24 June 2024. It further appeared that, without the applicant being aware of the closing date at the time, an entity unknown to the applicant, Jwayelani Supermarkets (Pty) Ltd (Jwayelani) took occupation of the property during June 2024. On 26 June 2024, the financial manager of Jwayelani, Mr Naicker, advised the applicant that Jwayelani is part of the Devland Group, that a deal was concluded between Massmart Retail and the respondent and that Massmart Retail's Nongoma store, undertaken from the applicant's property, was handed over to Jwayelani. Mr Naicker requested the applicant's company information to list the applicant as a vendor, to ensure payment of the monthly rental.

[13] It is common cause that the respondent had not notified the applicant of its nominee, nor had it provided the full particulars of the nominee to the applicant. The nominee, presumably Jwayelani, did not sign and ratify its acceptance of the assignment agreement, and the respondent did not sign a deed of suretyship, jointly with the nominee, in favour of the applicant.

[14] Numerous letters were exchanged between the applicant's attorney and the respondent. On 16 August 2024, the applicant, through its attorney, recorded that the respondent was the applicant's lessee in respect of the property, that the respondent would accordingly be invoiced in accordance with the terms of the lease and that the respondent seemingly placed Jwayelani in the property, which was an unauthorised occupier and in breach of the lease. The respondent was invited to respond before 31 August 2024 if the position was salvageable. On 28 August 2024, the applicant received a phone call from Mr S Doherty, the chief executive officer of the respondent, who informed him that all the documents needed pursuant to the conditions of the assignment agreement had been drafted by their legal team and were in the process of being vetted before being sent through.

[15] Further correspondence was exchanged between the applicant's attorney and representatives of Jwayelani. The applicant's attorney also telephoned Mr Yoosuf Gathoo, who signed the assignment agreement on behalf of the respondent, who indicated that the matter would be dealt with on the following day, 7 October 2024, but nothing happened. On 15 October 2024, the applicant's attorney sent a letter to

the respondent, recording, *inter alia,* that Jwayelani was in unlawful occupation and that the applicant wanted to legitimise the occupancy. The applicant received an e-mail from Mr Naicker on 12 November 2024, wherein he stated that Jwayelani was not a wholly-owned subsidiary of the respondent and suggested that an assignment be concluded with it directly, effectively bypassing the respondent. It also appeared that Jwayelani was owned by Kind Investments (Pty) Ltd (Kind Investments), which is 100% owned by Mr Yoosuf Gathoo. The applicant contended that this disclosure exacerbated the unlawfulness of Jwayelani's occupation, as it was not a wholly-owned subsidiary of the respondent, as required by the assignment agreement.

[16] Further attempts were made by the applicant's attorney to rectify the situation. On 6 December 2024, the applicant's attorney sent a further letter to the respondent, recording that Jwayelani remained in occupation of the property without any agreement, consent or other commercial arrangement and was an unlawful occupier. Jwayelani was required to vacate the property within seven days, failing which an application would be launched enforcing the removal of Jwayelani from the property. It was also recorded that the respondent was the tenant and would be invoiced for the monthly rental. On the same day, Mr Naicker responded, stating that the documents were in the process of being signed off. Nothing further happened.

[17] The applicant contended that there has been no compliance with the conditions set out in the assignment agreement. The respondent failed to provide the applicant with the nomination of a nominee, which was a wholly-owned subsidiary and failed to provide the applicant with the full particulars of the nominee. The nominee, presumed to be Jwayelani, failed to co-sign and ratify the assignment agreement. The respondent also failed to sign the deed of suretyship together with its nominee.

[18] Around 26 February 2025, the applicant received an email from Ms V Makran, indicating that she was representing Business Venture Investments No 2243 (Pty) Ltd, with registration number 2022/207173/07 (Business Venture), who had taken over the Jwayelani stores. The applicant was requested to complete vendor credit application forms. Investigations revealed that Business Venture was now occupying

the applicant's property. It was not wholly-owned or even owned by the respondent but apparently had a management agreement with the respondent.

[19] The applicant had instituted an application on 25 February 2025 for the eviction of Jwayelani out of this court under case number 3144/2025P (the first eviction application). The respondent was cited as the second respondent and as an interested party. Both the respondent and Jwayelani opposed the first eviction application.

[20] The answering affidavit was deposed to by Mr Yoosuf Gathoo, on behalf of both the respondents. It contained a general denial of any factual allegations not specifically dealt with by the deponent. It set out the background of all the different entities involved. It is almost identical to what was set out in the answering affidavit filed in the present matter, which I will deal with more fully below. It also referred to a so-called memorandum of agreement (the memorandum), which was attached to the affidavit. I will likewise deal with the memorandum below. The respondents contended that all concerns of the landlord may be remedied through what was contained in the memorandum. The respondents also maintained that the respondent in the present matter, Devland, was in occupation of the property and not Jwayelani.

[21] The applicant denied in its replying affidavit that the respondent in the present matter, Devland, was in occupation of its property. Attached to the affidavit was a photo taken by Mr K Murphy on 3 June 2025, clearly showing three large signboards with the name 'Ingonyama Jwayelani' displayed on them. The signboards were attached to the property. Mr Murphy also made a purchase at the store on 2 June 2025. The tax invoice, referred to as a 'till slip', was attached to the replying affidavit. The name displayed on the till slip was 'Business Venture Investment Ngoma Superstore'. Mr Murphy made a confirmatory affidavit.

[22] The respondents' insistence that Jwayelani was not in possession of the property prompted the applicant to institute the present application.

[23] I pause to mention that this first eviction application was set down to be heard on the same day as the present application, but Mr *Potgieter* indicated that he had no instructions to appear in the matter. After the hearing of the present application, he and his instructing attorney left the court, whereafter I proceeded to hear the first eviction application. I granted the eviction order prayed for against Jwayelani in default of any appearance. The terms were almost identical to the order granted in the present application.

[24] In returning to the present application, it was subsequently discovered from the Nongoma Municipality that an account had been opened in respect of the property in the name of 'Ingonyama Jwayelani-BVI 2243 (Pty) Ltd, Business Venture Investments N.O.: Ingomyama Jwayelani'. There was another account with the Nongoma Municipality, still in the name of Massmart Retail, with an unpaid accumulated debt of R663 940.37, which the respondent had failed to pay. An inspection of the applicant's property was conducted by an insurance risk assessor, who found the property to be badly maintained. The report of issues to be addressed was attached to the founding affidavit and included numerous photos taken during the inspection.

[25] The applicant's attorney sent a letter to the respondent on 1 May 2025, giving it 20 business days to rectify the breaches referred to in the letter and, in particular, to settle the outstanding municipal account, to convert the municipal account into its own name, to evict the current unlawful occupier from the property and to take occupation of the property. It was also requested to repair and maintain the property, as contractually required. It was further stated that the failure to remedy the breaches within the required time would lead to the cancellation of the lease agreement. The respondent did not acknowledge receipt of the notice and failed to comply with it.

[26] On 5 June 2025, the applicant cancelled the lease agreement. The various breaches were set out in detail. The respondent was given until the weekend of 28 and 29 June 2025 to vacate the property, failing which the present application would be launched. The respondent ignored the notices and continued to occupy the

applicant's property through a third party. The applicant then launched the present application on 29 July 2025.

[27] The respondent's answering affidavit was also deposed to by Mr Yoosuf Gathoo, its financial manager. It likewise contained the same general denial of any factual allegations not specifically dealt with by him. He indicated that it was imperative to set out the background of the matter, as well as 'the potential for confusing or misunderstanding' that may have arisen between the parties. It was alleged that the respondent trades as a cash and carry business in fast-moving, low-cost consumable goods. The respondent is the holding company for a group of companies within the Devland Group. Jwayelani is a chain of supermarkets, trading in fast-moving consumables in the KwaZulu-Natal area. The shareholder of Jwayelani is Kind Investments (with registration number 2008/016511/07). Mr Yoosuf Gathoo is the sole director of Kind Investments and the sole shareholder of the Kind Investments Group.

[28] It was also stated that Kind Investments is furthermore the shareholder of the second arm of the Kind Investments Group, Business Venture, formally known as Choppies Supermarkets SA (Pty) Ltd. It was pointed out that Kind Investments, Business Venture and Jwayelani do not form part of the Devland Group of Companies.

[29] It was explained that from time to time, Jwayelani would enter into a management agreement with Kind Investments in order for Jwayelani, or alternatively Business Venture, to manage a store within the Devland Group. The beneficial ownership of the store would always remain with the respondent. A copy of the management agreement entered into with Kind Investments for the management of the store trading from the applicant's property was attached as an annexure.

[30] The respondent contended that confusion existed in relation to the occupancy of the property, as well as the cession of the lease between the applicant and Massmart Retail. Previously, Massmart Retail concluded an agreement with the respondent for the purchase of ten stores, which were subject to the landlords

ceding the leases to the respondent. The transactions became very drawn out. The respondent took a decision to have Kind Investments manage their Nongoma store on its behalf. It contended that there are a valid cession and a valid management agreement in place and that there has been no breach of either of the agreements. The respondent also contended that there has been no breach of the lease agreement, as all the rental amounts have been paid timeously. He did not engage at all with the various allegations made by the applicant in respect of the listed breaches of the lease agreement. He simply 'acknowledged the concerns' of the applicant but stated that such concerns may be addressed in the memorandum of agreement, which had been sent to the applicant's attorney, and which was attached as an annexure. It was the same document referred to above. It was contended that the eviction application was without merit, as the respondent was occupying the property.

[31] The memorandum purports to be an agreement entered into between the applicant, referred to as 'the landlord', the respondent, referred to by its registered name, and Jwayelani, referred to as 'the lessee'. It records *inter alia* in para 2.3 of the introduction that both Massmart Retail and the respondent had failed to notify the landlord of the closing date as required in the assignment agreement. It records in para 2.4 that:

'Devland Cash and Carry failed to nominate a nominee as Lessee but placed the Lessee in its stead in the premises which is accordingly in occupation of the premises as purported Lessee in terms of the lease'.

This clearly contradicts the contention that the respondent was occupying the property and that the eviction application was without merit.

[32] In para 2.6 further aspects were recorded to 'regularise the status quo' and to 'remedy and ratify the aforesaid breaches'. The memorandum was only signed by Mr Y Gathoo on behalf of the respondent and by Mr ZA Paruk, on behalf of Jwayelani, on 26 November 2024. The applicant had not signed the memorandum.

[33] The respondent also raised a point *in limine*, alleging the non-joinder of Kind Investments as a party to the proceedings, as it was fundamentally involved in the management of the Nongoma store trading from the applicant's property. The

respondent stated that it had also referred to the involvement of Kind Investments in the first eviction application, which should have clarified any confusion regarding the nature of the agreement. It was contended that Kind Investments, which managed the store, has a direct and substantial interest in the matter and that its non-joinder rendered the application fatally defective and incapable of being entertained. That concluded the answering affidavit.

[34] In the replying affidavit deposed to on behalf of the applicant, it was conceded that there exists a serious confusion in relation to the occupancy of the property and the applicant conceded that it has no idea who is occupying its property, despite a watertight lease agreement and a watertight assignment agreement, which were designed to regulate the tenancy in respect of the property.

[35] The applicant highlighted the following issues:

(a) Jwayelani is not owned by the respondent and does not form part of the Devland Group of Companies and, for purposes of the conditions of the assignment agreement, is not a wholly-owned subsidiary of the respondent.

(b) It appears that the respondent did acquire the rights and obligations of Massmart Retail as purchaser and if that was the case, then it does not have the right to place anyone else in the property.

(c) As far as Kind Investments is concerned, it was pointed out that the correct registration number was 2019/108229/07. The relevant company reports were attached as annexures. The number mentioned in the answering affidavit, namely 2008/016511/07, in fact, belonged to the respondent. I pause to mention that in the so-called memorandum of agreement, referred to by the respondent, the registration number of Jwayelani is reflected as 2008/016511/07. The respondent's registration number is reflected as 1997/00337/07. It appears that the respondent is just as confused about which entity is which in its own papers.

(d) It was also pointed out that the registration number of Business Venture is 2022/207173/07. It was not formally known as Choppies Supermarkets South Africa (Pty) Ltd, which entity's registration number was 2008/00162/07, which was in the process of being deregistered. It has never had a name change.

(e) It was clear from the management agreement that Jwayelani was not a wholly-owned subsidiary of the respondent, as required in the assignment agreement. The management agreement, of which the applicant had no knowledge, also did not elevate Jwayelani to a subsidiary of the respondent. It was also never nominated by the respondent, as required in the assignment agreement.

(f) As far as the respondent's decision to appoint Kind Investments to manage the Nongoma store was concerned, the applicant contended that the decision was contractually unlawful and was never communicated to the applicant. The applicant did not consent to Jwayaleni's occupancy or to anyone else but the respondent. The management agreement was irrelevant, and the applicant was not a party to it.

(g) Although the monthly rentals were paid, it was not the only obligation the respondent had to perform.

[36] The applicant dealt with the memorandum referred to by the respondent in detail. It was sent to the applicant's attorney on 5 May 2025. It was submitted that the respondent, however, failed to disclose the contents of a letter sent by the applicant's attorney in reply on the same date. It was pointed out that if Jwayelani was a wholly-owned subsidiary, it had not co-signed and ratified the acceptance of the assignment agreement and the respondent had not bound itself as co-principal debtor and surety. The closing date given by the respondent was different from the closing date given by Massmart Retail and it appeared that the memorandum of agreement received on 5 May 2025 had been backdated to 26 November 2024. The letter was never replied to.

[37] As far as the point *in limine* was concerned, namely the non-joinder of Kind Investments, the applicant pointed out that, according to the records of CIPC dated 12 September 2025, it is in final deregistration. There is accordingly no entity to join. It was contended that even if it was not deregistered, it never had an interest in the matter and was never a necessary party to the proceedings. It, furthermore, never applied for leave to intervene.

[38] The applicant denied that the application for the respondent's eviction was without merit. The respondents in the first eviction application had alleged that it was the respondent who was in occupation of the applicant's property.

[39] The respondent filed its supplementary answering affidavit, as mentioned above, before the hearing of the matter. It was again attested to by Mr Yoosuf Gathoo. He stated that this supplementary affidavit had to take precedence over the initial answering affidavit, as it did not 'adequately' address the respondent's position. He did not explain why he had not previously set out the respondent's position adequately. He addressed the alleged breaches relied upon by the applicant and now sought to introduce a number of alleged disputes of fact.

[40] As far as the issue concerning the municipal account was concerned, he stated that the respondent had under no circumstances requested Jwayelani to change the municipal account into its name. The respondent has since attempted to change the municipal account into its name. An employee, Mr Rogers, attended at the municipality during May to July 2025 but experienced difficulties, as he did not have the ownership details of the property and the municipality was furthermore 'offline' and could not give effect to the change. It was contended that the respondent could therefore not have been in breach of the lease agreement arising from the failure of the municipality to assist it. It was also pointed out that the applicant billed the respondent on a monthly basis in lieu of municipal charges, which the respondent has paid. An amount of R84 482.03 was due but would be paid before the hearing of the matter. The respondent did not address the arrears of Massmart Retail's municipal account, referred to above.

[41] The respondent denied that it had sub-let the property or ceded the lease agreement in any manner or form to any third party. It could not do so without the consent of the applicant. The respondent insisted that it was and remained in possession of the property. The party referred to by the applicant as being in possession of the property is the management agent of the respondent. The respondent contended that the applicant was approached by national retailers, and that it then began finding fault in order to evict the respondent and escape from its lease. It was, however, conceded that whilst it was dealing with the acquisition of the Massmart stores, there were oversights, which have now been rectified, especially after the first eviction application was launched. The respondent stated that there is a dispute of fact. The respondent failed to address in any manner the memorandum previously relied upon by the respondent, the terms of which were highlighted above.

[42] As far as the maintenance issues were concerned, the respondent stated that the applicant failed to provide it with a snag list, as required by clause 21 of the lease agreement. It was alleged that clause 21 was vague as to what was to be maintained and the extent of such maintenance. The respondent furthermore simply stepped into the shoes of Massmart Retail and at the time it took over the store, there was no maintenance required. It disputed the correctness of the insurance assessor's snag list. There was no qualification of the expertise of the author of the report by way of a confirmatory affidavit, and it therefore constituted hearsay. It was contended that this was a further dispute of fact. The respondent did not dispute the authenticity of the photos attached to the report.

[43] The respondent also made submissions regarding its employees. It stated that 105 employees stand to lose their jobs due to 'a simple miscommunication' between the parties. The court was asked to consider the number of people who would be affected by the proceedings. The respondent assumed responsibility for the employees who were transferred from Massmart Retail into the respondent's employment. It was also contended that the respondent pays close to R1 million in rental a month and cannot be accused of being a 'squatter'.

[44] The respondent concluded by stating that the applicant was aware of the disputes of fact or ought reasonably to have been aware of the disputes of fact. The matter should therefore be referred for trial. It was submitted that, notwithstanding the disputes of fact, and should the court be inclined to order an eviction, the order be suspended for 90 days to allow its employees to regularise their circumstances and to allow the respondent to remove frozen and other perishables.

[45] The applicant likewise filed a supplementary replying affidavit. It pointed out that all the evidence had to be considered in totality and that the respondent's supplementary affidavit could not take precedence over its answering affidavit. The applicant pointed out that Mr Rogers attended at the municipal offices during May to July 2025, whilst the respondent had already assumed the rights and obligations of Massmart Retail in June 2024, some ten months earlier. The respondent never contacted the applicant to keep it abreast of the difficulties or to seek assistance.

The applicant attached a municipal account in the name of Ingonyama Jwayelani BVI, referred to above, dated 31 March 2025, from which it appears that an account was opened, just not by the respondent. The applicant added that the obligation on the respondent did not stop at the opening of an account in its name. It also had to make payment to the municipality. The account in the name of Massmart Retail, whose obligations the respondent acquired and took over, remains in arrears with R663 940.37. This was the position when the lease was cancelled on 5 June 2025. It was also pointed out that, in terms of the Local Government: Municipal Systems Act 32 of 2000, an owner of an immovable property can be held liable for the obligations of the tenant towards the municipality. The applicant was therefore at risk in this regard. The applicant confirmed that the respondent was up to date with its rental and its electricity consumption but that it remained in default in respect of the other municipal charges.

[46] When dealing with the respondent's denials regarding the sub-lease to any third party, the applicant referred to its dealings with Mr Naicker, who suggested to the applicant that it should conclude an assignment agreement with Jwayelani in such a way as to bypass the respondent. Mr Yoosuf Gathoo, who attested to the answering affidavits, and who owns 100% of the shares in Kind Investments, which is the shareholder in Jwayelani, made no mention of this issue. The respondent's attorneys also forwarded the memorandum to the applicant's attorney on 5 May 2025. As mentioned above, it was signed by both the respondent and Jwayelani (described as the 'Lessee'). The applicant contended that there could be no doubt that the respondent had given up possession of the property.

[47] The applicant also contended that the respondent stepped into the shoes of Massmart Retail as far as its maintenance obligations were concerned. It pointed out that clause 21, mentioned by the respondent, did not deal with the maintenance obligations. It was, in fact, clause 25, which can under no circumstances be described as vague. I do not intend quoting the clause in full but it refers in no uncertain terms to very specific items, such as sewerage pipes, water taps, water pipes, interior ceilings and walls, to name but a few, and what is expected in respect of the particular items.

[48] As far as the contentions regarding the respondent's employees were concerned, the applicant submitted that they were irrelevant to the proceedings but it did consider that it was not easy 'to simply move a business'. It would accordingly allow the respondent grace until 31 December 2025 within which to vacate the property.

[49] This concludes the background facts and circumstances set out in the application that came before me.

Requirements for a commercial eviction

[50] In respect of a commercial eviction, the applicant is required to prove:

(a) Its *locus standi*, in the sense that it is either the owner of the property or an entity which is otherwise in law entitled to possession and occupation thereof.

(b) That the respondent is in occupation of the property.

(c) That the respondent does not have any right in law to be in possession and occupation.

[51] There can be no doubt that the applicant has *locus standi* and that the respondent, or whoever is occupying the property through it, is in occupation of the property. It is clearly only the third requirement that requires discussion and consideration.

Submissions by the parties

[52] Mr *Pretorius* submitted that the respondent, and any other entity occupying under or through it, had no right to occupation. The respondent was clearly in breach of its obligations in terms of the lease and other agreements and has failed to raise any defence valid in law. It was also submitted that the respondent had breached its contractual obligations in that it unilaterally abandoned or gave occupation of the property in favour of foreign and unknown third parties, with disregard for the applicant as landlord and, in particular, since it has failed to open, manage and pay the municipal services due to the municipality, in breach of its contractual obligations. It further failed to maintain and keep the property as it was contractually obliged to do. I was also referred to the various clauses of the lease agreement relevant to the matter and the cancellation letter, which set out clearly the grounds of

cancellation. I was reminded that in the month before the cancellation of the lease, the municipal account was in arrears in the amount of R666 000.

[53] Mr *Potgieter* submitted that the matter had to be dealt with on the respondent's version of the events. He, however, accepted that what was set out in the respondent's affidavits was not necessarily sufficient to address the relevant issues. It was submitted that it was the applicant's case that there were breaches of the lease agreement and that the respondent has failed to raise any defences. Although the respondent's affidavits were not very thorough, there were clear disputes of fact, which had to be referred to oral evidence. It was also submitted that it was a strange situation where the payments of rentals and municipal charges were up to date, but the applicant nonetheless wanted to evict the respondent. It was further submitted that there was a dispute of fact in respect of the sublease issue, which, once again, had to be referred for oral evidence. The issues regarding maintenance, the changing of the municipal account and the respondent's difficulties in respect thereof, and the outstanding municipal account are all disputes requiring oral evidence. It was again emphasised that the matter had to be decided on the respondent's version, as is customary when an applicant approaches a court by way of an application.[1]

[54] Mr *Potgieter* also submitted that a court has a discretion when it comes to the eviction of tenants, even though there may have been breaches. The court must consider whether it is proper to order an eviction and must consider factors such as the position of the respondent's employees. I was urged to consider granting the respondent a grace period of 90 days, should I decide to grant the order, as I had a discretion in this regard.

[55] Mr *Pretorius* submitted in reply that the respondent did not at any stage deny that the municipal account was in arrears in the amount mentioned above. It only

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[1] It was held in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623(A) at 634E- 635C that if disputes of fact became apparent on the affidavits, a final order may only be granted if the allegations in the applicant's affidavit, which have been admitted by the respondent, considered together with the allegations made by the respondent in its answering affidavit, justifies such an order.

paid the rentals and the electricity charges as invoiced by the applicant but not the municipal account. The respondent did not deny that the amount had accrued to it.

A court's discretion in commercial evictions

[56] In *AJP Properties CC v Sello,*[2] it was held that a court does not have the power to refuse a commercial eviction, but has the discretion to suspend the execution of the order:

'Although the court has no equitable jurisdiction to decline the grant of an eviction order it has nevertheless given the erstwhile tenant time within which to vacate.' (Footnote omitted.)

And further:[3]

'There is accordingly a history of case law spanning close on a century which has, irrespective of its pedigree, become solidified and which has accepted that courts can exercise a discretion which, it appears, is not derived from its inherent jurisdiction but from a common-law power to stay or suspend the execution of an ejectment order.' (Footnotes omitted.)

[57] In *AJP Properties,* the court referred to *Potgieter and Another v Van der Merwe*,[4] where the Appellate Division referred to, but did not decide, the issue of whether a court has the discretion, when granting an ejectment order, to give the party time to vacate. The following was held by the Appellate Division:[5]

'The question arises whether we should accede to the request made by the defendants' counsel**.** *I shall assume that the Court has a discretion, in granting an ejectment order, to give the defendants time within which to vacate the premises.* No authorities were cited to the Court on this point, but there are many cases where a Court has granted an ejectment order *simpliciter cf. Frank v Ohlsson's Breweries* (1924 AD 289) and *Herison v SA Mutual Life Assurance Society* (1942 AD 259) … It is, however, unnecessary for me to decide whether a Court of law has the discretion referred to, but *I may add that in my view, if it has that discretion, it must exercise it judicially*.' (My emphasis.)

[58] In *MV Andre Builder Joiner CC v Nordien*,[6] the following was held:

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[2] *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) (*AJP Properties*) para 17.
[3] Ibid para 21.
[4] *Potgieter and Another v Van der Merwe* 1949 (1) SA 361 (A).
[5] Ibid 373-374.
[6] *MV Andre Builder Joiner CC v Nordien* [2021] ZAWCHC 255.

'[39] The legal position is that our Courts has no equitable discretion to refuse the granting of an ejectment order if the applicant has established all the grounds. See *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) *("AJP v Sello").*

[40] What remain is to determine an equitable date on which the respondent should be ordered to vacate the premises. During argument the applicant contended for between 3-14 days.

[41] According to *AJP v Sello supra* although a Court's discretion is limited if all the grounds for an ejectment order has been established, our law does recognise that courts can exercise a discretion, derived from a common law power to stay or suspend the execution of an ejectment order. This discretion is in line with the discretion afforded to a Court in terms of Uniform Rule 45A to suspend execution of its orders. Eviction or Ejectment is a species of execution.' (Footnote omitted.)

[59] In *Parkhurst Investments CC v Pauls Homemade (Pty) Ltd*,[7] no reference is made to the discretion of the court to grant an equitable date for eviction. The court merely stated that having regard to the fact that the business employs various staff and is trading, it would not be appropriate to grant the immediate eviction of the respondent:[8]

'The respondent operates a business at the premises at which it employs various members of staff. Accordingly, an order for the immediate eviction of the respondent is not appropriate.'

Disputes of fact and referral to oral evidence

[60] In light of the respondent raising various alleged disputes of fact and its bare denials in respect of other issues, it is perhaps appropriate to consider what was held in *Soffiantini v Mould* [9]:

'If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue on affidavit merely because it may be difficult to

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[7] *Parkhurst Investments CC v Pauls Homemade (Pty) Ltd* [2023] ZAGPJHC 767.

[8] Ibid para 71.

[9] *Soffiantini v Mould* 1956(4) SA 150 (E) at 154.

do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits'.

[61] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [10] held that:

' A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will, of course, be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances, all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all the relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be and will only in exceptional circumstances be permitted to disavow them'.

The court also held that:

' …an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far far-fetched or clearly untenable that the court is justified and rejecting them merely on the papers'.[11]

[62] In deciding to refer disputes of fact to oral evidence, a court has a wide discretion. 'In every case the court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence. If this is not done the respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant. The taste is a stringent one that is not easily satisfied.

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[10] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008(3) SA 371 (SCA) at para 12.

[11] Ibid para 12.

Vague and insubstantial allegations are insufficient to raise the kind of dispute of fact that should be referred for oral evidence.'[12] (footnotes omitted.)

Analysis

[63] The respondent's initial answering affidavit raised very little in defence to the relief being sought. It engaged with a few aspects raised by the applicant and accordingly the majority of the applicant's allegations were met with a bare or general denial. The respondent claimed that it was in possession of the property and that it had merely entered into a management agreement with Kind Investments, which turned out to be deregistered. The respondent also denied that it was in breach of the lease agreement as all the rental payments were up to date.

[64] The respondent further claimed that there was a valid cession and management agreement in place but later denies that it had ceded the lease agreement. Just a cursory glance at the detailed facts and circumstances set out above will demonstrate that the respondent has not adhered to a number of the terms of the lease agreement. The respondent has failed to seriously address the facts surrounding the occupation of the property by Jwayelani, who in my view, clearly occupied the property. This much is clear from the photo and till slip obtained by Mr Murhpy and the municipal account in its name.The respondent had an opportunity to address these specific allegations and failed to do so.

[65] The supplementary answering affidavit only made things worse for the respondent. It attempted to disavow the original answering affidavit but failed to show any exceptional circumstances which would permit the respondent to do so. What immediately comes to mind is the so-called dispute regarding the respondent's denial that it sub-let the property. This was in direct contrast to the memorandum, put up by the respondent, signed by it and by Jwayelani, wherein it is clearly stated that it had placed Jwayelani in occupation of the store and acknowledged that it had failed to nominate a nominee. It also indicated that it wanted to remedy and ratify its breaches. This is in my view a clear acknowledgement that what the respondent had

[12] See: The commentary on uniform rule 6(5)(g) in Van Loggerenberg *Erasmus Superior Court Practice* (RS 24, 2024) at D1 Rule 6-37 to 6-38 and the authorities referred to.

done, amounted to a breach of the lease agreement. The dispute created in this regard is in my view clearly far-fetched and untenable.

[66] The respondent also referred to the payment of the municipal charges as being in dispute. As mentioned above, on its own version, the respondent was in breach of the lease agreement as its employee, Mr Rogers, only attempted to from May to July 2025 (around the time the breach and cancellation letters were sent) to change the municipal account into the respondent's name. The respondent failed to comprehensively deal with the issue of the account being in the name of Jwayelani, simply denying that it requested Jwayelani to change the name of the account. There could only be one explanation for the account being in Jwayelani's name. It was because it was in occupation of the property and trading from it, having been placed there by the respondent as is borne out by the terms of the memorandum, in clear breach of the lease agreement. The respondent failed to engage at all with the applicant's allegations regarding its dealings with Mr Naicker, Jwayelani's financial manager.

[67] The respondent failed to address the fact that there was a substantial amount due to the municipality in respect of Massmart Retail's municipal account, for which the respondent was responsible, having stepped into the shoes of Massmart Retail. This was another undisputed breach of the lease agreement.

[68] The respondent's response to the allegations that it failed to properly repair and maintain the property, was to dispute the report's correctness, to state that the author was not an expert and to claim that it constituted hearsay. The respondent could have addressed the contents of the report, and particularly the attached photos. Its contents would have been within the respondent's knowledge as it claimed to be in possession of the property and it should have been able to provide a comprehensive answer in this regard. This is in my view not a *bona fide* dispute of fact and amounts to another bare denial. The respondent's contention that the maintenance clause was vague, holds no water.

[69] I was satisfied that the applicant had established that the respondent was in breach of the lease agreement and that the so-called disputes of fact could safely be

rejected on the papers alone. In my view the applicant had succeeded in proving that the respondent does not have any right in law to be in possession and occupation of the property.

[70] As far as the eviction was concerned, I align myself with the views referred to above, namely that once the grounds for the granting of a commercial eviction have been established, a court has no discretion to refuse the granting of the order. I do however belief that I have a discretion to determine an equitable date on which the respondent and those occupying the property under or through it is to be evicted from the property. I took into consideration that the respondent had arrangements to make in respect of all its employees, for whom I had some sympathy and that a large amount of stock would have to be moved. I was also aware that we were about to enter the festive season, and that to order the eviction by 31 December 2025 would in my view lead to an unfair situation. In my view an equitable date for the respondent to vacate the property would be 31 January 2026.

Conclusion

[71] It is for the aforementioned reasons that I granted the order mentioned above.

E BEZUIDENHOUT J

Date of hearing: 20 November 2025

Date of order: 5 December 2025

Date of reasons: 9 March 2026

The reasons were handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date and time for hand down is deemed to be 12h00 on 9 March 2026.

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