THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1086/2019

In the matter between:

MUNICIPALITY OF MHLONTLO **APPELLANT**

and

TDH TSOLO JUNCTION (PTY) LTD **RESPONDENT**

Neutral citation: *Municipality of Mhlontlo v TDH Tsolo Junction* (1086/2019) [2021] ZASCA 3 (7 January 2021)

Coram: VAN DER MERWE, MOCUMIE and PLASKET JJA and LEDWABA and MATOJANE AJJA

Heard: 09 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 7 January 2021.

Summary: Contract–conditions in preliminary letter of appointment not incorporated in main contract for development–main contract sole memorial of agreement between parties and not subject to suspensive condition based on letter of appointment.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Nhlangulela DJP, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Ledwaba AJA (Van der Merwe, Mocumie and Plasket JJA and Matojane AJA concurring)

[1] This is an appeal against an order of the Eastern Cape Division of the High Court, Mthatha (Nhlangulela DJP), dismissing the special pleas raised by the appellant, the Municipality of Mhlontlo, in respect of the claim for damages for breach of contract that the respondent, TDH Tsolo Junction (Pty) Ltd, had instituted against it. The only issue for determination in the appeal is whether the contract relied upon by the respondent had been rendered unenforceable by the nonfulfillment of a suspensive condition emanating from the letter of appointment referred to below. The factual matrix within which the issue arises is set out hereunder.

[2] In July 2008 the appellant invited proposals for the development of property of the appellant referred to as Tsolo Junction (the property) in Tsolo, a town within the jurisdiction of the appellant. The respondent was one of the bidders. In December 2008, the appellant issued a letter of appointment, signed by the municipal manager,

to the respondent with respect to the development of the property. The letter read as follows:

'APPOINTMENT OF A SUPPLIER FOR THE TSOLO JUNCTION DEVELOPMENT.

It gives us great pleasure to inform you that the Council of Mhlontlo Municipality hereby appoints you for the Tsolo Junction Development as per your proposal. A meeting between you and the Mhlonto Local Municipality is arranged for Thursday, the 4th of December 2008. The terms of reference will be discussed in that meeting with regard to standards, which should be maintained to keep up with the housing standards and NHBRC regulations. In addition, you will be required to table a detailed project plan with specific timeframes as well as signing of a Contract, which will outline the conditions of the contract.

Kindly note that your appointment shall only be effective when you have satisfied all the requirements, submitted all the documents outlined below and, you have signed the contract outlining the Conditions of Contract.

- Proof of Insurance
- Surety letter from the guarantor
- Letter of acceptance
- Program of work
- Occupational Health and Safety Plan [and names of personnel to implement it]

Kindly respond in writing to confirm acceptance of this appointment within seven (7) working days of receiving this letter.

We look forward to working with you.
Yours faithfully'

[3] The respondent accepted the appointment in writing. After negotiations between the parties, they signed a Supply and Development Agreement (the agreement) on 18 March 2009. The agreement stipulated the terms and conditions applicable to the development of the property by the respondent.

[4] On 25 February 2011, as I have said, the respondent issued summons against the appellant based on the appellant's breach of the agreement. In its particulars of claim, the respondent claimed damages in an amount of R48 340 059.00. The appellant filed numerous special pleas, to which the respondent replicated. By agreement between the parties, the court a quo determined the special pleas in a separate hearing. It dismissed all of them and granted leave to the appellant to appeal to this court only with regard to the special plea based on alleged nonfulfillment of the suspensive condition in the letter of appointment.

[5] It is common cause that the respondent did not submit any of the documents that had been listed in the letter of appointment. This formed the foundation of the appellant's argument before us. The appellant contended that the agreement was subject to the suspensive condition that the respondent had to submit the said documents. The appellant argued that the agreement did not come into existence and that, therefore, the claim for damages was not sustainable. For the reasons that follow, this argument is devoid of any merit.

[6] In its terms, the letter of appointment was a preliminary document. It expressly provided that the development of the property would be governed by a written contract which would "outline the conditions of the contract". The undisputed evidence was that during the negotiations between the parties that preceded the conclusion of the agreement, the representatives of the respondent had explained why the documents in question were not applicable to the project and that this was accepted by the appellant's representatives.

[7] Thus, the parties in fact agreed to exclude the requirement that these documents be submitted, from the agreement. The agreement contained no reference

to the letter of appointment and, importantly, clause 15 thereof provided that it constituted the sole memorial of their agreement:

'**WHOLE AGREEMENT**

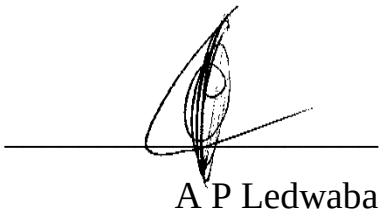
The terms and conditions set out herein constitute the entire agreement between the parties. No amendment or variation of whatsoever nature of the terms hereof and no consensual cancellation of this agreement shall be binding unless reduced to writing and signed by both parties.'

Accordingly, the agreement was clearly not subject to the alleged suspensive condition in the letter of appointment as submitted by the appellant.

[8] It follows that the appeal must fail. The appellant accepted that the employment of two counsel was justified, in the light of the amount involved and the importance of the matter to the respondent.

[9] The following order is issued:

The appeal is dismissed with costs, including those of two counsel.



A P Ledwaba
Acting Judge of Appeal

APPEARANCES

For Appellant:	V S Notshe SC (with him P Mnqandi) Instructed by: Potelwa & Co Attorneys, Mthatha Ponoane Attorneys, Bloemfontein
For Respondent:	A Beyleveld SC (with him I Bands) Instructed by: Friedman Scheckter, Port Elizabeth Symington De Kok, Bloemfontein