IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

CASE No: 4776/2013P

In the matter of:

THE DIOCESE OF NATAL OF THE ANGLICAN CHURCH OF SOUTH AFRICA Applicant

And

PRIMED SUB-ACUTE MEDICAL CC First Respondent

ELIZABETH CHETTY Second Respondent

NOMALARVSAGI REDDY Third Respondent

JUDGMENT

VAN ZÿL, J.:

1. In this application the applicant seeks wide ranging relief against the first respondent, as well as against the second and third respondents, insofar as the latter have bound themselves to liability as sureties of

the first respondent. The disputes concern the occupation by the first respondent of certain premises allegedly owned by the applicant and play out against the background of a long and acrimonious history of disputes between the parties.

2. The applicant alleges that it is and remains the registered owner of [e… 6…….], [1…….] and [1…… B…..]. Such ownership is common cause. The three sub-divisions are adjoining one another and have their street address at [1……] [S…… Road, B……], Durban in the Province of KwaZulu-Natal. For convenience these sub-divisions will be referred to simply as "the properties", or "the property", where appropriate.

3. The properties had historically been developed by the construction thereon of certain buildings described as the All Saints' Church, the Rectory and the Gugini Hall. It was not in dispute that the first respondent took occupation of the Rectory and the Gugini Hall, although the allegations of when this occurred and upon what terms and conditions, are not harmonious.

4. In regard to when the first respondent took occupation the applicant alleged that such occupation commenced during 2006. However, the respondents recounted negotiations during December 2006 with the then local parish priest to occupy the properties with a view to the eventual acquisition thereof. They are however unclear as to when exactly they took control of the Rectory and the Gugini Hall.

5. Also the terms upon which the first respondent assumed occupation and control of the Rectory and the Gugini Hall gave rise to dispute. This resulted in subsequent litigation between the parties whereby the applicant instituted action against the first respondent during 2011 under case number 8629/2011 claiming, *inter alia*, eviction, damages and other relief. This action was defended, but ultimately settled.

6. The settlement agreement arrived at between the parties comprised different parts, although it was agreed that the various portions would comprise one indivisible transaction. There was a written agreement of settlement concluded and signed by and on behalf of the applicant as plaintiff on 13 September 2012 and the first respondent as defendant on 30 August 2012.

7. In terms of the settlement agreement, a copy of which is annexed marked "RP.1" to the applicant's founding affidavit, the first respondent acknowledged its indebtedness to the applicant for payment of arrear rentals and water and electricity charges in the total sum of R265 112-39, which sum it undertook to repay by way of nine instalments of R28 456-39 per month. The first such instalment and despite the date of signature of the settlement agreement, became payable by 31 August 2012 and the remaining instalments monthly thereafter by the last day of each succeeding month. It is not necessary at this juncture to deal with the further terms and conditions contained in the settlement agreement.

8. The second part of the settlement comprised a formal agreement of lease relating to the Rectory and the Gugini Hall. The leased portions were identified in the agreement by virtue of a diagram marked "X" attached thereto and a copy the lease itself forms annexure "RP.2" attached to the applicant's founding affidavit. For convenience the leased potions are herein referred to as "the leased property" or "leased properties", depending upon the context. In the interests of brevity it is unnecessary to set out the relevant terms and conditions of the lease at this stage. The lease was signed on behalf of the applicant and the first respondent simultaneously with the settlement agreement on the dates already specified.

9. The rental for the leased properties agreed upon was R10 000-00 per month payable monthly in advance on or before the first day of each

succeeding month. Such rental would escalate at the rate of 10% with effect from 1 January of each succeeding year and the lease was agreed to terminate on 31 December 2016.

10. The remaining portions of the settlement reached between the parties involved each of the second and third respondents binding themselves jointly and severally with the first respondent in writing to the applicant as sureties and co-principal debtors *in solidum* for the due and punctual performance by the first respondent of all its obligations under the settlement agreement and the lease, as well as those obligations which arise in consequence of any termination of the lease.

11. Regrettably, instead of the settlement laying the foundations for an harmonious future relationship between the parties, that relationship became strained, deteriorated and ultimately gave rise to further litigation in the form of the present proceedings.

12. In its founding papers the applicant alleges that the first respondent breached its obligations both in respect of the settlement agreement, as well as the lease. It further alleges that such breach continued despite demand and that it then cancelled the lease and is entitled to the eviction of the first respondent from the leased properties, as well as to judgement for the outstanding monies due.

13. On the approach taken by the applicant it was common cause that it is the registered owner of the leased properties and that the first respondent was in occupation thereof in terms of the agreement of lease. The applicant contended that the lease was duly cancelled, as a result of which the first respondent's continued occupation of the leased properties became unlawful and accordingly that the applicant is entitled, as against the first respondent to the latter's eviction. In this regard reliance was placed upon Chetty v Naidoo 1974(3) SA 13 (AD) as

applied in Worcester Court (Pty) Ltd v Benatar 1982 (4) SA 714 (C). In Worcester Court Comrie AJ (as he then was) held at page 722 E that:-

> "*The applicant's case is that it is the owner of the premises; the respondent is in possession of them; that respondent possessed the premises by virtue of a lease; that the lease has been duly terminated; and consequently that respondent is in unlawful occupation of the premises. All these facts, save the last, are admitted or not disputed. That being so, applicant has discharged the onus of proof under consideration in Chetty v Naidoo (sura) .*"

14. In Chetty v Naidoo (supra), Jansen JA at page 20B-G held that it was inherent in the nature of ownership that possession of property vests in the owner. However, where the owner concedes that a right to hold the property as against the owner would have existed but for its termination, the owner then bears the *onus* of establishing such termination in order to complete its cause of action for eviction.

15. In the present matter the applicant concedes possession by the first respondent in terms of the settlement of which the lease formed part, but contends that the right of continued occupancy terminated by reason of the cancellation thereof due to alleged breaches of its obligations committed by the first respondent. The first respondent in turn denies that any valid cancellation occurred and claims a continued right of occupation by virtue of the aforesaid lease agreement. The *onus* thus rests upon the applicant to demonstrate grounds for and the termination of the first respondent's right to continued occupation in order to secure relief.

16. It therefore becomes necessary to examine the application papers to establish whether it is possible in this regard to make a finding on the affidavits, as contended for on behalf of the applicant or whether, as claimed in behalf of the first respondent, there exist material conflicts of fact which cannot be determined on the affidavits, so that considerations such as set out in Room Hire Co (Pty) Ltd v Jeppe Street

Mansions (Pty) Ltd 1949 (3) SA 1155 (T) by Murray, AJP at 1162 come into play. These include a referral of the matter to the hearing of oral evidence, or to trial with directions as to pleadings, or to dismiss the application particularly where the applicant should have realised at the outset that a material dispute of facts was bound to develop.

17. It is convenient at the outset to consider the facts in relation to the applicant's claim to the cessation of the first respondent's right to continued occupation of the leased properties. Following the conclusion of the agreement of settlement of which the lease formed part, the applicant alleges that the respondent failed in particular to make payments as it was obliged to do, either fully or timeously. As a result, so applicant contends, it became entitled to and did cancel the settlement agreement inclusive of the lease. In the result the first respondent no longer enjoys a continued right of occupation and applicant is entitled to its eviction.

18. With reference to the settlement agreement and the lease the applicant sought to demonstrate, particularly by way of the schedule attached to the applicant's founding affidavit marked RP.18, that the first respondent was in default of payment at all material times. The first respondent, in its answering affidavit deposed to by the deponent Sateesh Isseri, its chief executive officer, did not dispute the accuracy of the schedule, save in two respects. In the first instance it was alleged that the applicant had allocated from the payments made the sum of R31 603-00 to reconnection fees "*without in any way validating this*" and secondly that the applicant had omitted form the schedule the sum of R40 000-00 paid by the first respondent on 26 April 2013 and a further R40 000-00 paid on 30 April 2013.

19. Before considering the issues arising from the disputed reconnection fees it is convenient to deal with the two payments of R40 000-00 claimed by the first respondent. The applicant, in reply, conceded both

that these two payment had been made, but explained that they were not included in the schedule (annexure RP.18) because at the time when the founding affidavit was deposed to on 29 April 2013 these payments had not yet reflected on the bank accounts of the plaintiff's attorneys. The fact of these payments are therefore not in dispute. The influence they may have on the outcome of this matter will be considered at a later stage, if relevant.

20. The issue of the reconnection fee has its origin prior to the conclusion of the settlement agreement when the Ethekwini Municipality had disconnected the water and electricity supply to the premises due to the first respondent's failure to maintain payment of the utility charges. This much was agreed to in clause 4.1 of the settlement agreement. In terms of clause 4.2. thereof the first respondent agreed to "*..pay such amounts as are required for the reconnection of water and electricity*" within seven days of demand by the applicant.

21. The applicant in its founding affidavit alleged and the first respondent in reply admitted that on 3 September 2012 the applicant called upon the first respondent to make payment of R31 603-00 required for the reconnection of the municipal water and electricity supplies to the leased properties and that the first respondent's attorneys on 7 September 2012 requested that monies which the first respondent had by then paid to the applicant be utilised for payment of the said reconnection fees. It is evident that the reconnection payment was at that stage unconditionally agreed upon. However, it was only at a later stage and once the parties had reached a stage of dispute, that the first respondent requested an accounting by the applicant as to how the sum of R31 603-00 was disbursed. This request was in the final paragraph of its attorneys' letter dated 7 November 2012 to the applicant's attorneys.

22. In opposing the relief sought the first respondent dealt at length with the events and disputes which occurred prior to the conclusion of the settlement agreement between the parties. In relation to the prior litigation between the parties the first respondent claimed that it had expended and had a claim as against the applicant for approximately R1,8 million for alleged improvements it had made to the leased properties.

23. However, this is of little relevance because these issues were overtaken and compromised by virtue of the conclusion of the settlement agreement between the parties. In this regard it is relevant to note that it was agreed that the settlement represented the entire agreement of the parties, that neither of them would thereafter have claims against each other which arose prior to the settlement and that no variation or amendment of their agreement would be valid unless reduced to writing and signed by or on behalf of the parties.

24. The first respondent, in paragraph 60 of its answering affidavit, set out the grounds upon which it sought to rely in denying the applicant's entitlement to cancel the lease agreement relevant to the leased properties. The first ground advanced is that the applicant failed to account to it for the R31 603-00 "*that was paid to it for the purposes of reconnecting the utilities*". The failure to account cannot, however, constitute a ground for denying the applicant a right to cancel the agreement of the parties. In the first instance their agreement cast no express duty to account upon the applicant and secondly, when payment of the amount was requested such payment was unconditionally agreed to by the first respondent. It was only much later and after the applicant claims to have cancelled the agreement of the parties that the first respondent requested an accounting.

25. The second ground advanced by the first respondent as to why the applicant was not entitled to cancel the settlement agreement and

corresponding lease is that the first respondent has an improvement lien over "*the property*", being a reference to the leased properties, for

"*at the very least, the new water piping that the first respondent had laid on the property at its own expense.*"

26. According to the first respondent's answering affidavit read with a letter from its attorneys dated 16 November 2012 (annexure SI.12) it was claimed that when the water supply was originally discontinued the water meters were removed (prior to the settlement agreement). When the water supply was reinstated the municipality fitted new water meters which caused "*further complications*", in that the old galvanised piping on site was unable to accommodate the water pressure, sprung leaks and the first respondent then commissioned a plumber at its expense to replace the piping with rubber piping. The sum expended in this regard remains unstated.

27. I have some difficulties with the proposition that an improvement lien could constitute a defence as against the cancellation of a lease due to the non-performance by the lessee of its contractual obligations. Such a lien, by its very nature, does not give rise to a cause of action. It does, however, in certain circumstances provide a bar to dispossession by the owner in proceedings for a *rei vindicatio.* But a lien is no defence where the lessee has, for instance, undertaken to vacate (De Aguair v Real People Housing (Pty) Ltd 2011 (1) SA 16 (SCA), Griessel AJA at page 20 G-H).

28. In Business Aviation Corporation (Pty) Ltd and Ano v Rand Airport Holdings (Pty) Ltd 2006 (6) SA 605 (SCA) it was stated that it was generally accepted that in Roman-Dutch law lessees were in the same position as *bona fide* possessors insofar as claims for improvements to leased premises were concerned. However, Brand JA in para 6 at page 608F held that:-

> "*It follows that absent any governing provisions in the contract of lease, lessees, like bona fide possessors, had an enrichment claim for the recovery of expenses that were necessary for the protection or preservation of the property (called impensae necissariae), as well as for expenses incurred effecting useful improvements to the property (called impensae utiles). More pertinent for present purposes, lessees, like bona fide possessors, who were still in possession of the leased property, also had an enrichment lien (a ius retentionis) that allowed them to retain the property until their claims for compensation had been satisfied.* " (emphasis added and authorities omitted)

29. In the present matter there are clauses contained in the agreement of lease which impact upon the claims made by the first respondent. Clause 4 recorded that, notwithstanding the date of signature, the lease took effect from 1 January 2012. Clause 11 recorded that the first respondent had, however, been in occupation of the leased properties since 2007 and that it was obliged to keep same in good order and condition. Included in the obligations was the duty promptly to repair and make good all damage occurring, whatever the cause of such damage. If the assertions by the first respondent are correct, then the original disconnection of the water supply was due to its non-payment for services. The services were reconnected following the settlement and its request. The damage to the piping necessitating its replacement followed as a result. The first respondent was therefore obliged to make good such damage and if it failed to do so the applicant as lessor would have become entitled to attend to the repairs and to recover the costs thus incurred from the first respondent (clause 11.3 of the lease).

30. It is evident that the first respondent cannot claim as against the applicant for whatever improvements to the water piping it may have effected and, in any event, the first respondent was prohibited in terms of the provisions of clause 7.2 of the lease from withholding, deferring, or deducting monies from any payments due to the applicant.

31. In the circumstances it cannot be said that the applicant was precluded from cancelling the lease because the first respondent was entitled to an enrichment lien over the leased properties based upon its replacement of the defective water pipes.

32. In terms of clause 13 of the lease the first respondent acknowledged that it would have no claim as against the applicant for damages resulting from any breach by the applicant of its obligations, any act or omission by or on behalf of the applicant, the condition or state of the leased properties at any time, or any failure or interruption or suspension of utility services.

33. The provisions of clause 13 also affect the third defence raised by the first respondent in paragraph 60 of its answering affidavit. According to paragraph 60.3 it is alleged that the applicant was obliged to, but did not, place the leased properties in a condition where they were fit for the purpose for which they were let. In this regard and in particular reference is made to annexure RP.17 to the applicant's founding affidavit.

34. Annexure RP.17 was a letter dated 30 January 2013 and addressed by the first respondent's attorneys to the applicant's attorneys and raised two issues of interest. The first is a denial contained in paragraph 4 of the letter that the first respondent had received the "*breach letters*". It is unnecessary at this point to deal with this issue to which I will revert later in this judgment.

35. The second point raised and which apparently relates to the defence raised in paragraph 60.3 of the first respondent's answering affidavit, is contained in paragraph 6 of the letter and reads that:-

> "*Your client is well aware that the Gugini Hall was leased for purposes of conducting business as a function hire venue, but this was impossible for most of November 2012 due to the amenities not being connected.*"

36. A claim such as is postulated on behalf of the first respondent cannot, in the light of the provisions of clause 13 of the lease, found a defence to a cancellation of the lease for non-performance by the first respondent. It is however and in any event in conflict with the manuscript letter of 9 January 2013 by the first respondent's attorney to the applicant' attorneys. Therein non-payment by the first respondent is attributed to a deception by its manager that no functions had been held when apparently they had been held but the proceeds had not been accounted for. As a result, so the applicant's attorneys were informed, the first respondent suffered cash-flow problems and criminal charges were being preferred against its manager. A request was then made for the withdrawal of the notice of cancellation and the reinstatement of the lease.

37. Whilst it is so that the letter of 9 January 2013 was marked "*Without prejudice*" it cannot be said to be privileged from disclosure because it evinces no bona fide attempt at compromise. Instead it admits non-payment by the first respondent due to misconduct by its manager and requests an indulgence by way of the reinstatement of the lease. There is no magic in the phrase. In this regard Combrink J observed in Jili v SA Eagle Ins Co Ltd 1995 (3) SA 269 (N) at page 275 B-D that-

> "*The mere fact that a communication carries that phrase does not per se confer upon it the privilege against disclosure, for example where there exists no dispute between the parties or it does not form part of a genuine attempt at settlement (Merry v Machin 1926 NPD 236; Schmidt Bewysreg 2nd ed at 552-3); nor is a communication unadorned by that phrase always admissible in evidence, for it will be protected from disclosure if it forms part of settlement negotiations (Gcabashe v Nene 1975 (3) SA 912 (D) at 914E-G, and see Cross on Evidence 5th ed at 300).*"

See also: Unilever Plc v Proctor & Gamble Co [2001] 1 All ER 783.

The objection based on an alleged privileged communication has no merit.

38. In my view there was also no misconduct shown which was attributable to the applicant and upon the first respondent could rely as a ground upon which to resist any cancellation of the lease which otherwise would have been valid.

39. This conclusion, in turn, relates to the final defence apparently sought to be relied upon by the first respondent in paragraph 60.4 of the answering affidavit, namely that the applicant acted *mala fide* when it "*entered into the arrangement constituted by annexure 'RP1' and 'RP2'* ", whereas the first respondent by implication was *bona fide.* As indicated above, nothing has been shown to establish that the applicant in exercising what it claimed to be its contractual rights, acted unlawfully or with an ulterior motive.

40. What remains to consider is whether, in purporting to cancel the contractual relationship which had come into existence as between the applicant and the first respondent by virtue of the agreement of settlement as a whole, the applicant was legally entitled to do so and whether its actions had the effect of terminating, *inter alia*, the first respondent's tenancy of the leased properties so that its eviction becomes justified.

41. The applicant asserts that as early as 3 October 2012 the first respondent was already in arrears with the settlement and rental payments it was obliged to make to the applicant. Accordingly and by letter of that date the applicant claims to have made demand upon the first respondent for payment of arrears in the sum of R40 016-86. The first respondent's attorneys responded by letter dated 4 October 2016 (annexure RP5) advising *inter alia* that "*.., our client will make payment of the arrears owed. The delay has been occasioned by late payment by medical aids.*"

42. By letter dated 2 November 2012 the applicant's attorneys addressed a formal demand for payment of arrears to the first respondent. With reference to the schedule of payments (annexure RP.18) earlier referred to, it is apparent that the first respondent in consequence made payment of R70 000-00 on 7 November 2012 to the applicant's attorneys, but that a shortfall of R8 473-79 remained. The demand was addressed by pre-paid registered mail to the first respondent at its address at 2 Marbleray Drive, Newlands, Durban 4001 which corresponds with the first respondent's chosen *domicilium citandi et executandi* as per clause 20.2.2 of the lease. In terms of clause 20.3 of the lease an item thus posted shall be deemed to have been received by the addressee on the fifth day after the date of posting. Since it is common cause that the next payment made to the applicant by the first respondent was only received on 9 January 2013, it is clear that the first respondent was in default of payment after expiry of the time period specified in the demand.

43. By letter dated 4 December 2012 the applicant's attorneys wrote to the first respondent, referred to their earlier demand of 2 November 2012 and again demanded payment of the then arrears from the first respondent within seven days. This letter too was sent by prepaid registered mail to the first respondent at its chosen domicilium address and was posted on 5 December 2015. It was therefore deemed to have been delivered by no later than 10 December 2016 and the first respondent became obliged to comply within seven days thereafter, namely by 17 December 2012.

44. When no satisfactory response was forthcoming the applicant's attorneys addressed a further letter to the first respondent, addressed and posted as before. This letter was dated 20 December 2012 and was posted on 21 December 2012. In the letter the first respondent was advised that the applicant had cancelled the agreement as between the

parties and *inter alia* required the first respondent to vacate the leased properties by no later than 31 January 2013.

45. As is evident from the schedule (annexure RP.18) a number of payments then followed commencing with the R40 000-00 paid on 9 January 2013. None of these are, however, relevant if the applicant lawfully cancelled the agreement, as it claimed to have done. In any event, clause 17.3 of the lease provides that the applicant may accept payment of amounts paid by the first applicant after cancellation as damages for holding over. As is apparent from the letter by applicants attorneys dated 29 January 2013, the applicant declined requests to reinstate the lease.

46. As indicated above, in paragraph 4 of the letter from the first respondent's attorneys, a claim was made that the first respondent had not received the letters from the applicant's attorneys dated "2nd December 2012 and 4th December 2012". In context the reference must be to the formal letters of demand addressed to the first respondent, so that the reference to the letter of "2nd December" should read "2nd November 2012". Be that as it may, as is apparent from the foregoing, once the letters were duly despatched as provided for in the agreement, they were deemed to have been received. It accordingly does not avail the first respondent later to claim not to have received the letters concerned.

47. But even if I were wrong in the conclusion drawn in the preceding paragraph, then and in any event clause 3.4.2 of the settlement agreement provides that should the first respondent fail to make any payment on due date or breach any term of the settlement agreement, or the lease, then the applicant would become entitled forthwith to cancel the lease while the total amount outstanding in terms of the settlement would immediately become due and payable. It follows that formal demand was dispensed with by agreement between the parties

and insofar as the applicant did formally demand compliance, such demand was *pro non scripto* and failure to demand cannot be relied upon by the first respondent to defeat the rights of the applicant.

48. On the contrary, the fact that the applicant sought to make multiple demands upon the first respondent before resorting to cancellation is indicative of good faith on its part and destructive of the first respondent's suggestions to the contrary. Insofar as reliance was sought in argument to be placed upon the observations of Nkabinde J in Botha and Another v Rich NO and Others 2014 (4) SA 124 (CC) at paragraphs 45 and 46, I respectfully consider the analogy with the facts of the present matter misplaced. For the reasons already discussed, I am of the view that no injustice arises from the cancellation of the agreement due to the failure of the first respondent to perform, as it had undertaken to do, but did not. Certainly it has not been shown that any delay in the reconnection of municipal services, even if attributable to the applicant, was the cause of the first respondents' failures to perform, as opposed to the failure of medical aids to make payments to it, or the duplicitous behaviour of the erstwhile manager of the first respondent which caused its claimed cash-flow problems.

49. In terms of the lease the rental of the leased properties escalated by ten percent with effect from 1 January 2013 and as discussed above the cancellation became effective prior thereto. Occupational damages for holding over would nevertheless operate at R11 000-00 per month from 1 January 2013 until the next increase would have taken effect from January 1st of the following year(s), until the first respondent vacates, or the lease expires due to the effluxion of time.

50. In the circumstances I conclude that there exist no factual conflicts which are sufficiently material so as to prevent the granting of final relief to the applicant by way of these motion proceedings. The applicant has duly discharged the onus of establishing that the first

respondent is no longer entitled to remain in possession and occupation of the leased properties and the applicant, as owner, is entitled to evict the first respondent in order to recover its property.

51. The monetary claims contained in prayer 2 of the notice of motion present some difficulty. The claim for payment in prayer 2(a) for R35 215-37 corresponds with the amount claimed as outstanding as on 30 April 2013 in the schedule (annexure RP.18). However, as already indicated the first respondent claimed and the applicant conceded that two further payments of R40 000-00 each had been made, but were too late to have been included in the calculations as contained in the schedule. The schedule took account of all nine payments derived from the settlement agreement in arriving at the shortfall of R35 215-37 as claimed in the notice of motion.

52. What remains unclear is whether and if so, then to what extent, the first respondent has continued, or failed to pay damages for holding over whilst it remained in occupation of the (formerly) leased properties. All these factors affect the manner in which an order under prayer 2 of the notice of motion needs to be formulated. The applicant attached to its replying affidavit a further schedule (annexure RP.19) which was claimed to be an updated schedule of payments due and outstanding. I am reluctant to accept this further schedule because it is tendered in reply and as such the respondents have not had the opportunity of responding to its accuracy.

53. What becomes apparent, however, is that taking into account the further two payments of R40 000-00 each, the deficit of R35 215-37 as claimed in the notice of motion would have been extinguished and ignoring the accumulation of further damages for holding over, there would have remained a surplus of funds paid by the first respondent. In my view it would therefore not be justified to make any order with regard to prayer 2(a) of the notice of motion.

54. Assuming that the first respondent remained in occupation of the (formerly) leased properties, liability for damages for holding over would have continued to accumulate at the rate of R11 000-00 per month after 1 January 2013. Unless further payments have been made in this regard, any surplus remaining would in time be extinguished and a growing deficit created. The relief as claimed in paragraphs 2(b) and (c) of the notice of motion would then be appropriate and the necessary arithmetical calculations would follow in determining whether the first respondent is entitled to a refund, or remains indebted to the applicant and if so in what amount.

55. Since there was no dispute as to the joint and several liability of the second and third respondents for any indebtedness of the first respondent, a suitable order will include them as well.

56. There is also no reason why the applicant should be deprived of its costs, claimed in the notice of motion upon the scale as between attorney and client. In this regard it is to be noted that clause 3.4.3 of the settlement agreement provided that in the event of breach the applicant was entitled to claim costs, including collection commission, on the higher scale as between attorney and own client. The applicant has therefore restricted its claim for costs, which is a further indication that it has not acted unreasonably, or conducted itself in a manner giving rise to criticism.

57. In the result I make an order:-

    a. As against the first respondent in terms of prayers 1, 1(a), (b), (c) and (d) of the applicant's notice of motion; and

    b. As against the first, second and third respondents, jointly and severally, the one paying the others to be absolved, as follows:-

i. in terms of prayer 2(b);

ii. in terms of prayer 2(c), save that the words "*alternatively, in accordance with the agreement of lease and otherwise according to law*" as contained in the notice of motion will be omitted from the order; and

iii. costs in terms of 2(d);

of the applicant's notice of motion.

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VAN ZYL, J.

APPEARANCES:

For the Applicant	:	Adv M M Swain, Instructed by Tatham Wilkes Inc. 200 Hoosen Haffejee (Berg) Street Pietermaritzburg. (Ref: N R Tatham/Michele/06G0399/08) Tel: 033 3453501
For the First, Second & Third Respondents	:	Adv O A Moosa SC and Adv J P Broster Instructed by Vijay Govender & Associates Hillary (VNG/LN/P21) c/o Cajee Setsubi Chetty 195 Boshoff Street Pietermaritzburg. (Ref: Mr A Essa) Tel: 033 3456719
Date appeal argued	:	5 November 2014
Judgment delivered	:	28 April 2015