THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 233/2018

In the matter between:

SIVUBO TRADING AND PROJECTS CC **APPELLANT**

and

DEVELOPMENT BANK OF SOUTHERN AFRICA **RESPONDENT**

Neutral citation: *Sivubo Trading v Development Bank* (233/2018) [2019] ZASCA 28 (28 March 2019)

Coram: Tshiqi, Majiedt and Schippers JJA and Carelse and Matojane AJJA

Heard: 21 February 2019

Delivered: 28 March 2019

Summary: Acceptance of tender – suspensive condition not met – no valid and binding contract between the parties.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Tsoka ADJP sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Tshiqi JA (Majiedt and Schippers JJA and Carelse and Matojane AJJA concurring):

[1] The issue in this appeal is whether or not a binding agreement came into existence between the appellant, Sivubo Trading and Projects CC (Sivubo), and the respondent, Development Bank of Southern Africa Limited (DBSA).

[2] By agreement between the parties and by order of the high court, the issues raised in DBSA's special plea, set out later, were adjudicated first and separately from the other issues in the case. The following is a summary of the common cause facts presented before the court a quo in respect of the separated issues: On or about 17 January 2014 DBSA issued several separate written invitations for tenders for the construction of school buildings and related infrastructure in the Eastern Cape Province, which included an invitation to tender for the Gobidolo Junior Secondary School in Mqanduli in the Eastern Cape Province ('the invitation to tender'). In response to the invitation to tender, Sivubo submitted a tender offer ('Sivubo's tender offer') to DBSA on 7 February 2014. DBSA did not accept Sivubo's tender offer in accordance with the Form of Offer and Acceptance specified in section C1.1 of the invitation to tender, but instead issued a letter dated 6 May 2014 (the Letter of Appointment), to Sivubo which read:

'The Development Bank of South Africa (DBSA) is pleased to inform you that your tender offer for . . . has been conditionally accepted.

Sivubo Trading & Projects CC is required to comply with and satisfactorily fulfil the following conditions listed hereunder by 16:00 hours on Friday, 16 May 2014. All the following documentation is to be provided to the DBSA and the Principal Agent . . . .'

. . .

vii . . . a safety plan in line with Construction Regulation clause 5.1 and [to] submit all necessary documentation to the Department of Labour with respect to Notification of Construction Work in line with Construction Regulation clause 3.

viii. Contract Works Insurance to the value of the works plus 10%;

ix. Public liability Insurance to be effected for the sum of R 10 000 000.00;
x. Fixed Construction Guarantee equal in value to 7.5% of the contract sum. . .
Provided the above requirements have been complied with, Sivubo Trading & Projects CC is to sign the contract documents which include the JBCC Series 2000 Principal Building Agreement . . . The contract document will be prepared by Mr Mxolisi Maome in conjunction with the quantity surveyor. The date and location for the signing of the contract will be communicated to you once the submitted documents have been checked.

. . . .'

[3] The Letter of Appointment was accompanied by a document in an uncompleted form that bore the heading: 'confirmation by contractor of receipt of letter of appointment and acceptance of the appointment for the provision of construction services under the terms outlined above', (the Acceptance Letter). Sivubo's sole member, Mr Dominic Skumbuzo Dube (Mr Dube) signed the Acceptance Letter and sent it back to DBSA. The parties are in agreement that as the Letter of Appointment imposed requirements at variance with the tender, it constituted a counter-offer, which was accepted by Sivubo in terms of the Acceptance Letter.

[4] On 18 May 2014, Mr Dube sent a further e-mail to DBSA and to its principal agent, R&G Consultants, accompanied by certain documents, which were not all the documents required in terms of the Letter of Appointment. DBSA provisionally handed over the construction site to Sivubo on 22 May 2014 and on this occasion the further documentation that DBSA required Sivubo to provide in terms of the Letter of

Appointment was discussed. At a technical meeting that took place on 5 June 2014 the documentation that DBSA required in terms of the Letter of Appointment was again raised and Sivubo promised to submit certain specified documents by 9 June 2014. On 23 June 2014 Sivubo provided all the documentation to DBSA and R&G Consultants. On 25 June 2014 Sivubo sent a letter to DBSA acknowledging that it was behind schedule and outlining its turnaround strategy. On 10 July 2014 DBSA sent a letter of 'termination of construction contract' of Gobidolo Junior Secondary School to Sivubo. It is common cause that this letter was subsequently followed by another termination letter dated 14 July 2014 from R&G Consultants.

[5] On 10 September 2014, Sivubo instituted action against DBSA for alleged damages in the amount of R2 838 485.04. It alleged that DBSA repudiated a contract between the two parties through the letters dated 10 July 2014 and 14 July 2014, which repudiation Sivubo accepted and cancelled the contract. As a result of the repudiation, so Sivubo contended, it lost profits it would have earned but for the repudiation. Sivubo subsequently filed an amended declaration and alleged that it had been appointed in terms of the JBCC Agreement. It thus based its cause of action on the JBCC Agreement.

[6] DBSA opposed the action, filed a plea and also raised a special plea in terms of which it denied that any contract between it and Sivubo came into existence. It averred that the Letter of Appointment was a conditional appointment which was subject to the suspensive condition that by 16h00 on Friday, 16 May 2014 ('the deadline'), Sivubo had to furnish DBSA and R&G Consultants, with certain documents. These comprised, amongst others, proof of contract works insurance, proof of public liability insurance and a construction guarantee. Sivubo furnished these documents to DBSA only on 23 June 2014, after the deadline. As a result the suspensive condition in the Letter of Appointment was accordingly not met, and the conditional appointment of Sivubo as the successful tenderer therefore lapsed and was of no force and effect. DBSA further pleaded that the contract documents, including the JBCC agreement referred to in the amended declaration were never signed and that consequently no contract as alleged in the amended declaration or at all came into being. It submitted that for these reasons the claim, premised on repudiation of the contract fell to be dismissed.

[7] On 26 April 2017 the matter served before Molahlehi J, who, in terms of Rule 33(4), ordered a separation of issues, referred the special plea to trial and postponed the other defences sine die. The trial relating to the special plea served before Tsoka ADJP on 24 May 2017. No evidence was led at the trial and the matter was decided on the basis of the pleadings and the common cause facts presented before the court. The court upheld the special plea with costs. This appeal is against this order with leave of the court a quo.

[8] In this court, Sivubo sought to argue a case different from that pleaded in the amended declaration. Instead of placing its reliance solely on the JBCC agreement, it submitted that the contract between the parties comprised of the JBCC agreement, as modified in terms of the Special Conditions of Contract and the Contract Specific Data, and as further modified in terms of the conditions that DBSA had specified in the Letter of Appointment. According to Sivubo, the listed requirements in the Letter of Appointment were not conditions precedent, but were terms of the contract. Sivubo had an obligation, by the deadline, to supply the various documents required by DBSA. The fact that Sivubo was unable to do so, so the submission went, did not cause the agreement to lapse, but rendered Sivubo in *mora.* Counsel for Sivubo also argued that the subsequent conduct of the parties after Sivubo had signed the Acceptance Letter fortified Sivubo's submission that a contract had been concluded.

[9] It is convenient to first consider whether Sivubo was ever appointed in terms of the JBCC Agreement as alleged in the amended declaration and consequently whether there was a contract between the parties in terms of the JBCC agreement. It is common cause that the JBCC agreement was never signed. Sivubo contends that para 3.5 of the JBCC agreement specified that formal signatures were not required in order to render it valid. The problem with Sivubo's reliance on para 3.5 is the following: The JBCC agreement had to be read together with the Special Conditions of Contract (SCC) which, in terms of Clause 1 of the SCC, formed an integral part of the JBCC agreement. Clause 1 clearly stated that the SCC 'shall amplify, modify or supersede, as the case may be, the JBCC 2005 to the extent specified below, and shall take precedence and shall govern'. Clause 2 of the SCC reflected amendments to the JBCC agreement and one of the clauses to be amended was Clause 3.5 of the JBCC by

deletion. There could thus be no reliance on para 3.5 as it had been deleted. The Letter of Appointment on the other hand stated unequivocally that Sivubo Trading & Projects CC was required to sign the contract documents which included the JBCC Agreement, provided the stipulated requirements had been complied with. It follows that, in the absence of para 3.5 or any other clause to the contrary, the clear language of the Letter of Appointment prevailed, and the JBCC agreement had to be signed. As this did not happen, there can be no reliance on it by Sivubo as a basis for the existence of a contract.

[10] This then takes me to whether the listed requirements contained in the Letter of Appointment imposed a suspensive condition which had to be met by Sivubo before a formal contract could be finalised, or whether they were merely terms of the agreement between the parties as alleged by Sivubo.

[11] A suspensive condition is a condition suspending the operation of all or some of the obligations flowing from the contract, pending the occurrence or non-occurrence of a future uncertain event. (See *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) 695C-D; *Thiart v Kraukamp* 1967 (3) SA 219 (T) 225A-C; *Diggers Development (Pty) Ltd v City of Matlosana* [2011] ZASCA 247; [2012] 1 ALL SA 428 (SCA) para 23). The approach to interpretation of a document is settled. It is the process of attributing meaning to the words used in a document, having regard to the context provided and having regard to the purpose of the provision and the background to the preparation and production of the document. (See *Natal Joint Municipal Pension Fund V Endumeni Municipality* [2012] ZASCA 13; 2012 (4) 593 (SCA) paras 17-26; *Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) paras 24-31) It is also well established that the mere use of the word ‘condition’ does not always translate into the condition in question being a suspensive condition. (See *Webb v Davis N O & others* 1998 (2) SA 975 (SCA) 982C-D; *Southern Era Resources Ltd v Farndell N O* [2009] ZASA 150; 2010 (4) SA 200 (SCA) para 11).

[12] In *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v SA Post Office Ltd* [2012] ZASCA 160; [2013] 1 All SA 266; 2013 (2) SA 133 (SCA) the South African Post Office Limited (Post Office) caused an advertisement to be placed in national newspapers inviting tenders for the guarding of post offices in six specified

regions of the country. Details of the services required were stipulated in a document called the Post Office Request for Proposal, which could be obtained from the Post Office. Command Protection Services (Command) submitted tender documents corresponding to the terms of the Request for Proposal document, to provide guarding services in all six regions as advertised. These documents were annexed to Command's particulars of claim as PC2. (This court found it convenient to refer to these documents in this fashion). Subsequently, Command received a letter of appointment from the Post Office dated 28 July 2003, which the court conveniently referred to as PC3. It read:

'LETTER OF APPOINTMENT

It is with pleasure that we inform you that the Tender Board has awarded the above tender proposal to [you]. As a result you are appointed as the supplier of the above-mentioned service as per our tender proposal.

This appointment is subject to the following:

- BEE improvement; and
- The successful finalisation and signing of a formal contract.

A draft contract will be forwarded to you within (7) seven working days for your comment and to the effect mutually agreed on amendments and finalisation into a formal contract. You are kindly advised to acknowledge receipt of this letter of appointment and provide this office with the contact information of the person(s) responsible for the finalisation of the contract process.

Yours sincerely

[Signed on behalf of the appellant]

Accepted and signed on behalf of the respondent]'

[13] In describing the nature of the dispute between the parties this court made the following observations in para 12:

'The dispute thus arising is not novel. It frequently happens, particularly in complicated transactions, that the parties reach agreement by tender (or offer) and acceptance while there are clearly some outstanding issues that require further negotiation and agreement. Our case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked *animus contrahendi* because it was conditional upon consensus being reached, after further negotiation, on the outstanding issues. In that event the law will recognise no contractual relationship, the offer and acceptance notwithstanding, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer

would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail.' (References omitted.)

[14] The court in para 21 dealt with the contents of PC 3 (the Appointment Letter) and made the following observations:

'The second stipulation under "subject to'' requires the "successful finalisation. . . of a formal contract''. "Finalisation" envisages a process, which in the context can only signify further negotiation, while the reference to "successful" suggests an awareness that the process might not be successful. In the context, "successful" can only mean resulting in a formal contract. Conversely stated, the requirement can only mean that unless and until the further negotiations that were contemplated resulted in a formal agreement, there would be no contractual relationship between the parties. This inference, I believe, is underscored by the last two sentences of PC3. The penultimate sentence envisages that a draft agreement would be prepared by the respondent; that the draft would be forwarded to the appellant; that the appellant would then have the opportunity to suggest amendments to the draft; and that, if agreement could be reached on the amendment proposed, this would lead to the finalisation of a formal agreement. In the last sentence the appellant is asked to nominate its representatives during the finalisation process. As I see it this means, in short, that as yet there was no binding contract. The contract would only come into existence upon the successful finalisation of the contract process, after inter-action between representatives of the parties.'

[15] The court then concluded as follows in para 25:

'The conclusion I arrive at is therefore that PC3 did not constitute an unconditional acceptance of the tender contained in PC2; but that it was intended by the respondent and accepted by the appellant as a counter-offer. The agreement that came into existence when the appellant accepted this counter-offer was an agreement to negotiate. Whether that agreement would be enforceable in the light of decisions such as *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), is one we do not have to consider. That is not the agreement that the appellant relied upon. The agreement the appellant relied upon is one that, in my view, never came into existence.'

[16] The attempt by Sivubo to distinguish between this matter and *Command* is a matter of emphasising form over substance. As appears from the statement of common cause facts, the Letter of Appointment in this matter had the following

fundamental features: it stated that (a) Sivubo's tender offer was accepted conditionally; (b) Sivubo was required to comply satisfactorily with a long list of conditions by a certain date and time; (c) a contract document which included the JBCC Agreement would only be prepared and signed at a later date provided the specified documents had been furnished. A further pertinent aspect is that consequent to the Letter of Appointment and the Acceptance of the Offer, R&G Consultants continued to demand the further outstanding documents such as a construction guarantee, an original tax clearance certificate, contract works insurance and public liability insurance, a detailed quality plan, and a health and safety plan. The common feature of these documents is that they are dictated by several pieces of legislation. If the contention by Sivubo is correct, it would mean that they were appointed as a preferred bidder even before DBSA had satisfied itself whether it was legally competent to do so. This is improbable. Furthermore, these documents by their very nature are essential in large construction contracts such as the present instance. It is inconceivable that a large financier such as DBSA would have been content to proceed without them having been in place.

[17] The more probable inference is that when DBSA sent the Letter of Appointment, it envisaged entering into further negotiations with Sivubo in order to satisfy itself whether Sivubo qualified as its preferred bidder. This finding is consistent with the clear language of the Letter of Appointment which says that the contract and the JBCC Agreement will be signed '*provided the above requirements have been complied with . . .' . . .* and that *the date and location for the signing of the contract will be communicated . . . once the submitted documents have been checked.* As the requisite documents had not been submitted on the stipulated date, the suspensive condition was not met and no contract ever came into existence. There is thus no basis to find that the listed requirements were terms of a contract.

[18] It therefore follows that the failure to furnish the documents which were required by the DBSA in the Letter of Appointment, within the date and time stipulated therein, resulted in a failure to fulfil the suspensive condition. Consequently the contract alleged by Sivubo never came into existence.

[19] For those reasons the appeal fails.

[20] I make the following order:

The appeal is dismissed with costs.

_____

Z L L Tshiqi

Judge of Appeal

APPEARANCES

For the Appellant:	F G Barrie SC
Instructed by:	Mbana Inc., Johannesburg
	McIntyre Van der Post Attorney,
	Bloemfontein
For the Respondent:	Y Alli
Instructed by:	Norton Rose Fulbright Attorneys,
	Johannesburg
	Matsepes Inc., Bloemfontein