

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

“ANNEXURE 11”

<b>Case Title:</b> The Municipal Council for the Municipality of Windhoek  vs  David John Bruni N.O IAN Robert McClaren N.O Simon Hercules Stryn N.O De Wet Esterhuizen Ramatex Textiles Namibia (Pty) Ltd		Plaintiff	<b>Case No:</b> I 2481/2013  <b>Division of Court:</b> High Court, Main Division
<b>Heard before:</b> Honourable Mr Justice Oosthuizen		1 <sup>st</sup> Defendant 2 <sup>nd</sup> Defendant 3 <sup>rd</sup> Defendant 4 <sup>th</sup> Defendant 5 <sup>th</sup> Defendant	<b>Date of hearing:</b> 22 October 2021  <b>Delivered on:</b> 22 April 2022
<b>Neutral citation:</b> <i>The Municipal Council for the Municipality of Windhoek v Bruni</i> (I 2481/2013) [2022] NAHCMD 207 (22 April 2022).			
<b>Result on merits:</b> Application to amend replication deferred to trial with the issues in the existing pleadings.			
<b>COURT ORDER</b>			
Having heard <b>Mr Narib</b> , counsel for the plaintiff and <b>Mssrs Heathcote SC</b> and <b>Schirckerling</b> counsel for the defendants and having read the documents filed of record:			

**IT IS ORDERED THAT:**

1. The application for leave to grant permission to Plaintiff to amend its replication dated 11 April 2016 as set out in Plaintiff's Notice in terms of Rule 52(1) dated 3 June 2021, is deferred to be heard together with the merits during the trial on the issues forthcoming from the existing pleadings.
2. Plaintiff shall pay the costs of the application to amend, which cost shall include the costs of one instructing and two instructed counsel (where used) applicable to opposed motions and inclusive of the dates from 3 June 2021 to 22 October 2021, which costs shall not be capped in terms of Rule 32(11).
3. The parties shall convene a case management meeting in terms of Rule 26(5) on or before 31 May 2022 subsequent to Plaintiff's compliance with the aforesaid Rule 26(5).
4. The parties shall file their joint pre-trial report (and nothing else) on or before 15 June 2022.
5. The case is postponed for a pre-trial conference, where all involved counsel shall be present, on 27 June 2022 at 11h00 at SADC.

**REASONS FOR ORDERS:**

Oosthuizen J:

[1] Plaintiff (applicant for amendment) is since 2013 before Court for the ejectment of Defendants (and damages) from a portion of its townlands.

[2] The portion of land is approximately 7,5 hectares and warehouses were constructed thereon by the fifth Defendant (Ramatex), subsequent to a lease agreement entered into by Plaintiff and a now deregistered company (Tai Wah), which was a subsidiary of Ramatex.

[3] Ramatex developed the land and according to Ramatex it is in possession of the land by virtue of an improvement lien.

[4] It can not be seriously disputed that the documents on which the Plaintiff now, by way of a belatedly raised estoppel defence to the improvement lien, wish to rely in order to counter the alleged lien of Defendants, were since the creation of the said documents in Plaintiff's possession.

[5] Defendants opposed the sought amendments by Plaintiff on the basis that the pleadings had closed 5 years ago; the matter was already trial ready in 2018. The Plaintiff wants to change front without tendering a reasonable explanation and the Defendants will be seriously prejudiced if the belatedly sought amendment, is granted. Defendants also says that the estoppel defence will be excipiable.

[6] It is common cause that the Court has condoned the Plaintiff's failure to file witness statements timeously as ordered on 23 April 2020. It is also common cause that when Plaintiff complied with the subsequent Court Order for filing of witness statements, it filed one witness statement, foreshadowing its notice to amend on 3 June 2021.

[7] Having considered the affidavits filed in this amendment application and the arguments tendered on behalf of the parties and the indexed files provided on 18 November 2021, it has become clear that the sought amendment is intertwined with the real issues between the parties which are to be considered during the trial of the matter.<sup>1</sup>

[8] I am not saying that the Court shall allow the amendment. The Defendants, however, would be allowed in cross examination to not only probe the new stance of the Plaintiff, but to also probe the reasonableness of the explanation of Mr Ngairorue concerning for instance, the change in Legal Practitioners which contributed to Plaintiff's change of front.

[9] After careful consideration of the present position of both parties; the plea of *lis alibi pendens* by Defendants; the continued opposition by Plaintiffs to the joinder of this case with the pending 2010 case; the previous pre-trial report and pre-trial order and the fact that both parties have already provided this Court during 2017 with their lists of

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<sup>1</sup> I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC (I 601-2013 and I 4084 -2010) [2014] NAHCMD 306 (17 October 2014), paragraph [55].

intended witnesses to be called<sup>2</sup>; the contents of para [55] in I A Bell<sup>3</sup>; the lateness of Plaintiff's change of front; the indulgence sought by Plaintiff and generally the absence of resolve to bring this matters to finality, the undermentioned orders are issued.

[10] It is ordered that:

[10.1] The application for leave to grant permission to Plaintiff to amend its replication dated 11 April 2016 as set out in Plaintiff's Notice in terms of Rule 52(1) dated 3 June 2021, is deferred to be heard together with the merits during the trial on the issues forthcoming from the existing pleadings.

[10.2] Plaintiff shall pay the costs of the application to amend, which cost shall include the costs of one instructing and two instructed counsel (where used) applicable to opposed motions and inclusive of the dates from 3 June 2021 to 22 October 2021, which costs shall not be capped in terms of Rule 32(11).

[10.3] The parties shall convene a case management meeting in terms of Rule 26(5) on or before 31 May 2022 subsequent to Plaintiff's compliance with the aforesaid Rule 26(5).

[10.4] The parties shall file their joint pre-trial report (and nothing else) on or before 15 June 2022.

[10.5] The case is postponed for a pre-trial conference, where all involved counsel shall be present, on 27 June 2022 at 11h00 at SADC.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
OOSTHUIZEN Judge	
<b>Counsel:</b>	
<b>Applicant(s)</b>	<b>Respondent(s)</b>
Mr Narib	Mssrs Heathcote SC and Schirckerling

<sup>2</sup> Index, Notices and Other Documents, pp49 to 54.

<sup>3</sup> I A Bell, op cit in paragraph 7.

Instructed by Dr Weder, Kauta & Hoveka Inc	Instructed by Koep & Partners
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