REPUBLIC OF NAMIBIA

CASE NO. (P) A200/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SEAGULL'S CRY CC Applicant

and

THE COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND 1st Respondent

THE MAYOR OF THE MUNICIPAL COUNCIL OF SWAKOPMUND 2nd Respondent

THE CHAIRPERSON OF THE MANAGEMENT COMMITTEE OF THE MUNICIPAL COUNCIL OF SWAKOPMUND 3rd Respondent

CORAM: **VAN NIEKERK, J**

Heard: 22 January 2007
Delivered: 13 February 2009

JUDGMENT

VAN NIEKERK, J: [1] In this application the applicant calls upon the respondents to show cause why an order should not be made in the following terms as set out in its amended notice of motion:

> "1.1 Reviewing and setting aside the decision taken by first respondent on or about 31 March 2005 and conveyed to applicant on or about 12 April 2005 – and in

respect of the notarial lease agreement signed and submitted on behalf of applicant on or about 16 March 2005 (hereafter "the second agreement") which decision was recorded by first respondent in the following terms:

(a) *"That the second agreement which was meant to replace the existing (signed) agreement be cancelled;*

(b) *That Messrs Malherbe be advised that their clients shall adhere to the conditions of the existing (signed) lease agreement;*

(c) *That an in loco inspection be done by the departments of the Town Secretary, Town Engineer – and Town Health Officer to determine whether Seagulls Cry is complying with the provisions of the existing agreement;*

(d) *That the results of the in loco inspection mentioned in (c) above be reported to Council".*

(hereafter "the decision")

1.2 Alternatively, declaring the decision to be in conflict with Article 18 of the Constitution of Namibia and be set aside;

1.3 Reviewing and setting aside the decision taken by first respondent on or about 31 March 2005, which decision was recorded by first respondent in the following terms:

"(a) *That Council rejects the signed Notarial Lease submitted by Messrs Seagull's Cry due to the fact that they are making a counter offer instead of accepting the terms of Council;*

(b) *That Council accepts the recommendation of Management Committee, as contained In the Ordinary Council Agenda for 31 March 2005 under item 11.1.9 on page 46."*

Alternatively, declaring the above decision to be in conflict with Article 18 of the Constitution of Namibia and be set aside.

2. Confirming that the second lease agreement as aforesaid, is binding and of full force and effect between applicant and first respondent.

3. That the following amendments proposed by applicant to the second agreement be referred to, or referred back to, first respondent for consideration and reconsideration after due compliance with, and adherence by, first respondent to applicant's procedural and substantive rights under the common law and Article 18 of the Constitution of Namibia:

3.1 That the date of 31 December 2017 appearing in paragraph 4.2 at page 8 thereof, be changed to 31 December 2018;

3.2 That the date of 31 March 2005 appearing in paragraph 6.1 at page 9 thereof, be changed to 31 March 2006;

3.3 That the date of 31 October 2005 appearing in paragraph 6.2 at page 11 thereof, be changed to 31 October 2006;

3.4 That the date of 31 December 2006 appearing in paragraph at page 11 thereof, be changed to 31 December 2007;

3.5 That the date of 1 February 2017 appearing in paragraph 17.1 at page 25 thereof, be changed to 1 February 2018;

3.6 That the date of 31 July 2017 appearing in paragraph 17.3 at page 26 thereof, be amended to 31 July 2018;

3.7 That the cabaret and entertainment venue (referred to in paragraph 6.4.2.3 at page 14 of the second agreement as a *"venue for live entertainment covering not more than 200m²"*) not be included in the area identified as *"area 4"* on the relevant location plan, but in the area designed as *"area 5"* on such plan;

3.8 That the one storey height restriction contained in paragraphs 6.3, 6.4 and 6.4.2 of the second agreement be waived or relaxed.

4. Directing first, second and third respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved.

5. Granting such further or alternative relief as the above Honourable Court may deem fit."

History

[2] Although the matter has along history, it is not necessary to include a lengthy summary of the historical facts, as ultimately the issues to be considered were narrowed down considerably and mainly do not turn on the facts.

[3] During 1997, first respondent put out a tender for the lease of the Swakop River Mouth area for a development project. Applicant responded to the tender and made a project proposal. The outcome of the tender process and further negotiations was that a

lease agreement was concluded for a period of 9 years and 11 months terminating on 31 August 2009, unless renewed.

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[4] During 2000 applicant submitted a further extensive development proposal in respect of the area leased. The proposal made provision for the development in various phases to the value of more than N$15.5 million. In terms of the proposal applicant requested a lease term of at least 30 years in order to justify the capital outlay intended; to give applicant sufficient security of tenure and to satisfy the requirements if applicant's financiers. First respondent approved applicant's proposal "in principle", but indicated that it was not prepared to extend the lease beyond 31 August 2009, save for agreeing to the same extension clause contained in the existing lease, which applicant contended did not entail a legally enforceable option to renew the lease. This aspect proved to be a big bone of contention between the parties for some time. During 2002 applicant tabled an application with first respondent for a new lease agreement for 15 years, renewable at the applicant's option for a further 15 years. First respondent agreed to the substitution of the existing lease agreement with a fresh lease for a period of 15 years calculated from January 2003, with the same renewal clause as before. Further negotiations, correspondence and meetings ensued between the parties about the details of the intended lease. The agreement was also advertised in terms of section 63(3) of the Local Authorities Act, 23 of 1992, and underwent Ministerial scrutiny when certain objections were lodged. After the Minister's approval for the lease was obtained, the lease underwent further changes and during early 2004, a draft lease agreement was provided to applicant. (It is common cause that this was the lease which applicant eventually

signed on 16 March 2005 and which is the subject of this application. This agreement was often referred to as the "second" lease agreement to distinguish it from the first lease agreement ending on 31 August 2009, also referred to as the "existing" lease agreement and I shall do the same in this judgment.)

[5] During 2004 applicant again attempted to convince respondents to change the wording of the renewal clause, but to no avail. During December 2004 applicant was informed that first respondent had resolved not to consider any further amendments to the draft lease and that, should applicant not sign same the existing lease would be enforced. Thereafter further correspondence was addressed to Applicant in which the acting town secretary, Mr Plaatjie, set a deadline for the draft lease to be signed by close of business 18 February 2005. Applicant did not meet this deadline for reasons which have become irrelevant. On 15 March first respondent in a letter essentially conveyed to applicant that as applicant had not signed the lease agreement it could make representations for consideration at its next meeting why the draft lease should not be "cancelled".

[6] As a result of the "take it or leave it" stance by first respondent, applicant decided to sign the draft lease and to make a formal application to consider certain amendment which concerned the extension of certain dates because of the effluxion of time since the draft was prepared and other errors which had crept into the details. Applicant signed the lease agreement on 16 March 2005 and this document was placed before first respondent who, on legal advice obtained, considered it to be a counter offer. The decision quoted in prayer 1.1 of the notice of motion was then taken.

Misjoinder of second and third respondents

[7] Applicant alleged in its founding affidavit that the second and third respondents are cited *"in the light of their respective statutory capacities, duties and responsibilities in respect of the decisions taken concerning the implementation of"* the development project.

[8] All three respondents oppose the application. In their joint answering affidavit deposed to by the General Manager: Corporate Services in first respondent's employ, Mr Swarts, the point is taken that the citing of second and third respondents amount to a misjoinder in the circumstances of this case and that the application should be dismissed in respect of these respondents on this basis alone.

[9] During oral argument Mr *Frank* on behalf of respondents pointed to the provisions of section 6(3) of the Local Authorities Act which provide that *"a municipal council ... ... shall under its name be a juristic person"* and to the provisions of section 11(1) of the Act which provide that the mayor of the council shall be elected from its members and shall be the chairperson of the council.

[10] Mr *Frank* referred to the well known case of *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A), where it was held that

rule 53(1) does not require the separate citation as a party of the chairperson of a board where the board's decision is sought to be reviewed (see 672C-F).

[11] Mr *Tötemeyer* for applicant also relied on this case as authority for the proposition that it is not wrong to cite the second and third respondents and submitted that, as in the *Safcor* case, there is no prejudice for respondents and no additional costs incurred by citing the second and third respondents. However, in my view counsel's reliance on the *Safcor* case is misplaced. The issue in *Safcor* was whether there was a fatal nonjoinder because of non-compliance with rule 53(1), if a statutory board is cited *eo nomine* instead of the chairperson of the board in a representative capacity. The Appellate Division held (at 673B) that this failure did not merit the dismissal of the application with costs and finally pointed out that *"it was not a case of the wrong person being before the Court, but a case of the right person having been incorrectly cited"* (at 673G). However, the second respondent in this case was not cited in her representative capacity as chairperson of the municipal council, but as a separate party. In the case of second respondent it is *"a case of the wrong person being before the Court"*.

[12] Furthermore, as the decisions sought to be reviewed are those of the first respondent council, of which the second respondent is the chairperson, there is in my view no need to join second respondent. There is also no need to join the third respondent who merely made recommendations to first respondent.

[13] In the result the application is dismissed against the second and third respondents.

The relief sought in prayer 1.3 of the notice of motion

[14] In its answering papers first respondent conceded that the relief in prayer 1.3 should be granted. The basis for this concession is that the decision was taken at an *in camera* meeting held in conflict with section 14(2) of the LA Act which provides:

> "**14** (2)(a) Every meeting of a local authority council shall be open to the public, except on any matter relating to-
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> (i) the appointment, promotion, conditions of employment and discipline of any particular officer or employee of a local authority council;
> (ii) any offer to be made by the local authority council by way of tender or otherwise for the purchase of any property;
> (iii) the institution of any legal proceedings by, or opposition of any legal proceedings instituted against, a local authority council,
>
> unless the local authority council by a majority of at least two-thirds of its members present at the meeting in question determines such meeting to be so open.
>
> (b) The local authority council may allow the chief executive officer or any other staff member of the local authority council or other interested person to attend any proceedings of the local authority council, and to take part in any such proceedings, but the chief executive officer or such other staff member or person shall not have the right to vote in respect of any decision of the local authority council."

[15] It is clear that section 14 requires every meeting of a local authority to be open to the public, except in the specific instances set out in sub-paragraphs (i), (ii) and (iii), none of which, it is common cause, apply to this case. Applicant submitted that the provisions of section 14(2) are clearly peremptory of the kind which need exact compliance and that the decision taken at the *in camera* meeting was taken *ultra vires* and is therefore a nullity. In this submission applicant is in my view correct and the concession on the part of respondent is well made. (See *Nkisimane and others v Santam Insurance Co. Ltd* 1978

(2) SA 430 (A) 434B; *The Council of the Municipality of Swakopmund v Vantrimar Properties CC* (unrep. Case No. (P) A 245/2006) del. 28/11/07).

The second decision taken on 31 March 2005 (i.e. the relief sought in para. 1.1, alternatively para. 1.2 of the notice of motion)

[16] At the outset when this application was heard, Mr *Frank* made it clear that respondents position is that, should the Court decide that DW41 constitutes a valid acceptance of first respondent's offer, and if the tender board issue (see *infra*) is decided in favour of applicant, that would be the end of the matter. He stated that it would not be necessary to refer the application for amendments to the lease agreement back to first respondent for consideration, as it has already stated that, if there is indeed a valid lease agreement, it would reconsider the application for the amendments.

[17] As far as the issue of the deadline set by Mr Plaatjie is concerned, Mr Frank made it clear during oral argument that the respondent was no longer placing it in issue that the offer by first respondent was still open for acceptance even after the expiry of the deadline and that the Court need not concern itself with the factual and legal disputes regarding the issue of the deadline as they have arisen in the papers.

[18] Applicant contended that the relief sought in paras. 1.1, alternatively 1.2 of its notice of motion should be granted for essentially the same reasons that the relief sought in para. 1.3 (the *in camera* decision) should be granted (and which first respondent

conceded should be granted). First respondent does not agree for reasons which I shall examine in more detail below. For convenience' sake I shall distinguish between the two decisions by referring to the "*in camera* decision" and "the second decision".

[19] In order to understand the contents of the various decisions, it is necessary to step back somewhat in time and to take note of some preceding events. On 8 March 2005 the third respondent at its Ordinary Management Committee meeting discussed agenda item 11.1.9 *"Proposed new lease agreement for Seagull's Cry"* (to be discussed at first respondent's Ordinary Council Meeting scheduled for 31 March 2005)(see "DW43"). The members noted that a letter had been sent to applicant's lawyers on 10 February 2005 "advising them that if their client did not accept Council's terms then the second agreement which was meant to replace the existing (signed) agreement, would be cancelled.'' It was further noted that the lawyers had responded by informing that applicant was in South Africa and would attend on the matter upon his return. It was not made clear when applicant would return and whether upon his return he would in fact sign the agreement. After the matter was considered, it was decided to recommend to first respondent to make following decision:

(a) "That the second agreement which was meant to replace the existing (signed) agreement be cancelled;

(b) That Messrs Malherbe be advised that their clients shall adhere to the conditions of the existing (signed) lease agreement;

(c) That an in loco inspection be done by the departments of the Town Secretary, Town Engineer – and Town Health Officer to determine whether Seagulls Cry is complying with the provisions of the existing agreement".

[20] On 15 March 2005 the Town Secretary notified applicant's lawyers by letter ("DW40") recorded that the applicant never signed the second lease. It informed them of the above quoted recommendation and requested them to provide written proposals by close of business on 16 March 2005, why first respondent should not accept the recommendation.

[21] This letter jolted applicant into action. He signed the second lease agreement on 16 March 2005 and forwarded it to the Town Clerk under cover of an evenly dated letter by his lawyers ("DW41").

[22] On 31 March 2005 first respondent held the *in camera* meeting during which it discussed agenda item 6.1.2 namely, *"Proposed new lease agreement for Seagull's Cry"* ("DW45"). From the minutes it appears that it had earlier been decided that the matter should be discussed "in the in camera session prior to making a final decision as this item is also covered in the Ordinary Council Meeting Agenda of 31 March 2005." Councillor A is recorded to have stated at the *in camera* meeting:

> "Madam Chair the applicant has eventually signed the notarial lease but they attempted to enter in these conditions to make a counter offer on the terms contained in the lease. The matter was discussed with Council's legal advisor on the 17th of March of this year and it is recommended that Council reject the signed notarial lease agreement on the grounds that the applicant is making a counter offer and does not accept Council's terms."

[23] After discussion the following recommendation was carried:

> "(a) That Council rejects the signed Notarial Lease submitted by Messrs Seagull's Cry due to the fact that they are making a counter offer instead of accepting the terms of Council;
>
> (b) That Council accepts the recommendation of Management Committee, as contained In the Ordinary Council Agenda for 31 March 2005 under item 11.1.9 on page 46."

[24] When the Ordinary Meeting of first respondent took place later that same day, it did not embody paragraph (a) in its decision, but followed the recommendation in paragraph (b) and worded the decision as set out in paragraphs (a), (b) and (c) of the recommendation under item 11.1.9. It also added a paragraph (d), which does not add anything of importance for purposes of this case, namely *"That the results of the in loco inspection mentioned in (c) above be reported to Council."*

[25] In regard to the two decisions applicant alleges in its further founding affidavit incorporated by virtue of the Court order dated 7/8/2006 (Record p495, para. 7.4) that the agreement which was *"rejected"* in terms of the *in camera* decision, is the same agreement which respondents seek to *"cancel*" in the second decision. It further alleges (in para. 7.5) that the second decision *"clearly flowed from, or was based on"* the *in camera* meeting and the deliberations held during that meeting. It contended that the two decisions concern or amount to one and the same decision which was merely recorded in different wordings. The contention made is that, as the first decision was *ultra vires* and

illegal, any decision making flowing therefrom falls to be reviewed and set aside on that basis alone.

[26] In this regard respondents' answer is as follows (Record p506, para 3):

> "It is correct that the same agreement was discussed at both meetings. It is correct that at the meetings the decisions as minuted was taken. The fact that essentially the same decision was made I submit does not detract from the fact that at the second meeting a decision was made standing on its own. In fact as pointed out it is only the second decision that was validly taken."

[27] Respondents continue to allege that the *in camera* meeting could not validly take decisions, hence there was a need for a properly constituted meeting which then subsequently took place. In regard to the second decision they state (Record 506, para. 4):

> "This was a new decision and even if based on the same considerations as the prior invalid one this had to be done and for all purposes the reasons were then adopted for the valid meeting. It must be borne in mind that it was the exact same persons that took both decisions (with the exception of Councillor //Gaseb, who was unable to attend the in camera meeting). The second decision was not based on the first decision. It was based on the same reasons which also underpinned the first decision."

[28] Already in applicant's original replying affidavit it alleged that the second decision was based on the first decision or *"at the very least based on the deliberations of the council meeting held in camera or fundamentally tainted thereby"* (Record p453, para. 63.2). First respondent does not deal with this allegation head on by denying it or

stating that there were indeed deliberations during the second meeting on which the second decision was based. When respondent states in its answering affidavit that "it is correct that the same agreement was discussed at both meetings" I do not understand it to allege that a discussion as such took place at the second meeting (whereas it is clear from the detailed minutes of the *in camera* meeting that there was a lengthy discussion of the agreement), but rather that the same matter (item) came up for consideration at both meetings. The focus of the allegations in the founding affidavit is that the agreement which was rejected at the *in camera* meeting was the same agreement that was cancelled at the second meeting and it is in reply to this that respondent admits that it was indeed the same agreement that was "discussed". However, no details of any discussion as such at the second meeting are given and no minutes of any discussion were provided as part of the record of proceedings pursuant to rule 53. The allegation that "for all purposes the reasons were then adopted" is a reference to the fact that the second decision may have been based on the same considerations as the first. Reading respondent's answer in context, I conclude that first respondent was aware that it had to take the decision at an open meeting and merely went through the formality of doing so, without really considering the issue at hand because it had already been discussed fully at the *in camera* meeting. Although applicant only expressly alleges in reply that its deponent, Mr de Wet, attended that second meeting; that there indeed were no deliberations or discussions of whatsoever nature; and that the recommended resolution was read and accepted without any further discussion, I think that a proper reading of respondent's papers in context is not at variance with applicant's allegations on this issue.

[29] Based on these facts, I agree with the contention advanced by applicant that the provisions of section 14(2) were violated and that first respondent's statutory obligations under section 14(2) cannot be circumvented by deliberating and taking a decision *in camera* and by simply thereafter – in a meeting purportedly "open" for the public – take a decision based on the deliberations at the *in camera* meeting and which amounts to essentially the same decision as the decision taken *in camera*. In the circumstances that second decision is also *ultra vires* and a nullity.

Applicant's claim that the second lease agreement is valid and binding

[30] It is not necessary to deal with the factual dispute on the papers on the issue of the deadline allegedly set by Mr Plaatjie and the legal issue of whether he could legally determine such a deadline or not. Mr *Frank* on behalf of the respondents made it clear during the hearing of this application that the respondents no longer dispute that first respondent's offer as constituted by the second lease agreement was still open for acceptance by applicant on 16 March 2005, the day when applicant signed the lease.

[31] He further made it clear that the issue of whether the second lease agreement is binding need only be considered on the confined issues of (i) whether applicant's acceptance of the offer was unequivocal, thereby giving rise to a binding lease agreement, or whether applicant made a counter-offer; and (ii) whether first respondent's conduct in making the offer fell foul of the Tender Board Regulations. The further two defences raised in respondents' papers namely, that even if the acceptance by applicant

was unconditional, the offer was impossible to perform and therefore no contract came into being; and that the time limits set out in section 63(3)(a) of the Local Authorities Act precluded first respondent from entering into the agreement, were not dealt with further by either party and need therefore not be considered.

[32] It is important to have regard to the wording of the crucial correspondence exchanged between the parties on 15 and 16 March 2005. On 15 March 2005 the Town Clerk addressed a letter ("DW40") to applicant's lawyers in which the following is stated:

> "SEA GULL'S CRY CC
>
> With reference to your telephone conversation and enquiries with the writer hereof, please be informed of the following:
>
> 1. Despite our numerous correspondences in the past, your client never signed the Notarial Lease as requested by our legal advisor.
>
> 2. The non-performance as indicated in (1) above resulted in a final notice to your firm and a report to the Management Committee of Council.
>
> 3. After considering the report, Council's Management Committee recommend as follows:
>
>   (a) That the second agreement which was meant to replace the existing (signed) agreement, be cancelled.
>
>   (b) That Messrs Malherbe be advised that their client shall adhere to the conditions of the existing (signed) lease agreement.
>
>   (c) That an in loco inspection be done by the departments of the Town Secretary, Town Engineer and Town Health Officer to determine whether Sea Gull's Cry is complying with the provisions of the existing agreement.
>
> We accordingly request you to provide us with written proposals, why Council should not accept the recommendation to cancel proposal number 2 (ie the Notarial Lease).

Your response is required urgently and should reach our office not later than the close of business tomorrow, 16 March 2005 in order for us to submit it to Council for consideration."

[33] On 16 March 2005 applicant's lawyers addressed the following letter to the Town Clerk in reply:

"**SEA GULL'S CRY**

We refer to the above, your letter dated the 15th of March 2004, various discussions regarding same and hereby wish to confirm the following as per our instructions:

1. That our client was willing to sign the Lease Agreement provided that three material issues were addressed.

   The material issues were as follows:

   (a) the dates clearly no longer apply as reflected in the Lease Agreement due to the extended negotiation process; It is requested that the dates be changed as follows:

      (i) page 7 no. 4.2 should be changed to 31st of December 2018 (15 years from date of council approval obtained in January 2004);

      (ii) page 9 no. 6.1 change to 31st of March 2006;

      (iii) page 10 no. 6.2 change to 31st of October 2006;

      (iv) page 11 no 6.1 change to 31st December 2007 (The above falls within the 48 (forty-eight) month approved contract as per annexure "B" provided that the 1 (one) year extension be granted due to the negotiation process);

      (v) page 25 no. 17.1 be changed to 1st of February 2018;

      (iv) Page 25 no. 17.3 be changed to 31st of July 2018.

   (b) the cabaret and the entertainment venue was wrongly placed in area 4 and not in area 5.

   (c) The restriction of one storey in height was never in any resolutions prepared before the 29th of January 2004 and it is clearly a mistake in the agreement as drafted as the buildings depicted in proposal 2 exceeds this height restriction. This was also addressed in our letter dated the 12th of January 2004 which is attached hereto as annexure "A".

2. Attached hereto please find the duly signed agreement.

Application

Having regard to paragraph a-c above we kindly request council to amend the agreement to remedy the unpractical dates and the two other mistakes referred to in (b) and (c) above.

We trust you will revert to our offices timeously in this regard."

[34] First respondent's case is that the letter by applicant conveys that first respondent's offer was not accepted unequivocally, but that it was conditional and amounted to a counter offer, which was not accepted by first respondent. In contrast, applicant's case is that it accepted the offer unequivocally by signing the lease agreement without any changes.

[35] Counsel for both parties relied on the case of *JRM Furniture Holdings v Cowlin* 1983 (4) SA 541 (W) in which the following was stated (at 544B:

> "The trite rule relevant in this regard is that the acceptance must be absolute, unconditional and identical with the offer. Failing this, there is no consensus and therefore no contract. (Wessels *Law of Contract in South Africa* 2nd ed vol I para 165 *et seq*.) Wille *Principles of South African Law* 7th ed at 310 states the principle thus:
>
> > "The person to whom the offer is made can only convert it into a contract by accepting, as they stand, the terms offered; he cannot vary them by omitting or altering any of the terms or by adding proposals of his own. It follows that if the acceptance is not unconditional but is coupled with some variation or modification of the terms offered no contract is constituted..."".

[36] However, Mr *Tötemeyer* referred to the following passage from the same case (at 544E –G):

> "Counsel for the applicant, however, relied on the fact that the rule is not without qualification. One quasi-exception to it exists where an acceptance incorporates a reference to a term which is implied in the offeree's favour. It is regarded as no more than a statement of the legal position and in no way varies the terms of the offer. (Christie *The Law of Contract in South Africa* at 54.) A second occurs where an offeree enquires whether the offeror will modify his terms. This does not F constitute a refusal. (*Amalgamated Society of Woodworkers of SA v Schoeman NO and Another* 1952 (3) SA 85 (T) at 87, quoting Wessels (*op cit* para 177).) In his note on the *ACC Bio Kafee* case Professor E Kahn, writing in 1958 SALJ at 12, refers to the statement of Corbin vol 1 para 84 at 266 that:
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> > "An expression of acceptance is not prevented from being exact and unconditionalby the fact... that the offeree makes some simultaneous 'request', but it must appear that... the offeree has assented to the offer, even though the offeror shall refuse to comply with the request.""

[37] He submitted that the applicant's case is on all fours with the second exception to the general rule set out in the above quoted passage. I agree with this submission. (See also *Amalgamated Society of Woodworkers of SA v Schoeman NO and Another* 1952 (3) SA 85 (T) at 87). In my view the contents of paragraph 1 of applicant's letter does not amount to stating that he has conditionally signed the agreement, but is an explanatoryy reply to the allegation in first respondents letter that he had failed to sign the agreement before. The application made simultaneously in the letter is a request to first respondent to consider modifying some terms of its offer. In my view the fact that applicant signed and forwarded the second lease agreement is indicative of the unequivocal acceptance of first respondent's offer. In conclusion, I am therefore of the view that the second lease agreement is binding.

Alleged non-compliance with Tender Board Regulations

[38] First respondent submitted for the first time in its heads of argument, which submission was repeated at the hearing, that the lease agreement could not have been concluded by first respondent since it is not empowered to enter into agreements of this nature. Respondent relies on the Local Tender Board Regulations (GN 30 of 2001) promulgated by the Minister under section 94A of the Local Authorities Act and which came into operation on 15 February 2001. Counsel submitted that, if the relief sought by applicant, more specifically in prayer 2 of the Notice of Motion, is granted, effect would be given to an illegality.

[39] Mr *Tötemeyer* submitted that applicant is severely prejudiced by the fact that this entirely new defence is so belatedly raised. He referred to the Full Bench decision of this court's predecessor in *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) 634H-J where the following was stated:

> "A defence, whether it is contained in a plea or an affidavit, must be sufficiently clearly stated to enable the other litigant as well as the Court to be apprised of the defence. In *Seedat v Arai and Another* 1984 (2) SA 198 (T) the respondent in a summary judgment application did not 'suggest that the Rent Control Act' (at 201C) was applicable. The Court held that the respondent could not raise that Act as a defence.
>
> Where a litigant relies upon the provisions of a statute he should, in his pleading or affidavit, as the case may be, refer to the Act and section whereon he relies. More important, however, he should plead such facts which entitle him to invoke the legislation concerned. *Price v Price* 1946 CPD 59. Where he sets out the facts and omits the reference to the Act or section, he would, nevertheless, be entitled to rely on such

legislation (subject of course, to the rules relating to pleadings) if it is clear what his case or defence is."

[40] In *Courtney-Clarke v Bassingthwaighte* 1991 (1) SA 684 (NM) at 689J-690B LEVY J said:

"It is trite that the pleadings define the issues between litigants and in the trial, the parties should be confined thereto. *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 279B; *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198; *Shill v Milner* 1937 AD 101 at 105.

As a consequence of the aforegoing, a litigant who wishes to rely on illegality must plead it. If he relies on a particular section of a statute, he must say so, but in addition to referring to the section, he must plead those facts which entitle him to invoke the section. *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623 - 4.

These requirements in respect of pleadings are the very essence of the adversarial system."

[41] However, the Court went on to say (at 690D-E):

"The aforesaid notwithstanding, if *ex facie* a contract or from the evidence which has been placed before the Court, it appears that the contract relied on is as a fact illegal, the Court cannot enforce such contract. In such circumstances, the Court will act *mero motu* even if the illegality is not pleaded and will refuse relief at the trial or on appeal. (See Christie *The Law of Contract in South Africa* at 385 and the cases relied on by the learned author.)"

[42] Mr *Frank* contended that it was open to respondents to rely on this new defence as a party may raise any point of law if the factual basis is provided in the papers. He submitted that it is clear from the factual allegations that the local tender board, since its

establishment, played no role in the second lease agreement on which applicant now seeks to rely.

[43] It is common cause that no mention whatsoever is made of the local tender board or the tender board regulations in the papers. From the papers it is not evident why there is no such mention made. In my view it cannot simply be deducted that just because these matters are not mentioned, the first respondent overlooked or ignored the local tender board and/or the regulations or wrongly acted on the assumption that the local tender board had no role to play. If this is in fact what happened, first respondent should have stated this in its papers. What is more, applicant has indicated that it would have wanted to make certain factual allegations to deal with this challenge, which it is not possible to do at this late stage. I agree that applicant is severely prejudiced in this respect. In my view the evidential basis is lacking for this Court to decide that the lease agreement was unlawfully concluded on the basis submitted by respondent.

[44] Counsel for applicant contended that respondent should in any event have proved the Regulations. In my view this is not necessary in the light of sec 5 of the Civil Proceedings Evidence Act, 1965, which requires that judicial notice shall be taken of any law or government notice, or of any other matter which has been published in the Government *Gazette.*

Applicant's alleged abuse of process

[45] It was contended on behalf of first respondent that the essence of the relief sought by applicant is a declaratory order that the new lease agreement is binding and that the institution of review proceedings amount to an abuse of the Court's process. The stance initially taken in respondent's papers is that the application should be struck, alternatively that applicant should carry the costs of this application. However, at the hearing counsel for respondents submitted that applicant should pay all additional costs caused by the filing of the supplementary affidavits and the requests for additional documentation.

[46] Both counsel addressed me on the issue of whether the first respondent was exercising public power or whether it was exercising when it took the decision to "cancel" the second agreement and referred to the case of *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA) and other cases discussed in that judgment. In my view it is not necessary to deal with the matter on this basis. The fact is that applicant was entitled to approach this Court for review of the decisions mentioned in the notice of motion and succeeded therein. Applicant is also entitled to ask for a declarator on the issue of the binding nature of the lease agreement and it has also succeeded on this aspect. It does not matter if the main purpose of the application is to obtain an order holding that a binding contract was concluded. There is no abuse of process which needs to be the subject of a special costs order.

[47] As far as the relief sought in prayer 3 is concerned, I make no order thereon, as Mr Frank has made it clear that it is not necessary to formally refer the matter back to first respondent which has acknowledged that, if the lease is held to be binding, the

amendments will be considered. In the light of the effluxion of time, some of the dates may in any event not be practical and the parties would probably, in the exercise of common sense and practicality, consider to agree on other dates that those mentioned in prayer 3.

[48] The result then is that the relief as prayed for in paragraphs 1.1, 1.3, and 2 is granted and that first respondent is ordered to pay applicant's costs, which shall include the costs of one instructed counsel and two instructing counsel.

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VAN NIEKERK, J

Appearance for the parties:

For applicant: Mr R Tötemeyer
Instr by Dr Weder, Kauta & Hoveka Inc

For respondents: Mr T J Frank SC,
Assisted by Mr D Obbes
Instr by Fisher, Quarmby & Pfeifer