IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 09/32489

In the matter between:

RIJCKSHOF BODY CORPORATE Applicant

and

URBAN HIP HOTELS (PTY) LTD First Respondent

SOUTHNET WILDERNESS (PTY) LTD Second Respondent

J U D G M E N T

ROOS, AJ:

[1] The applicant in this matter is the body corporate of a sectional title development known as Rijckshof which was established in terms of section 36(1) of the Sectional Titles Act No. 95 of 1986 (the Act) and registered as a sectional title scheme under SS No. 359/2007 (the Scheme). The first

respondent administers certain parts of the common property in the Scheme and operates a rental pool pursuant to a management agreement concluded with it. The second respondent is the developer of the Scheme. The application was opposed only by the first respondent.

[2] The relief sought by the applicant was an order:

> "*1 Declaring that neither the Applicant nor the individual members thereof are parties to, and nor are they bound by any of the provisions of the Management Agreement entered into between the Second Respondent and the First Respondent on 15 March 2007;*
>
> *2 Ordering and directing the First Respondent, to the extent that it presently occupies any part of the common property in the sectional title scheme known as RIJCKSHOF (SS No. 359/2007) ('the Scheme'), to vacate same and to return to the Applicant, any of its furnishings, equipment or other movables of any nature whatsoever, used by the First Respondent in connection with the Scheme and to return all keys to the units which are in the possession of the First Respondent.*
>
> *3 Ordering and directing the First Respondent to account for all and any income and expenditure it has received and incurred on behalf of any individual members of the Applicant and to forthwith make payment to such members, all such amounts as are due to them;*
>
> *4 Granting further and/or alternative relief; and*
>
> **5** *Ordering that the costs of this application be paid jointly and severally, the one to pay, the other to be absolved, by any party or parties who may oppose it.*"

[3] The Scheme comprises 47 luxury self-catering apartments which are administered and let out by the first respondent as if the Scheme was a hotel. The 47 apartments are individually owned. To facilitate the letting out of the apartments the first respondent occupies common areas in the Scheme such

as the reception and lobby and various offices. It is from these common areas that the applicant seeks the first respondent's eviction.

[4] The development of the Scheme was completed during May 2007. The registration of transfer of the first unit in the Scheme from the developer to a purchaser took place on 30 May 2007. In terms of the Act the applicant was formed on the date of this first transfer.[1]

[5] On 15 March 2007 the respondents concluded an agreement which is stated to be the "*Preliminary Heads of Agreement for Management Agreement*". The relevant terms of this agreement are:

> "*WHEREAS:*
>
> *A.* *Southnet is the owner of certain land known as Erf 168 Roggebaai situated on the Corner of Ferry and Wharf Street, Cape Town upon which land a 47 unit apartment block has been erected and developed by Southnet;*
>
> *B.* *Southnet intends opening a sectional title register over the 47 apartments units which sectional title register will be known as Rijckshof (hereinafter referred to as the 'the Rijckshof Development');*
>
> **C.** *Southnet has sold each of the units in the Rijckshof Development to purchasers and registration of transfer of most of the said units to the purchasers will be effected simultaneously with the date of the opening of the sectional title register;*
>
> *D.* *In terms of the agreement of sale concluded between Southnet and each of the purchasers of the apartment units:*
>
> *(i)* *each purchaser has the election to place the apartment unit purchased into a rental pool, which rental pool will be managed by a manager who will make the unit available.*
>
> *(ii)* *Southnet has the power and authority to appoint a rental pool manager to manage the rental pool on behalf of the*

[1] Section 36(1) of the Act.

purchasers referred to in C above and to enter into and negotiate the terms and conditions by which the rental pool manager will be appointed to manage the rental pool on behalf of the purchasers of the apartment units.

E. Southnet has investigated and had discussions with various rental pool managers and has agreed to enter into an agreement with Urban Hip to manage the rental pool of the Rijckshof Development;

…

G. Due to the time constraints involved the parties have not had the opportunity to finalize a formal management agreement in respect of the Rijckshof Development but wish to show their bona fides and their intentions to enter into a management agreement until such time as they are able to enter into a more formal rental pool management agreement.

H. The parties hereto wish to record the preliminary heads of agreement for the rental pool management agreement, which heads of agreement will be amplified by a more formal rental pool management agreement to be finalized between the parties before a specific date.

…

1.1 Southnet, by its signature of these heads of agreement, hereby appoints Urban Hip as the rental pool manager for the Rijckshof development for a period of 5 (five) years from date of signature of this agreement.

1.2 The main object of Urban Hip shall be to make the apartment units available for rental on their rental database and booking system, to rent out the apartment units in the Rijckshof Development, and to manage and administer the Rijckshof Development as 5 (five) star accommodation.

1.3 Urban Hip shall immediately, on date of signature of this agreement, commence its duties as referred to in 1.2 above.

…

5.1 The parties shall conclude a formal rental pool management agreement by no later than the opening of the sectional title register of the Rijckshof Development.

5.2 Until such time as the formal rental pool management agreement has been concluded these heads of agreement shall be binding on each party and shall only be amended if set down in writing and signed by all the parties."

(I shall refer to this agreement as the Management Agreement.)

[6] The units in the Scheme were apparently sold in terms of standard contracts one of which is annexed to the papers as an example. The agreement of sale is one concluded between Southnet Projects (Pty) Ltd or its nominee as seller and Legito Investment 47 CC as purchaser. Attached to the agreement of sale is a schedule of terms and conditions. The relevant terms are:

> "*PREAMBLE*
>
> **A.** *The SELLER has purchased the LAND with the existing buildings thereon and intends doing extensive alterations to the BUILDINGS thereon substantially in accordance with the BUILDING PLAN and SPECIFICATION.*
>
> *B.* *The SELLER will make a rental pool available to the owners of the UNITS in the DEVELOPMENT so that in the event that a owner of the UNIT does not reside in the UNIT permanently and/or wishes to let the UNIT the said owner will make the UNIT available for letting in the rental pool and the manager of the rental pool can then let out the UNIT on behalf of the owner.*
>
> *C.* *The SELLER intends to apply for the approval of the DEVELOPMENT in terms of the ACT and for the opening of the Sectional Title Register in respect thereof.*
>
> *…*
>
> *1.7 COMMON PROPERTY:*
>
> *The portions of the DEVELOPMENT not forming part of any section and/or unit in the DEVELOPMENT in terms of the ACT and excludes any EXCLUSIVE USE AREAS.*
>
> *…*
>
> *1.15 MANAGER:*
>
> *The SELLER or its nominee who shall manage the RENTAL POOL.*

…

8.3 It is recorded that the proposed sectional title scheme is run subject to the provisions of the MANAGEMENT and RENTAL POOL AGREEMENT and that it will therefore comprise of non-residential facilities associated therewith such as an entrance lobby, restaurant and administrative units as will appear from the PROVISIONAL DRAFT SECTIONAL PLAN. The participation quota for both the residential as well as non-residential components of the scheme shall be determined on a like basis for all sections in the scheme i.e. the participation quota of a section shall be a percentage expressed to four decimal places, and arrived at by dividing the floor area, correct to the nearest square metre, of the section by the floor area, correct to the nearest square metre, of all the sections in the BUILDING comprised in the scheme.

8.4 Until the appointment of Trustees at the inaugural general meeting of the Body Corporate, the SELLER may delegate any or all of its powers and duties to the MANAGER who shall be entitled to exercise such powers as the SELLER may determine.

…

13. <u>RENTAL POOL AND MANAGEMENT AGREEMENT</u>

By the PURCHASER'S signature to this AGREEMENT, the PURCHASER is deemed to have entered into the MANAGEMENT and RENTAL POOL AGREEMENT in the following respects:

13.1.1 Should the PURCHASER make his UNIT AVAILABLE for letting by the MANAGER then the PURCHASER shall be bound by the terms and conditions of the MANAGEMENT and RENTAL POOL AGREEMENT in respect of the letting of the UNIT.

13.1.2 The PURCHASER shall be liable to pay the costs incurred and the fees of the MANAGER for the running and administration of the RENTAL POOL and for the management and administration of the SECTIONAL SCHEME once the SECTIONAL TITLE REGISTER has been opened at the appropriate Deeds Registry.

This sale is concluded subject to the imposition of a condition by the SELLER as developer in terms of Section 11(3)(b) of the ACT whereby the PURCHASER as owner of the UNIT may not alienate the UNIT without written consent of the SELLER until the Body Corporate is established and thereafter, of the Body Corporate, which shall be obliged to grant such

consent if the transferee enters into an agreement substantially in the form of the MANAGEMENT and RENTAL POOL AGREEMENT.

…

20. CONDITIONS

This agreement is subject to the following conditions:

20.1 That the MANAGER continues to manage the DEVELOPMENT, SECTIONAL SCHEME and RENTAL POOL for at least 10 (ten) years after the signature of this agreement on the terms and conditions of the MANAGEMENT and RENTAL POOL AGREEMENT.

20.2 This sale is concluded subject to the imposition of a condition by the SELLER as developer in terms of Section 11(3)(b) of the ACT whereby the PURCHASER as owner of the UNIT may not alienate the UNIT without written consent of the SELLER until the Body Corporate is established and thereafter, of the Body Corporate, which shall be obliged to grant such consent if the transferee enters into an agreement substantially in the form of the MANAGEMENT and RENTAL POOL AGREEMENT.

…

26. MANAGER

The SELLER records that the SELLER has entered into a contract with the MANAGER, for the management and administration of the DEVELOPMENT, the SECTIONAL SCHEME and the RENTAL POOL."

[7] Also attached to the sale agreement was the Management and Rental Pool Agreement referred to in paragraph 13 of the terms quoted above (the Rental Pool Agreement). The relevant terms of the Rental Pool Agreement are:

"*1 PARTIES*

1.1 The parties to this Agreement are:

1.1.1 The SELLER in the Agreement of Sale to which this RENTAL POOL AGREEMENT is an annexure.

1.1.2 The PURCHASER in the Agreement of Sale to which this RENTAL POOL AGREEMENT is an annexure.

1.1.3 The MANAGER, who shall become and be a party to this MANAGEMENT and RENTAL POOL AGREEMENT, either on the signing hereof, or on acceptance of the rights and obligations conferred and imposed on the MANAGER in this MANAGEMENT and RENTAL POOL AGREEMENT.

1.2 The parties agree as set out below.

…

3.3 BODY CORPORATE:

The Body Corporate in respect of the DEVELOPMENT consisting of all owners of UNITS in the DEVELOPMENT.

3.4 LETTING OWNER:

Any PURCHASER in the AGREEMENT who makes his UNIT available to the RENTAL POOL for letting by the MANAGER.

…

3.7 MANAGER:

The SELLER or its nominee.

3.8 MANAGEMENT and RENTAL POOL AGREEMENT:

This Agreement, which is an annexure to the AGREEMENT.

…

4.1 The OWNER irrevocably and in rem suam, appoints the MANAGER as his agent, effective from the date upon which the MANAGER commences his duties as such or the date of commencement of this MANAGEMENT and RENTAL POOL AGREEMENT, whichever is the later, to:

4.2 manage and administer the DEVELOPMENT and the SECTIONAL SCHEME for a period of 10 years from date of the opening of the SECTIONAL SCHEME;

...

4.5 Furthermore, notwithstanding any Management Rules in respect of the DEVELOPMENT and SECTIONAL SCHEME, the OWNER and the LETTING OWNER, agree to be bound by any unanimous resolution, in terms of the Act, of the BODY CORPORATE, passed by not less than 75% of the owners of the Units in the DEVELOPMENT and SECTIONAL SCHEME and shall be deemed to have been accordingly extended or renewed, as the case may be, with the MANAGER (being the MANAGER that is a PARTY to this MANAGEMENT and RENTAL POOL AGREEMENT).

…

5.1 The MANAGER shall manage and administer the DEVELOPMENT and the SECTIONAL SCHEME for all the owners of units in the DEVELOPMENT and SECTIONAL SCHEME and shall make the UNIT available to OCCUPIERS during the operation of this MANAGEMENT and RENTAL POOL AGREEMENT.

…

5.3 For the duration of this MANAGEMENT and RENTAL POOL AGREEMENT, the MANAGER is entrusted with the control and management of the DEVELOPMENT and shall be responsible for attending to all such matters as are normally attended to by the manager of such a development, and, in particular, the following:

5.3.1 the maintenance of the interior of the UNITS in the DEVELOPMENT and the SECTIONAL SCHEME and the furniture, furnishings, fixtures and fittings, appliances and equipment therein;

5.3.2 the replacement through damage or fair wear and tear of all furniture, furnishings, fixtures and fittings, appliances and equipment in the UNIT and COMMON PROPERTY;

5.3.3 the control of all room OCCUPIERS and their visitors;

…

10. SOLE CONTRACTUAL RELATIONSHIP

10.1 The PARTIES hereto acknowledge that the AGREEMENT, the said management contract and this MANAGEMENT and RENTAL POOL AGREEMENT contain the entire agreement between them and that no other conditions, stipulations, warranties and/or representations whatsoever have been made by any PARTY or their agents other than as set forth in the AGREEMENT, the said management contract and this MANAGEMENT and RENTAL POOL AGREEMENT.

10.2 No variation of this MANAGEMENT and RENTAL POOL AGREEMENT shall affect the terms hereof unless such variation shall be reduced to writing and signed by the PARTIES hereto."

[8] For reasons that are not relevant to this decision the applicant and its individual members became unhappy with the manner in which the first respondent was managing the rental pool. At a meeting of trustees held on 28 November 2008 the trustees unanimously resolved to terminate the mandate of the first respondent as the rental pool manager. Pursuant to this resolution the trustees sent a special resolution to each of the individual owners of units in the Scheme. The resolution provides *inter alia* for the chairman of the trustees of the applicant to act for and on behalf of all members of the applicant and to terminate the mandate of the rental pool manager (i.e. the first respondent) on an appropriate effective date. It is alleged that in excess of 75% of the members signed and returned the special resolution.

[9] On 16 March 2009 the trustees of the applicant sent a notice to all owners in the Scheme seeking approval of a further resolution. The relevant portion of the notice is as follows:

> "*The attorneys have further deemed it requisite that the approval by the members of the above actions be obtained by way of Special Resolution. In the circumstances, please find attached hereto a draft resolution, which will strengthen our application, thereby protecting all our rights and investment in Rijkshof.*
>
> *We require 75% approval by the owners, both in number and value. Your urgent attendance hereto is vital. The signed resolution can be returned to me or any other Trustee as per the detail below.*"

[10] Attached to the notice was a special resolution in the following terms:

> "*RESOLVED:*
>
> *1. That the Body Corporate institute Court proceedings against Urban Hip Hotels for an Order in the following terms:*
>
> *1.1 declaring UHH to have no contractual rights against Rijckshof and/or the individual members of Rijckshof;*
>
> *1.2 evicting UHH from the Rijckshof premises and ordering UHH to restore undisturbed possession of Rijckshof to the trustees or their nominee;*
>
> *1.3 ordering UHH to account fully to the Rijckshof body corporate for any and all amounts charged to the body corporate and/or the individual owners during their period of possession of Rijckshof, and to reimburse the body corporate and/or the individual owners to the extent that any such amounts have not been contractually or otherwise lawfully charged by UHH.*
>
> *2. That the Body Corporate take whatever steps, institute such Court processes and take whatever legal counsel and opinion necessary in order to investigate and, if necessary, enforce and protect the rights and claims of the Body Corporate and the members of the Body Corporate against Southnet Projects (Pty)*

Ltd and/or Southnet Wilderness (Pty) Ltd (jointly 'the Seller/Developer'), including, inter alia:

2.1 challenging the enforceability of any third party contracts purportedly concluded by the Developer on behalf of the Body Corporate;

2.2 enforcing the rights of the members of the Body Corporate and obligations of the Developer in terms of the various agreements of sale of sections in Rijckshof;

2.3 investigating a possible claim for damages against the Developer for material misrepresentation by the Developer in the course of its marketing of the Rijckshof scheme.

3. *That the trustees of Rijckshof be and are hereby authorised to take any and all steps necessary in order to achieve the matters recorded under paragraphs 1 and 2 above, as well as any matters ancillary thereto.*"

[11] It is alleged that the resolution was approved by more than 80% of the members and that no formal objections to the resolution were received from any of the members.

[12] It is alleged that the owners of only five out of the 47 units did not respond to the notice. Of the five units three are owned by the second respondent. These figures were not placed in dispute by the first respondent. Accordingly I must find that 89,36% of the owners responded to the notice and approved the resolution attached thereto and which is quoted above.

[13] On 29 November 2008 the applicant addressed a letter to the first respondent requiring it to accept and set a date for negotiating with the applicant for the conclusion of a formal agreement for the future operation of the Scheme. The first respondent was required to set a date not later than 15

January 2009. After setting out the applicant's requirements for the agreement the letter states as follows:

> "*Should you find any of the above requirements impossible to comply with, this letter shall serve as official notice that:*
>
> *1. Your services as Hotel Manager at Rijckshof, currently operating as 'Circa on the Square', are then to be terminated effective 1st February 2009; and*
>
> *2. In such a case, you are hereby given official notice to vacate the premises of Rijckshof by not later than 13h00 on the 1st of February 2009; and*
>
> *3. You are further required to prepare and submit, by not later than 15th January 2009, a suitable plan and program for the official handing over of the hotel operation as a going concern to the Body Corporate, the date of which should not be later than 30th January 2009.*"

[14] On 12 December the first respondent's attorney responded to the applicant's letter of 29 November 2008. Having stated that they act on behalf of the first respondent they say:

> "*A management agreement was concluded between the developer of your sectional scheme, Southnet Wilderness (Proprietary) Limited* (the developer) *and Urban Hip Hotels on 15 March 2007.*"

This clearly is a reference to the Management Agreement referred to above.

[15] Correspondence was thereafter exchanged between the attorneys acting for the applicant and the first respondent respectively. On 19 February 2009 the applicant's attorney wrote to the first respondent's attorney. The relevant portion of the letter is:

"*3. In your letter to my client dated 12th December 2008, you referred to a management agreement allegedly concluded between your client and Southnet Wilderness on 15th March 2007. In my letter of 30th January 2009, I advised that the only agreement that I am aware of between your client and Southnet Wilderness, is a document entitled 'Preliminary Heads of Agreement for Management Agreement', dated 15th March 2007. Should your client rely on any contract other than the 'Preliminary Heads of Agreement for Management Agreement', you are hereby called upon to provide me with a copy of such agreement by Friday 20th February 2009, failing which my client's papers will be drawn on the basis that no such further agreement exists, and that your client claims its rights purely from the aforesaid document.*"

[16] On 24 February 2009 the applicant's attorney responded to the aforesaid letter as follows:

"*3 At the outset we point out that our client reiterates its stance as recorded in its facsimile to your client dated 12 December 2008. For your ease of reference, a copy of this facsimile is attached hereto marked Appendix 1.*

4 With respect to your client, kindly note the following:

4.1 At no stage was any agreement concluded with your client nor was this ever intended.

4.2 Our client has only contracted with individual owners of units that are situated in your scheme. As recorded in our initial facsimile, individual owners had the choice (and still have the choice) to either participate in the rental poor or not. This is not a centrally controlled function as appears to be envisaged by your client."

[17] It is clear that the allegations made in paragraphs 3 and 4 of this letter as quoted above are contradictory. In the letter of 12 December the first respondent relied on the Management Agreement concluded with the developer on 15 March 2007. In paragraph 3 it purports to reiterate this contention. In paragraph 4.2 however it contends that it contracted only with the individual owners of units in the Scheme.

[18] The applicant contends that neither the Management Agreement nor the Rental Pool Agreement are valid or enforceable against it and that it is accordingly entitled to the eviction order that it seeks against the first respondent.

[19] The defences raised by the first respondent were:

19.1 That the applicant had no *locus standi*.

19.2 That there had been a material non-joinder as the owners of the individual units in the Scheme were the parties with which it had contracted to manage the rental pool and they should accordingly have been joined as parties to the application. It also contended that Southnet Projects who was the seller of the individual units in the Scheme had nominated it as the manager of the rental pool and that it also should have been joined as a party.

19.3 It contended further that the contracts between it and the individual owners of units in the Scheme had not been cancelled and that it accordingly was entitled to remain in occupation of the common property occupied by it to enable it to perform its functions as rental pool manager.

19.4 The first respondent also contends that there is a tacit agreement with the applicant that it is entitled to occupy common property presently occupied by it in order to carry out its obligations in terms of the agreements with each of the individual owners.

[20] When the matter was called counsel for the parties advised me that an agreement had been reached between the parties that:

20.1 The applicant would no longer oppose the application for condonation by the first respondent for the late filing of its answering affidavit which application was opposed by the applicant until that stage.

20.2 The first respondent would not persist with its point that there had been a material non-joinder.

[21] If an applicant concedes that a respondent has an existing right to occupy property an eviction order cannot be granted unless such right has been terminated. The *onus* to prove the termination rests on the applicant.[2]

[2] See *Chetty v Naidoo* 1974 (3) SA 13 (AD) at 20D-21H.

[22] It seems appropriate to start with the determination of whether the applicant has *locus standi* or not. Mr Hitchings for the first respondent did not press this point in argument. I gained the impression that he regarded the *locus standi* point as being coupled to the point of non-joinder which by agreement the first respondent did not persist with. However he did not abandon the defence of *locus standi* and it remains an issue on the papers. In my view the applicant does have *locus standi* for the following reasons:

22.1 "*Common property*" is defined in the Act as meaning the land included in the Scheme and such parts of the building or buildings as are not included in a section.

22.2 "*Section*" means a section as shown on a sectional plan.

22.3 A "*unit*" means a section together with its undivided share in common property apportioned to that section in accordance with the quota of the section.

Having regard to the above definitions it is clear that the common property is owned by each of the individual owners of units in undivided shares apportioned in accordance with the quota of the section as shown on the sectional plans.

22.4 "*Body corporate*" in relation to a building and the land on which such building is situate means the body corporate of that building referred to in section 36(1) of the Act. Section 36(1) of the Act provides as follows:

> "*With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members and every person who thereafter becomes an owner of a unit in that scheme shall be a member of that body corporate.*"

Accordingly every owner of a unit in the Scheme is a member of the body corporate.

22.5 In terms of section 36(4) of the Act the body corporate is responsible for the enforcement of the rules and for the control, administration and management of the common property for the benefit of all owners.

25.6 Section 39(1) of the Act provides that the functions and powers of the body corporate shall be performed and exercised by the trustees of the body corporate holding office in terms of the rules.

25.7 The applicant is acting in this matter pursuant to a resolution passed by 89,36% of the owners of individual units in the

Scheme. The Act provides that where a resolution has been passed by at least 80% of all members of the body corporate that it is deemed to be a unanimous resolution.[3]

25.8 Because the individual owners only own an undivided share of the common property they cannot individually apply for the eviction of the first respondent. Conceivably they could have done so if all the individual owners joined in the application. However in terms of section 36(4) the control of the common property has been removed from the individual owners and vests in the applicant who has to exercise such control for the benefit of all the owners. In my view therefore it is only the applicant who has *locus standi* to pursue eviction proceedings. The individual owners would not have the right to pursue eviction proceedings on the ground that they own the property because they have been divested of control of the property in terms of section 36(4) of the Act. This view is supported if it is borne in mind that the applicant is effectively acting on behalf of the owners pursuant to the unanimous resolution authorising it to do so.

[23] The next issue that requires determination is whether the first respondent has a right to occupy the common property in the Scheme and if so what the source of such right is.

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3 See definition of unanimous resolution in section 1 of the Act.

[24] In the correspondence from the first respondent's attorney referred to above the first respondent relied on both the Management Agreement and the Rental Pool Agreement despite these allegations being contradictory for the reasons set out above. In the answering affidavit the first respondent relied only on the Rental Pool Agreement which it contended was concluded with each individual owner and coupled to this it alleged a tacit agreement with the applicant entitling it to occupy the common property to enable it to carry out its obligations in terms of its agreements with the individual owners.

[25] As regards the Management Agreement:

25.1 It was concluded between the first respondent and the developer (the second respondent) on 15 March 2007 prior to the establishment of the body corporate on 30 May 2007 when the first transfer of a unit in the Scheme was registered.

25.2 It is clear from paragraphs D and E of the Preamble quoted above that the developer believed it had both the power and authority to appoint a rental pool manager and purported to do so in terms of the Management Agreement. It is not possible to ascertain on what basis the developer based its belief that it had both the power and authority to appoint a rental pool manager. The developer was not the seller of the units despite the recordal to the contrary in paragraph C of the Preamble of the Management Agreement quoted above. The seller in each case was Southnet

Projects (Pty) Ltd or its nominee. Mr Porteous for the applicant submitted that the court should find that the second respondent as the owner and developer of the land was the seller's nominee. There is no such nomination in the papers before me. In addition the contention that the developer was the seller's nominee in my view conflicts with paragraph A of the Preamble to the terms attached to the Sale Agreement which records that the seller had purchased the land with the existing buildings thereon. Mr Porteous submitted however that even if the developer had the right to conclude a Management Agreement with the first respondent that the applicant was not bound by the terms of such an agreement because of the provisions of Rule 50(2)(4) of the Rules applicable to the Scheme read with section 47(2) of the Act.

25.3 The Rules of the Scheme are the management rules promulgated in terms of section 35(2)(a) of the Act and contained in Annexure 8 to the Act.

25.4 Rule 50(1) provides that the first meeting of owners shall be held within 60 days of the establishment of the body corporate. It requires 7 days' notice of such a meeting to be given in writing and to be accompanied by a copy of the agenda to be discussed at the meeting.

25.5 Rule 50(2)(iv) provides:

"*(2) The agenda for the meeting convened under subrule (2) shall comprise at least the following:*

(iv) subject to section 47(2) of the Act the taking of cession of such contracts relating to the management control and administration of the building as may have been entered into by the developer for the continual management control and administration of the building and the common property and in respect of which the developer shall be obliged to submit such contracts to the meeting."

25.6 Section 47(2) of the Act provides:

"*No debt or obligation arising from any agreement between the developer and any other person shall be enforceable against the body corporate.*"

25.7 The minutes of the inaugural general meeting of the body corporate which was held on 14 June 2007 refers to the cession and adoption of two contracts concluded by the developer. They are the Lease Agreement concluded with Zelkar Investments 39 CC in respect of the restaurant in the Scheme and an agreement concluded with Thornburn Security Solutions (Pty) Ltd for providing security at the Scheme. There is no reference to the Management Agreement concluded with first respondent. Accordingly I must find that the Management Agreement concluded with the first respondent was not submitted to the inaugural meeting as required

by Rule 50(2)(iv) and as a result thereof that it is not binding on the body corporate pursuant to the provisions of section 47(2) of the Act.

25.8 In any event it is clear from the terms of the Management Agreement quoted above that it was intended to be only a preliminary agreement and that the parties were to conclude a Management Agreement by not later than the opening of the sectional title register. The sectional title register was opened on 30 May 2007. It is not contended that a Rental Pool Management Agreement was concluded with the first respondent by that date.

25.9 In addition in terms of clause 1.1 of the Management Agreement quoted above the first respondent was appointed for a period of 5 years from the date of signature of the agreement. Apart from the fact that this is in conflict with paragraphs G and H of the Preamble and clauses 5.1/2 of the Agreement it is also in conflict with the provisions of Rule 46(1) which determines the manner in which the managing agent is to be appointed in a sectional title scheme. The Rule provides as follows:

> "*46(1)(b)* *A managing agent is appointed for an initial period of one year and thereafter such appointment shall automatically be renewed from year to year unless the body corporate notifies the managing agent to the contrary: Provided that notice of termination of the contract may be given by the trustees in accordance with a resolution taken at a*

trustee meeting or an ordinary resolution taken at a general meeting."

25.10 Apart from the fact that the developer had no right to appoint the first respondent as managing agent for a period in excess of one year the trustees have given notice of termination of the contract pursuant to a trustee's resolution per the letter addressed by the trustees to the first respondent on 29 November 2008 and which is referred to above.

Accordingly I find that even if the developer had the right to conclude the Management Agreement with the first respondent which in my view is doubtful that the terms of such agreement are not binding on the applicant and that the agreement has in any event been properly terminated. Apart from the above it is also apparent from the terms of the agreement that it did not give the first respondent the right to occupy the portions of the common property presently occupied by it.

[26] The next issue to be determined is whether the first respondent is entitled to occupy the common property in terms of the individual agreements which it contends it has with the owners of the individual units. In my view it has no such right for the following reasons:

26.1 The seller in each case was Southnet Projects (Pty) Ltd or its nominee.

26.2 In terms of clause 13.1 of the Terms and Conditions attached to the Agreement of Sale the individual purchasers were deemed to have entered into the Management and Rental Pool Agreement on the basis set out in that clause.

26.3 The manager in the Rental Pool Agreement is defined as the seller or its nominee. As stated above Mr Porteous submitted that the nominee was in fact the developer. For the reasons set out above I find that this submission cannot be upheld. The first respondent contends that it was the seller's nominee. I cannot uphold this contention for the following reasons:

26.3.1 There is no document evidencing the alleged nomination. It is inconceivable that such a nomination could have occurred orally. In addition clause 1.1.3 of the Rental Pool Agreement provides that the manager shall only become a party to the agreement if it signs the agreement or accepts the rights and obligations conferred and imposed on the manager in the agreement. It is not alleged that the first respondent signed the agreement nor is it alleged that it accepted the rights and obligations conferred and imposed in terms of the agreement. There is no document evidencing such an acceptance and again I find that it is inconceivable that such an acceptance could have been oral.

26.3.2 The contention that the first respondent was the seller's nominee was raised for the first time in the answering affidavit. It was never raised in the letters written by its attorney on its behalf. In particular it was not raised in the letter written in response to the letter form the applicant's attorney in which the first respondent's attorney was requested to advise exactly what right its client was relying upon for the occupation of the property. It is inconceivable that if the first respondent intended relying on the fact that it was the seller's nominee that it would not have stated this in response to the said request.

26.3.3 Even if the first respondent was appointed as the manager in terms of the Rental Pool Agreement clause 4.2 of the agreement purports to appoint the first respondent as a manager for 10 years. This is in conflict with the provisions of Rule 46(1)(b) quoted above and is therefore unenforceable.

26.3.4 In terms of clause 4.5 of the Rental Pool Agreement if the first respondent was in fact appointed as the manager pursuant to a nomination by the seller then it is bound by the unanimous resolution of the body corporate to terminate such appointment.

26.3.5 Apart from the above it is apparent from the terms of the Rental Pool Agreement quoted above that on a proper

interpretation thereof it does not provide the first respondent with the right to occupy the common property.

26.3.5 In addition Mr Porteous submitted that in any event the Rental Agreement was not binding on the applicant as it was not a party to the agreement.

[27] It remains to consider whether the first respondent is entitled to rely on the tacit agreement it contends for. There are currently two conflicting tests for inferring the existence of a tacit contract. The first test was stated as follows:

> "*In order to establish a tacit contract it is necessary to show by a preponderance of probabilities unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to and did in fact contract on the terms alleged. It must be proved that there was in fact consensus ad idem*."[4]

The other test has been stated to be:

> "*A court may hold that a tacit contract has been established where by a process of inference it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence*."[5]

[28] I shall assume for the purpose of this judgment that the test as stated in the *Joel Melamed* case is the correct one because it appears in the later of

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[4] See *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 292.

[5] See *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 164G-165G and *Charles Velkes Mail Order 1973 (Pty) Ltd v CIR* 1987 (3) SA 345 (A) at 357H-I.

the Appellate Division's decisions. Whichever of the tests is to be applied however it is clear that what is required is that the court must draw an inference from the conduct of the parties to determine whether the tacit agreement contended for has come into existence.The onus to allege and prove the facts or conduct rests on the first respondent.[6] I am unable to draw any inference in this matter because the first respondent has failed to set out in its answering affidavit the conduct that it relies on for contending that a tacit agreement came into existence. It has therefore failed to establish the essentials of such an agreement and cannot rely on it.

[29] For the reasons set out above the applicant is in my view entitled to an order in terms of prayers 1 and 2 as quoted above. In my view it has made out no case in support of the relief claimed in prayer 3. The accounting it claims can only be claimed in terms of contracts concluded between the first respondent and the individual owners. Whilst I have found that the applicant has *locus standi* to claim an eviction of the first respondent for the reasons set out above this is based largely on the provisions of section 36(4) of the Act which vests the control of the common property in the applicant. There is no similar provision in the Act which would entitle the applicant to claim an accounting from the first respondent on behalf of the individual owners nor has Mr Porteous for the applicant referred me to any provision or authority entitling it to do so.

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6 **Roberts Construction Co. Ltd v Dominion Earthworks(Pty)Ltd 1968 (3) SA 255 at 261 D - F**

[30] The relief claimed in prayer 2 is deficient because it does not set a date by which the first respondent is to vacate the property nor does it provide a remedy should the first respondent fail to vacate the property in terms of the order. Accordingly I grant the following order:

1. Prayer 1 of the Notice of Motion is granted.

2. The first respondent is ordered to vacate the common property in the sectional title scheme known as Rijckshof (SS No. 359/2007) (the Scheme) by not later than 15 December 2009.

3. Should the first respondent fail to vacate the common property of the Scheme by 15 December 2009 the Sheriff is authorised and directed to evict the first respondent from the property.

4. The first respondent is ordered to return to the applicant all furnishings, equipment or other movables of any nature whatsoever used by the first respondent in connection with the Scheme and to return all keys to the units which are in the possession of the first respondent.

5. The first respondent is to pay the costs.

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J F ROOS
ACTING JUDGE OF THE HIGH COURT

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INSTRUCTED BY	A WOLMARANS INC
COUNSEL FOR SECOND RESPONDENT	NONE
INSTRUCTED BY	ROSSOUWS LESLIE INC
DATE OF HEARING	
DATE OF JUDGMENT	13th November 2009