REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: 2025-077523

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

15 June 2026

DATE SIGNATURE

In the matter between:

K2012150042 (SOUTH AFRICA) (PTY) LTD Applicant

(Registration no: 2012/150042/07)

and

CASUAL DINING CONCEPTS (PTY) LTD First Respondent

Trading as Chicking
Registration no: 2019/504570/07)

NATHANAEL PERSEFONI Second Respondent

This Judgment is handed down electronically by circulation to the Applicant's Legal Representatives and the Respondents by email, publication on CaseLines as well as Saflii. The date for the handing down is deemed to be 15 June 2026.

Summary- Contract law – whether an eviction order can be properly granted – whether the applicant has a right to cancel the lease agreement without a proper notice as agreed

JUDGMENT

MUDAU, J:

Introduction

[1] The Applicant ("the Landlord") seeks final relief against the First Respondent ("the Tenant") and the Second Respondent ("the Surety") arising from a commercial lease agreement in respect of retail premises situated at T[…] Z[…] […] R[…] Johannesburg. The relief comprises (i) the eviction of the Tenant; (ii) payment of R323 081.68 for arrear rental and charges as at July 2024; (iii) payment of R689 834.49 for holding-over damages from August 2024 to May 2025; and (iv) ancillary relief, including costs on an attorney-and-client scale and interest at 2% per month.

[2] The matter was set down as an opposed motion. Both parties filed extensive affidavits and heads of argument. Having carefully considered the papers and the submissions, I have concluded that the application cannot succeed. The Landlord has failed to prove a valid cancellation of the lease; there are material, bona fide disputes of fact that cannot be resolved on the papers; and the monetary claims are not properly before the court. Each of these grounds is independently fatal to the application.

[3] Below I set out the factual background, the legal framework, and a detailed analysis of the determinative issues.

Factual background

<u>The lease agreement</u>

[4] The parties concluded a written commercial lease agreement during July 2022. The material terms, which are common cause, include:

a. Lease period: 5 years, commencing 1 March 2022 and terminating 28 February 2027.
b. Beneficial occupation date (for shopfitting): 1 February 2022.

c. Monthly rental: escalating annually by 7% compounded, with the initial amount of R51 203.75 (VAT inclusive).
d. Additional charges: municipal charges, marketing fund contribution, utilities, and turnover rental.
e. Deposit: R145 700.00.
f. Suretyship: The Second Respondent bound herself as surety and co-principal debtor.

[5] The Tenant took occupation and commenced trading as a “Chicking” fried chicken franchise. It is not disputed that the Tenant fell into arrears in the course of 2023 and 2024.

The termination correspondence

[6] On 9 May 2024, the Landlord’s managing agent sent letters of demand to the Respondents claiming R217 617.71. The Tenant did not remedy the breach.

[7] On 1 July 2024, the Landlord’s agent sent a notice of cancellation (Annexure “FA8”). The notice demanded payment of R323 081.68 within seven days and required the Tenant to vacate the premises by 31 July 2024. The Tenant did not vacate and remains in occupation.

The answering and supplementary affidavits

[8] The Tenant and Surety oppose the application. Their answering affidavit (deposed to by Stylianos Costa Nathanael) raises three principal defences:

a. Delayed occupation: The Landlord failed to give the Tenant beneficial occupation by the agreed date of 1 March 2022. Keys were only handed over in mid-September 2022, and trading only commenced on 22 October 2022. Nevertheless, the Landlord levied rental and operating charges for the period March to October 2022, which the Tenant paid under protest (R409 630.00).
b. Removal of communal seating: More than 12 months ago, the Landlord removed all granite tables and chairs from the food court area outside the Tenant’s premises. This has severely reduced the ability of customers to eat immediately after purchasing food, which is critical for a

fast-casual restaurant. The Tenant's turnover has dropped by approximately R200 000 per month, and profits have declined by at least R60 000 per month, equating to a loss of R720 000 over the past year. The Tenant invested over R2 million in specialised equipment, and the viability of the business is now in peril.

c. Invalid cancellation: The notice of cancellation was not delivered in accordance with clause 18 of the lease, which requires hand delivery or prepaid registered post to the parties' chosen *domicilia citandi et executandi*. The Landlord did not prove compliance. There is no proof of service to the domicilium address or hand delivery of the notice. It is trite that strict compliance with the prescribed requirements is necessary concerning notice of breach.[1] I expand on this aspect below.

[9] In a supplementary answering affidavit (filed with condonation), the deponent amplified the defence regarding the removal of seating, attached photographs of the food court before and after, and provided a company resolution and power of attorney to cure any earlier authority defects.

The replying affidavit

[10] The Landlord's replying affidavit attacks the Respondents' defences as bald, unsubstantiated, and opportunistic. It points to the offer to lease (December 2021) which states that rental is payable from 1 March 2022 "notwithstanding the completion status of the premises, unless delays have been caused by the Landlord or its agents". It also relies on an Acknowledgement of Debt signed by the Second Respondent on 17 June 2022, acknowledging arrears of R395 228.20 for the period March to June 2022 and undertaking a repayment plan. The Landlord argues that this AOD estops the Respondents from now disputing the rental for that period.

[11] Regarding the removal of seating, the Landlord contends that the lease contains no clause obligating it to maintain communal seating and that the "whole agreement" clause (clause 19) precludes reliance on any alleged representations or expectations.

[1] See *Datacentrix (Pty) Ltd v O-Line (Pty) Ltd* [2022] ZASCA 162 at para 11

Legal framework for motions proceedings

[12] It is trite that in motion proceedings, a final order can only be granted if the facts averred in the applicant's founding affidavit, together with the facts admitted by the respondent, justify such an order. Where the respondent raises a *bona fide* dispute of fact, the court must accept the respondent's version unless it is so far-fetched or untenable that it can be rejected on the papers. This is the well-established *Plascon-Evans* rule: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C.

[13] A court will not be drawn into resolving complex factual disputes on affidavit alone, particularly where credibility findings are required and where oral evidence would be necessary to determine the facts. As was stated in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) at para [5], motion proceedings are unsuitable for the resolution of real, genuine, and material disputes of fact. The applicant bears the onus of establishing its case on the papers. If the respondent's version raises a plausible defence, the application must be dismissed or referred for oral evidence.

[14] I apply these principles throughout this judgment.

Validity of the Cancellation: Non-compliance with clause 18

[15] The lease agreement, at clause 18, provides:

> "All notices shall be delivered by hand or posted by prepaid registered mail and shall be deemed to have been received by the addressee on the fifth business day after posting thereof, or forthwith upon hand delivery. The parties may change their domicilia to another address in the Republic of South Africa of which they may advise each other in writing on not less than seven (7) days' notice." (Emphasis)

[16] The *domicilium citandi et executandi* of the Tenant and the Surety is stated in the Schedule as: "Unit […], 3[…] R[…] Crescent C[…] Park, Randjiespark, Gauteng, 1685"

[17] The notice of cancellation (Annexure “FA8”) is addressed, on its face, to three different destinations: The leased premises (Shop F[…], T[…] Z[…] […] R[…]); Two email addresses (p[…] and s[…]); and the domicilium address (Unit […], 3[…] R[…] Crescent…).

[18] The deponent to the founding affidavit, Ms Chetty, states only that “the Applicant’s agent caused a notice of cancellation of lease to be delivered to the Respondents” (paragraph 21). She does not state: who delivered the notice; whether it was delivered by hand or by prepaid registered post (as required); to which address it was delivered; and the exact date of delivery.

[19] In her replying affidavit, she does not cure this deficiency. There is no confirmation from the agent who allegedly effected delivery, no registered post receipt, and no affidavit from the process server. The Landlord simply assumes that delivery to multiple addresses, including email, is sufficient because the notice was “sent”. This is not compliance with the peremptory terms of clause 18.

[20] The law is clear: where a contract prescribes a specific mode of giving notice, that mode must be strictly followed, failing which the notice is invalid.[2]

[21] It is not enough for the Landlord to assert that the Respondents “received” the notice or that they were aware of it. The right to cancel flows from proper compliance with the contractual machinery. Without proof of hand delivery or registered post to the correct *domicilium*, the cancellation is legally ineffective.

[22] Consequently, the lease agreement remains in force. The Landlord’s claim for eviction, which is predicated on a lawful cancellation, must fail. Likewise, the claim for holding-over damages (Claim C) – which assumes that the lease has been terminated and that the Tenant is in unlawful occupation – falls away because there has been no valid termination.

Material dispute of fact regarding delayed occupation and the acknowledgement of debt

[2] See *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) at para 46 (concerning the Rental Housing Act, but the principle of strict construction of notice provisions is general).

[23] Even if I were wrong on the cancellation issue, the Respondents have raised a genuine factual dispute about whether the Landlord itself breached the lease by failing to deliver beneficial occupation timeously.

[24] The lease provides for a beneficial occupation date of 1 February 2022 and a commencement date of 1 March 2022. The Respondents allege that keys were only handed over in mid-September 2022, and trading began on 22 October 2022. They claim that they paid rental for the intervening months (March to October 2022) under protest and under duress, fearing cancellation.

[25] The Landlord's answer is threefold:

a. Clause 8 of the offer to lease makes the Tenant liable for rental from 1 March 2022 "notwithstanding the completion status of the premises, unless delays have been caused by the Landlord or its agents". The Landlord argues that the Tenant has not proved that any delay was caused by the Landlord.
b. The Tenant signed an Acknowledgement of Debt (AOD) on 17 June 2022 acknowledging arrears of R395 228.20 for the period up to June 2022.
c. The Tenant's current dispute is a late-raised, opportunistic defence.

[26] The difficulty for the Landlord is that the AOD does not expressly waive the right to later dispute the cause of the delay or the quantum of the charges. The AOD was signed in the context of the Landlord's threat to cancel the lease if the Tenant did not agree to the terms set out in the email of 13 June 2022. Those terms included that "BO [beneficial occupation] will only be granted upon items 1-5 being finalised". This suggests that the Landlord itself had not yet granted beneficial occupation by 13 June 2022 – which is consistent with the Respondents' allegation that keys were only handed over in September 2022.

[27] Moreover, the AOD was a compromise to avoid cancellation and to regularise the Tenant's position. It does not constitute an admission that the Landlord was not in breach. The question whether the Landlord caused the delay is a factual issue that cannot be resolved on the papers. The Respondents' version is not so implausible as to be rejected without oral evidence. Indeed, the Landlord

has not produced any contemporaneous record (such as a handover certificate or a key register) to prove exactly when occupation was given.

[28] This dispute goes to the root of the Landlord's claim for arrear rental (Claim B). If the Landlord was in breach by failing to provide beneficial occupation, the Tenant might be entitled to a set-off or a counterclaim for damages. That is a matter for trial.

The removal of communal seating: Derogating from Grant

[29] The most substantial defence raised by the Respondents concerns the Landlord's removal of all granite tables and chairs from the food court outside the leased premises. This is amplified in the supplementary answering affidavit with photographic evidence (Annexures "SN4" and "SN6") and an article from 2015 describing the food court as having "granite tables".

[30] The Tenant's case is that: When the lease was concluded, the food court had extensive communal seating. Customers could order food from the Tenant and eat immediately at those tables and chairs. Because the leased premises themselves are relatively small (137m², whereas the Tenant had sought more space), the existence of communal seating was critical to the viability of the business. More than 12 months ago, the Landlord removed all the seating, leaving an empty open space. As a result, customers now go to other food outlets that have internal seating. The Tenant's turnover has dropped by approximately R200 000 per month, and profits have fallen by R60 000 per month.

[31] The Landlord's response in its replying affidavit is dismissive. It says: The lease contains no clause obligating the Landlord to maintain communal seating. The "whole agreement" clause (clause 19) precludes reliance on any representations about the food court. The allegations are vague and unsupported.

[32] I find the Landlord's response legally inadequate. The principle that a landlord may not derogate from its grant is an implied term of every lease. A landlord cannot, after letting premises for a particular purpose, do anything that

substantially interferes with the tenant's reasonable use and enjoyment of the premises or that destroys the essential character of the leased property.

[33] The removal of communal seating in a shopping centre food court, when the tenant's business is a fast-casual restaurant that depends on customers being able to eat on the premises, is a classic example of derogation from grant. It is not necessary that the lease expressly promise to maintain seating. The implied obligation arises from the nature of the lease and the purpose for which the premises were let. The lease itself, in clause 5, permits the Tenant to use the premises as a "halal fried chicken restaurant". That use, by its nature, involves on-site consumption. If the Landlord removes all public seating in the immediate vicinity, it effectively nullifies a fundamental aspect of the Tenant's business model.

[34] The fact that the "whole agreement" clause excludes prior representations does not assist the Landlord here. The complaint is not about a broken promise. It is about post-contractual conduct that has rendered the premises unsuitable for the purpose for which they were let. A landlord cannot, by including a standard entire agreement clause, immunise itself against subsequent acts that amount to a breach of the lease.

[35] The Respondents have provided specific, quantifiable allegations of financial loss. This is not a bald denial; it is a detailed factual defence supported by photographs and a plausible causal link. The Landlord has chosen not to rebut the factual allegations with any evidence of its own – for example, by explaining why the seating was removed, whether it was temporary, or whether alternative seating was provided. On the papers, the Tenant's version stands as the only version.

[36] This alone creates a material dispute of fact that cannot be resolved on motion. It also provides a strong basis for the Tenant's claim that the cancellation (if valid) was not justified, or that the Landlord has itself repudiated the lease.

The quantum of the monetary claims: Inadmissible and insufficient evidence

[37] Even if the Landlord had proved a valid cancellation, the monetary claims are fatally flawed.

[38] The founding affidavit was deposed to by Ms Kirsten Chetty, a legal advisor employed by the managing agent. She asserts in paragraph 5 that "[a]all documentation of the Applicant pertaining to this application is in my study and under my control, accordingly I possess personal knowledge of the content thereof." This assertion is too sweeping and does not comply with the requirement that a deponent must set out facts within their personal knowledge or the source of their information.[3]

[39] It is vital that motion court litigation should be conducted in an efficient manner. In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd*[4] the court observed:

> "The efficient conduct of litigation has as its object the judicial resolution of disputes, optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost-efficient manner is a collaborative effort. The role of witnesses is to testify to relevant facts of which they have personal knowledge."

[40] Crucially, Ms Chetty does not state that she personally calculated the arrears, prepared the reconciliation (Annexure "FA9"), or verified the accuracy of the charges. She merely attaches the reconciliation. In so doing, she has not placed the contents of that reconciliation before the court as admissible evidence. Hearsay evidence not confirmed by a person with personal knowledge is inadmissible in motion proceedings unless an exception applies. It is trite that If an affidavit sets out facts based on hearsay information, the deponent must state that the allegations of fact are true to the best of his information, knowledge and belief and state the basis of his knowledge or belief.[5] Moreover, the reconciliation contains charges that are not mentioned in the founding affidavit or the lease agreement, such as:

a. "GENERATOR USAGE RECOVERY"

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[3] See *FirstRand Bank Ltd v Kruger* 2017 (1) SA 533 (GJ)
[4] 2016 (1) SA 78 (GJ) at 85D–F
[5] See *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672B; *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at 230F–G.

b. “GENERATOR COMM AREA RECOV”
c. “OTHER RECOVERIES”
d. “PENALTIES – TURNOVER”
e. “TENANTS CONTRIBUTION”

[41] No case is made out for these charges. The Landlord cannot simply annex a spreadsheet and expect the court to sift through it to find a basis for each item. The founding affidavit must set out a clear cause of action and a calculation that can be verified. It does not.

[42] Consequently, the claim for arrear rental (Claim B) is not properly before the court and cannot be granted.

[43] As for the holding-over damages (Claim C), that claim is predicated on a valid cancellation and unlawful occupation. Since I have found the cancellation to be invalid, this claim falls away. In any event, the same evidentiary deficiencies apply to the calculation of the holding-over damages.

[44] There is an additional legal flaw: The Landlord claims “holding over rental” calculated by reference to the contractual rental and charges under the lease. However, if the lease is cancelled, the measure of damages is the market rental value of the premises, not the contractual rate. The Landlord has not tendered any evidence of market rental. This is a further reason why Claim C cannot succeed.

Authority to depose to the answering affidavit

[45] The Landlord raised a preliminary point that the answering affidavit was deposed to by Stylianos Costa Nathanael without proper authority from the First Respondent (a company) or the Second Respondent (a natural person). This point was initially well-taken, as the answering affidavit contained no resolution or power of attorney.

[46] However, the Respondents filed a supplementary answering affidavit, together with a company resolution dated 3 September 2025 authorising Stylianos to oppose the application and to depose to affidavits, and a special power of

attorney executed by Persefoni Nathanael in his favour. These documents were filed with a request for condonation, which was not opposed.

[47] In these circumstances, the authority point is no longer a viable ground to strike out the answering affidavit. The Respondents have cured the defect. The Landlord cannot claim prejudice because it had the opportunity to file a supplementary replying affidavit (which it did not).

[48] I therefore dismiss this preliminary point. The opposition is properly before the court.

Evaluation and conclusion

[49] The Landlord has failed to discharge the onus of proof on several critical elements: It has not proved valid cancellation in accordance with clause 18 of the lease. It has not adduced admissible evidence to support the quantum of its monetary claims. The papers reveal genuine, material disputes of fact regarding delayed occupation and the removal of communal seating – disputes that cannot be resolved without oral evidence.

[50] These deficiencies are independently fatal to the application. Consequently, the application must be dismissed.

[51] I have considered whether the matter should be referred for oral evidence in terms of Uniform Rule 6(5)(g). However, given the fundamental failure to prove a valid cancellation and the inadmissibility of the quantum evidence, a referral would not be appropriate. The proper forum for the Landlord's claims, if it wishes to pursue them, is action proceedings where pleadings, discovery, and oral evidence can take place.

Costs

[52] The general rule is that costs follow the result. The Respondents have been successful and are entitled to their costs. The Landlord has pursued this application despite obvious deficiencies, and there is no reason to deprive the Respondents of their costs. I see no basis for a punitive scale (attorney-and-client); costs will be on

the ordinary party-and-party scale. I also note that the Respondents employed counsel.

Order

[53] In the premises, I make the following order:

1. The application is dismissed.
2. The Applicant shall pay the costs of the First and Second Respondents, such costs to include the costs of counsel, on scale B, as between party and party.

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MUDAU J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

For the Applicants:	Adv TB Mirtle
Instructed by:	NLHS Attorneys
For the Respondents:	Adv A Du Plooy
Instructed by:	Kyprianou Attorneys
Date of Hearing:	25 May 2026
Date of Judgment:	15 June 2026