FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

PARTIES:

SECRIVEST TWENTY (PTY) LTD **APPLICANT**

and

MAZISI NYUBUSE **RESPONDENT**

- Case Number: **514/07**
- High Court: **EAST LONDON CIRCUIT LOCAL DIVISION**

Date Heard: 07 August 2007

Delivered on: **14 August 2007**

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES-

Appearances:

- Applicant(s): **Adv Brooks**
- Respondent(s): **Adv Kincaid**

Instructing attorneys:

- Applicant(s): **Drake Flemmer & Orsmond**
- Respondent(s): **V Gwebindlala & Associates**

CASE INFORMATION –

- *Nature of proceedings :* ***Application for Eviction***

IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: **EL 214/07**

ECD 514/07

In the matter between:

SECRIVEST TWENTY (PTY) LTD **APPLICANT**

and

MAZISI NYUBUSE **RESPONDENT**

JUDGMENT

DAMBUZA J:

1. **In this application seeks an order evicting the respondent from an immovable property known as Unit 52 (or 31 or 66) Scheme B Sectional Title Scheme, Coral Wood in Beach Bay, East London (the property). The application is opposed.**

2. **The applicant contends that the respondent has breached the terms of an agreement of sale entered into between the parties on 31 March 2005 (or 23 February 205). In terms of this agreement the applicant sold the property to the respondent for a purchase price of R381 500.00. The respondent paid R10 000.00 to the applicant as deposit in respect of the purchase price. The respondent then, subsequent to payment of the deposit, and prior to registration of transfer of the Unit in his name, took occupation**

of the Unit. He however could not obtain finance from a commercial bank and/or could not provide security for payment of the balance of the purchase price. It appears from the papers that the Unit number originally allocated to the Unit was 31. However, due to certain administrative reasons during the course of preparation of the sectional plans the number changed to 52 and later the body corporate allocated the number 66 to the Unit. I did not understand the respondent to dispute that the Unit which is the subject matter of these proceedings is the same Unit he bought under the agreement of sale.

3. In terms of the agreement the respondent had to furnish the applicant's attorneys with an irrevocable guarantee issued by a *"recognized commercial bank"* in respect of the balance of the purchase price, within 40 days from the date of the signature of the agreement. This application is founded on the breach of this clause.

4. The respondent does not dispute that he is in breach of the agreement as alleged by the applicant. His contention, as I understand it is that he is not obliged to perform under this clause as the respondent itself is in breach of the agreement in that: It has failed to furnish him with approval of the site development plan, subdivision and/or consolidation application as well as rezoning (the property on which the Unit is situated) as stipulated in the agreement. In this regard the respondent relies on Clause 2.1.1 of the agreement which provides that:

"2.1 This agreement is subject is subject to the following suspensive conditions:

2.1.1 Approval of the site development plan, subdivision and/or consolidation application as well as any rezoning that may be required by the Buffalo City Municipality on or before 30 November 2004."

5. The respondent contends further that the purported cancellation of the agreement by the applicant, through its attorneys, is invalid as the applicant failed to refund to the respondent the deposit of R10 000.00 paid by the respondent.

6. The respondent further sought to take issue with what he regarded as failure by the applicant to comply with Section 4 (2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE or the Act) which requires notice of proceedings contemplated under Section 4 (1) of the Act be served on the unlawful occupier at least 14 days before the hearing of the proceedings. This point was however correctly abandoned during the argument. I was, in any event, satisfied, from the papers that effective notice had been served on the respondent in terms of Section 4 (2) of the Act and as directed by an order of court on 17 April 2007.

7. During argument Mr Kincaid who appeared on behalf of the respondent sought to apply fro the bar that the matter be postponed to enable the respondent to file a further affidavit detailing his opposition to the application. He indicated, although somewhat hastily and therefore not clearly that the respondent wished to place before the court further details pertaining to his

contention that there was never a proper cancellation of the sale agreement as the applicant retained the deposit paid by the respondent. As a result of the retention of the deposit there was a dispute of fact as to whether the cancellation was valid (or lawful) or not. I indicated to Mr Kincaid that I was not inclined to grant the postponement sought. My reasons there fore were that the parties had already filed all relevant affidavits and had prepared Heads of Arguments.

8. There was no substantial application before me for a postponement. In any event the reasons for which the postponement was sought, as outlined by Mr Kincaid was clearly alluded to in the respondent's answering affidavit in which the respondent contended that *"The amount paid as deposit is still with the applicant and has not been paid back to me" and "The applicant has failed to place me in a (sic) situation that I was at (sic) before the contract was signed (restitution)."* For these reasons I refused the application for a postponement.

9. Regarding the contention raised by the respondent as a point in *limine* that there is a dispute of fact as to the applicant's compliance with its obligations under the agreement to advise the respondent that the suspensive condition stipulated in Clause 2.1.1 of the agreement had been met. I am of the view that this is either an attempt to create a dispute of fact or a gross misinterpretation of the relevant terms of the agreement. As submitted by Mr Brooks on behalf of the applicant the inference to be drawn from the respondent's argument is that the respondent was relieved of the necessity to furnish security for payment of the balance of the purchase price (as provided in paragraph 3.3 of

the agreement) as a result of the presumed non-compliance with paragraph 2.1.1 of the agreement by the applicant. This argument is of no assistance to the respondent as its natural conclusion would be that the agreement never came into being because of the non-fulfilment of the suspensive condition. In such event the parties would be obliged to restore to each other whatever each had received in contemplation of the fulfilment of the suspensive condition. The respondent would be obliged to vacate the Unit and on refusing to do so despite demand would be on illegal occupation thereof. But the fact is nothing in paragraph 2.1.1 of the agreement does provide for advice or notice to be given to the respondent that the suspensive condition has been fulfilled.

10. In response to the argument by the respondent that the retention by the applicant of R10 000.00 is to be viewed as an indication that the applicant has elected to enforce the agreement of sale thus rendering the purported cancellation the applicant in the replying affidavit Tersia Cook sets out developments leading to the retention of the deposit by the applicant. Cook states that subsequent to withdrawal of the loan previously approved by ABSA Bank for the purchase price of the Unit, the respondent tendered the R10 000.00 deposit to the applicant's attorneys towards payment of arrear rental. The parties then agreed that the deposit would be used towards payment of arrear rental owed by the respondent to the applicant. In any event as Mr Brooks submitted, the respondent was not entitled to a refund of the deposit as Paragraph 24.1.3 of the Standard Conditions of Sale provides that in the event of a party to the contract (the defaulting party) failing to pay any amount due in terms of the agreement and remain in default for more than seven days after being

notified by the other party to pay, the aggrieved party shall be entitled to cancel the agreement the defaulting party shall forfeit all monies paid by it in terms of the sale agreement. Consequently *ex contracta* the money should be kept by the applicant.

11. The respondent further intimates that his inability to obtain a loan from a commercial bank resulted from the confusion regarding the definition of the Unit. However it seems to me that at no time has there been uncertainty regarding identification of the Unit. It seems rather that at some point a loan was granted to the respondent's family Trust for the purchase price for the unit but was later withdrawn. Consequently contention that there is a dispute in this regard is not borne out by the evidence.

12. I am satisfied that the applicant has made a good case for the eviction of the respondent. What falls to be determined is a reasonable period within which he and those occupying through him should be ordered to vacate the property. It was submitted, on behalf of the applicant that a period of three weeks would afford the respondent sufficient opportunity to secure alternative accommodation. However it seems to me that a period of one calendar month from the date of the order would be more appropriate.

Consequently the following order shall issue:

(a) The respondent and/or all persons occupying the property commonly known as Unit 52, Scheme B, Sectional Title Scheme, Coral Wood, Beacon Bay, East London be evicted from the property on a date and in a manner to be determined by this Honourable Court;

(b) The respondent be ordered to pay the costs of this application.

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JUDGE OF THE HIGH COURT

Applicant's Counsel:	**Adv Brooks**
Applicant's Attorneys:	**Drake Flemmer & Orsmond** **Tewkesbury House** **Southernwood** **EAST LONDON**
Respondents' Counsel:	**Adv Kincaid**
Respondent's Attorneys:	**V Gwebindlala & Associates** **2nd Floor, Office 201** **MEEG Bank Building** **MTHATHA** **c/o Makhanya Incorporated** **Offices 206 & 207, 2nd Floor Building, Argyle Street** **EAST LONDON**
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Heard on:	**07 August 2007**
Delivered on:	**14 August 2007**