



## **REPORTABLE**

CASE NO: SA 33/2016

### **IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**IAN ROBERT MCLAREN N.O.**

**First Appellant**

**DAVIN JOHN BRUNI N.O.**

**Second Appellant**

**SIMON HERCULES STEYN N.O.**

**Third Appellant**

**RAMATEX TEXTILES NAMIBIA (PTY) LTD**

**Fourth Appellant**

and

**MUNICIPAL COUNCIL OF WINDHOEK**

**First Respondent**

**MINISTER OF TRADE AND INDUSTRY**

**Second Respondent**

**MINISTER OF LOCAL GOVERNMENT AND  
HOUSING**

**Third Respondent**

**Coram:** MAINGA JA, HOFF JA and FRANK AJA

**Heard:** 13 November 2017

**Delivered:** 17 January 2018

**Summary:** The fourth appellant (Ramatex) is a Namibian subsidiary company of a Malaysian company that was established with the main aim of establishing a textile industry in Namibia through a staggered investment in infrastructure and equipment

over a period of time, at a cost of millions of Namibian dollars and which would create thousands of job opportunities for Namibians.

As a result of this understanding, Ramatex and the Municipal Council of Windhoek (the City) entered into a lease agreement for a period of 99 years at a once off rental amount of N\$1188 for the entire period. The City undertook to provide municipal services and spent just in excess N\$87 million in this regard. Ramatex on the other hand took occupation of the site, constructed a number of warehouses, brought equipment on site and commenced with operations. The expenditure incurred in establishing its business on the site was around N\$500 million.

Ramatex undertook to comply with all laws and regulations relating to the manufacturing and handling of hazardous material, to comply with and execute sound environmental practises and 'within a reasonable time' comply with an international environmental standard described as 'ISO 14 000'.

In about 2008, Ramatex commenced to scale down its operations. Ramatex started disposing off its assets and informed the Namibian authorities of its unequivocal intention to discontinue with its business in Namibia. In March 2008 it gave notice to all its employees that they would be retrenched as the company would cease all its operations the next day.

The City in March 2008, wrote letters to Ramatex putting the company on terms to rectify certain alleged environmental breaches it claimed to be material breaches, the non-remediation whereof it was stated, would lead to cancellation of the

contract. In a further letter, delivered to Ramatex's registered address, the City maintained that the cessation of operations by Ramatex also constituted a material breach. Per letter dated 21 April 2017 the City informed Ramatex that it cancelled the agreement, based amongst others, on 'the discontinuance of your textile and garment factory operations.'

On 8 May 2008, Ramatex was placed under provisional liquidation, which was subsequently confirmed in June and the first to the third respondents were appointed as liquidators. On 9 May 2009 the liquidators informed the City that it elected to continue with the lease and the City's attitude was that no valid lease was in force at the time. The liquidators filed an application in the High Court in which they sought a declarator to the effect that the said lease was valid and of full force and effect. The application was dismissed with costs and hence the appeal before this court.

*Held* – that the general principle in leases is that where the property leased is stated to be used only for a specific purpose, this does not mean that there is an obligation to conduct the stated business for the full duration of the lease. To impose such an obligation the lease must expressly or implicitly contain such terms.

*Held* – that tacit terms contended for on behalf of the City that cessation of environmental friendly textile industry would terminate lease not established. This would be contrary to the express term that lease would not terminate on insolvency, was not pleaded, and ignored the general principle mentioned above.

*Held* – that annexure D, which was in essence the agreed schedule of operations between the parties, although not attached to the lease agreement, was identified and hence could be relied upon in considering the parties' rights and obligations in terms of the lease. The identification of the document does not offend against the parol evidence rule and although the identified document may have posed problems of interpretation this did not mean it should be ignored.

*Held* – that tacit term pleaded that Ramatex should establish an environmentally friendly textile industry cannot be imported into contract as the 'schedule of operations', annexure "D" to the lease expressly dealt with Ramatex's obligations and tacit term thus not expedient, reasonable or necessary.

*Held* – that authority given to employee to set proceedings in motion to cancel the agreement implicitly authorized the actual cancellation of the agreement.

The court thus concluded that on 21 April 2008 when the City cancelled the lease agreement based, *inter alia*, on the cessation by Ramatex of its operations, it was entitled to do so based on the repudiation of the lease agreement by Ramatex.

*Held* – that the decision by the City to cancel the lease did not constitute administrative action and hence that no review lay against this decision. The appeal was dismissed with costs.

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## JUDGMENT

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FRANK AJA (MAINGA JA and HOFF JA concurring):

Introduction

[1] During 2000 the United States of America (USA) passed legislation to enhance market access to that country for qualifying sub-Saharan African states of which Namibia was one (The AGOA Act).<sup>1</sup>

[2] A major Malaysian company involved in the textile industry saw the AGOA Act as an opportunity to establish an African presence from where it could export textile products to the USA.

[3] The Malaysian company approached the Namibian authorities for the purpose of establishing a presence in this country. Eventually an understanding was reached between the Malaysian company and the authorities along the following lines. The Malaysian company would establish a wholly owned Namibian subsidiary company and through this company establish a textile industry in Namibia through a staggered investment in infrastructure and equipment over 3 years of around U\$100 million and which would create thousands of job opportunities. (The figures of around 8000 jobs within 3 years and around 10000 within 5 years were mentioned). The textile products produced would be solely for export purposes (initially mainly to the USA). In relation to the land from which this venture would operate the municipal services like electricity and water infrastructure would be made available by the Namibian authorities. In addition the Namibian company would be given certain favourable tax concessions seeing that its produce would be solely for export.

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<sup>1</sup> *The African Growth and Opportunity Act, Public Law 106 of the 200<sup>th</sup> Congress.*

[4] As a result of the understanding reached between the parties mentioned above, a lease agreement was entered into between the Municipal Council of Windhoek (the City) and Ramatex Textiles Namibia (Pty) Ltd (Ramatex). Ramatex was a wholly owned subsidiary company of the Malaysian company referred to above. In terms of this lease agreement which was notarially registered in November 2001, the City let to Ramatex an area of about 43 hectares. From the evidence it is clear that this land comprised industrial land on the outskirts of the City of Windhoek. The City undertook to provide municipal services. The evidence further shows that the City expended just in excess N\$87 million in this regard. The lease was to endure for 99 years from signature (14 June 2001) at a once off rental of N\$1188 for the entire period. It is clear from the record that Ramatex took occupation of the site, constructed a number of warehouses, brought equipment on site and commenced with operations. According to Ramatex the expenditure incurred in establishing its business on the site was around N\$500 million.

[5] Ramatex commenced with its activities in November 2001 and continued with its business operations up to 2008 when the events that led to this matter and to the liquidation of Ramatex unfolded. (I deal with some of these events in more detail below). On 8 May 2008 Ramatex was placed under provisional liquidation. On 9 May 2009 the liquidators (the current first to third appellants) informed the City that it elected to continue with the notarial lease. On 11 May 2008 the City responded asserting that 'there is no lease agreement in place' as the lease was 'cancelled on 18 April 2008 and notice to this effect was given to Ramatex on 21 April 2008'. The provisional order of liquidation was confirmed on 20 June 2008, which date is the date of final liquidation.

[6] The dispute as to whether the City had validly cancelled the lease prior to the election to continue with it by the liquidators (and hence that there was no lease in place which could be continued with) or not, continued with correspondence flowing to and fro between the liquidators and the City and the matter could not be resolved between these two parties. The liquidators brought an application in the High Court seeking, amongst others, a declarator that the lease agreement was of full force and effect, alternatively that the City's decision to cancel the lease be reviewed and set aside. The City, apart from opposing this relief, sought a declarator that the liquidators' appointments be declared invalid. The court *a quo* dismissed both the application and the counter-application with costs. There is no appeal in respect of the counter-application and nothing more needs to be said about it. In this court counsel for the liquidators limited the appeal to the dismissal of the relief sought in the alternative set out above and this is thus all that needs to be determined, namely is the lease still in place and if cancelled should the decision by the City be reviewed.

#### Decision reviewable

[7] As is evident from what is stated above in sketching the background to this matter, Ramatex as subsidiary of a Malaysian company which was a major player in the textile industry entered into the lease agreement with the City after extensive negotiations which not only involved the direct parties to the agreement but also the Namibian Government through its relevant Ministries. There was no question of unequal bargaining positions. There is nothing to suggest that the parties to the lease intended their relationship to be governed by anything but the contractual terms agreed to.

[8] Counsel for appellants submitted that a clause providing for negotiations in case of hardships differentiates this matter from the cases where the courts held that where purely commercial contracts were terminated per its terms this did not constitute administrative action.<sup>2</sup>

[9] Clause 22.4 of the lease to which counsel for the appellants referred to reads as follows:

‘If by reason of any unforeseen occurrence or development the operation or application of this Agreement causes, or is likely to cause, any inequitable hardship contrary to the spirit of this Agreement to one or both of the parties they shall 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.’

[10] In my view the aforesaid clause in fact bolsters the case for the City as it is clearly envisaged that unforeseen events and/or occurrences is to be dealt with in terms of the contract and not in terms of some residual exercise of public power which vests in the City. Similarly the reliance on an arbitration clause to attempt to distinguish this case from the cases where this court determined that, in general, the exercise of contractual powers does not amount to administrative acts, is in my view not well founded. The arbitration clause itself is indicative of the fact that the parties intended that it must be enforced and not that disputes would be resolved by the City exercising some or other residual discretionary power.

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<sup>2</sup> *Ward v Permanent Secretary of the Ministry of Finance and Others* 2009 (1) NR 314 (SC) and *Transworld Cargo (Pty) Ltd v Air Namibia and Others* 2014 (4) NR 932 (SC).

[11] The fact that the lease constitutes a real right cannot change what is essentially a commercial contractual arrangement into an administrative public law relationship in which the contractual arrangements changed to become arrangements of an administrative nature. This is more so where the agreement is a singular one and not one in a series of like worded arrangements by the City with multiple persons or entities. The nature of the City's powers pursuant to the contract is solely contractual and is not overridden or subject to any legislation which can be stated to alter those powers to anything other than contractual powers. The source and nature of the power is contractual.<sup>3</sup> This is simply a case where the 'decision to terminate a contract was not an administrative action, because the organ of State in question has contracted in an equal power relation with a powerful commercial entity without any additional advantage flowing from its public position.'<sup>4</sup>

[12] As a reason for cancelling the lease the City relied on the cancellation of an EPZ certificate, which cancellation according to Ramatex was invalid. This according to the submissions on behalf of the liquidators somehow meant that the cancellation of the lease became an administrative act and not a contractual one. This is not so. Assuming that the cancellation of the EPZ certificate by the issuing authority (not the City) would entitle the City to cancel the lease, then this would presuppose a valid cancellation of the EPZ certificate and not an invalid or purported cancellation. In such case the contractual remedy is to enforce the agreement as the basis for the cancellation was invalid. In short, the City cannot validly cancel the lease based on an

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<sup>3</sup> *Mbenderu Traditional Authority and Another v Kahuure and Others* 2008 (1) NR 55 (SC).

<sup>4</sup> *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC) paras [18.5] to [18.7].

invalid cancellation of the EPZ certificate and if it does, the liquidators have a contractual remedy and not an administrative remedy. The incorrect application of contractual remedies does not transpose the City's actions from contractual ones to administrative ones. The City's acts are then reviewed as against its contractual powers per the contract and not as against its residual public powers which plays no role in this context.

[13] It follows from what is stated above that the liquidators cannot review the decision by the City to cancel the lease on administrative law grounds but must seek their remedy in the terms and conditions of the lease agreement and the relevant contractual principles flowing from it.

#### Contractual issues

[14] It is submitted on behalf of the City, in the heads of argument, that it was either a material tacit term or a tacit resolute condition that 'should Ramatex withdraw from Namibia and should the very purpose for which the lease agreement was concluded fail, principally, the agreement would become terminated by that very failure. Alternatively, at the very least, it would entitle (the City) to terminate the agreement between the parties as a result thereof.' (I point out in passing the City is the only respondent who joined issue with the liquidators).

[15] Counsel for the liquidators took issue with the stance on behalf of the City on various grounds but principally that the tacit terms contended for in the heads of argument are not those contended for in the answering affidavit, that the tacit terms cannot be imported into the lease agreement as it would be in conflict with the express

terms, that it in any event does not naturally flow from the lease nor would it be imported by a bystander responding to the 'what if' question, i.e. what the parties would have said if faced with the facts when entering into the agreement. Counsel for the liquidators further submitted that as the lease was notarially registered a tacit term could not be imported that would affect the rights of third parties and that this was especially so where a *concursum creditorum* had already been established and where the tacit term does not follow implicitly from the express terms but was reliant on evidence of surrounding circumstances.

[16] The lease agreement refers to an annexure D to it which was not attached thereto. A deponent on behalf of the City explained that this document was intended to be a summary of a written proposal made to the City by the Malaysian holding company which proposal he identifies and which forms and exhibit in the record. On behalf of the City it is submitted that the proposal must be regarded as the annexure, alternatively that the lease must be rectified to include the proposal as exhibit D, whereas counsel on behalf of the liquidators submits this cannot be done as a rectification was not sought as part of the counter-application, the rectification cannot be granted in respect of a notarial lease registered where the rights of third parties are effected and maintains that it would amount to the admission of inadmissible evidence if regard is had to the proposal to interpret the lease. The City seeks to rely on the proposal to bolster its argument relating to the alleged tacit term or condition it contends for.

[17] On behalf of the liquidators it is submitted that the person cancelling the agreement on behalf of the City was not authorised to do so, whereas it is contended

on behalf of the City that the cancellation was properly authorised.

[18] Lastly, it is contended on behalf of the City that the lease was terminated as a result of the breaches and conduct by Ramatex which evidenced a repudiation by it of the agreement and which was accepted by the City. Counsel for the liquidators counters that the breaches relied upon were of no avail as it was either not breaches of Ramatex's obligations or not material and that the conduct of Ramatex in any event did not and could not convey to any reasonable person that it intended to repudiate the lease agreement.

#### The Lease Agreement

[19] As mentioned above the notarial lease agreement was for a period of 99 years with a once-off rental payment of N\$1188. I have already alluded to the arbitration and unforeseen occurrences clauses. It is apposite to briefly state the further terms of the lease prior to considering the submissions relating to the tacit term that the City maintains should be imported into the lease agreement.

[20] The property could not be used for any purpose other than the 'setting up a textile industry' as described in the EPZ certificate or any 'activity which is necessary or incidental to the setting up and operating a textile industry'. The EPZ certificate circumscribes and limits Ramatex's activities so as to 'engage in manufacture of textile yarns, knitted fabric and apparel'.

[21] Ramatex could sublet or give up possession to a subsidiary or associate but could not, without prior written consent of the City, let to others or cede or assign any

rights or obligations to others. It further had to 'commence with and keep to the implementation and execution of the project as contained in its schedule of operations' which is stated to be annexure D to the lease agreement. As mentioned this schedule was not attached to the lease.

[22] The City had to, in terms of a 'Service Agreement' that was attached as annexure B to the lease agreement provide what can be termed the usual municipal services namely, electricity, water, sewerage, refuse (solid waste) removal and an access road.

[23] Ramatex undertook to comply with all laws and regulations relating to the manufacturing and handling of hazardous material, to comply with and execute sound environmental practises and 'within a reasonable time' comply with an international environmental standard described as 'ISO 14 000'.

[24] If Ramatex fell in breach and failed to remedy such breach within 30 days of written demand, the City would be entitled 'without prejudice to any alternative or additional right of action or remedy' to recover damages from Ramatex.

[25] The agreement contains the normal non-variation clause ruling out amendments or variations to the agreement unless in writing and signed by both parties as well as a clause stating that it contains the whole of the agreement and that no representations or warranties not included in the agreement could be relied upon.

[26] Lastly, and in line with the Insolvency Act<sup>5</sup>, the agreement stipulates that:

‘Insolvency of either the City or the Company shall not terminate the agreement. However, the trustee of the Company’s insolvent estate shall have the option to terminate this Agreement in writing to the City. If the trustee does not within three months of his appointment as trustee notify the City 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 three months.’

### Tacit Term

[27] Before dealing with the issue of the tacit term it is apposite that certain trite principles in this regard be stated. First, the onus is on the City to prove it as it alleges it formed part of the lease.<sup>6</sup> Second, the terms sought to be imported into the agreement must be clear and unambiguous.<sup>7</sup> The term must be pleaded and it must be shown that there is no express term dealing with the aspect.<sup>8</sup> A tacit term in conflict with an express term cannot be imported into the agreement.<sup>9</sup>

[28] The tacit term contended for the City is stated as follows in the answering affidavits. The agreement was averred to have terminated:

(a) ‘ . . . 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.’

and

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<sup>5</sup> Section 37 of Act 24 of 1936.

<sup>6</sup> *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere* 1984 (2) SA 261 (W) at 267.

<sup>7</sup> *Desai v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 522-523.

<sup>8</sup> *Merit Investment Eleven (Pty) Ltd v Namsoy Fishing Enterprises (Pty) Ltd* 2017 (2) NR 393 (SC) par [9] and *Nel v Nelspruit Motors (Edms) Bpk* 1961 (1) SA 582 (A) and *McWilliams v First Consolidated Holdings (Pty) Ltd* 1984 (3) SA 155 (A).

<sup>9</sup> *Nedcor Bank Ltd v SDR Investment Holding Co (Pty) Ltd* 2008 (3) SA 544 (SCA) par [12].

- (b) 'The property was leased to Ramatex for a very specific and singular purpose, namely, in order to establish an environmentally 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 fail and the agreement itself failed and Ramatex closed down its business, the very reason for concluding the agreement failed and the agreement itself failed and terminated for this reason alone and as well.'

And, in the heads of argument filed on behalf of the City the tacit term is dealt with as follows:

'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 and should the very purpose for which the lease agreement was concluded fail, principally, the agreement would become terminated by that very failure. Alternatively, at the very least, it would entitle first respondent to terminate the agreement between the parties as a result thereof . . . .'

[29] As is evident from what is averred in the answering affidavits two tacit terms are alleged; namely, that where Ramatex abandoned the project, the lease would terminate and that Ramatex had 'to establish an environmental friendly textile industry in Namibia.' In this court the implied term relating to the abandonment of the project was not persisted with. Such abandonment would probably in any event have amounted to a repudiation of the lease by Ramatex in which case the normal contractual remedies would have been available to the City. (In fact, as will become apparent, this is an alternative ground on which the City relies). There is simply no basis to import this tacit term into the agreement as it is not necessary at all to ensure business efficiency and will in any event deprive the City of the right to seek specific performance from Ramatex. It is not necessary to render the lease functional and in

view of the remedies available in such event there is no need for such implied term. It is not reasonable nor desirable.

[30] A common assumption in itself is in any event not a term of a contract. This is so because of the fact that the courts:

‘ . . . are after all not concerned with the motives which activated the parties in entering into the contract, except in so far as they were expressly made part and parcel of the contract or are part of the contract by clear implication.’<sup>10</sup>

[31] The second tacit term relied upon is that ‘Ramatex would establish an environmental friendly textile industry in Namibia’. This obligation is advanced as a tacit condition (as was the one relating to the abandonment of the project) namely, that if the conditions failed the contract would automatically terminate, i.e. it is stated as a tacit resolutive condition. The problem with this tacit condition is that the evidence does not support its failure. If regard is had to the express provisions of the lease agreement, it is clear that a financial failure that led to the liquidation of Ramatex would not terminate the lease. In fact a term to the effect that liquidation would terminate the lease would be contrary to s 37 of the Insolvency Act and thus null and void. On the facts Ramatex occupied the property, made substantial investments and operated in the textile industry from the end of 2001 up to, at least, the end of 2007. Surely it cannot be said that it had to ‘establish’ an industry over the full 99 year period? No facts were advanced to show what ‘establish’ in the context of this case would be, nor why this industry was not established during the period aforementioned when Ramatex

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<sup>10</sup> *African Realty Trust Ltd v Holmes* 1922 AD 389 at 403.

operated and did business in the textile industry. After how many years would they be allowed to go bankrupt and be liquidated? Thus even on its own version the City did not establish that Ramatex did not 'establish' an environmental friendly textile industry. Lastly in this regard, there were express provisions as to how Ramatex had to establish its operations. Its schedule of operations were embodied and made terms of the lease agreement as annexure D thereto as will become apparent below. There is simply no room to import the tacit term contended for in this regard as the establishment of operations are expressly dealt with.

[32] In the heads of argument a further refinement to the tacit term is advanced and the stance on behalf of the City is stated as follows:

'The tacit term refers to the continuation of the environmentally friendly textile industry in Namibia. This was the very purpose of the entire agreement. . . . The aforesaid was the entire basis and substratum of the agreement . . . and supposition under which the lease agreement was concluded . . . '

and

'This substratum was a tacit term in the nature of a condition. The condition being that the lease agreement would only subsist for as long as the substratum is maintained. Once the substratum disappears, the lease agreement automatically terminates.'

[33] There are a number of problems with the failure of the substratum submission. Firstly, this was never the City's case on the papers. Secondly, the provision in the lease stating that on insolvency the lease would not terminate (which is also a provision in the Insolvency Act), counters the suggestion that there was a tacit term that the 'environmentally friendly textile industry had to continue for the duration of the lease', i.e. 99 years. Counsel for the City realised this and submitted that if Ramatex went

insolvent in such a fashion that its liquidators could still sell a textile related (albeit crippled) industry operation, it could be liquidated but where this was not possible the tacit condition kicked in and the lease terminated automatically. It seems that Ramatex would be allowed to fail but not spectacularly so. Thirdly, it ignores the general principle in leases that where the property leased is stated to be used only for a specific purpose this does not mean that there is an obligation to conduct the stated business for the full duration of the lease. To impose such a condition the lease must contain such terms (expressly or implicitly).<sup>11</sup> Cooper states the general principle as follows:

‘A term restricting the use of business premises for a specific purpose, coupled with the obligation to conduct the business in compliance with statutory provisions applicable to it and in a manner that will not endanger the business licence, does not by implication impose an obligation upon the lessee to keep the licence alive or conduct the business for the duration of the lease.’<sup>12</sup>

[34] Annexure D to the lease agreement does refer to the obligation of Ramatex to ‘commence with and keep to the implementation and execution’ of the ‘schedule of operations’ in the said annexure and these were the only obligations of Ramatex in the context of the continuation of the conduct of its business. This was the express term as to business continuation. Once again if they did not keep to the schedule or abandoned it the normal contractual remedies would be available to the City and the need for a tacit term or condition is not practical, reasonable or in any manner necessary. Furthermore as pointed out below it would be in contradiction of the express terms found in annexure D read with the clause applicable in the case of insolvency.

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<sup>11</sup> *Bresgi v Lazersohn* 1939 AD 445 and *Food Town Incorporated (Pty) Ltd v Florenca and Another* 1974 (1) SA 635 (A).

<sup>12</sup> *Cooper: The South African Law of Landlord and Tenant* at 213.

[35] It follows from what is set out above that the City did not establish the tacit terms it alleged or the one submitted in argument on appeal. It is thus not necessary to deal with the aspect relating to the alleged prejudice to third parties by importing tacit terms into a notarial lease subsequent to the *concursum creditorum* as a result of the liquidation.

#### Annexure D

[36] Annexure D to the lease agreement is stated to contain the obligations of Ramatex 'to commence with and keep to the implementation and execution of the project as contained in its schedule of operations' which schedule is attached to the agreement as Annexure D.

[37] The annexure, it is common cause, was not attached to the lease. A deponent on behalf of the City explains this. He was to distil the 'schedule of operations' from the investment proposal made to the Namibian authorities which as indicated was a precursor to the lease agreement. This document by its very nature addressed many issues such as the background of the Ramatex group of companies, the availability of services for its operations, social responsibility of the proposed Namibian venture and the like which had nothing to do with a 'schedule of operations'. It was however clear that Annexure D was intended to refer to the 'schedule of operations' that could be ascertained and distilled from the mentioned proposal. The deponent never got around to doing this.

[38] Counsel for the liquidators submitted that to have regard to the proposal would

amount to parol evidence and as the annexure was deliberately not attached no evidence could be led which would be admissible as the agreement itself stated it contained the whole agreement. Counsel for the City submitted that Annexure D was identified by the deponent who explained that it was contained in the proposal. In the alternative he submitted that the agreement should be rectified by reading the relevant portions of the proposal into it. The rectification was objected to on behalf of the liquidators as it was not sought as relief in the counter application and it could not be sought at all at this late stage subsequent to the *conkursus creditorum* being established as third party rights flowing from a registered notarial lease would be effected.

[39] The answer in my view to this debate is that the deponent on behalf of the City simply identified the document containing the 'schedule of operations'. This was the initial proposal. Whereas the idea was that he would sanitize this document to distil from it the schedule of operations and omit the rest of the contents not relevant to such schedule so as to create a compact document shorn from the matters irrelevant to the schedule and attach this abridged document as annexure D to the lease agreement, it still would only contain the schedule which was already contained in the proposal. This meant the evidence tendered was of an identificatory nature which does not offend the parol evidence rule.<sup>13</sup> The deponent merely pointed to the document where the 'schedule of operations' could be found and which should have been attached as annexure D to the lease. The fact that the proposal (annexure D and in its undistilled form) may present challenges of interpretation in excising and separating the 'schedule of operations' from the rest of the document does not mean that there is no 'schedule

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<sup>13</sup> *Richter v Bloemfontein Town Council* 1922 AD 57 at 59 and *Trust Bank Ltd v Frysich* 1977 (3) SA 562 (A) at 586.

of operations' or there never was an annexure D and hence that the reference to this annexure in the lease agreement must be read as *pro non scripto*. The schedule of operations is contained in the proposal which is in effect in respect of the relevant portions annexure D to the lease. Put differently, as the schedule was not attached to the proposal, the whole proposal remains annexure D and the 'schedule of operations' must be extracted from it by way of interpretation.

[40] The starting point in the endeavour to determine the 'schedule of operations', and which cannot be controversial, is the chapter in the proposal under the heading 'Ramatex Action Plan and Budget'. In terms of this Ramatex undertook to construct certain buildings within a 12 month timeframe. It would operate a textile division and a garment division. From the project turnover which would reach US\$146.10 million in year 5, it is clear a large operation was intended. This is enforced by what is stated under the heading 'Ramatex Namibia Investment' that a fully integrated textile mill in excess of US\$100 million would be operational with 3 years from the commencement of business. Further, employment would be created on a vast scale starting with 3000 employees in year 1, rising to 8000 in year 3 and peaking at 10601 in year 5. Human resources development was specified over a 5 year period. Ramatex undertook that at least 50% of the water usage would be recycled and that it would be used in an environmentally friendly dyeing process. There may be other matters that need to be specified but it is not necessary for purposes of this judgment to attempt to stipulate a full list of the matters that formed part of the 'schedule of operations'. Suffice to say Ramatex undertook to invest a substantial amount to establish and operate a textile mill or complex which would employ thousands of Namibians and conduct its operations in an environmentally friendly manner.

[41] The aforesaid 'schedule of operations' thus formed part of the terms and conditions of the lease agreement but did so expressly and contained obligations that Ramatex undertook to comply with. If for any reasons they could not do so, they would be able to refer the matter to the City for renegotiation in terms of the clause already quoted relating to unforeseen occurrences.

### Repudiation

[42] The City relied, in the alternative to the tacit term or condition which I have dealt with above, on a repudiation by Ramatex of the lease agreement which it accepted. It is to this aspect that I now turn. There are two issues that arose in this context namely, did Ramatex repudiate and was the acceptance (cancellation) as a result thereof communicated by an official who had the necessary authority to do so on behalf of the City. I deal with the two issues in sequence.

[43] Prior to the liquidation there were correspondence between the parties, mostly relating to Ramatex's alleged breaches in respect of its environmental practises and waste water treatment facilities. Both these matters in fact featured in a letter of cancellation of 21 March 2008 which was delivered to Ramatex. The letter however also cancelled the lease based on the fact that Ramatex's EPZ had been cancelled and 'the discontinuance of your textile and garment factory operations'. Counsel on behalf of the City, already in the court *a quo* disavowed reliance on the grounds for cancellation raised in the letter based on the environmental and waste water treatment concerns. The cancellation or termination was justified on the basis of the alleged

repudiation of the agreement by Ramatex. This the City is entitled to do because if a party to a contract cancels it for reason A which turns out to be invalid such party may rely on reason B provided reason B is a valid reason and was in existence at the time of cancellation.<sup>14</sup> Further, if this right of cancellation accrued prior to the insolvency because the breach or repudiation occurred prior thereto, the lessor can exercise this accrued right.<sup>15</sup>

[44] Where a party to a contract unequivocally evidences an intention not to be bound by the agreement, it amounts to a repudiation of the agreement. This may be either an indication not to perform the obligations imposed or by conduct disabling such party or the other party from performing. As stated in the *Datacolor* case –

‘..... 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.’<sup>16</sup>

The intention of the repudiating party is irrelevant as the test is objective and the matter is thus approached from the vantage point of the innocent party. If a reasonable person in the position of the innocent party would have concluded that the other party did not intend to fulfil his part of the bargain, then a repudiation is established. A reasonable person will obviously factor into his/her decision before coming to a final conclusion, the nature and degree of the impending non- or malperformance.<sup>17</sup> Lastly, in connection with the applicable legal principles, the conduct from which the inference

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<sup>14</sup> *Datacolor International (Pty) Ltd v Intramarket (Pty) Ltd* 2001 (2) SA 284 (SCA) par [28].

<sup>15</sup> *Smith v Parton* NO 1980 (3) SA 724 (D) at 729 D-F and *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 553J-554C.

<sup>16</sup> *Highveld Seven Properties (Pty) Ltd and Others v Bailes* 1999 (4) SA 1307 (SCA) par [19].

<sup>17</sup> *Datacolor* case above paras [17] and p19].

of repudiation is sought to be drawn must be 'clear cut and unequivocal, i.e. not equally consistent with any other feasible hypothesis.'<sup>18</sup>

[45] As indicated above Ramatex commenced with its operations at the end of 2001 and continued with operations up to the end of 2007. In this period disputes arose between it and the City relating to certain environmental and waste water treatment issues. These however have no bearing on the issues at hand. The relevant indicators from Ramatex as to its intention were the following:

- (a) On 29 February 2008 the holding company of Ramatex and Ramatex addressed letters to the Namibian authorities. Although these letters were not addressed to the City it is not disputed that these letters came to the attention of the City. The letter from the holding company informed the authorities that it was negotiating with a USA investor to take over the assets of Ramatex. The authorities were further informed that 'the textile machinery were shipped out at the end of January, however we are still busy with Customs and Excise on outstanding issues for disposal, . . . '. The second letter by Ramatex requested the Acting Chief Executive Officer of the Overseas Development Corporation not to cancel its EPZ certificate because –

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

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<sup>18</sup> *Datacolor* case above par [18].

of the site.'

- (b) On 5 March 2008 Ramatex announced the closure of its business with effect the next day. The announcement indicated that all the Namibian employees would be retrenched. The reasons for the closure was stated to be, 'amongst others', catastrophic business failure, lack of profits as well as costs overruns and heavy indebtedness.
- (c) On 6 March 2008 a consultative meeting was held attended by various high ranking government officials including the Prime Minister, Minister of Trade and Industry, Minister of Labour and Social Welfare and the Acting CEO of the City of Windhoek to discuss the decision by Ramatex to cease its business operations. The minutes of this meeting reflects that the announcement by Ramatex was 'unexpected'. It was noticed that despite the reason given for the cessation of operations which indicated 'bankruptcy' it had not 'been declared bankrupt as it was a requirement in terms of the law (Companies Act)' as it was 'supposed to approach the court to be declared bankrupt' and that it may have flouted the law in this regard. It was decided at this meeting that the City 'should trigger the application of the provisions of the lease agreement as applicable under the current circumstances'.
- (d) On 7 March 2008 the EPZ certificate of Ramatex was cancelled.
- (e) In a letter dated 10 March 2008 the holding company of Ramatex informed the Namibian High Commission in Malaysia that the liquidity problems in

Ramatex was caused by a delay from local management to dispose of the machinery, that the general manager of Ramatex in Namibia, Mr Ong, would be given the authority to dispose of all the assets belonging to the 'Namibia Group of Companies' including 'factory buildings, machines and inventories' so as to settle its liabilities in respect of the workers as well as other 'local operational liabilities' and that the holding company would not provide further funding for Ramatex. The Government was given the option to purchase the buildings at their net asset value. As the City refers to this letter in one of its letters dated 19 March 2008 which I deal with below it is clear that this letter of 10 March 2008 came to the attention of the City prior to 19 March 2008.

- (f) Per letter dated 19 March 2008 the City admonishes Ramatex in respect of its environmental practises and the waste water treatment facility and it is given 30 days to remedy the position or face cancellation of the lease. However the letter puts the following option to Ramatex:

'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 cause.

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.'

- (g) A second letter was also forwarded from the City to Ramatex on 19 March 2008. It is common cause that despite this letter being delivered to the

registered address of Ramatex (its auditors) it was never forwarded to Ramatex by the auditors. It is however of importance to indicate how the City perceived the development at that stage. This letter states Ramatex is in material breach of the lease agreement based on the same reasons as the other letter of 19 March 2008 mentions, but adds to these alleged breaches the announcement of the business closure and the fact that it lost its EPZ status. These two latter breaches are also alleged to be material breaches by the City.

- (h) Per letter dated 11 April 2008 the lawyers acting on behalf of Ramatex and in response to the letter seeking the remediation of or security in respect of the alleged environmental breaches tenders to provide security and request the City to provide it with the amount and form of the security demanded. It appears that this letter was overtaken by events and hence never responded to by the City.
- (i) The above was the lay of the land when the cancellation letter of 21 April 2008 was forwarded and delivered to Ramatex. The issue thus is whether on this date it can be said the City was entitled to cancel because Ramatex had repudiated the agreement.

[46] As mentioned above the City informed the liquidators that the lease had already been cancelled by the time the liquidators informed the City that they elected to continue with the lease. The City did not initially state that the lease was cancelled because Ramatex repudiated it. This only happened sometime after the liquidators on

9 May 2008 sought to elect to continue with the lease. The City through its lawyers and presumably on their advice in August 2008 and only in correspondence exchanged between the parties, raised this as a justification for their cancellation. Counsel for the City seems to suggest that even if it could not justify the cancellation conveyed to Ramatex on 21 April 2008 it could in August 2008 still terminate the agreement by accepting the repudiation as this right accrued to it and the liquidators could not undo it by their election to continue with the lease. I do not agree. The repudiation had to be accepted prior to the decision by the liquidators because if it was not, the contract remained in place and it was open to Ramatex or the liquidators to renounce the repudiation or correct the acts so constituting the repudiation as it did not lead to the termination of the agreement. Once this was done there was no longer a repudiation or repudiatory acts that could be accepted. Furthermore, despite the fact that repudiation is to be approached from the vantage point of the City, a retraction of the repudiation would lead to dispel any intimation of repudiation on behalf of Ramatex but rather a resolve to adhere to the contract.

[47] The letters of 28 February 2008 clearly indicates an intention by Ramatex to repudiate the agreement. The holding company is in the process of selling the assets of Ramatex. It is not clear whether the reference to assets included a reference to the lease. It is clear that the sale of assets was not at such stage that consent for the assignment or cession of the lease had been requested or even mentioned to the City. If Ramatex sold its assets it is obvious that it would not maintain the scope of the business as envisaged in its 'schedule of operations' (annexure D to the lease) and that this would be a breach of a material term. Ramatex also did not at any stage seek to invoke the clause related to unforeseen occurrences to negotiate an amendment to

annexure D. The fact that it would not comply with annexure D is further underscored by the fact that it shipped out the 'textile machinery' by the end of January 2008 which by necessary implication also meant that operations would not continue per the said 'schedule of operations'. The second letter is to the same effect as it confirmed the only activity still undertaken was, in essence, to wound down operations. It was also according to the letter 'negotiating certain issues pertaining to the handover of the site'. With whom they were negotiating is not stated. In short, the letter indicated that the project and operation would come to a standstill and the premises handed over, i.e. the whole venture was being abandoned. Furthermore the issue of financial unsustainability is not raised at all in these two letters.

[48] The City however did not act on these two letters. This may be because it was not addressed to them and only later came to its knowledge. The City only reacted subsequent to the notice of cessation of business. By then it was clear that the closure was due to catastrophic business failure, a lack of profits and heavy indebtedness. These are all factors that indicate commercial insolvency if not actual insolvency. Still, however, no reference is made to liquidation.

[49] In the City's response they referred to the letter addressed to the High Commissioner on behalf of Ramatex. This letter makes it clear that Ramatex, through its sole shareholder, the holding company, was not contemplating the liquidation route. Instead of going this route assets were sold to attempt to settle debts which would, of course, be prejudicial to any liquidation process where a fully or partially fitted textile operation would be on offer. According to the letter Mr Ong would be mandated to negotiate a settlement with the local debtors based on the total amount recovered from

the sale of assets and no more as the holding company would not provide further cash, i.e. 'subject to the amount raised from the disposal of the local assets'. The impression created was that, controlled and directed by the holding company, Ramatex would dispose of all its assets and make the money so raised available to its debtors (and no more), that the distribution between these debtors would be negotiated with them by the country manager of Ramatex and that the holding company who was probably the biggest debtor (the last balance sheet for the year ended 31 December 2004 indicated a loan in excess of U\$50 million in this regard) would walk away from what it considered a failed venture. This private 'liquidation' would also involve the offer of the buildings at 'net book value' to the Government. From the minutes of 6 March 2008 consultation, this is also how the matter was viewed by the City and other government entities involved.

[50] Ramatex thus clearly intimated that they would not adhere to the lease agreement in respect of its commitments contained in the 'schedule of operations', neither would they liquidate the company as envisaged in the Companies Act but that the business operations would cease, the local assets would be disposed of and the money raised in this regard would by negotiation be distributed amongst the local debtors so that what was left would be a dormant company with a massive debt to its holding company. This private 'liquidation' was obviously not envisaged in the lease agreement and the activities taken to give effect to it was clearly contrary to the liquidation process contemplated in the agreement and hence also a repudiation of that section of the lease agreement.

[51] The letter to Ramatex by the City on 19 March 2008 does not indicate that they regarded the actions by Ramatex as a repudiation and hence they still attempted to deal with the position as if Ramatex was in breach of a material term of the lease agreement. The only real issue that arises is whether Ramatex's tender to provide security in respect of the alleged environmental damages means that this should have raised doubts as to whether Ramatex intended course of action amounted to an unequivocal repudiation. I am of the view that it did not as it is clear the private 'liquidation' envisaged the payment of local liabilities which the environmental rehabilitation costs would be and the approval by Ramatex in this regard did not detract from its stated intention to cease operations and settle debts outside the formal and intended liquidation process.

[52] It thus follows that on 21 April 2008 when the City cancelled the lease agreement based, *inter alia*, on the cessation by Ramatex of its operations, it would have been entitled to so cancel (terminate) the lease based on the repudiation of the lease agreement by Ramatex. The question that arises is, can the City after seeking to cancel the agreement, amongst others, on the basis of 'the discontinuance of your textile and garment factory operations' which it alleged was a material breach (Reason A) turn around and after the election by the liquidators say they could have done it because of a repudiation by Ramatex (Reason B) and hence the cancellation was valid? It must be borne in mind that breaches of material terms and repudiation can overlap and that the same conduct can amount to a material breach or breaches and repudiation.<sup>19</sup> Further that any breaches that manifests an unequivocal intention not

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<sup>19</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) par [38].

to adhere to a contract justifies cancellation by the other party.<sup>20</sup> This is what happened in this case. The manner in which Ramatex chose to cease its operations constituted material breaches of its express obligations and also constituted a repudiation of the agreement as I endeavoured to explain above. This was also, amongst others, what the City relied upon as the cancellation was because of the 'discontinuance of your textile and garment factory operations'. The material breaches by Ramatex also amounted to a repudiation by Ramatex and hence entitled the City to terminate (cancel) the agreement. It follows that the acceptance of the repudiation by way of cancelling the lease brought it to an end on 21 April 2008 provided, of course, that the official acting on behalf of the City had the authority to so terminate the lease.

#### Authority to cancel

[53] The letter of cancellation was signed on behalf of the City by its Chief Executive Officer (CEO). He was given authority to cancel the agreement by the Management Committee of the City in terms of resolutions taken by the said committee on 17 March 2008. On 10 April 2008 the Council of the City ratified the decision of the CEO 'to set proceedings in motion in order to cancel the lease agreement' with Ramatex. At the time the letters of 19 March 2008 had already been forwarded to Ramatex which indicated that a failure to address the issues raised therein would lead to cancellation. As pointed out above one of the issues raised was the cessation of business operations. It thus follows implicitly from Council's resolution that the CEO was entitled to follow through on the letters of 19 March 2008 should the demands not be met.

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<sup>20</sup> *Aucamp v Morton* 1949 (3) SA 611 (A) at 119.

[54] It thus follows that the notarial lease agreement was validly cancelled on 21 April 2008 and there was no lease in place on 9 May 2008 which the liquidators could elect to continue with it.

#### Conclusion

[55] In the result I make the following order:

The appeal is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

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**FRANK AJA**

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**MAINGA JA**

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**HOFF JA**

## APPEARANCES:

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Instructed by Koep & Partners

Respondent: R Tötemeyer (with him D Obbes)

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