

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

21108/2008

DATE:

12 FEBRUARIE 2009

5 In the matter between:

TIELMAN JOHANNES ROOS N.O.

IZAK BARTLOMEUS VAN DER VYFER N.O.

JOHAN GEORGE ROOS N.O.

APPLICANT

and

10 ROSTBERG (PTY) LIMITED

RESPONDENT

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JUDGMENT

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15 ALLIE, J:

In this matter, in applying the generally accepted principles in motion procedures and applying the principles of Plascon Evans and in considering therefore the facts submitted by the 20 applicants, alleged by the applicants, which have been also admitted by the respondent, as well as looking at the respondent's facts as to whether in fact an order sought by the applicant is justified, I am of the opinion that the rights of occupation initially held by the respondent were in fact derived 25 from terms set out in the draft unsigned written agreement of

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lease. It is common cause that in fact the period provided for in that unsigned written agreement of lease had in fact expired and that therefore I am of the view that the respondent subsequently occupied the buildings and property owned by the applicants on a monthly basis as provided for in that agreement of lease.

With regard to the respondent's allegation that it subsequently entered into a contract of sale with the applicant, not directly itself but that Blue Nightingale, a different juristic person, entered into such contract of sale on its behalf, i.e. on respondent's behalf, with applicant and that certain rights of occupation which the respondent subsequently held were then derived from such contract of sale, of course the legal representative on behalf of the respondent correctly conceded that a contract of sale of that nature would fall foul of Act 70/1970 and therefore such sale "would not be allowed", to use his terminology.

Given that the respondent goes on to allege that by virtue of the fact that a representative of the applicant authorised the respondent to apply in terms of Act 126/1993 for sub-division and re-zoning, as well as for all the remedies available to an applicant in terms of that Act, the respondent's contention that it thereby derived further rights of occupation by virtue of such

consent to apply in terms of the 1993 Act is rejected on the basis that there is no evidence in the respondent's affidavits to support, and even on a conspectus of all the papers, there is no evidence to support a conclusion that even a discussion along the lines that respondent was permitted to make an application in terms of the 1993 Act, entitled the respondent to thereby occupy the leased premises or even portions of the property beyond the area of the leased premises, until such application was either granted or refused.

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So in the circumstances I am not persuaded that the respondent derived any further rights of occupation once the written agreement of lease had lapsed, other than what the written agreement of lease itself provided for, namely occupation on a monthly basis, and in the circumstances I am prepared to MAKE AN ORDER IN TERMS OF PRAYER 2, 3 AND 4 OF THE NOTICE OF MOTION.

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ALLIE, J