

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)**

**DATE: 21/8/2006
CASE NO: 40697/2005**

UNREPORTABLE

In the matter between:

LESAHJA DANIEL MASEKWAMENG

1st Applicant

MOLOMATJO PAULINA MASEKWAMENG

2nd Applicant

and

ANTON PSEIDL

Respondent

JUDGEMENT

MURPHY J

1. This matter concerns an exception taken by the plaintiffs to the defendant's plea. The plaintiffs have instituted action against the defendant for an order directing the defendant to vacate certain property, namely portion 18 of the farm Langbult 580, registration division LT, Limpopo and to restore the same to them. They seek also payment of an amount of R116 550 as damages. The plaintiffs allege that the defendant is in unlawful possession of the property.

2. The defendant originally filed a special plea, a plea on the merits and a counterclaim.
3. The defendant denies in the plea and counterclaim that he is in unlawful occupation of the plaintiffs' property and pleads that he occupies the property under a written lease agreement. In the counterclaim, the defendant claims damages as a result of the alleged continuous breach of the agreement by the plaintiffs relating to the provision of water to the property, which functions as a guesthouse.
4. The special plea filed by the defendant was to the effect that he was an "occupier" as defined in the Extension of Security of Tenure Act 62 of 1997 and that this court accordingly does not have jurisdiction to entertain the action, such being reserved to the Land Claims Court. The defendant has subsequently abandoned the special plea, effectively conceding that the property in question is used for commercial purposes.
5. The plaintiffs delivered an exception to the special plea, plea and counterclaim. However, given the defendant's concession with regard to the special plea, the plaintiffs persisted only with the exception to the plea and the counterclaim. At the hearing of the exception, Mr Muller, who

appeared for the plaintiffs indicated that he would persist only with the exception to the plea.

6. As stated, the defendant's plea is based upon the alleged existence of a valid contract of lease.
7. The plaintiffs allege that the lease agreement was subject to a suspensive condition expressed in writing as follows:

"Validity of contract

The validity of this contract is dependent upon both tenants receiving a working permit and residency permit in South Africa. The tenant certify (sic) that they will inform the renter as soon as these permits are received (late autumn 2003)."

8. The defendant has made no allegation in the plea that the suspensive condition was fulfilled as a consequence of which he acquired the rights to lawful occupation. In other words, it is submitted that the validity of the contract was dependent on the obtaining by the defendant of a valid work and residency permit in South Africa and the informing of the plaintiffs accordingly. The plaintiffs' contention is that the failure by the defendant to plead that the suspensive condition has been fulfilled renders the plea excipiable.
9. The defendant counters that after pleading the existence of the agreement with reference to the written contract of lease, and setting out

the terms of the agreement in the plea, he specifically pleaded in paragraph 6.4 of the plea that he has fulfilled all his obligations under the lease agreement and that it has not been validly cancelled. The defendant therefore submits that the pleading as it stands contains a valid defence to the plaintiffs' particulars of claim.

10. I am satisfied that the clause in question does indeed constitute a condition precedent suspending the operation of the obligations flowing from the contract until the occurrence of a future and uncertain event, namely the defendant's obtaining a work and residence permit from the immigration authorities. The condition governs the whole contract and should it not be fulfilled no obligations would arise in terms of the contract. The explicit use of the expression "is dependent upon" is a clear indication of an intention for the contract to give rise to no obligations until such time as the condition has been fulfilled. It follows that a plea by the defendant that he has fulfilled all his obligations under the lease agreement is insufficient. Such is not the same as pleading the fulfilment of a suspensive condition. Pending the fulfilment of the condition precedent, the contract was inchoate in nature, and no obligations arose.
11. I am accordingly of the view that the failure to plead the fulfilment of the suspensive condition renders the plea excipiable on the ground that it

discloses no defence or makes insufficient averments to ground a defence.

12. Counsel has referred me to *Errico v Lotter* 1956 (4) SA 139 (N) where the court stated that even if a contract contained a condition precedent, the allegation in the summons that the amount claimed was due, owing and payable would be a sufficient allegation of compliance. The case is however distinguishable from the present matter. Firstly, the learned judge clearly limited his remarks to proceedings in the magistrate's court. Secondly, a claim for monies due and payable in terms of a contract is qualitatively different to a defence of entitlement to occupation in terms of a lease. A claim that money is payable presupposes that it is payable on the basis of certain legal obligations which are implicit. A defence to the effect that the obligations under a contract have been performed does not necessarily imply in the same way that the contract has come into existence. And thirdly, the learned judge's observations were clearly *obiter dicta*. In this instance the entire cause of action is predicated upon the claim that occupation is held *sine causa*. In such circumstances it is incumbent upon the defendant to plead the existence of the *causa* and it is insufficient merely to allege that obligations pursuant to an inchoate contract have been fulfilled while leaving begging the question of the contract's existence.

13. In the result, the plaintiff's exception to the plea falls to be upheld. I accordingly make the following order:

"The defendant's plea is set aside with costs and the defendant is given leave to file an amended plea within 21 days of this order."

**JR MURPHY
JUDGE OF THE HIGH COURT
TRANSVAAL PROVINCIAL DIVISION**

Counsel for the Applicant's, Adv GC Muller, Pretoria and counsel for the defendant, Adv HS Havenga, Pretoria.

Attorney for the Applicant's, CF van Rooyen Inc. Tzaneen c/o Melanie Kunzman Attorneys c/o Van Heerden Van Staden & Vennote, Pretoria and Attorney for the defendant, Solomon Nicolson Rein & Verster Inc.