

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 15119/2011

In the matter between:

WAVELENGTHS 252 (PTY) LTD

Applicant

And

BITOU MUNICIPALITY

1st Respondent

REGISTRAR OF THE HIGH COURT CAPE TOWN

2nd Respondent

MINISTER OF HUMAN SETTLEMENTS, WESTERN CAPE

3rd Respondent

**APPLICATION FOR LEAVE TO CONDITIONALLY CROSS-APPEAL iro
CONDITIONAL COUNTER-APPLICATION**

JUDGMENT DELIVERED ON 22 FEBRUARY 2013

YEKISO, J

[1] On 28 and 29 February 2012 I heard an application in which the applicant (Wavelengths 252 (Pty) Ltd) sought an order declaring that a suspensive condition contained in a contract it (the applicant) concluded with the first respondent (Bitou Municipality) had been fulfilled and that, therefore, the contract thus concluded is

enforceable. I dismissed that application with costs, including costs consequent upon employment of two counsel.

[2] The matter has since become the subject of an appeal by the full court in this division. Simultaneous with the hearing of that application I heard the first respondent's conditional counter-application for the relief set out in its notice of conditional counter-application. The relief sought in the first respondent's conditional counter application was conditional upon the applicant succeeding in the enforcement order the applicant sought, the first respondent making a point in its submissions that, apart from the contention that the contract in point is not enforceable for want of fulfilment of the suspensive condition, the contract is nonetheless unenforceable on the grounds of alleged contravention of a number of Constitutional provisions, several statutes and ministerial regulations.

[3] On 26 April 2012 I handed down my judgment in the matter. As has already been pointed out, I dismissed that application with costs, coupled with an order that such costs shall include costs consequent upon employment of two counsel as well as costs occasioned by a postponement of the matter on 1 December 2011. Although the merits of the application, as well as the first respondent's conditional counter-application were heard simultaneously, I did not deem it necessary to pronounce on the merits of the first respondent's conditional counter application in the light of the conclusion I reached in the main application.

[4] The applicant subsequently filed its notice of intention to apply for leave to appeal against the whole of my judgment handed down on 26 April 2012 inclusive of a cost order attended thereto. The application for leave to appeal was argued before me on Thursday, 14 June 2012. The first respondent opposed the application for leave to appeal. Judgment in the application for leave to appeal was handed down on 27 July 2012. In terms thereof I granted the applicant leave to appeal to the full court of this division solely on the following grounds:

[4.1.] Whether the suspensive condition contained in clause 4.1 of the agreement of sale concluded between the applicant and Bitou Municipality on 28 January 2011 has been fulfilled;

[4.2.] Whether, in the determination of a question as to whether the condition contained in clause 4.1 has been fulfilled, regard has had to be had to clause 1.5 of the Funding Agreement concluded between the Department of Human Settlements of the Provincial Government, Western Cape and Bitou Municipality;

[4.3.] Costs of the application for leave to appeal be costs in the appeal.

[5] In the order granting the applicant leave to appeal I did not give any directive with regards to whether the first respondent, in opposing the appeal on the merits, shall also rely on those grounds set out in its conditional counter-application that the agreement concluded between the applicant (now the appellant) and the first respondent is nonetheless also unenforceable on those grounds.

[6] In the judgment I handed down on 26 April 2012 I did not deem it necessary to deal with the merits of the first respondent's conditional counterclaim, particularly in view of my finding on the merits of the main application. To this end, I made the following observation in paragraph [59] of the judgment handed down on 26 April 2012:

"Furthermore, in the light of the conclusion I have reached as set out in paragraph [56] above, it is not necessary for me to consider and, ultimately, determine the conditional counter application launched by the Municipality and heard simultaneously with this application."

[7] In paragraph 4 of the appellant's notice of application for leave to appeal the following is stated:

"Another Court may reasonably conclude, further, that the first respondent's conditional counterclaim should have been dismissed, and that the first respondent, alternatively, the first and the second respondents, jointly and severally, are liable to pay applicant's costs of suit, including the costs of two counsel."

[8] Once the application for leave to appeal was granted as indicated in paragraph [4] of this judgment, the appellant subsequently filed its notice of appeal. Paragraph 4 appellant's notice of appeal reads as follows:

"4. The Court ought to have concluded further, that the first respondent's conditional counter-claim should have been dismissed."

[9] Once the record of the appeal was prepared and delivered on the first respondent's legal representatives it was noted that the practice note appeared to contemplate the appellant (Wavelengths) raising wider issues than those which it had been granted leave to pursue on appeal, including an order that the first respondent's conditional counter-claim should have been dismissed.

[10] In the view of the first respondent's legal representatives, what is stated in paragraph 4 of the appellant's notice of appeal raised the question as to whether, notwithstanding what is stated in the appellant's notice of appeal, it was necessary for the first respondent to have conditionally cross-appealed in respect of its conditional counter-claim. It was in the light of these considerations that it was resolved by the first respondent's legal team to bring about what purports to be the "first respondent's notice of application for leave to conditionally cross-appeal in respect of its conditional counter-application" purportedly on the grounds that I would also have erred :

[10.1.] in failing to consider and determine the first respondent's conditional counter-application; and

[10.2.] failing to grant the relief sought in that conditional counter-application with costs including the costs of two counsel.

[11] In the judgment I handed down on 26 April 2012 I did not in that judgment give an order, adverse or otherwise, against the first respondent arising from its conditional counter-application. There is accordingly no judgment or order capable of being appealed against.

[12] What I omitted to do though, in granting the appellant leave to appeal, was to give a directive that the first respondent, in opposing merits of the appeal, shall also rely on those grounds set out in its notice of conditional counter-application in challenging the enforceability of the contract concluded between the appellant and the first respondent.

[13] The appellant's application for the declaration of the enforceability of the contract and the first respondent's conditional counter-application were heard simultaneously. In my view, it would be a travesty of justice if, in the consideration and the determination of the merits of the appeal, regard shall not be had on the merits of the first respondent's conditional counter-application. If this were not to happen, if the appellant were to succeed on appeal on the merits of its application, the matter would have had to be remitted for the consideration and the determination of the merits of the conditional counter-application.

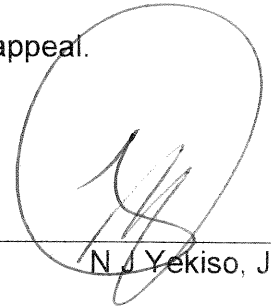
[14] In my view, therefore, the interests of justice would best be served if, on the hearing of the appeal, the merits of the first respondent's conditional counter-application were to be considered and determined. In anticipation of the acceptance of this view the order granting leave to appeal is supplemented by the addition of the following paragraph as paragraph [6.3] of the order granting leave to appeal:

"To the extent that the merits of the first respondent's conditional counter-application may have to be considered in the hearing of the proposed appeal the first respondent, in

opposing the merits of the appeal, shall also rely on those grounds set out in its notice of conditional counter-application.”

The order granting leave to appeal, duly supplemented, will be as per Annexure “A” annexed hereto.

[15] Similarly the costs of this application shall be costs in the appeal.



N J Yekiso, J

ANNEXURE "A"

[6.1] Whether the suspensive condition contained in clause 4.1 of the agreement of sale concluded between the applicant and Bitou Municipality on 28 January 2011 has been fulfilled;

[6.2] Whether, in the determination of a question as to whether the condition contained in clause 4.1 has been fulfilled, regard has had to be had to clause 1.5 of the Funding Agreement concluded between the Department of Human Settlements of the Provincial Government, Western Cape and Bitou Municipality;

[6.3] To the extent that the merits of the first respondent's conditional counter-application may have to be considered in the hearing of the proposed appeal the first respondent, in opposing the merits of the appeal, shall also rely on those grounds set out in its notice of conditional counter-application

[6.4] Costs of the application for leave to appeal be costs in the appeal.