FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 77

PARTIES:

- Registrar CASE NO: **2743/06**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **SECLD OF THE HIGH COURT**

DATE HEARD: **13 November 2006**
DATE DELIVERED: **21 November 2006**

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Plaintiff(s)/Applicant(s)/Appellant(s): **Adv Eksteen SC**
  Adv Rorke
- for the accused/defendant(s)/respondent(s):

Instructing attorneys:

- Plaintiff(s)/Applicant(s)/Appellant(s): **Goldberg & De Villiers**
- Respondent(s)/Defendant(s): **Brian Kahn Inc**

CASE INFORMATION -

- *Nature of proceedings*: **APPLICATION FOR LEAVE TO APPEAL**
- *Topic*:

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO: 2743/06

In the matter between:

WORTHY HOMES CC **FIRST APPLICANT**
TRIPPLE R DEVELOPERS CC **SECOND APPLICANT**

and

FIRSTRAND BANK LIMITED **FIRST RESPONDENT**
COLD CREEK INVESTMENTS 43 (PTY) LIMITED SECOND RESPONDENT
IMMOBILI RETAIL INVESTMENTS (PTY) LIMITED THIRD RESPONDENT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

DAMBUZA J:

1. In this application the second respondent seeks leave to appeal against the judgment in which I granted an order that:

   1.1 That the First Respondent pay into the Trust account of **Messrs Goldberg & De Villiers Inc**, being **Trust account number 712743638** held at **ABSA Bank**, by 15 September 2006, the sum of **R9 154 699,36** presently held by the First Respondent in

terms of Letter of Undertaking number **G657/340879/GLO**, dated 5 June 2006;

1.2 That the aforesaid sum, together with a further sum of **R100 000,00** already paid by the Second Respondent to attorneys **Goldberg & De Villiers Inc** as a deposit, shall be held in an interest bearing Trust account by attorneys **Goldberg & De Villiers Inc, Port Elizabeth**, pending registration of transfer of the property, alternatively, the outcome of an action to be instituted by the Applicants against the Second Respondent for specific performance by the Second Respondent of its obligations in terms of the agreement of sale concluded between the Applicants and the Second Respondent on 30 March 2006 and as evidenced by annexures **"BHB3", "BHB4"** and **"BHB5"** to the founding affidavit annexed hereto, alternatively, for cancellation of the agreement and damages flowing from such cancellation, which the Applicants may elect;

1.3 That, failing Second Respondent remedying its breach of contract, the Applicants institute the action contemplated by paragraph 2.2 hereof within 60 days of the granting of this order;

1.4 That the Second and Third Respondents pay the costs of this application jointly and severally, such costs to include costs of two Counsel and to be on attorney and own client scale as per the Deed of Sale.

2. The application is founded on the premise that I erred in finding that:

2.1 The commencement date for computation of the 30 day period within which the second respondent had to obtain a loan for the purchase price was 31 March 2006; and

2.2 That the date of the signature of the agreement of sale by the applicant and the second respondent was 30 March 2006.

3. In opposing the application, the applicants contend that the order in respect of which the second respondent seeks leave to appeal is not a *"judgment or order"* as envisaged in **Section 20 (1) of the Supreme Court Act, 59 of 1959** (the Act).

4. Indeed the jurisdictional requirements for a civil appeal emanating from a provincial or local division as a court of first instance are:

4.1 That the necessary leave to appeal must have been obtained; and

4.2 The decision appealed against must be a "judgment or order' within the meaning of these words in the context of **Section 20 (1) of the Act. See: Zweni v Minister of Law and Order 1993 (1) SA 523A**

5. In **Zweni's** case the Supreme Court of Appeal held, at **532 I-J** that a judgment or order is a decision which:

(i) is final in effect and not susceptible of alteration by the court of first instance;

(ii) is definitive of the rights of the parties; and

(iii) has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

6. Simple interlocutory orders are not appealable under **Section 20 (1) of the Act.**

7. The order set out in paragraph 1 of this judgment is clearly an interlocutory order. The effect thereof is that the monies mentioned

therein are to be held in Trust by attorneys **Goldberg & De** Villiers, pending registration of the property, alternatively the outcome of the action to be instituted by the applicants against the second respondent. The submission by **Mr Van Blerk**, on behalf of the second respondent, that the order disposes of the counterclaim is, in my view not correct. In the event of the property which is the subject of the sale agreement between the applicants and second respondent being transferred to the second respondent, the second respondent will not be entitled to refund of the **R100 000.00** deposit. If the action contemplated by the applicants proceeds, the court dealing therewith will consider the validity of the agreement of sale. The court's finding on the issue will necessarily be a finding on whether the **R100 000.00** should be refunded to the second applicant or not; for the deposit was paid in anticipation of a valid agreement of sale. The order in respect of the amounts of **R9 154 699.36** and **R100 000.00** turns on the same facts and findings.

8. Consequently the order is not a judgment or order as envisaged under **Section 20 (1) of the Act.**

9. In any event, I am not persuaded that another court might find that the intention of the parties to the sale agreement was that computation of the 30 day period should start from 30 March 2006 or that the civil method of computation should apply in respect of the said period:

Consequently:

(a) The application for leave to appeal is dismissed with costs; such costs to include costs of two counsel.

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N DAMBUZA

JUDGE OF THE HIGH COURT 15 November 2006