

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
RULING

<b>Case Title:</b>  Municipal Council Of Windhoek Plaintiff  and  Gernot Albert Bahr Defendant	<b>Case No:</b> HC-MD-CIV-ACT-CON-2019/02193
	<b>Division of Court:</b> Main Division
	<b>Heard on:</b> 20 April 2022
<b>Heard before:</b> Honourable Lady Justice Rakow, J	<b>Delivered on:</b> 7 June 2022
<b>Neutral citation:</b> <i>Municipal Council Of Windhoek v Bahr</i> (HC-MD-CIV-ACT-CON-2019/02193) [2022] NAHCMD 281 (7 June 2022)	
<b>Order:</b>	
1.     The application for absolution is granted. 2.     Cost of suit is awarded to the defendant.	
<b>Reasons for order:</b>	
RAKOW, J:  [1]     This is an application for absolution from the instance at the end of the plaintiff's case. The defendant is the plaintiff in reconvention.  [2]     The Municipal Council of Windhoek (COW) instituted action against Mr. Gernot Albert Bahr in May 2019. It was alleged that Mr. Bahr was operating an illegal mechanical workshop on a property not zoned for the specific activity. Mr. Bahr pleaded to these allegations and instituted a counterclaim against COW for an order directing them to within 30 days, take all steps necessary to submit the application of the defendant for the rezoning of the said erf to	

the Namibian Planning Advisory board (NAMPAB). The matter proceeded to trial and during the cross-examination of the only witness called on behalf of the COW, Mr. Rust, it became clear that the cause of action initially pleaded can no longer stand and should be amended. Such an application was then brought on behalf of the plaintiff.

### Background

[3] Mr. Bahr, the defendant initially conducted his mechanical workshop and tyre repairs shop, Rolling Wheels for Africa CC, on the premises that he shared with his uncle. His uncle sold these business premises situated at Erf 2498. Sam Nujoma drive and early in 2016 Mr. Bahr purchased Erf 2533 (Number 23 Dr. Kuaima Riruako Street – or the old Bach street) and it is against the use of these premises that the complaint was raised. Mr. Bahr at that time thought that the property was correctly zoned for the business he wished to conduct and proceeded to move his mechanical repair shop there. It seems that at that time, there was only an application pending for the rezoning of the property from residential use to office use.

[4] Mr. Rust, on behalf of the plaintiff, testified that they received a complaint from the neighbours residing next to the property who complained about the noise being emitted by the mechanical workshop and the tyre repair shop. Upon receipt of the complaints, the COW sent investigators out to the erf on 26 October 2016 and again on 16 June 2017 who reported that it was indeed the case that a mechanical workshop was operating from the premises and tyres were being sold from the same premises. The erf was to be used only for residential premises at that time and not for the purposes the defendant was using it for. The defendant was then informed in writing of the fact that he did not have approval from COW to operate a business from the said premises and he further did not have the necessary planning permission for erecting some of the structures found on the premises. This correspondence was dated 26 June 2017.

[5] In a letter dated 30 January 2018, the COW informed the defendant that the proposed rezoning of erf 2533 from 'residential' with a density of 1:900m to 'office' with a bulk of 0,4 was approved for submission to NAMPAB subject to two conditions, one being that the betterment fees are paid and a non-related issue regarding encroachment which had to be resolved. Subsequently, this issue was resolved and the betterment fees were paid by the defendant. This according to Mr. Rust was enough to allow the defendant now to use the premises for purposes as per the zoning allocated to offices. During cross-examination, he

explained that the amendment scheme was indeed approved by NAMPAB during a meeting on 28 May 2020 and as such published in the Government Gazette of 31 July 2020 number 7290, notice number 173/2020. The problem, as explained by him is not that the premises were zoned as residential at the time when the defendant used it as a mechanical repairs shop but that even though the erf now has office zoning, it is still not correct because it needed an additional approval falling under the class of types of consent uses.

#### The application for amendment

[6] The problem that arose during the evidence produced by the plaintiff, and which was the subject of an application to amend the particulars of claim, was that the particulars of claim referred to the conducting of a business on an erf with residential zoning and no reference is made to the fact that it was indeed rezoned to office use, which was still not the correct zoning for conducting the defendant's business in its current format. The fact that the erf was indeed rezoned for office use, only became known during the evidence presented by Mr. Rust. This information was however never communicated from the side of the plaintiff to the defendant and neither was he informed that his business cannot be conducted on the said property, although now zoned for office use, as it still needs additional planning permission from the plaintiff.

#### The case that had to be met by the defendant

[7] The particulars of claim ask for the following relief:

'4. On or about 27 October 2016, the Plaintiff discovered that the Defendant was operating an illegal mechanical workshop (hereinafter referred to as the "workshop") from a (sic) four large containers selling tyres on erf 2533, Bach Street, Windhoek, Republic of Namibia. The Plaintiff issued a notice to the Defendant to cease the illegal activities on the aforesaid erf being carried out without the required consent from the Plaintiff.

5. On or about 14 June 2017 and upon receipt of complaints that the workshop is still operational, the Plaintiff undertook to carry out a site inspection on the erf and confirmed that the workshop is still operational.

6. The aforementioned erf 2533, Bach Street is zoned as a residential area and falls within the Windhoek Town Planning Scheme and is subject to section 48 of the Town Planning Ordinance 18 of 1954 and section 11 of the Town Planning Amendment Act 27 of 1993. The Defendant's workshop on a residential erf without the required consent from the Plaintiff is unlawful and constitutes criminal

conduct.

7. On or about 16 June 2017, a further notice to cease illegal activities was issued summons constituting demand, (sic) the Defendant continues to illegally operate a workshop in the residential area, causing nuisance and undesirability, Defendant refused, failed, and or neglected to stop operating the workshop. A copy of the notice is attached hereto marked "A".

8. In the premise, the Defendant is liable to cease its illegal activities on erf 2533, Bach Street, Windhoek.

WHEREFORE PLAINTIFF CLAIMS AGAINST THE DEFENDANT:

1. Declaring that the Defendant's conduct to operate a workshop selling tyres on erf 2533, Bach Street, Windhoek, the Republic of Namibia without such erf being rezoned by the Plaintiff and without the plaintiff's consent as unlawful.
2. Interdicting the Defendant from continuing to operate a workshop on erf 2533, Bach Street, Windhoek in the Republic of Namibia for as long as there (sic) aforesaid erf 2533 remains zoned as "residential".
3. (was abandoned)
4. Cost of suit
5. Further and/or alternative relief.'

The arguments by the parties

[8] For the applicant (defendant) it was argued that in essence, the scope of the plaintiff's case is that the erf in question is zoned as residential and due to the erf being zoned as residential, the operation of a workshop and or the selling of tyres are allegedly unlawful. It was therefore argued that the plaintiff's case is, on the pleadings, premised on a nexus between the residential zoning of the erf and certain alleged conduct of the defendant, and the only applicable zoning to the erf as per the particulars of claim relates to residential zoning.

[9] On behalf of the plaintiff, it was argued that there is no dispute about the fact that four business buildings are erected on the premises and that the CC is conducting a business in tyre and mounting, car parts and rental of vehicles, being the same business previously carried on at Erf 2498, Sam Nujoma Drive. It was further stated that it is common cause that despite the zoning of the property as residential, the town planning scheme and the ordinance require additional approval for business activities to be conducted on such

premises. The consent of the plaintiff is required to conduct the activities currently carried on by the defendant. We know now that the defendant does not have such consent.

[10] The issues according to the plaintiff, in this matter are crystalized. These are whether the defendant has the necessary consent to carry on the activities conducted by the CC on the property because the property, despite the fact, is zoned 'residential' for purpose of determining the legal issues and if such consent is absent, whether the court, on the evidence before it, may grant the order that the defendant is interdicted to conduct such activities.

#### The basis for absolution from the instance

[11] The process for the application for absolution from the instance is set out in rule 100 of the High Court rules but it however does not set out what needs to be considered. The test for granting absolution from the instance at the end of a plaintiff's case is set out in *Claude Neon Lights (SA) Ltd v Daniel*<sup>1</sup> where Miller AJA said:

'(W)hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.'

[12] In *Ramirez v Frans and Others*,<sup>2</sup> this court dealt with the application and the principles applicable. Concerning case law, the following principles were extracted:

“(a) (T)his application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials i.e. in terms of s 174 of the Criminal Procedure Act — *General Francois Olenga v Spranger*<sup>3</sup>;

(b) the standard to be applied is whether the plaintiff, in the mind of the court, has tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff — *Stier and Another v Henke*<sup>4</sup> “

(c) the evidence adduced by the plaintiff should relate to all the elements of the claim because in the absence of such evidence, no court could find for the plaintiff — *Factcrown Limited v*

<sup>1</sup> *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G – H.

<sup>2</sup> *Ramirez v Frans and Others* [2016] NAHCMD 376 (I 933/2013; 25 November 2016) para 28. See also *Uvanga v Steenkamp and Others* [2017] NAHCMD 341 (I 1968/2014; 29 November 2017) para 41.

<sup>3</sup> *General Francois Olenga v Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019), *infra* at 13 para 35.

<sup>4</sup> *Stier and Another v Henke* 2012 (1) NR 370 (SC) at 373.

*Namibian Broadcasting Corporation*;<sup>5</sup>.

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is, however, hopelessly poor, vacillating, or of so romancing a character, the court may, in those circumstances, grant the application — *General Francois Olenga v Erwin Spranger*;<sup>6</sup>

(e) the application for absolution from the instance should be granted sparingly. The court must generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant this application — *Stier and General Francois Olenga v Spranger (supra)*.”

### Discussion

[13] The issues of law to be resolved during the trial, as per the pre-trial are:

- Whether the defendant's workshop, if any, on a residential erf is without the consent of the plaintiff is unlawful and constitutes criminal conduct.
- Whether the defendant is liable to cease the alleged illegal activities on Erf 2533, Bach Street, Windhoek.
- Whether the plaintiff is entitled to declaratory relief and interdictory relief.

[14] Throughout the pleadings and also the evidence presented it was clear that the defendant had to meet a case based on the allegation that the erf on which he conducts his business, is zoned residential and as such not suitably zoned to conduct any business on it. He indeed was aware of an application for rezoning the said property for office rights but was never informed by the plaintiff that as such, the zoning will still not be correct, as they have indeed done at the time that the property was zoned residential in their letter dated 16 June 2017 headed notice to cease illegal activities. The court would have expected the plaintiff to, after the permission to change the zoning from 'residential' to 'office' was granted, again bring it to the attention of the defendant that the operations he conducted, are not operations that can be accommodated under the 'office' zoning but need additional permission concerning the type of business being conducted.

[15] In this instance, the evidence provided by the plaintiff is that the defendant is

<sup>5</sup> *Factcrown Limited v Namibian Broadcasting Corporation* 2014 (2) NR 447 (SC).

<sup>6</sup> *General Francois Olenga v Erwin Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019) and the authorities cited therein.

conducting business activities on a property not correctly zoned for such activities. However, the investigation the plaintiff conducted was conducted at the time when the property was still zoned as 'residential' and the plaintiff initially acted on that information and issued the 16 June 2017 warning. This was also the basis as set out in the particulars of claim of the plaintiff, which the plaintiff attempted to amend, and such amendment was not granted by this court, mainly for the reasons that it will change the whole case the defendant has to meet at a very late stage of the proceedings.

[16] In the result, I make the following order:

1. The application for absolution is granted.
2. Cost of suit is awarded to the defendant.

<b>Judge's signature</b>	<b>Note to the parties:</b>
E RAKOW Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendant:</b>
Mrs. E Angula Of AngulaCo Inc. Windhoek	Adv. Boonzaier Instructed by Engling, Stritter & Partners Windhoek