

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING**

Case no: I 6045/2014

In the matter between:

ENVIRO-FILL NAMIBIA (PTY) LTD

PLAINTIFF

and

COUNCIL FOR THE MUNICIPALITY OF TSUMEB

DEFENDANT

Neutral citation: *Enviro-fill Namibia (Pty) Ltd v Municipality of Tsumeb* (I 6045/2014)
[2018] NAHCMD 373 (12 November 2018)

Coram: USIKU, J

Heard on: 12 November 2018

Delivered: 12 November 2018

ORDER

- 1 There are no preliminary issues standing for adjudication by the court before trial commences.
 2. I therefore direct that the trial should commence as was previously set-down.
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RULING

USIKU J:

[1] At the commencement of the trial, counsel for the Defendant indicated that the Defendant wishes to have the preliminary issues that were reserved in a judgment by Masuku J, dated 18 October 2016 addressed first before the matter proceeds to trial.

[2] The 'preliminary issues' referred to above are:

- (a) whether the amendment of the particulars of claim to cure the description of the Defendant, has effect on the validity of the agreement entered into by the parties;
- (b) whether s 31A of the Local Authorities Act was complied with, and if not, the effect thereof on the validity of the agreement, and
- (c) the effect of failure to comply with clause 16 of the agreement (arbitration clause).

[3] Counsel for the Plaintiff argues that the 'preliminary issues' were overtaken by subsequent events when the court granted the Plaintiff leave on 22 November 2017 to amend its particulars of claim to include an additional claim for the rectification of the written agreement between the parties.

[4] Counsel for the Plaintiff further argues that the 'preliminary issues' were not raised in the amended pleadings and are not contained in the pre-trial order.

[5] The issue I am presently called upon to determine is whether there are presently before court 'preliminary issues' that the court must address first before trial commences.

[6] It is common ground that the matter comes to court today for trial. It is further common ground that there is no indication in the pre-trial order that there are certain 'pre-liminary issues' that the court is required to adjudicate on before trial commences.

[7] It is also clear from my reading of the Pre-Trial Order that the issues of failure to comply with clause 16 the agreement and the effect thereof, do not feature in the Pre-Trial order, nor do they appear in the pleadings as amended.

[8] In terms of Rule 26(10), issues and disputes not set out in the pre-trial order will not be available to the parties at trial, except with leave of court granted on good cause shown.

[9] Having read the pleadings and documents filed of record, and having listened to oral argument by counsel on both sides, I am satisfied that there are no 'preliminary issues' standing for adjudication by court before the trial commences. It appears to me that when the parties amended their pleadings, pursuant to the court's order of 22 November 2017, and when the pleadings as amended did not raise issues in a form of a 'special plea' or 'preliminary issues', then it must be taken as a matter of logic that the issues previously reserved by Masuku J, for later argument and decision, have been abandoned by the parties. As the issues previously reserved for argument and decision no longer appear in the pleadings, as amended, such issues are no longer available to the parties as 'preliminary issues'. Issues presently standing for the adjudication by the court are those issues that are set out in the pleadings and in the pre-trial order and they are to be heard during the course of the trial.

[10] The matter comes before court for trial today and trial should, therefore, commence.

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

- a) There are no preliminary issues standing for adjudication by the court before trial commences.
- b) I therefore direct that the trial should commence as was previously set-down.

B USIKU
Judge

APPEARANCES:

PLAINTIFF: C Van der Westhuizen
instructed by Etzold-Duvenhage, Windhoek

DEFENDANT: A Hans-Kaumbi
of Ueitele & Hans Inc., Windhoek