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the declarations, failure to furnish original copies of documents relied on, and inconsistencies in plaintiff's evidence.

Held: When the whole declaration (not just the opening paragraphs) it is clear that the perceived disparity falls away. The plaintiff's evidence establishes a prima facie case upon which a reasonable court might (and not should) find/or her.

JUDGMENT

[1] This is an application for absolution from the instance at the close of Plaintiff's case in terms of Rule 31(c) of the High Court Rules, which reads:

"At the close of the case for the Plaintiff, the Defendant may apply for absolution from the instance, in which event the defence Counsel on his behalf may address the Court and the Plaintiff or one Counsel on his behalf may reply. The Defendant may thereupon reply on any matter arising out of the address of Plaintiff or his Counsel. "

[2] Plaintiff and Defendant entered into an agreement of sale of a restaurant business, as seller and purchaser, respectively. The Plaintiff has brought action against Defendant for payment of a balance of the purchase price, and Defendant defended the claim.

[3] Plaintiff's evidence is that she sold her restaurant business to the Defendant for the price of E235, 000.00 in terms of a Deed of Sale they both signed on

the 6th May 2015. Defendant sought funding for the transaction from Swaziland Development Finance Corporation (FINCORP). However

Defendant could only get maximum loan of E150, 000.00. By arrangement with the Defendant the Plaintiff accepted

E1 50, 000.00 as deposit. FINCORP required an affidavit deposited to by the seller for the amount of E150, 000.00. The Plaintiff states that by arrangement with Defendant to facilitate the loan, she signed an affidavit with contents to the effect that the selling price of the business was

E1 50, 000. It is Plaintiffs evidence that a day after handing in the affidavit required by FINCORP, the parties signed a settlement agreement stating that the amount of E150, 000 was a deposit and that the balance of E80, 000.00 would be liquidated by three months instalments payable after the business had been handed over.

[4] It is Plaintiffs evidence further that she eventually handed the business to the Defendant after receiving the purchase deposit of E150, 000.00 from the lender, but Defendant never paid the balance as promised, despite reminders. This led to the Plaintiff launching this action for recovery of the balance of E80, 000. 00.

[5] The application for absolution is based on the following grounds:

(1) *Material variance of summons from Plaintiff's particulars.*

(2) *Absence at the trial, of original copies of documents relied upon.*

(3) *Inconsistent evidence of the Plaintiff.*

[6] Defendant points out that Plaintiffs claim in the summons is for E80, 000.00 arising from agreement concluded on the 25 August 2015, yet the Declaration refers to an agreement of the 6th May 2015. Defendants submits that this is a material difference which is fatal to the proceedings. Plaintiffs heads do not respond directly to the alleged disparity, but generally assert

that there was a main sale agreement signed by the parties on the 6th May 2015 for the purchase price of E235, 000 and subsequently another agreement signed by the parties on the 25th August 2015 for payment of balance of E80, 000.00.

[7] The part of the simple summons under attack reads as follows:

"...Plaintiff hereby institutes action against Defendant in the following terms..:

*I. Payment of the sum of EBO, 000 being in respect of a restaurant business **sold on the 25th August 2015**, by the plaintiff to the Defendant ... "* [Emphasis is added].

The assailed part of declaration reads thus:

*"On or about the 6th May 2015 and at Manzini, the parties in their personal capacities entered and signed a Deed of Sale of business ..."*¹

[8] There are notable differences in the dates stated in paragraphs 1 of the summons and 3 of Declaration as quoted by Defendant. However, to properly assess validity of the Defendant's criticism the entire Declaration should be taken into account. Paragraph 4 of the declaration reads:

"The material terms of the Deed of Sale, inter alia, were as follows:

4.1 The purchase price for the business shall be the sum of E235, 000.00 (Two Hundred and Thirty [sic] Thousand Emalangeni)."

Paragraph 5 reads:

¹ See Paragraph 3 of declaration.

"5.1 On or about the 25 August 2015, the Plaintiff and Defendant entered and signed a payment agreement ...

5.2 The defendant agreed to pay the Plaintiff and [sic] outstanding sum of E80, 000 (eighty thousand emalangeni) over a period of 3 months from date of payment of the deposit of E150, 000.00 (one hundred and fifty thousand emalangeni) ..."

There is a dispute between the parties pertaining to the payment of E150,

000.00 made by the Defendant which she maintains was in full and final settlement. The Plaintiff on the other hand maintains that was a deposit and that it was due and payable per the subsequent agreement of the 25 August 2015.

[9] Disparity referred to between the Summons and Declaration is superficial, and this is due to poor arrangement of facts and lack of attention to detail in drafting. However, defendant should not confine itself to the opening paragraphs of the Declaration, but the entire declaration provides a full picture and context of the claim stated in the simple summons.

[10] Omission to furnish original copies: No original copies of the documents relied on have been exhibited during the Plaintiff's case. These include the payment agreement signed on the 25 August 2015 relied on by the Plaintiff as evidence that despite her affidavit of acceptance of E150, 000.00 payment, they agreed that there was E80, 000.00 balance due to be paid by the Defendant.

[11] Defendant cited authorities in support of the best evidence rule and the exceptions when copies may be accepted as secondary evidence.

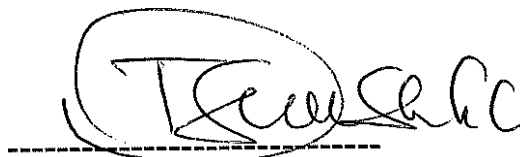
Curiously

Plaintiffs Counsel has not addressed this issue directly, contending himself with general submissions that a *prima facie* case has been made by the Plaintiff. Be that as it may, the Court reserves consideration of the strength or otherwise of the evidence presented to the end of the trial after hearing both parties.

[12] The attack on credibility of the Plaintiff as a witness and alleged inconsistencies of her evidence is presented as another basis for absolution. The Defendant cites *inter alia*, the fact that items in the inventory were used for evaluation of the business to come up with the sale price of E235,000.00 and that a subsequent evaluation came up with a lower figure. The Plaintiff denied knowledge of a subsequent evaluation. Defendant regards such denial as an act of dishonesty on the part of the Plaintiff. In any event I consider that evaluation of credibility of witnesses' testimony should best be dealt with after defence case. It is an exercise best dealt with at the end of the trial, unless the evidence complained of is hopelessly inconsistent and warrants no answer. This is not the case here.

[13] It is found that the Plaintiff has made *aprimafacie* case that warrants the Defendant to make a defence.

[14] The application for absolution is therefore dismissed with costs.

A handwritten signature in black ink, appearing to read 'D. Tshabalala', is written over a horizontal dashed line. The signature is stylized and cursive.

D. Tshabalala
Judge

For the Plaintiff:

For the Defendant: