IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL DIVISION, PIETERMARITIZBURG

APPEAL CASE NO: AR 263/16

In the matter between:

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| SANJAY KASIEPRASAD PATTUNDEEN N.O. | FIRST APPELLANT |
| RAJEEN KASIEPRASAD PATTUNDEEN N.O. | SECOND APPELLANT |
| NARENDRA KASIEPRASAD PATTUNDEEN N.O. | THIRD APPELLANT |

and

| | |
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| PRIYANKA SERVICE STATION CC | RESPONDENT |

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ORDER

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1. The appeal is upheld with costs including the costs of the application to appeal.

2. The order in the court a quo is set aside and substituted by an order that

   The application is dismissed with costs.

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JUDGMENT

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**Gordon A J**

[1] The Appellants are the trustees of a trust known as The Kasieprasad Pattundeen Trust. The parties refer to the Trust as The Kasieprasad Family Trust. This error is regarded by the parties as not material and indeed the written agreement of lease described the Trust under the name The Kasieprasad Family Trust. Accordingly no point was taken in this regard by the parties.

Background

[2] On 14 June 2011 the parties entered into a written agreement of lease, which was accompanied by a Schedule and a document setting forth General Conditions of Lease.

[3] In terms of the Schedule:

[3.1] parties were identified;

[3.2] the premises were identified as […] T. Road, Jacobs;

[3.3] the period of the lease was for five years;

[3.4] the rental was agreed for the period 1 January 2011 to 31 December 2015.

[4] The respondent sought confirmation of the renewal of the lease. The matter was heard and disposed of upon affidavits.

[5] The order of the court a quo was the following:

> ‘1) That the lease agreement between the Applicant and the Respondent in respect of the premises […] T. Road, Durban has been validly renewed for a period of five years from the 1December 2015 to 31 December 2020**.**
>
> 2) The rental for the renewed period shall be:
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> i) 1 January 2016 to 31 December 2016 R46232.36.
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> ii) 1 January 2017 to 31 December 2017 R50 856.60.
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> iii) 1 January 2018 to 31 December 2018 R55941.16.
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> iv) 1 January 2019 to 31 December 2019 R61553.28
>
> v) 1 January 2020 to 31 December 2020 R67688.81
>
> (c)sic The Respondents’ to pay the costs of the application.’

[6] Leave to appeal to this Court was granted by the judge of the court a quo.

<u>The Dispute</u>

[7] The dispute between the parties is whether an option was properly exercised.

<u>Option</u>

[8] On 25 September 2014 the Respondent’s attorney wrote to the Appellants as follows:

'*Dear Sirs*

*RE: LEASED PREMISES 230 TEAKWOOD ROAD, JACOBS*
*PRIYANKA SERVICE STATION CC t/a SILVER SERVICE STATION*

1. *We act on behalf of Priyanka Service Station CC.*
2. *Kindly be advised that our client hereby gives notice of its intention to exercise its option to renew the lease agreement concluded between our client and the Kasieprasad Family Trust in respect of the aforementioned property, for a further period of five years, commencing 1 January 2016.*
3. *Kindly would you acknowledge receipt hereof and further acknowledge the exercise of this option to renew.'* (*my emphasis*)

[9] Clause 7.1 of the Schedule read as follows:

'*7.5 Option to renew: 5 YEARS*.'

[10] There can be no doubt as to the proper interpretation of those words but because there was no interpretive discussion before the court and in the affidavits, I will in favour of the Respondent regard it as an option to renew the lease for a further period of five years, if properly exercised.

[11] The date of the termination of the lease was agreed to be 31 December 2015 so I will also accept that the Respondent attempted to exercise the option on the 21 September 2014 which is approximately 15 months before the agreed termination of it.

[12] In option–cases there is often a difficulty caused by the language used to explain the execution of it.

[13] The words ‘intend’, ‘desire’, ‘want to’, ‘wish to’ or similar words are often used when a reference is made to ‘the option’.

[14] This from time to time requires judges to have to decide whether the usage is:

i) to express an intention to exercise the option; or

ii) nothing more than the expression of a future actual acceptance of the option.

[15] Initially the courts ruled that an option could fail because the acceptance of it was required to be clear and unequivocal and unless otherwise recorded in the option, unconditional.

[16] It appears to have been common practice in England for leases of land to be entered into for long terms. The written leases gave to one or other party to enjoy a right to bring the lease to an early conclusion by the service of a notice of a particular kind at a particular time and which are referred to as ‘break clauses’. The equity in such contractual action was to allow usually the tenant to determine the lease prior to the date which otherwise would be the date of termination of a long lease.

[17] The English law became haunted by, in particular two important decisions. The first by Lord Denman, C.J. in *Cadby v Martinez (*1840) 11 Ad & El 720: 113 ER 587. This case was concerned with a lease for 21 years from Michaelmas day (29 September 1823). The lease had a covenant if the tenant should desire to determine its demise at the end of the first 14 years he should give six calendar months’ notice immediately preceding the expiration of the first 14 years, the lease would then determine six months’ before the June preceding the expiration of the first 14 years.

[18] The tenant gave notice that he wanted to quit on 24 June 1837.

[19] This was three months' short of the 14 years. The landlord appreciated that the Defendant had made a mistake and testified that the notice was not a good one:

> 'I saw that the moment it was delivered to me but it was not for me to say so'.

Lord Denman held at 726:

> 'We have heard the case argued and are of opinion that the covenant to pay rent during the whole term cannot be got rid of by any notice to quit which is not in accordance with the proviso introduced into the lease for the purpose.

The Lord Justice concluded that a deed cannot be satisfied by a notice inconsistent with the terms of it: 'no authority is required for so plain a proposition.'

[20] The next case is *Hankey v Clavering* [1942] 2 ALL ER 311. Extraordinarily this case was also a 21 year lease (from 25 December 1934). Again the tenant elected to give six months' notice relying on the break clause after seven years as authorised by the terms of the lease. He gave notice of the determination of the lease through the break clause and chose the date of expiration as 21 December 1941. The tenant wrote to the landlords solicitors in March 1940 and asked them to confirm that he had terminated the lease to take effect on 21 December 1941. The solicitors acknowledged the receipt of the notice and wrote:

> 'Our instructions are such that we are able to inform you that the notice therein contained is properly served upon us.'

[21] Lord Greene, M.R held at 312-314:

> 'This appeal raises a short point in connection with a break clause in a lease. The respondent was the lessor and the appellant was the lessee. The lease was dated June 10,1935, and was for a term of 21 years from Dec.25, 1934, determinable as therein provided. The break clause was as follows, so far as relevant:
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> > "If the lessee shall desire to determine the present demise at the expiration of the first 3 years and either party at the expiration of the first 7 years or 14 of

> the said term and shall give to the other party 6 calendar months notice of such his desire… then immediately at the expiration of such 3, 7 or 14 years, as the case may be, the present demise and everything herein contained shall cease and be void."

That is all I need read. The first 7 years expired on Dec.25, 1941. On Jan.15, 1940, the respondent wrote to the solicitors for the appellant, the lessee, a letter which contained the following sentences:

> "As I may have to be away for some time in the near future. I will be obliged if you would accept the 6 months notice to terminate your client's lease which I am allowed to give on June 21, 1941 ; this would mean that he would have to give up the cottage on Dec. 21, 1941. The reason I am doing this now is that I may be away at the time the notice should be given. Perhaps you would confirm you accept this notice on his behalf.'

The respondent, when he wrote that letter, was under some curious misapprehension or made some curious slip because he seems to have thought that in order to exercise his power to determine at the end of the first 7 years he would have to give a notice on June 21, 1941. Where he got that date from nobody can explain; but he was under the impression that the seventh year of the lease would end on Dec.21, 1941, whereas in point of fact it would end on Dec.25, 1941. Nevertheless, it seems to me quite clear that what he is attempting to do on the face of this document is to determine the lease by notice on Dec.21, 1941. The whole thing is quite obviously a slip on his part and there is a natural temptation to put a strained construction upon language in aid of people who have been unfortunate enough to make slips. That is a temptation which must be resisted because documents are not to be strained and principles of construction are not to be outraged in order to do what may appear to be a particular fairness in an individual case.

…

That takes me back to the real point in the case, namely, whether or not the notice was a good notice, that is to say, whether it had the effect of terminating the lease on Dec.25, 1941. Notices of this kind, given under powers in leases of this description,

> are documents of a technical nature, technical for this reason, that if they are in proper form they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They are not consensual documents; they are documents which must do the thing which the proviso in the lease says they are to do ; they must on their face and on a fair and reasonable construction do what the lease says they are to do. It is perfectly true that in construing such a document, as in construing any other document, the court in case of ambiguity will lean in favour of reading the document in such a way as to give it validity as, a document ; but I dissent entirely from the proposition that, where a document is clear and specific on a particular matter, such as that of date, it is possible to ignore the inaccurate reference to a date and substitute a different date because it appears that the date was put in by a slip. In the present case what the respondent purported to do by the notice on its face was to bring the lease to an end on Dec.21, and if he had said: "I hereby by this notice give you 6 months' notice to determine your lease on Dec.21, 1941," he would have been attempting to do something which he had no power to do; and however much the recipient might guess, or however certain he might be, that this was a mere slip, it would not cure the defect because the document immediately it is despatched is a document which is incapable on its face of producing the necessary legal consequence.'

[22] These two cases governed the English Law for a century in one instance and for a half century in the other. During the period of their influence on the common law they imposed an enormous burden.

[23] There were of course numerous attempts by practitioners and judges to avoid the straight jacket of the law eg a mistaken date, an innocent error inaccurately determining a month, a mistaken address and in effect any slight deviation from the wording of contractual terms, in exercising an option to determine a lease or to give notice of its exercise would be necessarily struck down by invalidity.

[24] Fortunately the two cases were overridden by the majority judgment of the House of Lords in *Mannai Investment Company Limited v Eagle Star Life Assurance Company Limited* [1997] 3 All ER 352.[1]

[25] The relevant facts in that case was that the tenant Mannai Investment Company Limited concluded two leases consisting of premises on the second floor at 98 – 99 Jermyn Street, London, SW1, and the Basement Car Park of the building.[2]

[26] The head note reads:

> 'Where a tenant served a notice purporting to exercise his contractual right to determine a lease, that notice would be effective to do so notwirthstanding the fact that it contained a minor misdescription, provided that, construed against its contextual setting, it would unambiguously inform a reasonable recipient how and when it was to operate. In the instant case, having regard to the fact that the leases commenced on 13 January and were determinable on the third anniversary of the term of commencement, it would have been obvious to a reasonable recipient that the notices purporting to determine the leases on 12 January contained a minor misdescription and that the tenant sought to determine the leases on "the third anniversary of the term commencement", ie 13 January. It followed that the notices were effective to determine the leases and the tenant's appeal would accordingly be allowed.'

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[1] Lord Steyn, Lord Hoffmann, Lord Clyde with Lord Goff and Lord Jauncey in the dissenting minority in the House of Lords.

[2] Jermyn Street is among the most expensive in London which no doubt persuaded the tenants to enable a "break clause" to determine the lease on the expiry of the 3rd anniversary of the term commencement date. The effective date was 13 January 1995 but the letters however referred to 12 January 1995. At this point we are going to make a brief reference to the ingenuity of the counsel. It was argued that the last moment of time on 12 January, is the same as the first moment of time on the 13 January. The preceding judge in the Court of Appeal dismissed the argument (Nourse L J).

"As a "magical result" an immeasurable stroke of midnight can take effect on the 12th or 13th January." It is simply incorrect.

[27] Lord Steyn reduced his conclusion to numbered propositions at 368-370:

> ‘(1) This is not a case of a contractual right to determine which prescribes as an indispensable condition for its effective exercise that the notice must contain specific information. After providing for the form of the notice ("in writing"), its duration ("not less than six months") and service ("on the landlord or its solicitors"), the only words in cl 7(13) relevant to the content of the notice are the words "notice to expire on the 3rd anniversary of the term commencement date determine this Lease". Those words do not have any customary meaning in a technical sense. No terms of art are involved. And neither side has suggested that anything should be implied into the language. That is not surprising since the tests governing the implication of terms could not conceivably be satisfied. The language of cl 7(13) must be given its ordinary meaning. A notice simply expressed to determine the lease on third anniversary of the commencement date would therefore have been effective. The principle is that that is certain which the context renders certain: see *Sunrose Ltd v Gould* [1961] 3 All ER 1142, [1962] 1 WLR 20.
>
> (2) The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene. The approach in *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989*,* which deals with the construction of commercial contracts, is by analogy of assistance in respect of unilateral notices such as those under consideration in the present case. Relying on the reasoning in Lord Wilberforce's speech in the *Reardon Smith* case [1976] 3 All ER 570 at 574–575, [1976] 1 WLR 989 at 996–997, three propositions can be formulated. First, in respect of contracts and contractual notices the contextual scene is always relevant. Secondly, what is *admissible* as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the inquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind. It follows that one

cannot ignore that a reasonable recipient of the notices would have had in the forefront of his mind the terms of the leases. Given that the reasonable recipient must be credited with knowledge of the critical date and the terms of cl 7(13) the question is simply how the reasonable recipient would have understood such a notice. This proposition may in other cases require qualification. Depending on the circumstances a party may be precluded by an estoppel by convention from raising a contention contrary to a common assumption of fact or law (which could include the validity of a notice) upon which they have acted: see *Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd, The Vistafjord* [1988] 2 Lloyds Rep 343. Such an issue may involve subjective questions. That is, however, a different issue and not one relevant to this appeal. I proceed therefore to examine the matter objectively.

(3) It is important not to lose sight of the purpose of a notice under the break clause. It serves one purpose only: to inform the landlord that the tenant has decided to determine the lease in accordance with the right reserved. That purpose must be relevant to the construction and validity of the notice. Prima facie one would expect that if a notice unambiguously conveys a decision to determine a court may nowadays ignore immaterial errors which would not have misled a reasonable recipient.

(4) There is no justification for placing notices under a break clause in leases in a unique category. Making due allowance for contextual differences, such notices belong to the general class of unilateral notices served under contractual rights reserved, e.g. notices to quit, notices to determine licences and notices to complete (see *Delta Vale Properties Ltd v Mills* [1990] 2 All ER 176 at 183, [1990] 1 WLR 445 at 454). To those examples may be added notices under charter parties, contracts of affreightment, and so forth. Even if such notices under contractual rights reserved contain errors they may be valid if they are "sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate": see the *Delta* case [1990] 2 All ER 176 at 183, [1990] 1 WLR 445 at 454 per Slade LJ and adopted by Stocker and Bingham LJJ and *Carradine Properties Ltd v Aslam* [1976] 1 All ER 573 at 576, [1976] 1 WLR 442 at 444. That test postulates that the reasonable recipient is left in no doubt that the right reserved is being exercised. It acknowledges the importance of such notices. The application

of that test is principled and cannot cause any injustice to a recipient of the notice. I would gratefully adopt it.

(5) That brings me to the application of this test. The facts are simple. Crediting a reasonable recipient with knowledge of the terms of the lease and third anniversary date (13 January), I venture to suggest that it is obvious that a reasonable recipient would have appreciated that the tenant wished to determine the leases on the third anniversary date of the leases but wrongly described it as 12 January instead of 13 January. The reasonable recipient would not have been perplexed in any way by the minor error in the notices. The notices would have achieved their intended purpose.'

[28] Lord Hoffmann approached the matter in a different way at 375:

'I propose to begin by examining the way we interpret utterances in everyday life. It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words. We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their utterance: so that the different parts of the sentence fit together in a coherent way and also to enable the sentence to fit the background of facts which plays an indispensable part in the way we interpret what anyone is saying. No one, for example, has any difficulty in understanding Mrs Malaprop. When she says "She is as obstinate as an allegory on the banks of the Nile", we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute "alligator" by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like "allegory".

Mrs Malaprop's problem was an imperfect understanding of the conventional meanings of English words. But the reason for the mistake does not really matter. We use the same process of adjustment when people have made mistakes about names or descriptions or days or times because they have forgotten or become mixed up. If one meets an acquaintance and he says "And how is Mary?" it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer "Very well, thank you" without drawing

attention to his mistake. The message has been unambiguously received and understood.'

[29] Lord Hoffmann at 378 then stated:

' Let us compare this rule with ordinary common sense interpretation of what people say. If someone has gone to great pains, well in advance, to secure tickets for himself and a friend for a Beethoven concert at the Royal Festival Hall by a famous visiting orchestra on 13 January and says to the friend a week earlier "I'll see you at the Festival Hall concert on 12 January," it will be obvious that he is referring to the concert on 13 January. According to the old rules of construction, the law will agree if there is no concert at the Festival Hall on 12 January. In that case there is a latent ambiguity. But if there is a concert on that date (Stockhausen, say, played by a different orchestra) he will be taken to have referred to that concert.

This extraordinary rule of construction is, as it seems to me, the only explanation for the decisions in *Hankey v Clavering* [1942] 2 All ER 311, [1942] 2 KB 326 and *Cadby v Martinez*.'

[30] In *Boerne v Harris* 1949 (1) SA 793 (A) the Appellate Division had to interpret a letter which had been sent by a lessee with the intention of exercising a right to renew a lease. The lease in question was entered into on the 15th April, 1942, for a period of five years, terminating on the 14th April, 1947. A clause of the lease provided that 'the lessee shall have the option to renew this lease upon the same terms and conditions for a further period of five (5) years provided that he shall give to the lessor notice in writing at least six (6) months prior to the expiration of the first period of five (5) years of his intention so to renew the lease ….'

On the 5 October, 1946, the lessee's attorneys sent the lessor a registered letter in the following terms: 'We refer to the lease in respect of the Savoy Hotel, Somerset West, between our client, Mr A.L.M.Boerne, and yourself, and have to advise that our client intends to renew the lease for a further period of five (5) years from the 15th October, 1946, in terms thereof'. This letter was received by the lessor but was

not acknowledged by her. Subsequent to the 14th April, 1947, the lessor applied to the Cape Provincial Division for a declaratory order that the lease had expired by effluxion of time. This order was granted, and the decision was affirmed by the Appellate Division (Schreiner, JA, dissenting).[3]

[31] The case is certainly a hard one from the lessee's point of view, for there is little doubt that if the words 'from the 15th October, 1946' had been omitted from the letter there would have been a good exercise of the option. The dissenting judgment of Schreiner JA is more comfortable because the learned judge recognised that in the exercise of options to renew there can be words or figures which just cannot be correct. The learned judge held, in effect, that a court does have the power to correct or substitute or to ignore a patent mistake. By that process a court can avoid a manifest mistake. Schreiner JA would have allowed the appeal and declared that the Appellant lessee has sufficiently exercised his rights of renewal in terms of the lease.

[32] We should align ourselves with the majority judgment of the House of Lords. We have spent some time on setting forth the development in law of the departure from the initial exactitude that courts required for a proper exercise of an option. There is sufficient in our law[4] to establish that a statement of an intention to exercise an option embodies the exercise of an option. We accordingly find that the Respondent purported to exercise the option. But the option was fundamentally flawed because there was no provision for the calculation of rental for the extended period.

[33] In fact the letter dated 6 October 2014 from the Appellants attorney which contained the following:

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[3] *Boerne v Harris* 1949 (1) SA 793 (A).

[4] *Kahn v Raatz* 1976 (4) SA 543 (A); *Ebrahim and Others v Khan and Others* 1979 (2) SA 498 (N).

'*Dear Sir*'

*RE: LEASE PREMISES […] T. ROAD, JACOBS*
*PRIYANKA SERVICE STATION cc t/a SILVER SERVICE STATION*

*We act for the trustees of the Kasieprasad Family Trust who have handed us a copy your letter dated 25 September 2014. We have also been furnished with a copy of the agreement of lease note that although there is a reference to an option to renew in clause 7.5 of the schedule, the agreement is silent in regard to a basic monthly rental for any renewal period. In this circumstance, the parties will be required to reach agreement in regard to a basic monthly rental failing which, your client will be obliged to vacate the premises at the termination of the lease on the 31 December 2015.*
*(our emphasis)*

*We have discussed your client's request to renew the lease with the trustees who have informed us that your client should contact either Mr Naren Pattundeen or Mr Rajeen Pattundeen to schedule a meeting to explore the possibilities or reaching agreement in respect of the basic monthly rental for the period after the lease expires on the 31 December 2015. Any agreement reached in this respect will only be binding on the parties once reduced in writing and signed by both parties as required by the provisions of Clause 22.*

*Kindly acknowledge receipt*
*Yours faithfully*

*Rowland Watts'*

[34] It would seem that Mr Watts was not unhappy with the renewal per se, but was concerned about the terms of the renewal which had not been agreed. The letter concluded with an invitation to the parties to meet with a view to agree a basic monthly rental for the period after the lease expired on 31 December 2015. They did not do so. This means that the renewed lease had no provision for the payment of

rental. The Respondent's attitude was that it did not have to participate in any such discussion because it had renewed the lease.

[35] The basic rule is that rent must be agreed and must be certain in a contract of lease.[5] In the present case the renewed lease has no provision for rental and accordingly the option was invalid. The original lease sets out the rental for the original term of five years at the escalated rates set forth in the document. The escalation was 8 per cent for the first two years and 10 per cent for the remaining three years. What the Respondent did was of its own accord to determine a five year period and add a 10 per cent escalation to each year. That was a unilateral act in which both the Respondent and the acting judge of the court a quo simply wrote a new contract for the parties. It is not for a party or the Court to make any contract which was not agreed upon between the parties.

[36] It is correct that after the termination of the original lease the Respondent paid amounts increased by 10 per cent each year. These payments were accepted by the Appellants as damages by reason of unlawful holding over by the Respondent as damages.

[37] We accordingly grant an order in terms of the order set forth at the beginning of this judgment.

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[5] *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 425 (A) at 434D-E.

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Gordon AJ

_____ I agree

Mnguni J

_____ I agree.

Lopes J

APPEARANCES

| | |
|---|---|
| Date of hearing: | 10th February 2017 |
| Date of Judgment: | 19th May 2017 |
| Counsel for the Appellants: | Mr M R *Naidoo* (instructed by Kushen Sahadaw Attorneys c/o AK Essack Morgan Naidoo & Co.) |
| Counsel for the Respondent: | Mr G M *Harrison* (instructed by Zeiler Jankey Incorporated c/o Austen Smith Attorneys) |