

SOUTH AFRICA / JUDGMENT

**Zerga and Others v TT Empowerment
CC (43785 / 2011) [2012] ZAGPJHC 127;
[2012] 4 All SA 472 (GSJ) (14 June 2012)**
[2012] ZAGPJHC 127

COURT

South Gauteng High Court, Johannesburg

BEFORE

J P V McNally

CASE / FILE NUMBER

43785 / 2011

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IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO. : 43785 / 2011

DATE:14/06/2012

In the matter between:

BAHERU TERGEGA ZERGA 1st Applicant AND 20 OTHERS And T T EMPOWERMENT CC
Respondent

Summary - The applicants sought a declaratory order that an agreement between them and the respondent, which had been made an order of court, be held to be void for vagueness alternatively cancelled as a result of a breach by the respondent.

Held that the agreement, having been made an order of court, could not unilaterally be “cancelled” by one of the parties. The consent order could be set aside by a court on certain recognised grounds, including that the underlying agreement had been induced by fraud, duress, iustus error, misrepresentation or some other ground of rescission, was void for any other reason, including for vagueness, or was impossible of performance.

In casu, the underlying agreement was not void for vagueness, and the applicants’ application was dismissed with costs.

J U D G M E N T

McNALLY AJ:

The subject matter of this application is an order granted by this Court (per Campbell AJ) on 16 February 2012. The order is in the following terms:

“1. The Respondent shall by no later than 2 (two) months from the date of this order relocate themselves to alternate premises in the CBD of Johannesburg either through the procurement of a new lease with a landlord other than the applicants failing such

relocation the respondents shall be evicted.

2. The first applicant and AFHCO (Pty) Ltd shall undertake to the best of its endeavours assist the respondents in finding and locating

suitable premises as contemplated in para 1 above.

3. Upon the building being renovated and rendered compliant in law, the applicant shall afford the respondents the first option to enter into valid and binding fixed period agreements of lease on terms to be negotiated between the parties for a period of 3 (three) years with a 2 (two) year option.

4. The costs are to be paid by the respondents.”

The errors of grammar and punctuation appear in the handwritten order which was handed up to court and was made an order by Campbell AJ. The order was obviously drafted in some haste, and without particular care to detail. Indeed, at the commencement

of the hearing before me, Mr Joseph SC, who appeared for the respondent, moved for an amendment to the order, particularly to

insert into clause 1 thereof the identification of the premises from which the respondents (the applicants herein) were evicted. The other amendments served to correct as far as possible, but without changing the essence of the order, various shortcomings in the handwritten order. There was no objection to the amendment, and I granted it. It was confirmed by Mr Vermeulen SC, who appeared with Mr Pye for the applicants, that the applicants were not relying on the shortcomings in the order that had been corrected by the amendment as further grounds in support of the application.

The applicants seek an order in the following terms:

“1.

1.1 An order declaring that the agreement between the applicants and the respondent evidenced by the order of Campbell AJ dated

15 February 2012 is void for vagueness, alternatively has been validly cancelled by the applicants; alternatively

1.2 That the respondent be interdicted from evicting the applicants from the premises that they occupy –

- 1.2.1 prior to the applicants procuring a new lease with a landlord other than the respondent; or
- 1.2.2 prior to the respondent and AFHCO (Pty) Ltd undertaking their best endeavours to assist the applicants in finding and relocating to suitable premises;
2. That the respondent be directed to pay the costs of any opposition to these proceedings.”

The respondent had filed a counter-application for the eviction of the applicants, but I was advised at the commencement of the hearing that the respondent was not persisting in the counter-application.

Mr Joseph pointed out to me that the relief sought by the applicants does not include a claim for the order to be set aside. The relief sought by the applicants is a declaration that “the agreement” is void for vagueness, alternatively has been validly cancelled by the applicants. Mr Joseph contended on that basis that, even if I were to uphold the application, the order of court would remain in effect. In support of this position, he contended that an order of court stands and must be obeyed (even if it is wrong) until it is set aside by a court of competent jurisdiction. He relied in this regard on, among other cases, *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (ECD) at 229 A – D, where Froneman J stated as follows:

“An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (Culverwell v Beira 1992 (4) SA 490 (W) at 494 A – C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside ... In Kotze v Kotze 1953 (2) SA 184 (C) Herbstein J provided the rationale at 187 F:

“The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.” ”

A similar observation was made by Maya JA in *Jacobs v Baumann N.O.* 2009 (5) SA 432 (SCA) at 439 G – I.

In my view, Mr Joseph’s submission is correct in relation to the alternative prayer for an order declaring that the order of Campbell AJ “has been validly cancelled by the applicants”. For reasons that I will set out more fully below, a party affected by an order cannot unilaterally cancel it, disregard it, or treat it as non-binding, without the sanction of a court. It is simply not open to a party to “cancel” an order – that is an action of self-help, or taking the law into one’s own hands, which is impermissible.

I do not have the same difficulty with the prayer for a declaration that “the agreement ... evidenced by the order of Campbell AJ ... is void for vagueness”. In my view, the form of the order sought reflects the foundational assumption of the applicants’ argument. The argument is that the court order, being an order which embodies the terms of the settlement agreement between the parties, should not, merely because it has been incorporated in a court order, be treated in any other manner (and certainly not with any greater reverence) than if it were a “mere” agreement.

In that sense, therefore, the order sought by the applicants reflects the contention that I should determine the efficacy of the court order by reference to the efficacy of the underlying agreement. If I set aside the agreement, it would follow, on the applicants' version, that the order would simply fall away. Whether the applicants' approach is sound in law is the issue with which I shall deal in this judgment.

There is a recognised difference in substance between an order handed down by the court after hearing and deciding upon the merits

of the dispute between the parties, and an order made at the behest of the parties incorporating a compromise agreement or transactio reached between the parties, without the court making any determination on the issues. The difference appears to lie in the

circumstances under which the order may be set aside by the court.

Herbstein J, in *Rossouw v Haumann* 1949 (4) SA 796 (C) at pages 800 to 801, analyses this difference with reference to certain previous decisions with which he clearly agrees:

"In Estate Walker v Estate Petersen (1933 AD 23 at page 30), Stratford JA, inter alia, said:

"... we have in this approved minute an order of court of competent jurisdiction; that order could be set aside on appeal to a superior court, possibly also by a court of concurrent jurisdiction on some such ground as its procurement by fraud of one of the parties; but until so set aside it is as binding on the parties to it as any law of the land."

That this order of court was made by consent does not really affect the matter, for, as was stated in *Kinch v Walcott* (1929, AC at page 493):

"For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the court made otherwise than by consent and not discharged on appeal. A party bound by a consent order ... must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly instituted for the purpose. In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the court; the second stands unless and until it is discharged on appeal."

It is also clear that the court has the power to set aside a judgment made by consent. In *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* (1895, 2 Ch. 273), Lindley, LJ, delivering the judgment in the Court of Appeal, said:

"The appellants contend that there is no jurisdiction to set aside the consent order upon such materials as we have to deal with;

and they go so far as to say that a consent order can only be set aside on the ground of fraud ... and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that; nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual.”

In this regard I can also refer to the judgment of Kay, LJ, in the same case –

“Now, what is this consent order? After all, it is only the order of the court carrying out an agreement between the parties. Supposing the order out of the way and the agreement only to exist, there can be no sort of doubt that the agreement could be set aside, not merely for fraud, but in case it was based upon a mistake of material fact which was common to all the parties to it.

Then, if it could be set aside on that ground, why should the court be unable to set it aside simply because an order has been founded upon it? It seems to me that, both on principle and on authority, when once the court finds that an agreement has been come to between parties who were under a common mistake of a material fact, the court may set it aside, and the court has ample jurisdiction to set aside the order founded upon that agreement. Of course, if the order had been acted upon, and third parties’ interests had been intervened and so on, difficulties might arise; but nothing of that kind occurs here. Here we have got simply the parties to this agreement and order before us. No-one else seems to have obtained any kind of interest under it; and therefore, if it be made out that the order proceeded upon the common mistake of a material fact, there is ample jurisdiction in the court to set it aside.” ” (my emphasis)

It is clear from the Rossouw judgment that the difference between a consent judgment and a judgment on the merits does not extend so far as to permit one of the parties thereto (without the intervention of the court) simply to treat a consent judgment as *pro non scripto* on the basis that the agreement on which it is founded has come to an end for some reason. It would seem, therefore, that the applicants go too far when they contend (as they do at paragraph 10 of the heads of argument put up on their behalf):

“10. The embodiment of the agreement between the parties into a consent order (which was made an order of court) did not change the nature of the agreement. The agreement embodied in the consent order (like any agreement) is subject to be set aside or cancelled for any of the reasons recognised by our law of contract.”

To the extent that the underlined words suggest that one party may unilaterally consider an agreement (which has been embodied in a court order) as cancelled or unenforceable, the proposition is, in my view, not sustainable.

Alkema J, in the matter of Thutha v Thutha 2008 (3) SA 494 (TkH), discussed the practice of making a deed of settlement an order of court. He commented on the “inherent and potential difficulties, if not dangers, of clothing a contract, albeit a settlement agreement, in the terms of a court order” (at 499 E). In the course of his examination of other decisions which had dealt with the question, he referred to the decision of Flemming J in Johannesburg Taxi Association v Bara-

City Taxi Association & Others 1989 (4) SA 808 (W), and particularly the following dictum in that case (at 810 H):

“When the parties reached agreement, the court was informed and an order was issued in the terms as requested by the parties. I still see no component of the Court regarding its order as a matter of the Court as an instance of legal authority requiring the

respondents to desist. It merely orders a contract between the parties to have binding effect. It is no different from “an

order in terms of” a contract to pay.”

Alkema J commented on that conclusion as follows:

“25. I have some difficulty with the last two sentences quoted in the passage above. If the court orders a contract between the parties to have binding effect, it follows that its order must also have binding effect. A court order without binding effect is

incapable of enforcement or execution, and is simply not a court order: it is merely a recording of what parties agreed, reflecting

the terms of the contract between them without enforcement by execution. Similarly, “an order in terms of a contract to pay” is readily executable without recourse to litigation. If not, it is not a court order, but merely evidence of the terms of the contract. Essentially, Flemming J, as he was constrained to do for practical considerations, treated the court order which he was asked to enforce not as a court order, but simply as a recording of an agreement (understanding) between the parties.”

There can be no doubt that the court order granted by Campbell AJ is a court order as such, and cannot be treated or dealt with as a mere agreement between the parties. The hand of the court has been placed upon the agreement that was reached between the parties; it was the parties’ intention that the agreement be given the imprimatur of the court. It is accordingly not open to either of the parties to treat the order as if it were merely an agreement between them, to be complied with or ignored at their will.

It follows from this that the applicants were not entitled to cancel the agreement, or to treat it as cancelled, as a result of the alleged non-performance by the respondent of the obligations imposed on it by clause 2 of the order. It is not open for one party to escape its duty to comply with a court order on the basis of the alleged non-performance by the other party of obligations imposed on it.

There was some argument before me as to whether the applicants would have been entitled to enforce the provisions of clause 2 of the consent order against the respondent, or seek the committal of the respondent for contempt for non-compliance with the order. In my view, I need not address these arguments. I am satisfied that the applicants are not entitled to ignore the order against them on the basis of an allegation that the respondent has not performed the obligations imposed on it.

In any event, I do not believe that I would have been able to find on the papers before me that the respondent had indeed failed to perform the obligations imposed on it. Mr Zerga, the first applicant and the deponent to the founding affidavit, gave little

detail in this regard. He merely stated that:

“... the respondent and/or AFHCO (Pty) Ltd have in fact made no endeavours whatsoever to assist the applicants in “finding and relocating” suitable premises.”

Mr Teferi, for the respondent, answered that allegation at some length, indicating that though neither AFHCO nor the respondent

owned commercial property in the Johannesburg central business district, they had undertaken to assist the applicants in finding

alternative premises through contacts which the respondent and AFHCO had in the business. Mr Teferi stated that the applicants took no steps themselves to liaise with the respondents or AFHCO in pursuance of the undertaking.

Moreover, Mr Teferi filed a separate affidavit dealing with this issue. He stated:

“3. I advise this Honourable Court that consequent upon the court order which was granted on 16 February 2012 I thereafter approached each of the applicants (as well as other occupiers in the building) whose eviction the respondent intends to procure, to approach AFHCO (Pty) Ltd or more particularly its managing agent being AFHCO Property Management (Pty) Ltd to find alternative accommodation for each one of the applicants herein and the remaining occupiers. I had approached Mr Plit, the director of AFHCO (Pty) Ltd, and Ms Mandy Botha, the commercial leasing manager of AFHCO Property (Pty) Ltd, to enquire what accommodation was available in the central business district of Johannesburg which would be suitable to the needs to the applicants and the remaining occupiers for business purposes. I also gave details of the number of Ms Botha to them and also gave them details of the contact numbers of AFHCO Property Management (Pty) Ltd. I was informed by the applicant that they had no intention of leaving the building and that they sought a mediation with me to secure rights of tenure, once the building in issue had been refurbished and rendered compliant. I thereafter, on at least three other occasions, met with the applicants and encouraged them to contact AFHCO (Pty) Ltd or its managing agents to find suitable and alternative accommodation for them. I repeated the tender in the court order and encouraged that they entered into agreements of lease for other premises. My requests to the applicants was (sic) ignored.”

Mr Teferi's second affidavit was confirmed by Ms Botha, who said that none of the applicants, except the eleventh applicant, had made any attempt to approach AFHCO (Pty) Ltd or its managing agent, being AFHCO Property Management (Pty) Ltd, to find alternative

and/or suitable business and/or commercial premises for occupation by them, consequent upon the order being granted. She said that she was approached by the eleventh applicant to find him alternative premises for commercial occupation, and that she was able to find alternative suitable premises for him. He ultimately entered into a valid and binding agreement of lease for those premises. She further approached two of the applicants herself. One told her that he had found alternative premises. The other turned down the offer, stating that he had no intention of leaving Delvers Square. Ms Botha went on to say that on or about 18 April 2012, she had spoken to the eleventh applicant who told her that he still had premises in Delvers Square and that his attorney had advised the applicants not to move out of the Delvers Square premises.

In reply to these allegations, Mr Zerga stated, inter alia, the following:

"The respondent misconstrues its obligations under prayer 2 of the order of Campbell AJ. ...

The applicants found comfort in the fact that they could not be evicted before we had concluded a written agreement in respect of

alternative premises and before the respondent (and AFHCO (Pty) Ltd) had used its best endeavours to find us alternative accommodation."

"The applicants believed that the order of Campbell AJ secured their occupation of the business premises until the respondent had bona fide embarked on endeavours to find us alternative business premises."

"The terms of prayer 2 were premised on the ability of the respondent (and AFHCO (Pty) Ltd) as prominent landlords in the CBD to identify and acquire alternative premises for the applicants. It does not behove the respondent to lay blame with the applicants in respect of an obligation which it undertook and in respect of which the respondent has made no meaningful attempt to comply with."

Incidentally, in my view, Mr Zerga's allegations betray an attitude to the order of Campbell AJ which cannot be countenanced.

As I have already indicated, it was not open to the applicants simply to disregard the order against them because, in their view, the respondent was not complying with its obligations. In any event, I do not regard the denials by the applicants of the respondent's allegations in this regard as being sufficient to raise a bona fide dispute of fact, and they are certainly insufficient, when read with the respondent's allegations, to justify a conclusion that the respondent should be held to be in breach of its obligations under clause 2 of the consent order.

Mr Vermeulen asked for an order that the issue of whether the respondent had complied with its obligations under clause 2 be

referred to the hearing of oral evidence. Given my view that the applicants would not be entitled to the order sought by them even if the respondent were found to be in breach of clause 2 of the order, I shall not accede to that request.

It is accordingly my view that the only relief potentially open to the applicants is to have the order set aside upon a ground or grounds recognised as justifying the setting aside of a consent order. The starting point is to identify the bases upon which a consent order might be set aside (other than on appeal). In this regard, I refer to the following decisions:

In *Rossouw v Haumann* (supra), Herbststein J held (at page 802) that a party would be entitled to have a consent order set aside on the grounds that the agreement upon which the consent order was based had become impossible of performance.

In *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd & Others* 1978 (1) SA 914 (A), the court dealt not with a consent order, but with a *transactio* (an agreement between two or more persons either to end litigation or to prevent litigation resulting from the differences between them). However, the court found a *transactio* to be most closely equivalent to a consent judgment (see page 922 B – H). The court (per Miller JA) held *inter alia*:

“It is obvious that, like any other contract (and like any order of court), a transactio may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is justus.” (At page 922 C – D)

This finding was qualified as follows:

“I am not aware of any reason why justus error should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.” (my emphasis) (See page 922 H – 923 A)

Miller JA went on to explain this proviso further (at page 923 D – E):

“Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the court must bear in mind

when it considers a complaint by a dissatisfied party that, had he not laboured under an erroneous belief or been ignorant of certain

facts, he would not have entered into the settlement agreement.”

In *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000

(1) SA 126, Gubbay CJ held as follows:

“The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as res judicata on a judgment given by consent. It extinguishes ipso jure any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. ... As it brings legal proceedings already instituted

to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action. ... but a compromise induced by fraud, duress, justus error, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court.” (At page 139 A – D)

Finally, in the matter of MEC for Economic Affairs, Environment and Tourism v Kruisenga & Another 2008 (6) SA 264 (Ck), the applicant sought relief affording it the opportunity to reopen its case on the issue of liability in circumstances where the applicant had previously agreed to concede the “merits of the plaintiff’s case”. In the course of his judgment, van Zyl J stated the following:

“27. ... The general rule is therefore that a final judgment must be given effect to even if it is erroneous. Subject to exception, a judgment which is null and void can similarly not be ignored and remains in force until it is formally set aside.

28. A judgment therefore ordinarily remains in force until such time as it is set aside by an order of court. The question that

arises in the context of the present matter is, namely: in what circumstances may a court rescind or possibly disregard its own

judgment? The powers of a court to set aside, in subsequent proceedings, a judgment of its own, are circumscribed. This may in

appropriate cases be achieved by invoking the rules of court or by relying on the court’s common law powers. [The court then dealt with its powers of rescission] ...

29. ... At common law, a judgment “may be set aside on any of the grounds on which a restitution in integrum would be granted by any law such as fraud or some other just cause” ...

36. More relevant for purposes of the present matter is what has for the sake of convenience been referred to as a “consent

judgment” [the learned judge then discussed Voet’s views on the subject] ...

37. ... The principle to be extracted from this, ... is two-fold: the first is that a consent judgment is founded on

contract, and like any other contract, defects such as fraud and error would entitle an innocent party to avoid the agreement because

his consensus, though real, was improperly obtained. For this reason, cases where a party to a consent judgment seeks to resile

therefrom on the ground that consensus was induced by error, must be approached along the same lines and judged according to the same principles as cases where a party may resile from an agreement on the ground of justus error. Secondly, and flowing from this, is that the absence of a valid agreement between the parties to support the judgment, is capable at law of constituting a lawful ground or reason (*iusta causa*) which justifies an order of restitution in respect of the judgment.”

On the basis of these authorities, it seems clear that, in principle, if I were to find that clause 3 was void for vagueness,

and that it was not severable from the balance of the court order, that would be a good ground for setting aside the consent order. The consent order as a whole would then be void, and its voidness on this basis would fall within the category of grounds or reasons justifying “an order of restitution in respect of the judgment”.

I deal first with the question of severability. Mr Vermeulen pressed upon me the argument that clause 3 could not be severed from the balance of the order. He submitted that it was plain that the applicants would not have consented to the order in clause 1 if they had not been satisfied that the disruption caused thereby would not be mitigated by the provisions of clauses 2 and 3 of the order. As Mr Vermeulen put it, the effect of the order read as a whole was that the applicants would not be put out onto the street (from a commercial perspective), but that they would be temporarily relocated and then given the opportunity to return once the premises which they had vacated were renovated. He accordingly contended that it would do the applicants a grave injustice if clause 3 were simply severed from the balance of the consent order.

Mr Joseph emphasised the distinction in the approach to severability between cases of illegality and cases of contracts found to be void for vagueness. He referred to the case of *Markowitz and Son Trust Co (Pty) Ltd v Bassous* 1996 (2) PH A65 (C), in which Corbett J (as he then was) considered a contract in which one clause thereof was void for vagueness, and said:

“The doctrine that a contract which contains an illegal term is rendered illegal in its entirety unless that term is severable from the rest of the contract is a well-recognised one. I know of no authority, however, which extends this doctrine to contractual terms which are not illegal but merely void for uncertainty.”

On this basis, Mr Joseph submitted that, if I were to find clause 3 to be void for vagueness, there was no reason why that should not leave the balance of the order standing.

I accept that clauses that are illegal and those that are void for vagueness may have to be distinguished from each other in

considering their effect on the balance of the contract. However, I am of the view that, considering the substance of the order as a whole, the removal of clause 3 would make it impossible to achieve the real object which the agreement underlying the order sought to achieve. If clause 3 is void for vagueness, it would, in my view, render the whole order void.

In determining whether clause 3 is void for vagueness, it is necessary properly to classify the nature and effect of the clause.

Mr Vermeulen argued that it was, in its terms, an option. As such, he said, it could not stand without a reference, at least, to the applicable rental. The question is whether the clause should indeed be construed to create an option, or whether it creates rather a right of first refusal.

The differences between an option and a right of first refusal are well recognised but, as Christie comments in the Sixth Edition of “The Law of Contract in South Africa” at page 58:

“The cases do not always distinguish between an option and a first refusal, which in the context of sale is usually called a right

of pre-emption, and the distinction is not always apparent to those who make contracts, but the two concepts are not the same.”

If clause 3 is to be construed as an option, it would indeed be invalid for want of agreement as to the applicable rental. If, on the other hand, it is a right of first refusal, it may not suffer that fate. In this regard, I am mindful that:

“The Courts are “reluctant to hold void for uncertainty any provision that was intended to have legal effect””.

(Per Nicholas JA in *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 at 931 G – H)

This consideration is particularly apt in this matter where the terms of the consent order were agreed to in the presence of counsel in circumstances where the parties clearly intended to settle their dispute and provide for a practical way forward which would be binding on both sides. It is all the more appropriate in these circumstances that every reasonable effort should be made to give effect to the order.

With this in mind, but predominantly based on the wording of clause 3 itself, I do not agree with Mr Vermeulen’s submission that the clause was intended to confer an option and accordingly must be held to be void for vagueness.

The clause purports to grant the applicants “the first option” to enter into valid and binding fixed period agreements of lease. Taking the clause on its face, it appears to me that its object is to confer a right of first refusal upon the applicants.

As such, the reference to “first option” imports an understanding that the rental and other terms and conditions to be contained in the offer (which will in due course be put by the respondent to the applicants) will be those upon which the respondent will offer the premises to other would-be lessees in the event that the applicants do not wish to exercise their rights.

Soteriou v Retco Poyntons (Pty) Ltd supra at 933 F – G

In relation to the facts of that case, Nicholas JA stated the following:

“I do not think that the qualification contained in the words “upon such terms and conditions and at such rental as may be mutually agreed upon” has the effect of making the clause void for uncertainty. Given that the lessor is obliged to make an offer, the lessee can either accept the offer (in which case the terms and conditions and rental will be mutually agreed upon), or refuse it.” (See page 933 J – 934 A)

In the same way, it is my view that the reference in clause 3 to the fact that the terms are “to be negotiated between the parties” does not render the clause void for vagueness. The clause must accordingly stand, and with it, the court order as a whole.

In the circumstances, I find that the applicants have not made out a case for the setting aside of the consent order granted by Campbell AJ. Accordingly, the applicants’ application is dismissed with costs.

J P V McNALLY

ACTING JUDGE OF THE HIGH COURT

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Ref : MVS / T268

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