REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A110/2009

In the matter between:

IAN ROBERT MCLAREN N.O.	**1ST APPLICANT**
DAVID JOHN BRUNI N.O.	**2ND APPLICANT**
SIMON HERCULES STEYN N.O.	**3RD APPLICANT**
RAMATEX TEXTILES NAMIBIA (PROPRIETARY) LIMITED	**4TH APPLICANT**

and

THE MUNICIPAL COUNCIL OF WINDHOEK	**1ST RESPONDENT**
THE MINISTER OF TRADE AND INDUSTRY	**2ND RESPONDENT**
THE MINISTER OF LOCAL GOVERNMENT AND HOUSING	**3RD RESPONDENT**

Neutral Citation: *McLaren NO v The Municipal Council of Windhoek* (A 110-2009) [2016] NAHCMD 161 (8 June 2016)

CORAM: BOTES, AJ

HEARD ON: 8 – 12 November 2010

DELIVERED ON: 8 June 2016

ORDER

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1. The relief sought in part A of applicants' main application, bearing in mind that applicants abandoned the relief sought in prayer 2 of part A of the main application, is dismissed with costs.

2. The relief sought by applicants in part B of the main application is dismissed with costs.

3. The relief sought by first respondent in its counter application is dismissed.

4. The cost in the counter application is ordered to be cost in the main application.

5. The costs referred to, in all the orders referred to hereinbefore, are inclusive of the cost of one instructing and two instructed counsel.

JUDGMENT

BOTES, AJ

[1] The applicant originally applied for an order in the following terms:

> "1. Declaring that the agreements (annexure "IRM6" to the founding affidavit hereto) are of full force and effect.
>
> Alternatively to the above and in the event of it being found that the agreements were validly cancelled.
>
> **2.** Declaring that first to third applicants may exercise an improvement lien *vis-a-vis*. first respondent in respect of the improvements erected by Ramatex Textiles Namibia (Pty) Ltd on the erven (which form the subject matter of the agreements referred to in prayers 1 above) hereinafter the ("property"). [1]
>
> IN THE FURTHER ALTERNATIVE and in the event of it being found that the agreements were validly cancelled, and that applicants are not entitled to exercise an improvement lien.
>
> **3.** Declaring that the applicants are entitled to remove all the plant, material and equipment and machinery which were brought onto or erected by Fourth Applicant on the property.
>
> **4.** That those respondents who oppose this application shall pay applicants' costs.
>
> **5.** Further and/or alternative relief...[2]
>
> and

[1]After it was correctly pointed out by the first respondent that all the structures on the identified Erf, cannot be the subject matter of the dispute, notice was given that an amendment will be moved to the following extent: "by inserting the words "excluding those buildings which were erected on the land as indicated in the lease agreement which was entered into between the first Respondent and Rhino Garments Pty Ltd, annexed as Annexure "W52" to the first Respondents answering affidavit, and annexed to the applicants replying affidavit as Annexure "IRM 24". The amendment was not opposed by the first respondent.

[2]Record: Part A, p1-2, prayer 1-5.

6. That the decision of the first respondent to cancel the agreements (annexure"IRM6" to the founding affidavit), be reviewed and set aside.

7. That the respondents, who oppose this review application, shall pay the costs of the review application."[3]

[2] The First Respondent opposes the application.

[3] After the record of proceedings had been dispatched Applicants supplemented their Founding Affidavit. [4]

[4] The Second and Third Respondents do not oppose the application.

First Respondent's opposition

[5] First respondent, in its opposing papers, in summary form, summarized the main basis of its opposition to the application as follows:

"3.1. Prayer 5 of both the provisional and final liquidation orders stand to be set aside;

3.2. First to third applicants have no *locus standi* in these proceedings by reason of their irregular and/or defective appointments;

3.3. The relief sought in the two Notices of Motion is misconceived. The lease agreement was duly terminated by reason of Ramatex's repudiation and was in any event cancelled in terms of the agreement by reason of material breaches of the terms thereof and/or by reason of the failure of a material

[3]Record Part B, p4, prayer 1-2.

[4]Record p138-187.

tacit term or assumption common to the parties that upon the abandonment of the whole project the agreement would terminate;

3.4 In any event first to third applicants had no authority or power to elect to continue with the lease agreement;

3.5 The cancellation of the lease agreement is not reviewable administrative action and as a consequence the right to a hearing does not arise at all. Quite apart from not constituting reviewable administrative action, first respondent submits that the right to a hearing would in any event not arise in the circumstances and on the facts by reason of the abandonment of the property and the project by Ramatex and the waiver and abandonment of any such right to hearing, insofar as it may be found to exist;

3.6 The relief sought in the first Notice of Motion deals with contractual rights, which are incompatible with the relief sought in the second Notice of Motion;

3.7 Ramatex furthermore lost any lien it may have had when it abandoned the property;

3.8 Any right Ramatex may have to rely on a lien has in any event become prescribed." [5]

The Stellenvale Rule

[6] The papers filed in these proceedings are voluminous. There exist various disputes of fact which factual disputes the court shall endeavour to

[5]Record pp247-248.

approach in compliance with the principles referred to hereunder which is normally referred to as the Stellenvale rule.

[7] In terms of the Stellenvale rule it is settled law that, generally speaking, factual disputes must be resolved on the basis of those facts stated by the applicant and admitted by the respondent together with those facts stated by the respondent.[6] The Stellenvale rule is however subject to two exceptions which can be summarized as follows:

1. Where the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bone fide* dispute of fact.[7]
2. Where the respondent's allegations are so farfetched, or clearly untenable that the court is justified in rejecting them merely on the papers. [8]

Notice to strike

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[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E — 635C; *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234(C) at 235E — G.

[7] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D — H; see also *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375 par [13].

[8] *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 152 B - J (referred to with approval in *Wightman*, supra, at 375 E-F par [12]).

[8] First respondent filed a comprehensive notice to strike various allegations which predominantly found their way into applicants' replying affidavit. I have decided not to deal with the application to strike, on its own and separately, but only once it becomes necessary to do so when and if it is required and material for purposes of this judgment, to decide on the merits of this application.

[9] Before the merits of the application and the relevant defences raised by the first respondent thereto, are considered, it is necessary to shortly refer to the relevant events which occurred prior to the termination by Ramatex of its business operations in the Republic of Namibia and the subsequent events which gave rise not only to the letters of demand having been issued by first respondent, but also the subsequent liquidation application and the events thereafter.

Background

[10] In respect of the history, the deponent, Du Pisani, on behalf of first respondent states that:[9]

> "2.1 During or about 2001 the Ramatex group, with its head office in Malaysia, proposed a textile manufacturing investment in Namibia to the Government of Namibia. The initial proposal can be found in bundle I, pp 1 to 75. In this proposal Ramatex Berhad, apart from extolling its virtues and global dominance and superiority in the textile industry, in particular with reference to the equipment used in its textile industry and those used to protect the environment, emphasised the following:

[9] Record page 220 – 224.

2.1.1 The construction of a plant that would require the investment of U$100 million over the first three years and the provision of employment to not less than 8,000 employees in the first 7years;

2.1.2 Ramatex anticipated the employment for approximately 15,000 people within the first 10 years. According to Ramatex many of the job openings would cater for the historically disadvantaged people. It extolled its strong commitment to human resources development and the upliftment of the society.

2.1.3 The training of the employees would comprise both an in-house training scheme and an industrial training scheme (as particularised on p 17 of the proposal); the proposal was accompanied by extensive proposed training courses for various categories of employees, pp 56-76 of the proposal. (As it turned out, the Namibian Government was called upon to subsidise the training of Ramatex employees).

2.1.4 The use of state of the art equipment along with sophisticated technology.

2.1.5 Ramatex's commitment to sound environmental practices was also extensively dealt with, including aspects of water usage and effluent practises to be employed, along with stern undertakings to abide the Namibian laws and regulations (p 27).

2.1.6 Ramatex undertook, in its commitment to conserve environmental quality in and around its complex, to introduce airflow dying machines and to invest in a water treatment facility to remove harmful residue before discharging the water into the drainage system.

2.1.7 Ramatex's moral duty to protect the welfare of mankind and ecology was emphasised.

2.1.8 Ramatex promised to move towards ISO 14,000 compliance.

2.1.9 Ramatex's supported its commitment towards environmental, health and safety matters with reference to a five point policy as a

guideline for the system's environmental health and safety programmes in order to keep its commitment to environmental excellence on track. This entailed compliance with, amongst others, state and local environmental health and safety statutes and regulations, employee awareness and responsibility towards environmental health issues through training programmes, the adoption of new technologies and processes to minimise the environmental health and safety impact; the utilisation of natural resources wisely and the reduction of waste generation through using bio-degradable materials and the waste disposal of unavoidable waste in a safe environmentally friendly way; the establishment of corporate controls and the allocation of adequate resources to ensure that the company's policies are being properly implemented, along with the continual improvement of the company's environmental performance. (p 47). This was followed by detailed information on the environmental impact of the dyehouse processes (pp 48 to 50 of the proposal).

2.1.10 Ramatex would employ two systems of wastewater treatment, a primary treatment system, to remove suspended solids organic matter etc: through physical separation and an advanced treatment system to remove all residual constituents including colour in the treated wastewater from the primary treatment system via a nano- filtration system. Under the advanced treatment system, the primary treated water would further go through an industrial membrane filtration plant where all colour and salt are removed.

2.1.11 Ramatex promised, through its advanced and modern treatment system, that the wastewater discharge will comply to all required statutory parameters for discharge of effluent required by the authorities and will not in any way have a negative impact on the environment.

2.2. First respondent believes that Ramatex was motivated to establish a textile industry in Namibia in order to benefit from AGOA, the African Growth and

Opportunity Act, an Act promulgated in the United States on 18 May 2000, aimed at the liberalisation of trade between the USA and 38 Sub-Saharan African (SSA) countries (including Namibia) which provided for preferential access and certain dispensations for Africa's imports into the USA including that of apparel from garment industries in Africa.

2.3 The primary environmental aspects of the textiles industry involve massive water usage and wastewater discharge from washing, chemicals used in dyeing and finishing, and management of scrap and solid waste, amongst others, coloured sludges. The garment textile industry is widely regarded as one of the most environmentally harmful industries in the world.

2.4 Ramatex initially wanted at least 100 hectares of land while it simultaneously required that the Government should provide the infrastructure. The Government (second respondent) approached first respondent to make land available for this project.

2.5 Three lease agreements were subsequently concluded with Ramatex (in Liquidation, fourth respondent[10]) hereinafter only referred to as "Ramatex" and its affiliates, Tai Wah Garments Namibia (Pty) Ltd ("Tai Wah"), and Rhino Garments Namibia (Pty) Ltd ("Rhino Garments", also in liquidation). Tai Wah and Rhino Garments concluded separate lease agreements with first respondent in respect of separate portions of land situated inside the area referred to in Ramatex's lease agreement. The intention was that the land would be surveyed and subdivided to reflect the separate areas as were leased to the separate entities. This process was never finalised due to amongst others legal, planning and survey issues that impacted on the process.

2.6 Due to Ramatex's requirement that the earthworks and infrastructure both in respect of the electricity requirements and water supply installations be

[10]Must read “fourth applicant”.

provided by the Government, the Government and the first respondent concluded an agreement in terms whereof first respondent would provide and prepare the site and provide the new infrastructure at a cost of N$87,263,139.17, of which it was agreed that the Ministry of Trade and Industry would fund the site levelling costs and 50% of the infrastructure costs.

2.7 It was agreed that the Government would subsidise the training expenses of the employees, over and above the lucrative virtually rent free 99 year lease agreements concluded with Ramatex and its subsidiaries who further enjoyed subsidised water (for 2 years) and electricity supplies while they were exempted from paying rates and taxes and enjoyed other privileges under their EPZ certificates. The infrastructure and electricity installations provided by first respondent were custom built to meet the very specific requirements demanded by Ramatex.

2.8 . . .

2.9 Prior to the conclusion of the agreement, on 1 September 2001, Ramatex provided further information to second respondent in respect of its intended water treatment processes, the salt minimisation processes, and its compliance with the international recognised standards embodied in the Environment Management System, known as ISO 14000. Ramatex, for the wastewater and potable water treatment processes, identified four processes, namely a Physical Unit Process, a Chemical Unit Process, a Biological Unit Process and a Micro screening Unit Process which it intended employing on the premises."

The Lease Agreement

[11] On the 25th of October 2001 and at Windhoek, Ramatex and the First Respondent entered into a written Notarial Lease Agreement.

[12] That lease agreement was duly registered by the Registrar of Deeds for Windhoek on 9 November 2001 under registration Number K 246 / 2001 L.[11] This agreement was entered into by the First Respondent while being represented by Ludwig Narib and Bjorn Von Finckenstein with full knowledge and approval of all the Respondents.

[13] The material express terms of the lease agreement are as follows:

13.1 Ramatex leased a portion of Erf 497, Goreangab, measuring 7,5621 hectares as indicated on diagram No.A.289/2001; a portion of the Erf 497, Goreangab, measuring 3,9339 hectares as indicated on diagram No. A290/2001, and a portion of Farm No. 466, measuring 34,1515 hectares as indicated on diagram No. A 291/2001 from the First Respondent ("the property").

13.2 The lease would commence on 26th October 2001 and continue for a period of 99 years at a once-off rental of N$1,188.00 per annum for the entire lease period.

13.3 The First Respondent undertook to provide Municipal Services to the property in accordance with the Service Agreement (Annexure "B" to the lease agreement).

[11] See annexure IRM6 to applicants' founding papers.

13.4 Ramatex *inter alia* undertook to:

13.4.1 keep the property clean and tidy;

13.4.2 not use the property or allow it to be used in whole or in part for any purpose other than the purpose for setting up a textile industry as is described in the certificate granting Ramatex Export Processing Zone Enterprise status or any activity which is necessary or incidental to the setting up and operating of a textile industry;

13.4.3 not contravene any of the conditions of title of the property or any laws, rules and regulations affecting owners, tenants, or occupiers of the property;

13.4.4 not leave refuse or allow it to accumulate in or about the property except in the refuse bins provided for that purpose;

13.4.5 refrain from interfering with the electrical, plumbing or any system serving the property, except as may be necessary to enable the Ramatex to carry out its obligations of maintenance and repairs in terms of the agreement;

13.4.6 take all reasonable measures to prevent lockages and obstructions from occurring in the drains, sewerage pipes and water pipes serving the property;

13.4.7 comply with all laws and regulations relating to:

13.4.7.1 the manufacturing and handling of hazardous materials and articles;

13.4.7.2 the safety of the lay-out of factory premises and machinery situated therein; and

13.4.7.3 the installation or provision of safety, health and fire-fighting equipment or other similar facilities on the property;

13.4.8 comply and execute sound environmental practices in and around the property;

13.4.9 within a reasonable time, move towards and comply with the International Standards for Environment ISO 14000 and to adhere and comply with the Social Accountability Policy.

13.4.10 commence with and keep to the implementation and execution of the project as contained in its schedule of operations (Annexure "D" to the agreement).

13.4.11 at its own expense, and without recourse to the City:

13.4.11.1 throughout the lease period maintain in good order and condition, the property;

13.4.11.2 upon the termination of the agreement, (however and whenever it terminates),

return the property and all parts thereof to the First Respondent in good order and, condition, fair wear and tear excepted;

13.4.12 comply with all such reasonable rules and regulations as are laid down in writing by or on behalf of the First Respondent for observance by Ramatex or other occupiers of the property, their customers and their invites;

13.5 Ramatex may –

13.5.1 subject to the first respondent's Building Regulations make any improvements to the property;

13.5.2 where Ramatex does alter, add to or improve the property in any way, Ramatex shall, if so required in writing by the first respondent, restore the property on the termination of this agreement to its condition as it was prior to such alteration, addition or improvement having been made.

13.5.3 The first respondent's requirement contemplated in subparagraph 13.5.2 must be communicated in writing to Ramatex at least 12 months before the agreement terminates.

13.6 Should Ramatex fail to carry out any of its obligations under the agreement with regard to maintenance, the first respondent would be entitled, without prejudice to any of its rights or remedies, to effect the required maintenance and recover the costs of such maintenance from Ramatex;

13.7 The first respondent *inter alia* undertook to:

13.7.1 sign and execute all documents that related to the agreement, in particular the documents necessary to confer the leasehold title in favour of Ramatex, so as to enable Ramatex to comply with its obligations in respect of foreign investment requirements, and all other documents that were necessary to enable Ramatex to exercise its obligations or enjoy its benefits under the agreement;

13.7.2 after signature of the agreement, grant to Ramatex peaceful and undisturbed possession of the property;

13.7.3 effect and carry out all maintenance and repairs as were incumbent upon the first respondent in terms of the agreement;

13.7.4 to provide Ramatex with details of the time schedule with regard to the civil works in respect of preparing the property;

13.8 Should Ramatex default to make any payment due under the agreement or be in breach of its terms in any other way, and fail to remedy such default or breach within 30 days, after receiving a written demand that it be remedied, the first respondent would be entitled, without prejudice to any alternative or additional right of action or remedy available to it under the circumstances without further notice, recover from Ramatex damages for default or breach of the agreement.

13.9 The parties chose as their *domicilium citandi et executandi* the following addresses:

13.9.1 The first respondent:

No 80 Independence Avenue, Windhoek,

Namibia or P 0 Box 59, Windhoek

13.9.2 Ramatex:

3rd Floor, No. 344 Independence Avenue, Windhoek, Namibia

P 0 Box 1571 Windhoek, Namibia.

13.10 No variation or consensual cancellation of the agreement would be of any force or effect unless reduced to writing and signed by both parties thereto.

13.11 The insolvency of either party to the agreement would not terminate the agreement, however the trustee of Ramatex' insolvent estate would have the option to terminate the agreement by notice in writing to the First Respondent.

13.12 Should the trustee not within three months of his appointment as trustee notify that he/she desires to continue with the agreement on behalf of the estate, he/she shall be deemed to have terminated the agreement at the end of the three month period.

13.13 If by reason of any unforeseen occurrence or development the operation of the agreement causes, or is likely to cause, any inequitable hardship contrary to the spirit of this agreement to one or both of the parties, the parties would immediately negotiate, in good faith, to modify or amend the terms and conditions of the agreement in order to provide an equitable solution to the occurrence or development within the spirit of the agreement, which amendment or modification would be reduced to writing and signed by both parties thereto.

13.14 Should any dispute arise out of the agreement, or which relates to the agreement, the parties to the agreement would endeavour first to resolve the dispute by negotiation between their respective Chief Executives or their nominees who may be assisted by not more than two advisors.

13.15 Where the parties fail to reach agreement within a period of 30 days or such other period as they may have agreed upon, then and in such event their dispute would be referred to arbitration by a single arbitrator

The Service Agreement

[14] In terms of the service agreement (Annexure "B" to the lease agreement):

14.1 First respondent committed itself to remove solid waste from Ramatex' premises;

14.2 Ramatex undertook to cause solid waste to be removed by the First respondent to be separately placed in different containers as follows:

14.2.1 Non-polluted and non-toxic biologically degradable materials;

14.2.2 Polluted and toxic solid waste.

14.3 The First Respondent furthermore undertook to:

14.3.1 accept sewerage effluent as part of its sewerage service;

14.3.2 for the above purpose the First Respondent would provide separate connections or domestic and industrial effluent and Ramatex would cause the separation of industrial and domestic effluent.

14.4 The volume of Industrial Effluent originating from the property would be determined by the First Respondent in consultation with Ramatex after considering the process, recycling and efficiencies and would have been agreed upon after calculation as a percentage of metered process water supply and/or potable water supply where potable water is used in processes by Ramatex.

14.5 Ramatex would introduce air-flow dyeing machines and invest in a water treatment facility to remove harmful residues in consultation with the First Respondent before discharging same into the drainage systems.

14.6 The infrastructure which includes all plants, material, equipment and machinery which the First Respondent would erect on the property for the purpose of rendering the service would remain the property of the First Respondent;

14.7 All plants, material, equipment and machinery which Ramatex would bring onto, erect or construct on the property would remain the property of Ramatex.

14.8 Should Ramatex default to make any payment due under the agreement or be in breach of its terms in any other way and fail to remedy such default or breach within 30 days, after receiving a written demand that it be remedied, the first respondent would be entitled, without prejudice to any alternative or additional right of action or remedy available to under the circumstances without further notice, recover from Ramatex damages for default or breach of the agreement.

14.9 The parties chose as their *domicilium citandi et executandi* the following addresses:

14.9.1 The first respondent:

No 80 Independence Avenue, Windhoek, Namibia or

P 0 Box 59, Windhoek

12.9.2 Ramatex:

3rd Floor, No. 344 Independence Avenue, Windhoek, Namibia

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14.10 No variation or consensual cancellation of the agreement would be of any force or effect unless reduced to writing and signed by both parties thereto.

14.11 The insolvency of either party to the agreement would not terminate the agreement, however the trustee of Ramatex' insolvent estate would have the option to terminate the agreement by notice in writing to the first respondent.

14.12 Should the trustee not within three months of his/her appointment as trustee notify that he/she desires to continue with the agreement on behalf of the estate he/she shall be deemed to have terminated the agreement at the end of the three month period.

14.13 If by reason of any unforeseen occurrence or development the operation of the agreement causes, or is likely to cause, any inequitable hardship contrary to the spirit of this agreement to one or both of the parties, the parties would negotiate immediately in good faith to modify or amend the terms and conditions of the agreement in order to provide an equitable solution to the occurrence or development within the spirit of the

agreement, which amendment or modification would be reduced to writing and signed by both parties thereto.

14.14 Should any dispute arise out of the agreement, or which relates to the agreement the parties to the agreement would endeavour first to resolve the dispute by negotiation between their respective Chief Executives or their nominees who may be assisted by not more than two advisors.

14.15 Where the parties fail to reach agreement within a period of 30 days or such other period as they may have agreed upon, then and in such event their dispute would be referred to arbitration by a single arbitrator.

[15] In its founding papers, applicant indicates that, Ramatex was floated by its holding company, Ramatex Berhad, for "the very purpose of enabling its holding company to embark upon a One Billion Namibia Dollar (U$127 Million) industrialisation investment project in Namibia and that the project in question was to be the first large scale industrialisation project in Namibia, with an incentive package which included subsidized water and electricity and a 99-year lease, for a 65 hectare site, situated within the Municipality of Windhoek.[12]

[16] On the 16th of May 2001 the Minister of Trade and Industry issued Certificate of Export Processing Zone Enterprise no. 096 to Ramatex.[13] The terms and conditions of which provides as follows:

[12]Record pp25-26.

[13]Annexure "IRM7" annexed to applicant's founding papers.

“ CERTIFICATE OF EXPORT PROCESSING ZONE ENTERPRIESES

No. 096

to

RAMATEX TEXTILES NAMBIIA (PTY) LTD

Which as such will benefit from the incentives established under the Export Processing Zones Act, subject to the following conditions:

1. The applicant will engage in manufacture of textile year, knitted fabric and apparel.
2. The operation will take place in Windhoek.
3. The applicant undertakes to establish to the satisfactory of the minister of Trade and Industry and of the Minister of Finance adequate fencing, walls, enclosures, demarcations or verification procedures to guarantee proper control by Customs authorities of the goods entering or leaving the EPZ enterprise, as indicated in the physical plan of the installation submitted with the application, or as may otherwise be required in the future.
4. The enterprise to which this certificate is granted shall not be permitted to sell any goods on the local market (SACU) without specials authorisation from the Minister.
5. The enterprise to which this Certificate is granted will be allowed 12 months from the date of the Certificate to become operational, which shall be interpreted as beginning the production of goods or services.
6. The conditions listed in points 1, 2, 3, 4 and 5 above cannot be altered without prior authorisation of the Minister in writing.”

[17] It, according to the applicant was in pursuance of "this project that Ramatex and the first respondent entered into the notarial lease agreement."[14]

The liquidation proceedings

[18] On 8 May 2008, the Malaysian based company, Ramatex Berhad applied to the High Court for an order in the following terms against its full subsidiary, Ramatex:

> "1. Condoning the applicant's non-compliance with the forms and service provided for by the Rules of the above Honourable Court and hearing this application as one of urgency as contemplated by Rule 6(12) of the Rules of this Honourable Court.
>
> 2. Placing the respondent under provisional liquidation into the hands of the Master of the High Court of Namibia.
>
> 3. That a *rule nisi* be issued calling upon the respondent and any interested parties to show cause, if any, to this Honourable Court on a date and time to be determined the Registrar of the above Honourable Court why:
>
> 3.1 the respondent should not be placed under a final order of liquidation into the hands of Master of this Honourable Court;
>
> 3.2 that the costs of this application should not be costs in the liquidation;
>
> 4 That service of the *rule nisi* be effected upon the respondent as follows:

[14]Record p26, para 19.4.

4.1 by service of a copy thereof by the Deputy Sheriff of this Honourable Court at the registered address of the respondent at No. 344 Independence Avenue, Windhoek; and

4.2 by publishing same in one edition of each of the Government Gazette and The Namibian newspapers;

5 That Simon Hercules Steyn of L & B Commercial Services and David John Bruni and Ian Robert McLaren of Investment Trust Company be appointed as provisional liquidators of the respondent with all such powers as provided for in Section 386(1), 386(2), 386(2A), 386(2B), 386(3)(a), 386(4)(a) to (i) and in particular the power to raise money on the security of the respondent's assets as contemplated by Section 386(5) of the Companies Act, 1973 and upon the final liquidation (if any) as liquidators of the respondent with the same powers as prayed for above.

6. That the costs of this application be costs in the liquidation of the respondent.

7. Granting such further and/or alternative relief as this Honourable Court may deem meet."

[19] On the same date the court per Hoff J, granted the order prayed for by Ramatex Berhad. [15]

[20] On the 9th of May 2008 the Master of the High Court of Namibia appointed the First to Third Applicants as joint provisional liquidators of Ramatex.[16] The certificate of appointment reads as follows:

"This is to certify that SIMON HERCULES STEYN of L & B COMMERCIAL

[15]A copy of the Rule *Nisi* is annexed to applicants; founding papers as "IRM 1".

[16]A copy of the Master's Certificate of appointed dated 9 May 2008 and issued under No. W17 / 2008 is annexed to applicants' founding papers as "IRM 2".

SERVICES and DAVID JOHN BRUNI and IAN ROBERT McLAREN of INVESTMENT TRUST COMPANY

Having found security to my satisfaction has/have been appointed Liquidator(s)/Provisional Liquidator(s) of the said Company with the powers contained in section 386, subsection (1)(a), (b), (c), (d) and 4(f) of the Companies Act, 1973 (as amended)"

[21] Thereafter, on 27 May 2008, the Master of the High Court of Namibia, cancelled the certificate of appointment dated 9 May 2008 and substituted same with the certificate annexed to the founding papers as "IRM 3". In terms of the latter certificate the Master of the High Court appointed the Applicants as Provisional Liquidators of Ramatex. That certificate reads as follows:

"The Company known as Ramatex Textile (Pty) Ltd has been provisionally wound up by order of the High Court of Namibia dated the 8th of May 2008.

This is to certify that SIMON HERCULES STEYN of L & B COMMERCIAL SERVICES and DAVID JOHN BRUNI and IAN ROBERT McLAREN of INVESTMENT TRUST COMPANY

Having found security to my satisfaction has/have been appointed Provisional Liquidator(s) of the said Company with the powers contained in section 386(1), 386(2), 386(2A), 386(2B), 386(3) (a), 386(4) (a) to (i) and in particular the power to raise money on the security of the respondent's assets as contemplated by section 386(5) of the Companies Act, 1973 as amended, and upon the final liquidation(if any) as liquidators of the respondent with the same powers as prayed for above."

[22] The rule *nisi* was confirmed on Friday 20 June 2008.[17]

[17]A copy of the order confirming the Rule *Nisi* is annexed to applicants' founding papers as "IRM 4".

[23] Applicant, in its founding papers indicated that it is accepted by the applicants that the appointment of the provisional liquidators is irregular as the appointment of a provisional liquidator is made by the master and not the court. The deponent McLaren (first applicant) deals with this aspect as follows in his affidavit.

"14.1 By virtue of the provisions of Section 368 of the Companies Act, 1973, the appointment of a provisional liquidator is made by the Master and not the Court;

14.2 By virtue of the provisions of Section 369 the Master may, subject to the provisions of section 370, appoint as liquidator, (a) person(s) nominated by the meeting of Creditors as liquidator(s).

14.3 Sections 386(2A) and 386(2B) are not applicable in Namibia;

14.4 The "power" provided for in section 386(3) (a) is not a power per se, but must be read with the provisions of sections 386 (4) of the Companies Act.

14.5 The powers referred to in Section 386(4) can only be exercised with the authority envisaged in section 386 (3) (a) and as such this Honourable Court could have refused to grant an order in terms whereof the First to Third Applicants obtained the powers contemplated by Section 386(4) (a) to (i).

15. However:

15.1 the First to Third Applicants were in fact duly appointed as provisional liquidators on the 9th of May 2008 by the Master of the above Honourable Court, as contemplated by and in terms of the provisions of Section 368 of the Companies Act;

15.2 the above appointment remained effective until 27 May 2008, when the Master of the above Honourable Court issued the Certificate of Appointment (Annexure “IRM3”, which was similarly an appointment duly made by the Master of the above Honourable Court. Reference to section 386 (2) (A) and 386 (2) (B) (being sections not in existence) is pro non scripto, and refers to powers which the First to Third Applicant could not, and in fact did not, ever exercise.

15.3 Up and until 27 August 2008, the date of the first meeting of creditors, the Master of the above Honourable Court had not received any nomination for the appointment as liquidator of any person, other than the Applicants.

15.4 At the first meeting of creditors held on 27 August 2008 the appointment of Applicants as final liquidators, were unanimously approved.

15.5 Subsequently thereto, and on 11 September 2008 the Master of the above Honourable Court issued the certificate of Appointment as final liquidators, to the Second Applicant, the Third Applicant and I, annexed hereto as "IRM 5""

[24] This irregular and unlawful appointment of the provisional liquidators gave rise to the first respondent’s counter application in which first respondent claims the following relief:[18]

“TAKE NOTICE that first respondent / applicant intends making application to the above Honourable Court on the date of the hearing of the main application for an order:

1. Condoning the non-compliance with the rules of the above Honourable Court, in particular those rules applicable to interlocutory applications.

2. Rescinding / setting aside paragraph 5 of the provisional liquidation order

[18]Record p486, Annexure “W38A”.

handed down by the High Court of Namibia on 8 May 2008 and

3. That the costs of this application be costs in the main application.

AND TAKE NOTICE FURTHER that first respondent / applicant will rely on the contents of its opposing affidavit, deposed to by Mr Taapopi and other opposing, supporting and confirmatory affidavits, for the relief herein sought."

[25] In its opposing papers, first respondent, relying on the irregularities, pointed out by applicant in its founding papers, as well as further irregularities as advanced by first respondent contend that the order, which was sought and granted in terms of paragraph 5 should never had been sought or granted. The stance of the first respondent is clearly supported by first to third applicants' concessions.[19]

[26] First respondent however indicates that:

"it is not disputed that first to third applicants were duly appointed by the Master as provisional liquidators on 9 May 2008. It is however denied that the master had any authority whatsoever to grant them any powers under section 386(4) of the Companies Act as was purportedly done in her first "certificate of appointment". [20]

[27] As such, the first respondent submits that paragraph 5 of the *rule nisi* should never have been sought, granted and/or confirmed, was patently wrong and as such submits that:

"The order granted in paragraphs 5 was granted in error and stands to be rescinded in terms of rule 44 (1) (a), alternatively 44 (1) (b) of the High

[19]Record p232, para 9.2.

[20]Record p253, para 1.

Court rules."[21]

[28] It is important to note that first respondent never requested an order for the removal of the liquidators and/or the withdrawal of their certificates of appointment, issued by the Master, subsequent to the court order having been made.

[29] In my view, two aspects dictate against first respondent's entitlement to the order sought in its counter application. They are the following:

29.1 In the first instance and in the light of the concessions made by the first respondent, the granting of the relief by first respondent in its counter application will be abstract, academic and irrelevant for purposes of this application. This outcome is premised on the decision reached in respect of the first to third applicants' *locus standi infra.*

29.2 In the second instance, I am in agreement with the submission made by Mr Heathcote, that the relief cannot be entertained as first respondent did not join Ramatex Berhad, the applicant in the liquidation proceedings, nor the Master as parties to its counter application. In my view both, especially Ramatex Berhad, has a direct interest in the relief sought in the counter application and as such therefore should have been joined as a party. In arriving at this conclusion I am alive to the submissions of Mr Smuts that it would have been difficult to join Ramatex Berhad as it is foreign company.

The fact that it may have been difficult does not make it impossible as the rules of this court have provisions in respect of which such a joinder could have been effected or at least attempted to be effected.

[21]Record p251, para 8.1.

First to Third Applicants' *locus standi*

[30] As already stated hereinbefore, the first respondent in its counter application did not ask for the removal of the first to the third applicants as liquidators nor did it request the setting aside of the certificates of appointment issued by the Master subsequent to the court order erroneously made.

[31] As such, Mr Heathcote submitted that the relief sought by first respondent in its counter application is to an extent separate from the attack on the *locus standi* of the first to the third applicants herein.

I am in agreement with the submission of Mr Heathcote as it is evident that, not only is it common cause between the parties that the first to third applicants were duly appointed by the Master as provisional liquidators on 9 May 2008, but also due to the ambit and operation of section 375 of the Companies Act, which provides as follows:

"375 Appointment commencement of office and validity of acts of liquidator.–

(1) When the person to be appointed to the office of liquidator of a company has been determined and when such person has given security to the satisfaction of the Master for the proper performance of his duties as liquidator, except where in the case of a members' voluntary winding-up the company concerned has resolved that no security shall be required, the Master shall appoint him as liquidator of the company by issuing to him a certificate of appointment.

(2) The said certificate of appointment shall be valid throughout the Republic.

(3) A liquidator shall be entitled to act as such from the date of his certificate of appointment.

(4) The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

(5) Upon receipt of such certificate of appointment the liquidator shall –

(a) Within seven days after receipt thereof send a copy thereof to the Registrar under cover of the prescribed form; and

(b) give notice of his appointment in the Gazette."

[32] The effect of s 375 is clear as it is intended in the section that the appointment of a liquidator is effected by the issue to him/her of a certificate of appointment which is valid throughout Namibia (thus enabling him to exercise his functions as liquidator wherever in Namibia it is necessary to do so). The liquidator's right as such exists only from the date of the certificate. His/Her acts, if not fraudulent, are valid, notwithstanding any defects which may afterward be discovered in his/her appointment or his/her qualification i.e. even if he/she was disqualified for appointment in terms of s 375.[22] Mr Smuts, during the hearing, indicated that no fraudulent conduct is alleged against first to third applicants.

[33] During the hearing of the application, I invited the first respondent's counsel to file additional submissions on the question whether the liquidators can rely on the provisions of s 375 (4) of the Companies Act of 1973 where their *locus standi* is placed in issue on the grounds that their appointments were irregular and unlawful, due to the non-compliance with the prescribed procedure.

[22] Henochsberg Companies Act, 4th Edition, Vol 2, p 659.

[34] Mr Smuts filed an additional note, for which the court is indebted, with the following content.

> "1. This note deals with the question whether the liquidators can rely on the provisions of section 375 (4) of the Companies Act of 1973 as an answer where their *locus standi* is put in issue on the grounds that their appointments were irregular and unlawful due to the non-compliance with the prescribed procedure of sections 52 to 54 of the Insolvency Act of 1936.
>
> **2.** We could not find any authority dealing with the provisions of section 375(4). We could also not find any authority that the liquidators' irregular and unlawful appointments deprive them of *locus standi*.
>
> **3.** After extensive research it appears to us that as long as the liquidators are holders of certificates of appointment as liquidators they will have the necessary *locus standi* to sue or be sued in their official capacities as such, despite the fact that their nomination, election and appointment were irregular and unlawful, by virtue of the provisions of section 375(4) of the Companies Act. Some indirect support for this view was found in *Hobson NO v Abib* 1981 (1) SA 556 (N) At 561E-H the following:
>
> "In any event, even if the Court were to allow the insolvent to rely on the alleged illegality of the trustee's election, I see no prospect of the application for his removal succeeding on that ground. The Court is not bound to remove a trustee from office if it is proved that his election was irregular or illegal. The Court has a discretion which it will exercise judicially in the light of all the relevant circumstances (*Brink v The Master and Others* 1960 (1) SA 510 (T); *Trans-Drakensberg Bank Ltd v The Master and Others* 1962 (4) SA 417 (N) at 425).""

[35] Muller J, in *Council of the Municipality of Windhoek v Bruni N.O. & Others*[23] had to express himself on an almost similar issue. In his judgment in

[23] 2009(1) NR 151 (HC).

respect of the appointment of the liquidators, which were also challenged, by the first respondent therein, Muller J stated that[24]

"Appointment of the liquidators

[23] The applicant relies on several submissions regarding the appointment of the first and second respondents as joint liquidators and argued that such appointment was unlawful and irregular. The effect thereof would then be that any subsequent conduct by the liquidators would be null and void, e.g. the sale of the property (or what it entails) to the third respondent. In this regard the applicant submitted that the joint liquidators had to be appointed by the creditors and were at pains to point out that both creditors' meetings were irregular for several reasons.

[24] Adv McWilliam's response to the applicant's submissions in this regard is that the appointment of the liquidators falls within the Master's jurisdiction according to s 367 of the Companies Act 61 of 1973, which Act is applicable to Namibia. He submitted that the fifth respondent, the Master, appointed first and second respondents as joint liquidators after Rhino was finally liquidated. They were also the provisional liquidators appointed as such subsequent to the provisional liquidation order. After their appointment, joint liquidators, first and second respondents, could act as provided for in the Companies Act.

[25] The second respondent deposed to an affidavit in which he confirmed the appointment of himself and first respondent as joint liquidators and attached a copy of the certificate of their appointment, dated 8 August 2007 and signed by the fifth respondent. The first respondent confirmed his appointment, as well as the allegations by the second respondent in his confirmatory affidavit. In my view, based on this certificate issued by the Master in terms of the relevant statutory provision, the joint liquidators were legally appointed and could act as such. It is trite that the liquidator steps into the shoes of the liquidated company and acts as such in the best interest of the creditors of the company. In any event, the Master retains control over a liquidator in terms of s 381 of the Companies Act. The joint liquidators could therefore deal with the property and assets of Rhino and could continue with the lease or sell the property, if it had not been cancelled. Kerr, The

[24]On pp 162-163, para [23] to [25].

Law of Sale and Lease 3 ed at 500. That brings us back to the crucial issue, namely whether the lease had been cancelled prior to the liquidation or not."

[36] In the circumstances, the first to third applicants, despite the fact that their initial appointments, by the court, were irregular and unlawful, by virtue of their certificates of appointment having been issued, read with the provisions of section 375 (4) of the Companies Act, have the necessary *locus standi* to sue or be sued in their official capacities as such. It therefore follows that they also have the necessary *locus standi* not only to institute the present proceedings, but also to have taken the steps and/or actions leading up to the bringing of this application, including, but not limited to the giving of the notice in an attempt to continue with the lease and service agreements.

[37] In the premises the relief sought by the first respondent, in its counter application, is dismissed. In respect of the costs of the counter application, I have decided to order that the costs shall be cost in the main application. This conclusion is premised on the fact that the appointment by the court, as admitted by the first to third applicants themselves, indeed was irregular and unlawful and should not have been requested nor granted.

The existence of the lease and service agreement

[38] It is evident from the contents of the application as amplified by the submissions made during the hearing thereof, that this dispute lies at the heart of the application.

[39] It therefore comes at no surprise that the liquidators, immediately upon their appointment, on the 9th of May 2009, by the Master of this court as provisional liquidators addressed a letter to the first respondent with the following content.[25]

"9th May 2008

The Chief Executive Officer

City of Windhoek

P O Box 59

WINDHOEK

Dear Sir/Madam

We confirm that Ramatex Textiles Namibia (Pty) Ltd has been put under provisional liquidation on 8th May 2008.

We are the duly appointed Liquidators.

We refer to the Notarial Deed of Lease Agreement No. 1(246/2001.

As you are aware the duly appointed Liquidators may, upon liquidation, elect to terminate or continue with the Lease Agreement.

Please be advised that we have elected to continue with the Lease Agreement. Please advise when the next rent payment must be made.

Yours faithfully

I.R. McLAREN

PROV. LIQUIDATOR"

[25]Applicants' Founding papers – "IRM8".

[40] On the 11th of May 2008 first respondent, responded to the liquidator's letter of 9 May 2008 as follows:[26]

"11 May 2008

Mr IR McLaren

Provisional Liquidator

Ramatex Textiles Namibia (Pty) Ltd

(In provisional Liquidation)

PO Box 11267

Windhoek

via Fax: 231788

Att: Mr IR McLaren

Dear Sir

RE: RAMATEX: NOTARIAL LEASE PORTION OF FARM 466 AND ERF 497 GOREANGAB

I refer to your letter of 9 May 2008. I hereby confirm that there is no lease agreement in place.

Notice was given to Ramatex on 17 March 2008 to rectify their breaches of contract. The breach of contract continued. Ramatex was also informed that upon termination the improvements on the immovable property would revert to the City.

The Lease has been effectively cancelled on 18 April 2008 and notice to this effect was given to Ramatex on 21 April 2008.

Your notice was also referred to the City's Legal practitioners. Your understanding is appreciated.

Yours Truly

[26]Applicants' Founding papers – "IRM9".

JS de Kock”

[41] To understand the background of the letter, of first respondent dated 11 May 2008, it is necessary to also refer to the following correspondence which was exchanged between the parties.

41.1 The first material correspondence in the chain of events is a letter from first respondent to the fourth applicant dated 19 March 2008. [27]

“Mr Ong B Keong

Ramatex Textiles Namibia (PTY) Ltd Box 268

466 Otjomuise Road Windhoek

via Fax: (061) 231652

Att: Mr Ong Boon Keong

Dear Sir

RE: UNSOUND ENVIRONMENTAL PRACTICES EXECUTED BY RAMATEX

Your Company in this Agreement of Lease with the Municipal Council of Windhoek undertook to execute sound environmental practices and comply with the International Standards for the Environment ISO 14000.

A recent inspection indicated that your Company' is continuing to disregard the International Standards for the Environment ISO 14000 and clause 9.1.1 of the Notarial Lease and clause 6.4 of the Service Agreement to keep the waste water treatment facilities on the Property in good order and condition and to remove harmful residues before discharging the water. The waste water treatment facility is in a dilapidated state and unfit for further use in its current state.

[27] Applicants’ founding papers – “IRM10”.

The Council is concerned that you gave Notice to discontinue your business operations without any indication as to the manner in which you will address the rehabilitation of the waste water facilities to be left behind or in which manner your Company is going to financially make provision to rehabilitate the environmental damages caused.

You are hereby given 30 days Notice under clause 16.1 of the Notarial Lease Agreement to remedy the above breaches or provide financial security for the rectification of the environmental damage.

Failure to effect the rectifications within the Notice period of 30 days will entitle the Council to terminate this Agreement and claim damages for your non-compliance.

Your urgent adherence to the conditions of the Contract is herewith demanded.

Your co-operation is appreciated." (emphasis added)

The receipt of this notice and the delivery thereof to fourth applicant is not disputed by applicants.

41.2 On 19 March 2008 a letter with the caption breach of conditions of notarial lease and demand to rectify, drafted by first respondent, and signed by its CEO, was on the same date served on the registered offices and *domicilium citandi et executandi* of Ramatex and according to the acknowledgment of receipt it was received by a certain A Harmse. The said letter provides as follows:

"Date: 19 March 2008

Your reference: Ramatex

Mr Ong B Keong

Ramatex Textiles Namibia (PTY) Ltd
Box 268
466 Otjomuise Road Windhoek

via Fax: (061) 231652

Att: Mr Ong Boon Keong

Dear Sir

RE: BREACH OF CONDITIONS OF NOTARIAL LEASE AND DEMAND TO RECTIFY

It has come to the attention of the Municipal Council of Windhoek that you are in material breach of the Notarial Lease Conditions in respect of the Ramatex lease of a Portion of Farm 466 and two Portions of Erf 497, Goreangab as well as the Service Agreement with the Council.

In this respect I refer to:

Your Company's continued disregard of clause 7.8 of the Notarial Lease by not following and executing sound environmental practices or complying at all with the International Standards for the Environment ISO 14000,

Your Company's continued disregard of clause 9.1.1 of the Notarial Lease and clause 6.4 of the Service Agreement to keep the waste water treatment facilities on the Property in good order and condition and to remove harmful residues before discharging the water. The waste water treatment facility is in a dilapidated state and unfit for further use in its current state.

The General Announcement of Ramatex dated 5 March 2008 in respect of your intended business closure on 6 March 2008, your Letter to the Hon Minister of Trade and Industry on the same day with the same intent and your subsidiary Flamingo Garment's retrenchment agreement with NAFAU and the Workers employed within the leased area. This announcement clearly indicates a breach of the Service Agreement with the Council, which was attached to the Lease Agreement

- The notice given that your Company would no long enjoy EPZ status. If your Company is not enjoying EPZ status, you will be transgressing clauses 7.2 of the Notarial Lease.

You are hereby given 30 days Notice under clause 16.1 of the Notarial Lease Agreement to remedy the above breaches.

Failure to effect the rectifications within the Notice period of 30 days will entitle the Council to terminate this Agreement and claim damages for your non-compliance.

Kindly note that the Council has also received a copy of a letter of Ramatex Berhad dated 10 March 2008 giving notice to the Namibian High Commissioner that the Company has given authority to Mr Ong B Keong to "dispose of all assets belonging to the Namibian group of companies including the factory buildings."

Kindly note that your Company is not entitled to remove or alienate the factory buildings. The Council is the owner of the immovable property and all assets affixed thereto that became immovable.

You have no right in terms of clause 6 of the Notarial lease to assign the Lease Agreement to a Party not approved by the Council. In addition clause 9.1.2 of the Notarial lease read with clause 7.2 of the Service Agreement does not allow your Company to sell the immovable property including the immovable factory building or remove anything from the Property except plant, material, equipment and material.

Your urgent adherence to the conditions of the Contract is herewith demanded.

Your co-operation is appreciated.

Yours Truly

Nilo Taapo

CHIEF EXECUTIVE OFFICER”

Applicant, despite the letter having been served on fourth applicant's registered address and chosen *domicilium citandi et executandi*, the letter was received by Ramatex, as it appears from the affidavit of Harmse that she never forwarded the letter to Ramatex after having been informed by the messenger of the Municipality that a copy of the letter will be delivered to Ramatex.[28] This aspect, as well as the application to strike the affidavit of Ms Harmse will be dealt with if and when same become necessary.

41.3 On 11 April 2008 Koep & Partners, being the legal practitioners of fourth applicant, responded to the letter dated 19 March 2008, in the following fashion.[29]

"11 April 2008

City of Windhoek

Office of the Chief Executive Officer

P.O.Box 59

WINDHOEK

ATTENTION: JS de Kock

Dear Sir,

RE: RAMATEX

We act herein on behalf of Ramatex Textiles Namibia (Pty) Ltd. We have been handed your letter dated 19 March 2008.

Our instructions are, without dealing with the other issues raised in your letter at this stage, but the rights of which we reserve our clients to do at any relevant stage in the future, to request that you provide us with a reasonable amount that you require as financial security for the rectification

[28]See founding papers, p48 para 36.22.9.5, see also answering papers p289, para27.39, the affidavit of Oscar Simataa, pp664-667; Replying papers of David Bruni pp 1166-1169.

[29]Applicants' Founding papers – "IRM11".

of the alleged environmental damage as mentioned in paragraph 4 of your letter.

Furthermore please indicate in which format such security would be acceptable. Your urgent response to this is appreciated.

Yours faithfully

KOEP & PARTNERS

R T D MUELLER"

[42] On 21 April 2008, the Chief Executive Officer addressed a letter to the fourth applicant under the heading "Notice of Lease Cancellation due to breach of conditions of Notarial Lease", on the following terms.[30]

"21 April 2008

Mr Ong B Keong
Ramatex Textiles Namibia (PTY) Ltd
Box 268
466 Otjomuise Road
Windhoek

via Fax: 061 231652

Att: Mr Ong Boon Keong

Dear Sir

RE: NOTICE OF LEASE CANCELLATION DUE TO BREACH OF CONDITIONS OF NOTARIAL LEASE

The Letter of the Chief Executive Officer dated 19 March 2008 in which you were given Notice to rectify certain material breaches in respect of your Notarial Lease

[30]Applicants' Founding papers – "IRM12".

of a Portion of Farm 466 and two Portions of Erf 497, Goreangab as well as the Service Agreement with the Council.

In this respect I refer to:

Your Company's continued disregard of clause 7.8 of the Notarial Lease by not following and executing sound environmental practices or complying at all with the International Standards for the Environment ISO 14000.

Your Company's continued disregard of clause 9.1.1 of the Notarial Lease and clause 6.4 of the Service Agreement to keep the waste water treatment facilities on the Property in good order and condition and to remove harmful residues before discharging the water.
The waste water treatment facility is in a dilapidated state and unfit for further use in its current state.

- The discontinuance of your textile and garment factory operations.

- The fact that your Company no longer enjoys EPZ status.

In the light of these material breathes that have not been rectified within the notice period, you are hereby given Notice that your lease is hereby terminated and cancelled under clause 16 of the Notarial Lease read with clauses 17 and clause 9 of the Lease and clause 13 of the Service Agreement.

You are hereby given instructions to immediately vacate Portion of Farm 466 and two Portions of Erf 497, Goreangab and hand over the buildings and site to the Manager. Property Management of the City.

The City Police of the Council will take over the security of the Leased Portions and the necessary take over arrangements will have to be made with the Manager. Property Management of the City."

42.1 This letter was followed up with another letter by the first respondent, addressed to the fourth applicant, dated the 24th of April 2008, which provided as follows. [31]

"24 April 2008

Mr Ong B- Keong

[31]Applicants' Founding papers – "IRM13".

Ramatex Textiles Namibia
P 0 Box 268
Otjomuise Road
WINDHOEK
Via Fax: 061 231652

Attention Mr O B Keong

RE: NOTICE TO TAKE CONTROL OF THE BUILDINGS FOLLOWING CANCELLATION OF THE LEASE: FARM 486 [RAMATEX PREMISES]

Our cancellation letter dated 21 April 2008 and our subsequent meeting held 22 April 2008 have reference.

The City needs to record that you have failed to comply with the City's Notice of 19 March 2008 to correct the breach of contract in respect of the environmental damage caused. The City is undertaking an environmental audit to determine the final costs for the rehabilitation of the area. Once the rehabilitation costs are known the City would institute action in respect of our claims for damages and loss incurred. You are advised that the City of Windhoek in its capacity as landlord of the buildings on Farm 486 holds a hypothec over the movables situated on the premises and the same may not be removed by yourself or any agent or occupants of the premises.

Kindly take note that the City of Windhoek in keeping with the cancellation of the Lease Agreement will make arrangements to provide its own security to the Property and buildings. The City security personnel will resort under the City Police Department and that department would provide them with Security details as to how they would secure and guard the premises and its assets to safeguard the City's interest. In this communication we take note of your statement that the current security arrangement is a temporary arrangement and that after your company has completed the administrative work, your security company would vacate the premises.

You have however been given notice to vacate the premises. Should you continue to occupy the same and not vacate the premises within fourteen

days from the date of this notice, the City would have no alternative but to approach the court for the necessary relief.

We therefore ask for your co-operation in this regard.

Yours faithfully

CHIEF EXECUTIVE OFFICER"

[43] On 28 April 2008, Lorentz Angula Inc, the legal practitioners of record of first respondent, addressed a further letter to PF Koep & Co, legal practitioners of fourth respondent, which letter mainly addressed the question as to the environmental damages to premises: Farm 466. [32]

"28 April 2008

PF KOEP & CO
Attn.: Mr RTD Mueller
BY FACSIMILE: 233 555

ENVIRONMENTAL DAMAGE TO PREMISES: FARM 486

With reference to our client's letter addressed to Ramatex Textiles Namibia dated 24 April 2008, a copy whereof was also delivered to your offices on 25 April 2008, we confirm that we act herein on behalf of our client the Council of the Windhoek Municipality.

We hold instructions to institute action in respect of our client's claim for loss incurred due to environmental damage to the above premises.

You are advised that our client in its capacity as landlord of the buildings on Farm 466 holds a tacit hypothec over the movables situate on the premises.

Unless we receive an unequivocal undertaking from you on behalf of your client by close of business tomorrow Tuesday 29th April 20013 that your client will not

[32] Applicants' Founding papers – "IRM14".

remove any movable assets from the premises, we hold instructions to approach the High Court of Namibia for interdictory relief."

[44] On 29 April 2008, Koep & Partners responded to the letters of first respondent, dated 21 April, 24 April and 28 April 2008, in the following manner. [33]

"29 April 2008

LorentzAngula Inc. Windhoek

Dear Madam

RE: RAMATEX TEXTILES NAMIBIA (PTY) LTD

We refer to your letter dated 28 April 2008. Please note that the name of our firm has changed - quite a while ago already.

In respect of your client's letters dated 21 April and 24 April 2008, we record that, while taking note of the contents of the letters, all our client's rights are reserved.

As far as your client's reference to a hypothec is concerned, we hold instructions that no rent is outstanding.

Please inform us as soon as possible on what you base your client's claim to exercise a hypothec.

Nevertheless, and until such time as you have responded to this letter (provided a satisfactory response is received within a reasonable time) you can have the undertaking sought in the last paragraph of your letter."

[33] Applicants' Founding papers – "IRM15".

[45] Another letter annexed to applicants' founding papers is a letter dated the 7th of August 2008, addressed by first respondent's legal practitioners of record to applicants' legal practitioners of record with the following content –

"07 August 2008

PE Koep & Company

33 Schanzen Road WINDHOEK

Att: Mr. R. Mueller

Dear Sirs,

RAMATEX (liquidation)

1. Your letter dated 28 July 2008 refers. We confirm that we act on behalf of the Municipal Council of Windhoek.

2. We take note that you purport to act on behalf of the "liquidators" of Ramatex (Pty) Ltd ("Ramatex"). The appointment by the Court of Messrs Steyn, Bruni and McLaren as provisional liquidators was sought and granted without any statutory authority thereto contrary to the provisions of section 368 of the Companies Act (as applicable in Namibia).

3. It furthermore appears that the applicant, the sole shareholder of Ramatex, in that capacity applied for and was granted an order in terms whereof the provisional liquidators were granted such "powers" as provided for in section 386 (1), 386 (2), 386 (2A), 386(2B), 386 (3) (a), 386 (4) (a) to (i) including the power to raise money on the security of respondent's assets as contemplated by section 386(5) of the Companies Act). Applicant also applied for and was granted an order that the provisional liquidators be appointed "as liquidators upon the final liquidation" of Ramatex contrary to the provisions of section 369 (2) (c) with the same powers [contrary to the provisions of section 386(3) (a) read with section 386 (4).] This order amounts to a complete undermining and

perversion of the whole liquidation process envisaged in both the Companies Act and the Insolvency Act.

4. Sections 386(2A) and 386(2B) referred to in the order are not applicable to Namibia. Furthermore, an order was sought that the provisional liquidators shall have the "**power**" as provided for in section 386 (3) (a), which is not a power at all and clearly an order which the Court could not make. The Court could also not grant an order in terms whereof the provisional liquidators obtained all such powers as provided for in section 386(4) (a) to (i). The powers described in section 386(4) can only be exercised with the authority envisaged in section 386(3) (a) of the Companies Act.

5. The effect of this order is that the Court appointed liquidators (when the order was made final) and granted such liquidators the power to liquidate the company prior to the first meeting of creditors thus obviating the need to hold a creditors' meeting at all for any purpose other than the proving of claims. The Court could only grant an order as contemplated in section 386(5) of the Companies Act upon admissible evidence that this authority was required. Needless to say, no attempt has been made in the application to do so.

6. Based on the aforesaid, our client disputes the authority of the "**liquidators**" to act in this matter in general and in particular to appoint attorneys or to consider "**offers**" in respect of the lease agreement in question (the nature of which was not disclosed to our client, the owner of the property).

7. Our client reserves its rights to raise your clients' lack of authority to conclude any enforceable agreement with third parties, which may have an effect on our client's rights as owner and/or landlord.

8. We have considered the opinion dated 1 July 2007. It is evident that the legal practitioners who drafted the opinion were not provided with the correct correspondence, which preceded our client's letter dated 21 April 2008. A second letter was addressed to Ramatex (also dated 19 March 2008) in which the matters raised in the letter of 21 April 2008 were addressed. In the circumstances, nothing much turns on the opinion obtained at the behest of the **"liquidators**" as the agreement was cancelled based also on further breaches thereof by Ramatex.

9. Our client persists with its contention that the lease agreement had been validly cancelled prior to the application for and granting of the provisional liquidation order on 8 May 2008. Neither Ramatex nor its parent company, which launched the liquidation application, has at any stage contested our client's right to cancel the lease agreement or contested the cancellation thereof on the grounds relied upon for such cancellation or otherwise.

10. Ramatex has clearly repudiated its obligations in terms of the agreements concluded with our client, which our client accepted, alternatively herewith accepts, quite apart from the breaches complained about, which entitled our client to cancel the agreement between the parties. Ramatex has in any event waived its right to enforce the agreement or to object to the cancellation thereof. We point out that Ramatex was at all times relevant represented by you as legal practitioners. The provisional liquidators cannot now seek to resurrect the agreement.

11. Our client, while reserving all its rights, demands to be fully informed of all offers received pertaining to our client's property. If our client's contention is correct, namely that the lease agreement had been duly cancelled, the provisional liquidators cannot deal at all with any matter pertaining to the property and/or the erstwhile lease agreement. Should it be found that the lease agreement had not been validly cancelled (which is denied), the provisional liquidators cannot proceed to consider and deal with offers on the basis of this lease agreement (their stated intention) without the express approval and permission of our client. In terms of the Court order (the validity of which is disputed) only the authority to terminate the lease agreement was granted. No authority was granted to deal in any other manner with the lease agreement and/or the rights in and to the lease agreement.

12. Similar issues pertaining to a similar lease agreement and similar conduct by Messrs Bruni and McClaren were raised in legal proceedings which are currently pending between our client and Messrs Bruni and McClaren and others. The provisional liquidators have not been duly appointed as provisional liquidators or as liquidators. There has to date been no attempt to comply with the provisions of section 37(2) of the Insolvency Act of 1936. Our client in any event reserves all its rights in terms of clause 6 of the lease agreement. We

also herewith record that our client as the owner / landlord of the property in question, is under no obligation whatsoever to change the terms of the lease agreement so as to accommodate a third party who may wish to acquire rights in terms of the lease agreement which our client, in any event, still contends, has been duly cancelled. In this regard your clients are specifically referred to the provisions of, amongst others, clause 7.2 of the lease agreement.

13. This letter serves to demand of your clients to keep our client fully informed of each and every step taken or matter taken under consideration by the "liquidators" in respect of or pertaining to our client's property and/or the lease agreement (which your clients contend, had not been duly cancelled). Our client also demands that the provisional liquidators inform all interested parties of our client's stance and rights as owner in and to the property in question as well as of the terms of the lease agreement in question. Our client requires to be provided with all offers received by the provisional liquidators pertaining to our client's property and/or the lease agreement and demands that your clients will not allow any third party to take occupation of our client's property without our client's express permission to do so, as was done in the Rhino Garments matter.

14. Kindly revert to us as a matter of urgency in respect of the matters raised in this letter.

Yours faithfully,

LORENTZ ANGULA INC.

per: S HOFFMANN" [34]

[46] To place the letters of demand and the letter of cancellation and their contents in perspective for purposes of this judgment, it is necessary to refer to the following background.

[34]Applicants' founding papers "IRM17" p123-125.

[47] Ramatex on 29th of February 2008 addressed the following letter to the acting CEO of the Offshore Development Co (Pty) Ltd:

"29 February, 2008

The Acting CEO

Offshore Development Company (Pty) Ltd PO Box 13397

Windhoek, Namibia

Attn: Mr. Nghidinua Daniel

Fax : 061-231001

Dear Sir,

Re: RAMATEX TEXTILES NAMIBIA (PTY) LTD - NOTICE OF CANCELLATION OF EPZ STATUS

With reference to your letter of 11 February 2008, we request that for now you do not take any steps in cancellation of our EPZ status.

The operations have not totally ceased after exported machinery out of country on end January 2008. Certain of the operations are still ongoing like dismantling fitting, housekeeping. We are also still in the process of administering the disposal of certain items and negotiating certain issues pertaining to hand over of the site.

We will advise you before the end of May 2008 as to the further proceedings of the operations of our company but for now request that until the end of May 2008 you do not take any further steps.

Yours faithfully

General Manager" [35]

[35]Record p435 – annexure "W46".

Courtesy copies of this letter was send to the Honourable Minister of Trade & Industry, the Honourable Minister of Finance, the Governor – Bank of Namibia, The Permanent Secretary, Minister of Trade & Industry, The Namibia High Commissioner, Malaysia and the Executive Director – Namibia Investment Centre.

[48] On 5 March 2008 Ramatex, by way of a general announcement, announced its business closure and informed that:

"GENERAL ANNOUNCEMENT ON BUSINESS CLOSURE

It is with regret to inform you that the management has decided on the closure of the entire Namibia business operation with effect from March 2008, as there is no magic solution to guarantee the future success to this business operation.

As you are probably aware, for some time now already both Ramatex Textiles Namibia and Flamingo Garments have operated at diminished capacities. Management has considered various options to avoid a total closure, but none of such have been fruitful.

The decision for this business closure was based on amongst others the following reasons:

(1) Catastrophic business failure and business sustainability factors due to economic factors and lack of operating profits; and

(2) Costs overrun, heavy indebtedness and imbalance experiences in Namibia operation.

As a consequence of the decision, all Namibian employees will be retrenched, in accordance with the relevant Namibia labour law.

It saddens us to have to make this announcement. We feel sympathetic towards all our employees, as well as suppliers, service providers and other contracting parties who are affected as a result of this decision. We thank all persons so affected for the period that we were engaged in a working relationship.

Issued by:

Board of Director of:
Ramatex Textiles Namibia (Pty) Ltd and
Flamingo Garments (Pty) Ltd"

[49] In a letter dated the 10th of March 2008, Ramatex Berhad also informed the High Commissioner of the Republic of Namibia in Kuala Lumpur, Mr Neville Gertze of the business closure.

"Ref: Business Closure

With reference to the above and our meeting on the above subject as follows:

(1) Management was under intense pressure by stakeholders due to unable to fulfil the liability obligations and also many unforeseen circumstance happening, we were forced to give short notice although it was not our intention to do so. The local management was blamed for the delay of disposal of the machinery that caused the cash liquidity crunch and stakeholders' unhappiness.

(2) Authority will be given to Mr. B K Ong, the General Manager, to dispose all the assets belonging to the Namibia group of companies including the factory buildings, machines and inventories with the purposes to raise fund to settle the workers compensation and other local operational liabilities. There shall be no further injection of fund from the Group. The government will be invited to access to the buildings for the purpose to purchase the buildings at the net book value ("NBV").

(3) Authority will also be given to Mr B K Ong to negotiate with all related parties on the retrenchment benefits. However, the compensation amount should be reasonable and subject to the amount raised from the disposal of the local

assets. We hope the Prime Minister can get involve as the authority to oversee the smooth negotiation between all parties.

Last but not least, we thank Excellency for your concern on this issue. We want this channel of communication to be there throughout the process of business closure.

Your kind cooperation on the above is being highly appreciated. Thank you.

Yours faithfully,

RAMATEX BERHAD"

[50] The contents of the letters are clear. It clearly indicates a permanent closure of Ramatex business enterprises in Namibia, the sale of all its remaining assets, i.e. those were not removed, as well as the handing over of the site presumably to the first respondent and/or the Government of the Republic of Namibia. Ramatex decided to abandon its operations and leave Namibia. All that therefore remained was to liquidate its assets and comply with the remaining ancillary issues as per the lease and service agreements. It is also common cause that Ramatex retrenched, if not all, then at least the majority of its workers.

[51] Ramatex' decision was not only clear but was also unequivocal. It unequivocally decided to abandon and/or not to continue with the project as envisaged in the lease and/or service agreements for the remainder of the period contracted for.

[52] Mr Ong, the General Manager in Namibia, was appointed as the responsible person to act on behalf of Ramatex.

[53] In none of the correspondence exchanged between the parties prior to the liquidation proceedings, which form part of the record of these proceedings, was any indication given that liquidation proceedings were contemplated by Ramatex, let alone any indication that the letters exchanged between the parties during the relevant period were exchanged by Ramatex and/or its legal practitioners of record subject to liquidation proceedings as now apparently alleged by applicants in their replying papers. If such proceedings indeed were contemplated and the letters were written subject thereto, such an important allegation should have found its way into applicants' founding papers and not only into their replying papers.

[54] I therefore, as requested by first respondent in its notice to strike out, strike out of each and every of the allegations in the replying affidavit to the extent that the letters and/or communications were addressed in anticipation of the liquidations proceedings.[36]

[55] Applicants' attack on the validity of the cancelation of the agreements, in its founding papers is based on *inter alia* the following:

> "34.1 The First Respondent's purported cancellation is null and void in that the person who issued the letters of demand has not been authorised by the First Respondent to do so, and as such had no authority whatsoever to cancel the lease agreement; and/or
>
> 34.2 The letters of demand, purportedly sent on behalf of the First Respondent, totally apart from being ultra vires, do not comply with the elementary requirements for a valid demand or cancellation. The alleged breaches are factually incorrect,

[36] As such the last sentence in para 83.1 is struck, as well as the following words in para 83.7 – "and it was done in anticipation of the liquidation application" and "it was not and could not have been an indication to repudiate the lease agreement."

not material, unidentified, and in addition, should they have been in existence, insufficient time was afforded to rectify same;

34.3 The procedure followed by the First Respondent when it purported to cancel the agreement, fails to comply with reasonable and fair administrative procedure, more particularly in that Ramatex was not afforded an opportunity to be heard prior to the purported cancellation, also in view of the provisions of the agreement quoted in paragraph 18.3.12. In this regard I also point out that the second respondent never cancelled Ramatex's EP2 status in terms of section 15 of the Export Procession Zone Act, No 9 of 1995"[37]

[56] First respondent's contentions in respect the existence of the lease and service agreements have already been referred to *infra.* It, *in esse,* boils down to the following that:

"The relief sought in the two Notices of Motion is misconceived. The lease agreement was duly terminated by reason of Ramatex's repudiation and was in any event cancelled in terms of the agreement by reason of material breaches of the terms thereof and/or by reason of the failure of a material tacit term or assumption common to the parties that upon the abandonment of the whole project the agreement would terminate"

Interpretation of contracts

[57] In *Erongo Regional Council and Others v Wlotzkasbaken Home Owners' Association & Another*[38] , Strydom AJA who wrote for the court referred with approval to *Coopers & Lybrandt & Others v Bryant* 1995 (3) SA 761 (A),

[37]Record p36 para 34 as amplified by the further allegations contained on pp 36-44.

[38] 2009 (1) NR 252 (SC) at 262 para [31].

where the following summary of the rules of construction in the interpretation of documents and contracts are provided –

"[31] In the recent case of *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) ([1995] 2 All SA 635) the Appeal Court of South Africa again summarised the rules of construction in the interpretation of documents. At 767E - 768E the following was stated:

'According to the golden rule of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. *Principal Immigration Officer v Hawabu and Another* 1936 AD 26 at 31, *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD F 458 at 465 - 6, *Kalil v Standard Bank of South Africa Ltd* 1967 (4) SA 550 (A) at 556D . . .

The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself . . .

The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word G or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ supra;

(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted. *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454G - H; *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A) at 305C - E; Swart's case supra at 200E - 201A and 202C; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) at 180I - J);

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'"

Admissibility of annexure "D" to the lease agreement

[58] It is common cause between the parties that the intended annexure "D" to the lease agreement was never annexed thereto as same was never completed in its intended form.

[59] The deponent Narib, on behalf of first respondent, indicates in respect of annexure "D" that:

"One matter remained outstanding namely that of annexure "D". Mr Lim Poh Boon, who was responsible to draft annexure "D" setting out its commitments and time lines for the commencement and the execution of the project in the days leading up to the signing of the agreement, provided first respondent with the executive summary of its proposed investment, annexure "W42" to Mr du Pisani's affidavit, as source document reflecting its undertakings which would be included in annexure "D" and form the basis thereof. We agreed that a condensed version of annexure "W42" would be prepared, to be attached as annexure "D" to the lease agreement." [39]

[60] The deponent Narib further indicated that at the date of the signing of the agreement, annexure "D", for the reasons set forth in this affidavit has not been completed yet. [40]

[39]Record p657, para 9.

[40]Record p658 paras 11-12.

[61] According to Narib - “It was at all times relevant the *bona fide* intention of both Ramatex and first respondent that the proposals contained in annexure "W42" would constitute Ramatex's commitment and undertakings to first respondent to implement, execute and keep to the whole project. It was, at the very least, tacitly agreed that until such time as annexure "D" had been drafted, that "W42" would, as source document, reflect Ramatex's commitments.”

[62] First respondent in the light of the aforesaid submitted and requested this court that annexure “W42”, for purposes of this application, be regarded as annexure “D” to the lease agreement.

[63] This version of Mr Narib is not disputed by applicants. In fact, as submitted by Mr Smuts, nor the liquidators or Mr Ong is in a position to dispute the factual correctness thereof as they were not involved during the negotiations and/or the signing of the agreements in question.

[64] Mr Heathcote is his submissions submitted that annexure “W42” is not admissible as it is common cause that there is no application for rectification but also that the condensed form at least must have been formulated to show how it should read, as the parties would have had to agree on the condensed form for it to become annexure “D”.

[65] It is evident that the terms of “W42”, in a condensed version, are material and would from an integral part of the lease agreement as the source document *inter alia* deals with:

a) Ramatex’s social responsibility in respect of the waste effluent and use of recycled water;

b) Ramatex's action plan with production commencing in spring/summer 2002;

c) Ramatex Group acknowledgment of the short span of AGOA opportunity;

d) the strategic significance of the Ramatex investment in Namibia as a world class textile leader in the African continent;

e) environment standards;

f) the impact on the Namibian micro economy;

g) the significance of the development in Namibia;

h) human resource training programs for previously disadvantaged groups.

[66] The first question to be answered, in the circumstances, is whether the agreement need to be rectified as suggested in the replying affidavits.

[67] In *Gralio (Pty) Ltd v DE Classen (Pty) Ltd*[41], the then appellant division in South Africa found that it is not necessary to formally claim rectification where a defendant raises a defence that the contract sued upon does not correctly reflect the common intention of the parties.

> "'The upholding of the defendant's plea that the escalation clause agreed upon was inaccurately rendered in the written contract would not have the effect of constituting a new contract, separate and distinct from that upon which plaintiff relied; it would merely serve to correct an inaccuracy in the contract relied upon by plaintiff. Indeed (leaving aside cases in which the contract is by law required to be in writing), a defendant who raises the defence that the contract sued upon does

[41] 1980 (1) SA 816 (A) at 824 A-C/D.

not correctly reflect the common intention of the parties, need not even claim formal rectification of the contract; it is sufficient if he pleads the facts necessary to entitle him to rectification and asks the Court to adjudicate upon the basis of the written contract relied upon by plaintiff as it stands to be corrected. (See, per STEYN J in *Volkskas Bpk v Geyser* 1960(4) SA 412(T) at 419.) The defendant's main contention is rejected."

[68] In the circumstances and based on the aforesaid authority it is evident that it was not necessary for first respondent to formally claim the rectification of the agreement as submitted by Mr Heathcote. First respondent clearly alluded to the facts necessary to entitle first respondent to rectification.

[69] The next question to be answered is whether the evidence deposed to by first respondent's Narib, in this regard, does not fall foul of the well-known parol evidence rule

"As has been indicated, the parol evidence rule is not a single rule. It in fact branches into two independent rules, or sets of rules: (1) the integration rule, described above, which defines the limits of the contract, and (2) the rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract: see, for example, the exposition by SCHREINER JA in *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (a) at 453-5. (For convenience I shall call this latter rule "the interpretation rule".) Neither rule, in my opinion, affects the matter under consideration.

Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is

usually to enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence. On the other hand, in a case such as the present, where ex facie the document itself the contract appears to be incomplete, the object of leading extrinsic evidence is not to contradict, add to or modify the written document or to complete what is incomplete so that the contract may be enforced thus completed, but merely to explain the lack of completeness, to decide why the parties left blanks in a particular clause and what the integration actually comprises, and in this way to determine whether or not the document constitutes a valid and enforceable contract and is in conformity with s 1 (1) of the Act. Consequently, it does not seem to me that the admission of such extrinsic evidence for this purpose in a case of the kind presently under consideration would be either contrary to the substance of the integration rule or likely to defeat its objects. To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered; the evidence which it is suggested could be adduced in this case would be to explain an overt lack of completeness in the document and at the same time to determine what has been integrated with a view to deciding upon the validity of the document as it stands.

Thus on principle it seems to me that the integration rule does not constitute an obstacle to the reception of evidence to explain the non-completion of clause 11 of annexure "A"."

and further:

“For these reasons I am of the view that an investigation of the surrounding circumstances of this case, including the negotiations between the parties which led up to the clause 11 was intended to be part of the contract and, if so, why it was not completed, would not be debarred by the integration rule.

As to the interpretation rule (the other branch of the parol evidence rule), I have little doubt that it also does not preclude such an investigation. As I see it, this rule, concerned as it is with what extrinsic evidence may be led in order to construe the contents of a written contract, does not affect the questions here under

consideration, viz as to what the contents of a written contract are, whether a particular portion of the document forms part of the contract, if it does why it was left incomplete, and whether the contract complies with certain statutory requirements." [42]

[70] As submitted by Mr Smuts the omission of annexure "D" is fully explained and, based on the aforesaid authority, the said evidence does not fall foul of the parole evidence rule.

[71] Based on the aforesaid, it in my view was established by first respondent that a condensed version of "W42" would constitute annexure "D" and that it was tacitly agreed that annexure "W42" would remain the source document of the agreed terms of annexure "D" until the condensed version has been formulated.

Common assumption tacit term and repudiation

[72] First respondent submitted that applicants failed to establish the relief sought with regard to the lease agreement as a result of the fact that the agreement came to an end by reason of the failure of a tacit term/common assumption, or at the very least, in any event, terminated by reasons of Ramatex' repudiation thereof.

[73] First respondent relies thereon that it was a tacit material term of the agreement between the parties and that the agreement was concluded on the common assumption that should Ramatex withdraw from Namibia

[42] *Johnston v Leal* 1980 (3) SA 927 (a) at 942 H – 943 G and at 946 E-G.

and/or should the very purpose for which the lease agreement was concluded fail, that first respondent would be entitled to terminate the agreement between the parties or that the agreement would become terminated by reason of its failure.[43]

[74] According to the uncontested evidence of Mr Ludwig Narib[44], which has not been disputed by applicant, it is stated that:

"It was of considerable importance, both to first respondent and the Government, who together would have to spend millions in order to develop the infrastructure according to Ramatex' demands, to be able to hold Ramatex accountable and to ensure that it would implement its undertakings and keep to the execution thereof. It was thus imperative to deal with the issues of Ramatex' undertakings in this regard in any agreement to be concluded with Ramatex, which was intended to endure for the duration of the lease agreement."

[75] Applicants, in their opposition to the existence of such a common assumption and/or tacit term, submitted that:

"61.1 It cannot be read into an agreement in the face of "whole agreement clauses";

61.2 The point has never been raised by first respondent in its papers; and

61.3 The tacit term is contradictory to some of the clauses in the agreements and more specifically the provision that the agreements survive even liquidation, which according to applicant is the "ultimate business failure".

[76] It is trite that the legal position in respect of tacit terms is as follows:

[43]Record p265 par 15.1; Record p273, par 25.4.

[44]Record pp 655-659.

76.1 A tacit term is an unexpressed provision of the contract which is based on the common or imputed intention of the parties and which is inferred from the express terms of the agreement and the surrounding circumstances (*Alfred McAlpine* case at 531 H to 532 F).

In order to establish whether a tacit term is to be imported, regard must first be had to the express terms of the agreement and then to the surrounding circumstances. A tacit term must be consonant with the rest of the agreement and should not conflict with any express term. (*Van den Berg v Tenner* 1975(2) SA 268 (A) at 274 A-B, 276 H — 277 C)." [45]

76.2 A tacit term can be actual or implied.

The paramount issue is the alleged tacit term. A tacit term, one so self-evident as to go without saying, can be actual or implied. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the

[45] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006(1) SA 350 (T) at 374 H-I.

celebrated bystander test. Since one may assure that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a terms will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a terms, not expressed, when such a terms is not necessary to render the contract fully functional. The above propositions, all in point, are established by or follow from numerous decisions of our Courts (see, for instance *Rapp and Maister v Aronovsky* 1943 WLD 68 at 75; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A); *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A)). [46]

[77] It is settled law that a tacit term can be incorporated in a written agreement even if such agreement, as in the present instance, contains a non-variation clause.[47]

[78] It furthermore is evident from first respondent's answering papers that this issue has been pertinently raised by first respondent therein.

"25.4. The property was leased to Ramatex for a very specific and singular purpose, namely in order to establish an environmental friendly textile industry in Namibia. This was a material tacit term of the agreement and a common assumption of the parties, in concluding the agreement. Where this purpose and common assumption (a material tacit term) failed and Ramatex closed down its business, the very reason for concluding the

[46] *Wilkins NO v Voges* 1994(3) SA 130 (A) at 136 H—137D, see also: *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531 H to 533 B (where the Court deals with an implied term to be incorporated in an agreement). *Delfs v Kuehne and Nagel (Pty) Ltd* 1990(1) SA 822 (A) at 827 A — 828 A.

[47] *Wilkins NO v Voges* 1994 (3) SA 130 (A).

agreement failed and the agreement itself failed and terminated for this reason alone and as well. Ramatex elected no longer to be bound by the terms of the agreement and its obligations towards first respondent. First respondent accepted Ramatex's breach and repudiation. Ramatex never sought to engage first respondent or attempted to negotiate or amend the terms and conditions of the agreement, relied upon in paragraph 18.3.12 of the founding affidavit. I submit that the same considerations apply in respect of the cancellation of Ramatex's EPZ status in terms of section 15 of the Export Processing Zone Act, Act 9 of 1995."

[79] The first two grounds of opposition raised by applicants therefore cannot be entertained.

[80] In terms of the remaining ground of opposition raised, i.e. that the tacit term and/or assumption to be read into the agreements is in conflict with some of the terms of the agreement and more specifically the term contained in both agreements that the agreements will survive Ramatex's or first respondent's insolvency.

[81] In arriving at a conclusion one must remember that a lease agreement in terms of section 37of the Insolvency Act always, where nothing contrary had been explicitly agreed on, survives the liquidation of the lessee and provides the liquidators with the authority to decide, within a period of three months, whether the liquidators want to continue with the lease agreement as such.[48]

[82] On the evidence it is common cause that a long term lease agreement was concluded with Ramatex for the purposes of establishing a textile industry in

[48]See section 37of the Insolvency Act, Act 24 of 36.

Namibia which would, amongst others, over a period have created employment for several thousands of Namibians and on the basis of the long terms benefits for Namibia and the Government of Namibia in general.

[83] Land was made available by first respondent for the express purpose. The property was leased to Ramatex for a very specific and singular purpose. The property 64 hectares in extend was leased virtually free of charge to Ramatex for the intended purposes. Government and first respondent injected huge amounts of money, i.e. in excess of eighty seven million Namibian dollars in respect of site levelling and infrastructure costs. Government furthermore subsidised the training expenses of employees and Ramatex furthermore enjoyed subsidised privileges for a period of two years inclusive of water and electricity supplies. Ramatex enjoyed further privileges under the EPZ certificate. The infrastructure and electricity installations provided by the first respondent were custom built to meet the very specific requirements demanded by Ramatex.

[84] In terms of clause 7.2 of the lease agreement Ramatex in fact was not entitled to use the property or allowed it to be used in whole or in part for any purpose other than the purpose as described in the certificate, granting the company export processing zone enterprise status or any other activity which is necessary or incidental to the setting up and operating of a textile industry. The conditions listed in the EPZ could not be altered without prior authorisation of the Minister in writing.

[85] In my view, first respondent established that it indeed was a material tacit term of the agreement and a common assumption of the parties, in concluding the agreement that where this purpose and common assumption failed and Ramatex closed down its business, in the manner that they did,

the very singular reason for concluding the agreements failed and it therefore follows that the agreements terminated by reason of this failure alone.

[86] In the event that this court may be wrong in arriving at the aforesaid conclusion, I have decided to deal with first respondent's contention that the agreement in any event has been terminated or cancelled as a result of Ramatex's repudiation and/or breach thereof.

Ramatex repudiation/breach

[87] Before I deal with this aspect, it is important to mention that Mr Smuts, during the hearing of the application, indicated that the first respondent, for purposes of the alleged repudiation of the agreement, as advanced by first respondent, do not rely on the environmental issues raised in the letter of demands and/or cancellation. As such, it is not necessary for the court to deal with the various disputes that existed between parties in respect of their obligations pertaining to the environmental issues raised and also with the relevant provisions of the Water Act of 1956 relied on by applicants.

[88] It is trite law that the test as to whether conduct amounts to repudiation is whether fairly interpreted, it exhibits a deliberate and unequivocal intention no longer to be bound by the agreement.[49]

[89] Where a party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no

[49] *Street v Dublin* 1961(2) SA 4 (W) at 10 B; *OK Bazaars 1929 Limited v Grosvenor Buildings (Pty) Ltd & Another* 1993 (3) SA 471 (A) at 480 I to 481 C.

longer to be bound by the contract he is said to repudiate the contract. The other party to the contract may elect to accept the repudiation and rescind the contract. If it does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated. The test for repudiation is not subjective but objective. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do. Repudiation is not a matter of intention but of perception, namely the perception of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that the proper performance (in accordance with the true interpretation of the agreement) will not be forthcoming. A repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor.[50]

[90] The so-called "acceptance" of the repudiation by the innocent party, does not "complete" the breach but is simply the exercise by the aggrieved party of its rights to terminate the agreement. The innocent party to a breach of contract justifying cancellation exercises his right to cancel it, by words or conduct manifesting a clear election to do so (b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind. In particular, the innocent party need not identify the breach or the grounds on which he relies for cancellation.[51]

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[50] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (1) SA 284 (SCA) at 287 para [17] to [18].

[51] *Datacolor International (Pty) Ltd*, *supra* at 299 (para 28 and 29).

[91] It is settled law that the innocent party having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at but was only discovered afterwards. Since the election to cancel, provided that it is unambiguous, need not be explicit but may be implicit and since the cause for cancellation need not be correctly identified and stated, it follows that the actual communication of the decision to cancel, once made and manifested, may even be conveyed to the guilty party by a third party.

[92] Once it has been established that the guilty party's conduct was such as to constitute a repudiatory breach of an agreement the applicant, in electing to cancel the contract, does not have any obligation to place the guilty party in *mora* in terms of the contractual provisions. The innocent party could simply have cancelled the agreement as it is entitled to do so.

[93] The following remarks in *Moodley and Another v Moodley and Another*[52], is apposite:

"Certain of the dicta in *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms) Bpk en 'n Ander* 1973 (2) SA 680 (T) are to the same effect. In that case it was held that the first defendant's repudiation, although not accepted by the plaintiff, exempted the latter from doing something which, but for the repudiation, the plaintiff would have been obliged to do but which, because of the repudiation, it had become futile to do.

> 'It would be surprising if the law were to be so much out of tune with common sense as to require of the plaintiff as a prerequisite to its cause of action against the first defendant that, notwithstanding its futility, it should perform the exercise.

[52] 1990(1) SA 427 (D) at 4301 J to 431 C.

> The purpose of a tender of performance is to enable the other party to take the necessary steps to perform his part of the contract. But, if the latter expressly declares that he is under no circumstances prepared to perform, the whole purpose of a tender falls away. In my view, the first defendant by its continuing repudiation of the contract waived its right to a tender of performance by the plaintiff.' (at 685B-C)"

[94] In *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd*[53] it was decided that -

> "Clause (12) of the agreement creates a contractual ground for cancellation by the innocent party where the defaulting party has failed to remedy the breach of a material term within 30 days after being called upon to do so by the innocent party. The innocent party is not compelled, however, to comply with the machinery created by clause (12) if the conduct of the defaulting party is such as to constitute a repudiation of the contract.
>
> The innocent party has in such circumstances the option to insist on the performance of the contract or to accept the repudiation and cancel it. If it elects to cancel the contract, it has no obligation to put the defaulting party in mora in terms of a contractual provision which would otherwise require it to do so where the defaulting party is in breach of a material term. (*Landau v City Auction Mart* 1940 AD 284; *Van Achterberg v Walters* 1950 (3) SA 734 (T) at 743H; *Moodley and Another v Moodley and Another* 1990 (1) SA 427 (D) at 431A-1.)"

[95] In this instance the first respondent has decided to demand from the fourth applicant's compliance with its obligations in terms of the relevant clauses in terms of the agreement itself. This aspect will be returned to hereunder, if necessary, to decide on the validity of the cancellation itself insofar as it may be necessary. It however is clear, for purposes of deciding on the alleged repudiation of the agreement, that same does not play any role at

[53] 1994 (3) SA 673 (A) at 683G-I-J.

all. I am therefore also further in agreement with Mr Smut's submissions that the question whether fourth applicant received the second letter of demand dated 19 March 2008 is not relevant for the decision on the question as to whether first respondent was entitled to terminate the agreement as a result of Ramatex's repudiation thereof.

[96] The question now is to decide whether Ramatex, on the available and admissible evidence, apart from the environmental issues raised in the papers, repudiated the agreements.

[97] The evidence in this regard is that inter alia –

a) Ramatex ceased its operations on 6 March 2008 [54];

b) Ramatex closed its factory on the property and retrenched all but the remaining skeleton staff;

c) Ramatex' only activities since January 2008 was to dispose of movable assets [55];

d) After Ramatex expressed it's unequivocal and firm intention to terminate the activity for which the EPZ certificate was granted being the sole and specific purpose for which the property was leased to Ramatex. As such, the certificate was not only bound to be cancelled, but in fact was cancelled on 7 March 2008 [56];

[54]Record p267 para 19.2, According to applicant, on 1 April 2008.

[55]Record p175 annexure "M10".

[56]Record p176, Annexure "M11".

e) Ramatex was in the process of removing machinery and equipment from the premises with the view of handing over the premises.[57]

[98] The aforesaid conduct in my view clearly amounts to repudiation of the contract through the unequivocal clear indication by Ramatex, no longer to be bound by the terms of the agreement. In fact the conduct of Ramatex resulted therein that the *substratum* of the agreements disappeared.

[99] Mr Heathcote submitted that first respondent could not have elected to terminate the agreement as a result of Ramatex' alleged repudiation as first respondent, in its letter dated 21 March 2008, demanded specific performance from Ramatex of its obligations in terms of the agreement, which was accepted by Ramatex in its letter dated 11 April 2008 when its legal practitioners indicated that it requires the amount of security to be set.

[100] This contention, in my view, is not borne out by the contents of the two letters under consideration. In first respondent's letter of 19 March 2008, it is clearly indicated that the first respondent wanted to know how Ramatex will rectify the environmental damages that was left behind. At the most, for Ramatex, it was indicated that the latter would consider the setting of security for the rectification of the environmental damages that was left behind. No undertaking was given at all, nor was it indicated in the letter to any extend that Ramatex intends to comply with its obligations in terms of the agreement which in my view, at that point in time, already had become an impossibility.

[57]Record p102, Annexure "IRM11".

[101] Applicants, furthermore, rely thereon that as McLaren had already given notice that the liquidators intended to continue with the agreement that no acceptance of an alleged repudiation was factually or legally possible thereafter. I am in agreement with Mr Smuts that this contention is legally unsound as a lessor's accrued right to cancel the lease or accept a repudiation of the agreement survives the liquidation of the lease.

> "Once one accepts, therefore, that the only real basic principle is that the contract survives the insolvency, then it seems to me to follow inevitably that the accrued right to cancel survives. Where the creditor decides after insolvency to exercise his right of cancellation, he is not thereby enforcing a right against the insolvent estate and in that way altering the order of things as established by the concursus; he is simply notifying the trustee of his election to exercise the right which he has and which has survived the insolvency. The creditor does not, as Mr Meskin's argument is inclined to assume, enforce a right of cancellation against the trustee; he elects to exercise a right which has accrued to him and, once he has notified the trustee of this election, the fact of cancellation flows as a legal consequence from this."[58]

[102] This is especially so as having elected to continue with the lease agreement, a liquidator steps into the shoes of a company in liquidation and has to comply with all the obligations in terms of the agreement, including all past unfulfilled obligations. As such, the liquidator is but an agent of the company in liquidation and cannot be regarded as a third party *vis-à-vis* same.

> "The law would appear to be clear that a trustee in insolvency, and thus a liquidator of a company in liquidation (see s 339 of the Companies Act 61 of 1973) is invested with a discretion to abide by or terminate an executory agreement not

[58] *Smith v Parton NO* 1980 (3) SA 724 (D) at 729D-F; *Michell v Sotiralis' Trustee* 1936 TPD 252; *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 553J-554C.

specifically provided for in the Insolvency Act, which had been concluded by the company in liquidation before its liquidation. Such agreement does not terminate automatically on the company being placed in liquidation. Chawick v Henochsberg 1924 TPD 703 at 705; *Tangney and Others v Zive's Trustee* 1961 (1) SA 499 (W) at 452H-453B; *Montelindo Compania Naviera SA v Bank of Lisbon & SA Ltd* 1969 (2) SA 127 (W) at 141G-H. The liquidator must make his election within what, regard being had to the circumstances of the case, is a reasonable time. Should he elect to abide by the agreement the liquidator steps into the shoes of the company in liquidation and is obliged to the other party to the agreement to whatever counter-prestation is required of the company in terms of the agreement. POTGIETER JA in *Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation)* 1968 (1) SA 717 (A) at 723 G and H remarked in regard to this principle,

> "that a trustee who elects to abide by an executory contract (which is what the present contract was) entered into prior to insolvency cannot demand performance of any remaining obligations under the contract from the other party unless the trustee is prepared to perform in full and tenders complete performance of all the insolvent's obligations, including unfulfilled past ones, under the contract."

See, too, *The Government v Thorne and Another NNO* 1974 (2) SA 1 (A) at 9H." [59]

[103] In terms of clause 7.2 of the lease agreement Ramatex in fact was obliged to not use the property or allow it to be used in whole or in part for any purpose other than the purpose as described in the certificate granting the company export processing zone enterprise status which certificate is annexed to the agreement as annexure "C" or any activity which is necessary or incidental to the setting up and operating a textile industry. In terms of annexure "C" Ramatex will engage in the manufacture of textile yarn, knitted fabric and apparel (clause 1 of annexure "C"). Clause 6 of the certificate provides:

[59] *Bryant Flanagan (Pty) Ltd v Muller and another NNO* 1978(2) SA 807(A) at 812G-813B; *Glen Anil Finance (Pty) Ltd v Joint Liquidators*, *Glen Anil Development Corporation Ltd (in liquidation)* 1981(1) SA 171(A) at 182.

"The conditions listed in points 1, 2, 3, 4 and 5 above cannot be altered without prior authorisation of the Minister in writing."

[104] On the facts, the liquidators failed to perform or to tender performance of any of Ramatex' unfulfilled obligations. They did not obtain an EPZ certificate, did not continue with the prescribed activity in the EPZ certificate on the premises, nor did they continue to execute the very purpose for which the agreement was concluded. Ramatex in fact sold the equipment required to conduct the business as a textile factory.

[105] The liquidators, after they stepped into the shoes of Ramatex, except for their alleged election to continue with the lease agreement, did nothing else but continued with the repudiation of same as it, due to the setting of the agreements and the surrounding circumstances thereto, in my view, became objectively impossible for the liquidators or even Ramatex to comply with Ramatex's material obligations in terms of same.

[106] Ramatex's conduct as indicated hereinbefore constituted a repudiatory breach of the lease agreement. As such, applicant had no obligation to put Ramatex in mora in terms of the contractual provision. First respondent therefore could simply have cancelled the lease agreement as it was entitled to do so.

The authority to terminate

[107] Applicant relies thereon that the termination is null and void since the person who issued the letters of demand, as well as the letter of termination or cancellation, was not authorised by the first respondent to do so.

[108] First respondent, at all relevant times, had the authority to conclude agreements for the letting of immovable property. This is abundantly clear in terms of sections 30, 31 and 63 of the Local Authorities Act of 1992.

[109] First respondent, in the exercise of its contractual powers, also had the power to cancel the lease agreement and furthermore to delegate such powers to its management committee and/or its CEO.

[110] First respondent's management committee passed a resolution on 17 March 2008 in which it result that the agreement be cancelled and that first respondent's CEO should do so. The relevant portion of the minutes in this regard provides as follows:

"[Management Committee Minutes: 2008-03-17]

[CEO] PROGRESS REPORT - RAMATEX

TEXTILES NAMIBIA (PTY) LTD

((L/Farm 466) (Ramatex)

It was

RESOLVED

1 That the disengagement and the announced closure of business by Ramatex Textiles Namibia (Pty) Ltd be noted.

2 That such closure be regarded as a breach of the Lease Agreement.

3 That in regard to the above, the lease, rights and title in order to secure its interest, be cancelled.

4 That the cancellation of the Lease Agreement be effective in respect to Ramatex Textiles Namibia (Pty) Ltd as the holding company as well as its subsidiaries Flamingo Garments, Tai Wah Garments (Pty) Ltd and Rhino Garments (Pty) Ltd.

5 That Ramatex Textiles Namibia (Pty) Ltd be informed of the cancellation of the Lease Agreement.

6 That similarly the Notarial lease in the Deeds Office be cancelled.

7 That the Chief Executive Officer negotiate with the Minister of Trade and Industry as to a suitable tenant/s to take over the leases of the erected buildings.

8 That it be noted that the Office of the Chief Executive Officer (Manager: Property Management) on 10 March 2008 went on site and Mr Ong Boon Keong, General Manager of Ramatex Textiles Namibia (Pty) Ltd, has given the assurance that, in the interim, arrangements were made to guard the property until 5 April 2008.

9 That it be noted that a letter, attached as pages 413 — 414 to the agenda, was received from the Ministry of Finance demanding the return of the N$13,000 000.00 meant for the rehabilitation of the Waste Management facilities.

10 That it further be noted that in regard to the paragraph 9 above, the City, at a technical level, took exception on the demand of the return of the N$13,000,000.00 in light of the fact that the Government owe the City N$31,866,069.59 in respect of the development costs of Ramatex Textiles Namibia (Pty) Ltd.

11 That the official request from the Ministry of Trade and Industry regarding the letter to the City of Windhoek to revisit its Lease Agreement with Ramatex Textiles Namibia (Pty) Ltd further be noted.

12 That the Strategic Executive: Finance address a letter to the Permanent Secretary of the Ministry of Finance indicating the Lily's concern mat no funds are available to rehabilitate the suspected environmental damage caused by Ramatex and to enquire if the N$13 000 000.00 should not be used to cover the same.

13 That the resolution be implemented prior to approval of the minutes."

[111] Mr Smuts submitted that these minutes were approved by first respondent on 26 March 2008 and referred this court to the following minutes of a council meeting held on the 26th of March 2008, the contents of which provides as follows:

"[Municipal Council Minutes: 2008-03-26]

8.1.9 HRD.1 [HUM] STAFF MATTER

(4/6/3/26)

Having been dealt with in terms of section 14(2)(a) of the Local Authorities Act, 1992 (Act 23 of 1992), the resolution taken on this matter is minuted as Council Resolution 72/03/2008 under the separate cover to the minutes of the Council meeting.

[RESOLUTION 72/03/2008)

[Municipal Council Minutes: 2008-03-26]

8.2 APPROVAL OF REPORT NO. MC 05/2008

On proposal by Councillor IJ Shikongo, seconded by Councillor Ms LS Shaetonhodi, it was

RESOLVED

That the report of the Management Committee meeting (MC 05/2008) held on 17 March 2008 be approved by the Management Committee members as being correct.

[Municipal Council Minutes: 2008-03-26]

8.3 REPORT NO. MC 05/2008

It was unanimously RESOLVED

That the report of the Management Committee meeting (MC 05/2008) held on 17 March 2008, be noted with the exception of items PBS.1, BRB.1, BRB.2, BRB.3, BRB.4, BRB.5, BRB.6, BRB.8, BRB.9, BRi3.10, BRB.11, BRB.12, BRB.13, BR33.14,BRB.15, BRB.16,BRB.17, PWI.1 and REP.1.

RESOLUTION 73/03/2008"

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[112] Mr Heathcote correctly submitted that, on the minutes of the council meeting as provided, it cannot be inferred that the decision of the management committee to cancel indeed was approved by first respondent's council. The correctness of this submission is also underpinned by the contents of the council agenda referred to *infra*.

[113] This is however not the end as it is clear from the council minutes of the meetings of 10 April 2008, which had already referred to hereinbefore, that the Municipal Council ratified the decision of its Chief Executive Officer to set procedures in motion in order to cancel the lease agreement, including the notarial lease concluded with Ramatex Textiles Namibia (Pty) Ltd.

[114] I have considered all the submissions made by Mr Smuts and Mr Heathcote in respect of the validity of the meeting held on 10 April 2008 where the first

respondent ratified the steps taken by its CEO to cancel the lease agreement.

[115] In my view it is evident from the minutes of the meeting, which were duly certified by first respondent's CEO that a quorum was present and that the voting was unanimously in favour of the resolution which was passed.

[116] The ratification and its extent must also be viewed and interpreted against the background of the contents of the agenda point that served before council on the 10th of April 2008 which provided as follows:

"Ramatex breach

On 17 March 2008 Management Committee was similarly informed of the breach of the Lease Agreement by Ramatex Textiles Namibia (Pty) Ltd and per item REP.4 it was resolved as follows:

1 That the disengagement and the announced closure of business by Ramatex Textiles Namibia (Ply) Ltd be noted.

2 That such closure be regarded as a breach of the Lease Agreement.

3 That in regard to the above, the lease, rights and title in order to secure its interest, be cancelled.

4 That the cancellation of the Lease Agreement be effective in respect to Ramatex Textiles Namibia (Pty) Ltd as the holding company as well as its subsidiaries Flamingo Garments, Tai Wah Garments (Pty) Ltd and Rhino Garments (Pty) Ltd.

5 That Ramatex Textiles Namibia (Ply) Ltd be informed of the cancellation of the Lease Agreement.

6 That similarly the Notarial lease in the Deeds Office be cancelled.

7 That the Chief Executive Officer negotiates with the Minister of Trade and Industry as to a suitable tenant/s to take over the leases of the erected buildings.

8 That it be noted that the Office of the Chief Executive Officer (Manager: Property Management) on 10 March 2008 went on site and Mr Ong Boon Keong, General Manager of Ramatex Textiles Namibia (Pty) Ltd, has given the assurance that, in the interim, arrangements were made to guard the property until 5 April 2008.

9 That it be noted that a letter, attached as pages 413 — 414 to the agenda, was received from the Ministry of Finance demanding the return of the N$13,000,000.00 meant for the rehabilitation of the Waste Management facilities.

On 19 March 2008 the cancellation letter was served on Ramatex Namibia, both at

their places of business and personally on their premises. The thirty (30) days notice as a deadline thus of 18 April 2008, whereafter the land and building would revert to council. Should Ramatex not have vacated the premises an eviction order must also be secured.

Council per Resolution 73/03/2008 on 26 March 2008 approved and noted Management Committee minutes held on 17 March 2008. Council thus did not directly approve the cancellation of the Ramatex Lease."

[117] In my view when first respondent's council ratified the decision of its CEO to set proceedings in motion in order to cancel the lease agreement, including the notarial lease concluded with Ramatex Textiles Namibia (Pty) Ltd, it also authorised, if not explicitly, then at least impliedly, the cancellation thereof.

[118] First respondent clearly was entitled to and could ratify and approve the cancellation of the lease agreement retrospectively as the steps were taken on its behalf and was an act which it had the power to do itself. In *Smith v*

Kwanonqubela Town Council 1999 (4) SA 947 SCA at 952, par [9], the following was stated:

"[9] It is in general essential for a valid ratification

'that there must have been an intention on the part of the principal to confirm and adopt the unauthorised acts of the agent done on his behalf, and that that intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be'

(*Reid and Others v Warner* 1907 TS 961 at 971 in fine - 972). Counsel for Smith submitted that there is no evidence that the councillors of the transitional council had knowledge of the fact that Watson's action had been unauthorised and, consequently, that the purported ratification was of no effect. I do not think, on the wording of the stated case, that this argument is open to Smith. In any event, the minutes of the meeting state that the matter was discussed in full and, further, the decision to proceed with the case evinces a clear intention to ratify whatever action was taken, irrespective of the legal niceties involved.

"[10] The next attack upon the purported ratification was along these lines: Watson's contentious act was an administrative one; it was not authorised by law; an unauthorised act is invalid; an invalid act cannot be ratified. The argument, I fear, already breaks down at the first proposition and it becomes unnecessary to consider the others. The launching of legal proceedings is not an administrative act but a procedural one open to any member of the public. Watson apparently believed on insubstantial grounds that he had the necessary authority to act on behalf of the town council. He was wrong. His expressed intention was to act on behalf of the town council and not on his own behalf. It is a general rule of the law of agency that such an act of an 'unauthorised agent' can be ratified with retrospective effect (*Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 806H-807H).

[11] It was further argued that, after an objection has been taken to the authority of a person to act on behalf of another, reliance may not be placed upon a ratification

that did not exist when the objection was taken. . . Lest there be any future doubt about the matter, this judgment holds that the point is bad for the reasons that follow."

[119] First respondent as such ratified, which itself could do. The retrospective ratification cannot in any event not affect the first to fourth applicants who failed to show that they had obtained an enforceable vested right at any time prior to the ratification.

[120] The conduct of first respondent's CEO therefore had been validly ratified retrospectively and the cancellation, which in itself amounts to an acceptance of the unequivocal repudiation or cancellation was in my view also clearly authorised.

[121] As already concluded hereinbefore, the objective conduct of Ramatex entitled the applicant to cancel the agreement on the grounds that the respondent repudiated the agreement. The acceptance of the repudiation is evidenced by the cancellation of the agreement, by first respondent, which came to Ramatex' notice on 21 April 2009, before the launching of the liquidation application and prior to, in my view, in any event, a futile attempt by the liquidators to extend the lease agreement.

Decision to cancel reviewable or not

[122] Applicant, in its heads of argument, did not address this issue at all. During the hearing, Mr Heathcote, on behalf of applicant, after he indicated that he completed his submissions on the merits of the matter, only on a question of the court itself, indicated that applicant still proceeds with the second notice of motion pertaining to the review application.

[123] During his short submissions on this aspect, Mr Heathcote conceded that the relationship between Ramatex and first respondent indeed is a contractual relationship.

[124] It therefore came as no surprise that Mr Smuts submitted, in respect of the review application, that this court should dismiss the application for review virtually out of hand as there is absolutely nothing sustainable in the application and applicants furthermore did not address the issue at all in applicant's heads of argument. Mr Smuts also submitted that the only reasonable inference to be drawn is that applicant, through the review proceedings, sought to force discovery in application proceedings and as such same constitutes an abuse of process.

[125] Despite these submissions by Mr Smuts, Mr Heathcote did not reply to the submissions advanced by Mr Smuts, nor advanced any further submission in respect of the review application during reply.

[126] Mr Heathcote furthermore also in reply did not move for the relief sought in the review application, i.e. part B of the notice of motion, when he addressed the court on the relief sought as well as the cost order to be made. However, due to his stance taken in the submissions made, in his initial argument, there exists no indication on record that the relief sought in the review application was also abandoned or not continued with.

[127] First respondent submitted, in its heads of argument, that applicant failed to bring the review application within a reasonable time.

[128] It is settled law that it is a requirement of review for an applicant to bring that review within a reasonable time. An applicant has the onus to show that this requisite is met and it may even be raised *mero motu* by a court when the application is heard.

[129] This requirement has been formulated in *Namibia Grape Growers & Exporters v Ministry of Mines & Energy* [60], by Strydom AJA, who wrote for the court, as follows:

> "B. Review of the renewal of the licence in 1998
>
> The second ground of appeal concerns the finding by the Court a quo that the review, brought by the appellants, was not within a reasonable time. The learned Judge further found that there were also no valid grounds on which the Court could relax the rule, with the result that the Court dismissed the application for a review.
>
> Because no specific time is prescribed for the institution of review proceedings, the Courts, as part of their inherent power to regulate their own procedure, have laid down that a review must be brought within a reasonable time. The requirement of a reasonable time is necessary in order to obviate possible prejudice to the other party, and because it is in the interest of the administration of justice and the parties that finality should be reached in litigation. Where the point is raised that there has been unreasonable delay the Court must first determine whether the delay was unreasonable. This is a factual inquiry depending on the circumstances of each case. Once it is satisfied that the delay was unreasonable the Court must determine whether it should condone the delay. In this regard the Court exercises a discretion. Because the circumstances in each particular case may differ from the next case, what is, or what is not, regarded in other cases to be an unreasonable delay is not of much help, except to see perhaps what weight was given to certain factors. (See *Schoultz v Voorsitter*, *Personeel-Advieskomitee van*

[60] 2004 NR 194 SC at 214 H-I.

die Munisipale Raad van George, en 'n Ander 1983 (4) SA 689 (C); *Setsoskosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A); *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N); *Mnisi v Chauke and Others; Chauke v Provincial Secretary*, Transvaal, and Others 1994 (4) SA 715 (T); *Kruger v Transnamib Ltd (Air Namibia)* and Others 1996 NR 168 (SC); and *Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union and Others* 2001 (4) SA 149 (SCA).)

In the case of *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A), the South African Appeal Court decided that prejudice to the other party was not a prerequisite before an application can be dismissed on the ground of unreasonable delay. Prejudice is, however, a relevant consideration in such matters. It is further clear that the issue of unreasonable delay may also be raised mero motu by the Court. (See *Radebe*'s case (supra) at 798G-H and *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC).)[61]

[130] It is evident from the facts in this matter that the applicants already knew on 22 April 2008 of the cancellation of the agreement by the first respondent.

[131] This application was only instituted on 23 March 2009.

[132] The date from the date of knowledge of cancellation to the filing of the application has not been explained and as such, in my view, constitutes an unreasonable time for the bringing of the review, which, if successful, would have also effectively put an end to the relief sought in part A of the notice of motion in its totality.

[61]See also *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia & Others* 1997 NR 127 (HC) at 133 H-I.

[133] The relief sought in the review application is based on a very limited issue namely, the alleged failure by first respondent to grant the applicant an audi prior to the taking of its decision to terminate or cancel the agreement.

[134] No explanation at all was provided by applicants for this unreasonable delay.

[135] In my view therefore the application for review falters at this very first hurdle and as such falls to be dismissed with costs for this reason alone.

[136] The review application, as submitted by Mr Smuts, is in any event unsustainable for the fundamental reason that the decision to cancel or terminate the agreement does not constitute reviewable administrative action and thus would not be subject to a review.

[137] The Supreme Court in *Mbanderu Traditional Authority and Another v Kahuure and others* [62] approved the following:

> "[141] In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, 106 that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to

[62] 2008(1) NR (SC).

whether conduct is `administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising."[63]

[138] The South African Constitutional Court[64] held that a dismissal of an employee of a statutory body corporate did not constitute reviewable administrative action. Although the main judgment of the Court dealt with the issue on a jurisdictional basis, two separate concurring judgments, the former also representing the majority, found that the action itself was not reviewable. In his concurring judgment, Ngcoba, J held that, although the dismissal did involve the exercise of public power, it did not constitute administrative action.

"[138] I am unable to agree with the view that in dismissing the applicant Transnet did not exercise public power. In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power. I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power and, '(t)hat power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution'. 95 Indeed, in *Hoffmann v South African Airways* this court held that 'Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest'.

[63]See also*: Pharmaceutical Manufacturers Association of SA and Others In re: Ex Parte President of the RSA and Others* 2000 (2) SA 674 (CC) *("Pharmaceutical).*

[64]*Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC), paragraphs 138 to 142 of the judgment at p 413 F — 415 H.

[139] However, the fact that the conduct of Transnet in terminating the applicant's employment contract involves the exercise of public power is not decisive of the question whether the exercise of the power in question constitutes administrative action. The question whether particular conduct constitutes administrative action must be determined by reference to s 33 of the Constitution. Section 33 of the Constitution confines its operation to 'administrative action', as does PAJA. Therefore to determine whether conduct is subject to review under s 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action. PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action under s 33. The appropriate starting point is to determine whether the conduct in question constitutes administrative action within the meaning of s 33 of the Constitution. The question therefore is whether the conduct of Transnet in terminating the applicant's contract of employment constitutes administrative action under s 33.

[140] In *SARFU* this court emphasised that not all conduct of State functionaries entrusted with public authority will constitute administrative action under s 33. The court illustrated this by drawing a distinction between the constitutional responsibility of cabinet ministers to ensure the implementation of legislation and their responsibility to develop policy and to initiate legislation. It pointed out that the former constitutes administrative action, while the latter does not. It held that 'the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government'. But what matters is the function that is performed. The question is whether the task that is performed is itself administrative action or not.

[141] . . .(quoting *SARFU*)

[142] The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of

statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of State. It follows therefore that the conduct of Transnet did not constitute administrative action under s 33.

[143] Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under s 33 can be found in the structure of our Constitution. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognises that employment and labour relations and administrative action are two different areas of law. It is true they may share some characteristics. Administrative law falls exclusively in the category of public law while labour law has elements of administrative law, procedural law, private law and commercial law."

[139] From a reading of the *Chirwa* matter, as correctly submitted by Mr Smuts, it is evident that the disagreement was not in the result of the dismissal of the appeal, but on the issue whether the dismissal of the employee did amount to the exercise of public power or the performance of a public function.

[140] In Permanent Secretary of the *Ministry of Finance v Ward*[65], the Namibian Supreme Court in a similar vein stated that:

[65] 2009 (1) SC 314.

"[59] In the present instance there can be no doubt that the first appellant is a public authority and that the power to enter into the agreement was derived from statute. However, the terms of the agreement are not statutorily prescribed, in fact nowhere is there even any direct mention of an agreement. Clause 11.5, in terms whereof the first appellant had cancelled the agreement, contained only common-law grounds on which the agreement could be cancelled. Correctly, in my view, the respondent did not deny the right of the first appellant to cancel the agreement if such grounds in fact existed. These grounds existed in the common law and the fact that they were contained in the agreement did not alter that fact. These were therefore not terms which the first appellant imposed by virtue of one or other superior position in which he found himself *vis-à-vis* the respondent. In cancelling the agreement the first appellant was also not implementing legislation.

[71] The issue in the present appeal is whether the termination of the agreement by the first appellant was administrative action which would have entitled the respondent to claim application of art 18 of the Constitution which requires fair and reasonable action by administrative bodies and administrative officials. Once it is found, as I have, that the termination of the agreement did not constitute administrative action, art 18 does not apply. Reference to cases such as *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) ([2006] 3 All SA 373) and *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) (2006 (9) BCLR 1011; [2006] 2 All SA 496) may be relevant, as the facts showed, to the particular contractual relationship in which the parties stood in those cases. It does however not deal with administrative action and the application of an Article such as art 18 of the Constitution. Mr Oosthuizen nevertheless relied on these cases.

[74] I further agree with Mr Smuts that the Logbro case is distinguishable from the present appeal. As was pointed out by counsel it relates to a tender process which has consistently been held by courts in South Africa and Namibia to constitute administrative action. So too in regard to [75] In regard to the financial claims of the parties, which were granted by the court a quo, I am of the opinion that these constitute ordinary claims, enforceable in the normal way by action procedure. No

administrative action was involved. (See *Smith v Kwanonquobela Town Council* 1999 (4) SA 947 (SCA) ([1999] 4 All SA 331).

[76] In the case of Eastern Metropolitan Substructure of the *Greater Johannesburg Transitional Council v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) (2001(4) BCLR 344) the defences raised by special pleas were that the defendant was not afforded a fair hearing before summons was issued and secondly that the common-law principles based on natural justice and the constitutional right to administrative justice in terms of s 33 of the Constitution of the Republic of South Africa was not complied with. Exception was taken to these defences and the court rejected the defences raised by the defendant. In regard to the first the court found that the issue of summons does not prejudicially impact on any of the defendant's rights. (See para 9. The reference here to the rights of the plaintiff is clearly a misstatement.)

[77] In regard to the second defence the court concluded that the issue of summons was not an administrative act but was procedural. In the course of its judgment the court stated that the decision to recover payment is a preliminary or interlocutory step having no determinate effect on the parties' rights. (Para 14.) I respectfully agree with these findings.

[78] I have therefore come to the conclusion that the respondent's application for review was the wrong remedy in all the circumstance. His remedy lies in contract and he should either have enforced the contract or claimed damages"

[141] The relevant factual background, as summarized by first respondent in its heads of argument reflects that:

141.1 “The lease and service agreements were negotiated with Ramatex, a wholly owned subsidiary of Ramatex Berhard, acting on behalf of the Ramatex Group of Companies, a huge international entity, listed on the Kuala Lumpur Stock Exchange, the largest integrated textile company in Malaysia, with its head office in Malaysia. The Group had, at the time, 250 international buyers, employed 45000 employees worldwide and had a turnover of U$300 million annually and investments in ten countries amounting to U$400 million.

141.2 A textile manufacturing investment along with the injection of U$100 million was proposed and subsequently accepted upon the conclusion of the agreement. Ramatex traded as such under its EPZ certificate (which prohibited it from selling any of its products locally).

141.3 The lease and service agreements were concluded with this international conglomerate trading as such in Namibia as Ramatex. The lease agreement was not negotiated and concluded from a position of superiority or authority by first respondent in its capacity as a public authority, but rather with the view of a commercial undertaking with Ramatex becoming a “global textile player". The agreement provides as follows in clauses 16.1.

"Where the company defaults to make any payment or be in breach of its terms in any other way, and fail to remedy such default or breach with thirty days after receiving a written demand that it be remedied, the City shall be entitled, **without prejudice to any alternative relief** or additional right of action or remedy available to the City under the circumstances without further notice, recover from the Company damages for the default or breach of the agreement". (emphasis added)

141.4 First respondent exercised its contractual rights upon Ramatex's repudiatory breach of the lease agreement, when it cancelled the agreement. That it was entitled to do contractually.

141.5 First defendant demanded of Ramatex to rectify its breaches on 19 March 2008 whereafter the agreement was cancelled on 22 April 2008. Ramatex did not dispute the entitlement of first respondent to cancel the agreement at any time before its provisional liquidation on 8 May 2008. Nor did Ramatex or the applicants at any stage prior to the launching of these proceedings even mention that first respondent's decision to cancel stands to be reviewed.

141.6 Applicant in that application relied on the fact that first respondent has cancelled the lease agreement along with the fact that it had ceased all its activities as a ground to show that Ramatex was unable to continue any of its objects or principal business and that Ramatex had lost its substratum. Mr Ong merely stated that he could not express himself on the validity of the cancellation. Notably he did not state that the cancellation was in issue.

141.7 Applicants now in these proceedings for the first time contend that the invocation of contractual rights against Ramatex constituted administrative action and the exercise of a public power and seek to set aside the termination of the contract by first respondent. They do so on the ground that the "procedure followed by the first respondent when it purported to cancel the agreement, fails to comply with reasonable and fair administrative procedures, more

in particular in that Ramatex was not afforded an opportunity to be heard prior to the purported cancellation, also in view of the provisions of the agreement quoted in paragraph 18.3.12".

[142] I am in agreement with Mr Smuts that the reliance on a contractual term to support the sole ground of review is untenable. There is no evidence that Ramatex invoked this contractual term at any stage. To the contrary, it became known that Ramatex was packing up and vacating the premises in February 2008, despite its undertaking to give 12 months' notice to first respondent of its intention to close down its business activities. Notice was given on 5 March 2008 of the closing down on 6 March 2008. Authority was given to Mr Ong to dispose of all the assets belonging to the Namibian Group of Companies by its sole shareholder (the applicant in the liquidation application). The Government was invited to purchase the buildings for the purposes of winding up Ramatex's commercial activities in Namibia.

[143] Based on the aforesaid reasoning and having considered all the relevant facts on the admissible evidence, as presented, I am in full agreement with Mr Smuts that the review relief sought is unsustainable for the reason that the decision to cancel or terminate the agreement did not constitute reviewable administrative action and as such is not subject to a review.

Applicants' lien

[144] Applicants, originally, in prayer 2 of part A of the notice of motion sought a declaratory order with the effect that first to third applicants be authorised to exercise an improvement lien *vis-à-vis* first respondent in respect of the improvements erected by Ramatex Textiles Namibia (Pty) Ltd on the erven (which form the subject matter of the agreements referred to in prayer 1 above), hereinafter the ("property"). This stance is closely related to the

fact that Ramatex, after the closing down of its business, invited the Government to purchase the buildings.

[145] The first applicant, during the hearing, after having given notice thereof to applicants, sought an amendment, which in turn was not opposed by first respondent, by inserting the words "excluding those buildings which were erected on the land as indicated in the lease agreement, which was entered into between the first respondent and Rhino Garments (Pty) Ltd, annexure as annexure "V52" to the first respondent's answering affidavit, and annexed to the applicants 'replying affidavit as annexure "IRM24".

[146] After hearing detailed argument on the issue as to the existence of the lien, its enforcement and a host of other matters incidental thereto, including the aspect of prescription, Mr Heathcote in his reply indicated that the applicants have decided to abandon the relief sought in prayer 2.

[147] As a result thereof it is not necessary to further deal with the applicants' entitlement or not to the relief sought in prayer 2 of part A of the notice of motion.

The removal of all the plant, material, equipment and machinery which were brought onto or erected by fourth applicant on the property

[148] The applicants in the notice of motion, in the alternative to the relief sought in respect of the lien, which was abandoned, requested the following alternative relief to be granted, to wit:

"IN THE FURTHER ALTERNATIVE and in the event of it being found that the agreements were validly cancelled and those applicants are not entitled to exercise an improvement lien.

3. Declaring that the applicants are entitled to remove all the plant, material and equipment and machinery which were brought onto or erected by Fourth Applicant on the property."

[149] Although indications were given by Mr Heathcote, during the hearing of the application in his reply, after abandoning the relief sought in prayer 2 of the notice of motion part A to move for amendment of the relief sought in prayer 3, no amendment was moved for and/or granted.

[150] In my view, the premises on which the relief sought still remains, i.e. being conditional to a finding not only that the agreements were validly cancelled, but also that the applicants are not entitled to exercise an improvement lien.

[151] As a result of the abandonment of the lien relief, this court did not make any finding, nor is it entitled to do so, i.e. that applicants are not entitled to exercise an improvement lien.

[152] It is evident that the basis on which the relief seeked in the alternative is sought, is based on clause 7.2 of the service agreement which expressly provides as follows:

"The parties agree that all plants, material equipment and machinery which the company brings onto, erect or construct on the premises shall remain the property of the company."

[153] Mr Heathcote submitted that the order sought in prayer 3 relates to immovable as well as movable property and that such is intended to not only cover the plant, material and equipment brought onto or erected by fourth applicant, on the property, in terms of the service agreement, but also in terms of the lease agreement itself.

[154] Although it can be said, that for purposes of this application the court must accept that applicants abandoned the declaratory order they originally sought, same in practice does not have any effect as applicants, at no stage, indicated that they are also in effect abandoning their entitlement to a lien and/or their right to rely on same in future.

[155] As a result of the blanket order seeked by the applicants herein, and the intended inclusion of both movable and immovable property therein, it in my view, without the condition having been fulfilled, can create more confusion and give rise to more disputes between the parties if declaratory relief is granted to the applicants in respect of prayer 3.

[156] O'Reagan AJA, who wrote on behalf of the Supreme Court [66] expressed herself in respect of the discretionary nature of declaratory relief as follows:

"The grant of declaratory relief is a discretionary matter. Ordinarily, a court will only grant declaratory relief when two conditions are met. First, the court must be satisfied that the person seeking declaratory relief is a person interested in an existing, future or contingent right or obligation and

[66] *Southern Engineering & 1 Other v Council for the Municipality of Windhoek* (unreported judgment of the Supreme Court) Case: SA14/2009, delivered on 7 April 2011, at p21, para [48] and further.

secondly the court must consider it appropriate to grant declaratory relief in the circumstances of the case.

In particular, the relief sought must not be abstract, or of academic or hypothetical interest only and it must afford the litigant a tangible advantage. (*Ex parte Nell*, 1963 (1) SA 745 (A) at 759 A-B; *Reinecke v Incorporated General Insurances Ltd,* 1974 (2) SA 84 (A) at 93 B-E). Where an order does no more than restate general principles of law, and does not determine any existing, future or contingent right, it is not appropriate for a court to grant declaratory relief. Such a declaratory order would be an "exercise in futility". *Reinecke v Incorporated General Insurances Ltd,* 1974 (2) SA 84 (A) at 97 D-E).

[157] Apart from the confusion which such a declaratory order may create without the condition for the alternative relief prayed for, not having been fulfilled, same also do not afford the applicants a tangible advantage as the order will only just be a restatement of the applicants' contractual right, without addressing the material disputes between the parties, as to not only whether it was intended to include movable as well as immovable property, an aspect which this court was not requested to adjudicate on, nor the existing dispute between the parties as to whether the buildings erected on the property are immovable or not.

[158] The applicants' right to sue the respondents for the return of the property contemplated *inter alia* in terms of section 7.2 of the Service Agreement, is a matter which will arise for full determination only if and when the applicants institute action against the respondents for the removal of same. The same in my view applies for the question pertaining to the *lien* and/or enrichment.

[159] In the exercise of my discretion I am of the opinion that for the reasons advanced hereinbefore that the applicants, in the circumstances are not entitled to the declaratory relief sought in prayer 3 of the first notice of motion.

[160] As a result of the aforegoing, the following orders are made:

1. The relief sought in part A of applicants' main application, bearing in mind that applicants abandoned the relief sought in prayer 2 of part A of the main application, is dismissed with costs.
2. The relief sought by applicants in part B of the main application is dismissed with costs.
3. The relief sought by first respondent in its counter application is dismissed.
4. The cost in the counter application is ordered to be cost in the main application.
5. The costs referred to, in all the orders referred to hereinbefore, are inclusive of the cost of one instructing and two instructed counsel.

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BOTES, AJ

APPEARANCES:

APPLICANTS:	Mr R Heathcote, SC assisted by Mr J Schickerling
	Instructed by Koep & Partners - R Maasdorp
RESPONDENTS:	Mr D F Smuts, SC assisted by Ms S Vivier
	Instructed by Lorentz Angula Inc - S Hoffmann