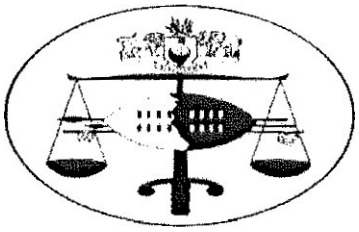

IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1870/19

HELD AT MBABANE In
the matter between:

AMANDA HENWOOD — Plaintiff

and

CORDELIA HENWOOD NO. — 1StDefendant
THE MASTER OF THE HIGH COURT — 2ndDefendant
THE ATTORNEY GENERAL — 3' d Defendant

Neutral Citation: Amanda Henwood v Cordelia Henwood and others
(1870/19/2020) [2021] SZHC 205 (2021)

Coram: B.W. MAGAGULA AJ,

Heard: 1 4 th October 2021

Delivered : 2 nd November 2021

SUMMARY: Civil Law Principles applicable to an application for absolution from the instance considered Plain.tiff especially in a claim for improvements on an immovable property Held: Plaintiff's evidence insufficient to enable a reasonable

man to ha.ve found for her. Application granted, with costs.

JUDGMENT

(ABSOLUTION FROM THE INSTANCE)

INTRODUCTION

[1] Serving bef01'e Court, is an application for absolution from the instance that . has been moved by the first Defendant after the close of Plaintiff's case.

[2] The first Defendant is the executor of the estate late Thornton Timo Henwood. She also happens to be a biological sister to the Plaintiff, as they share the same father but they have different mothers.

[3] During the hearing of this matter as the Plaintiff was on the stand, what unfolded could be but described as sibling rivali'Y reaching a boiling point. The tension between the sisters was laid bare. The first Defendant stood up from the gallery in an attempt to controvert what the witness was saying. The Plaintiff was the one and only witness that gave evidence.

[4] After the Plaintiff had finished leading her evidence, the Plaintiffs Counsel Mr. M.P Ndlangamandla closed his case. The Defendant's Counsel then

made an application for absolution from the instance, viva voce. This judgement is a sequel of that application.

BRIEF BACKGROUND FACTS

[5] The Plaintiff is one of seven children of the late Thornton Timo Henwood. He will be referred to as the deceased in this judgment. The first Defendant is the executor of the estate and also a sister to the Plaintiff. During his life time the deceased appears to have amassed a considerable amount of property. Both immovable and Inovable. The Court was told he had a house in Fairview, two sticks (Zakhele) and a farm in Hluthi.

[6] It is the alleged improvements in the house at Fairview, that is the subject of this litigation. The Plaintiff is before Court claiming from the first Defendant the value of the improvements she made whilst she stayed in the house. The circumstances under which she came to be in occupation of the house will appear in detail later in this judgment. The PlaintifPs claim appears to be against the fli'St Defendant only. Although there are two more other Defendants, being the Master of the High Court and the Attorney General in his official capacity.

[7] In order for the Court to properly determine the application for absolution from the instance, it is proper that a survey of the evidence that has been adduced by the Plaintiff thus far, be made.

SURVEY OF PLAINTIFF'S EVIDENCE

[8] The Plaintiff through her attorney made an opening statement before she took the stand. Ml'. Ndlangamandla submitted that they will seek to lead evidence to demonstrate that the Plaintiff made certain improvements on the house at Fairview. She would detail the costs thereof and she will demonstrate that there was never a lease agreement between her and the first Defendant. Mr. Ndlangamandla further submitted that what the Plaintiff is claiming before Court, is only a fraction of what she actually expended on the improvements. The estate was unjustifiably enriched by the Plaintiffs improvements on the immovable property.

[9] When Ms Henwood subsequently took the witness stand, her evidence in summation was as follows;

9.1 She is employed by eSwatini Civil Aviation Authority and the first Defendant is her sister.

9.2 She considers the house at Fairview which she fully described as lot 213 Mendip Road, Fairview Township, Manzini, her home. That is where her late father lived. She proceeded to tell the Court that it is where she and hel' other siblings lived. She started living there in her early teenage years. Her father also has another house in Zakhele.

9.3 After her father's desmise no one took occupation of the houses. That is, the house in Fairview and the house in Zakhele. The first Defendant rather arranged for certain people to take care of the

house. She did not mention who those people were at the time this arrangement was made. The house in Zakhele was let out.

9.4 The deceased had a Will, but it was apparently discarded by the first Defendant as she was not happy with it. Apparently the deceased had bequeathed the Fairview house to his children from his last marriage. The details of the siblings were not delivered. In December 2008, Plaintiff approached the first Defendant and requested to occupy the Fairview house. She accepted her request and allowed her to move in. The parties did not have a discussion about any rentals that would be payable by the Plaintiff. The Plaintiff told the Court that the arrangement was that she would simply move in and take care of the house.

9.5 Whilst she was in occupation of the house, the first Defendant concluded the drafting of the liquidation and distribution account. In terms of which Plaintiff inherited the Zakhele house, which she described as house No. 3 plot 569 Zakhele Township. She also inherited I I cows from the farm. Two of which as per the agreement with the other beneficiaries were pooled with those from the other siblings and given to what the Plaintiff called the "aunties" She also inherited 3 sheep and 3 goats. At some point, she also received a lump sum of El 0 000.00 (Ten thousand Emalangeni), which she allegedly also used for the ilnprovenwnts in the Fairview house.

9.6 In as much as Plaintiff inherited the Zakhele house in 201 1, she never took occupation thereof. The first Defendant continued to collect monthly rentals from it. Plaintiff also continued to live in the Fairview house without the payment of rentals. The Fairview house,

in terms of the distribution account, had accrued to her 6 other siblings jointly, including the first Defendant.

9.7 When she took occupation of the Fairview house it was in need of renovations. This is attributed to the fact that at the time of his death, her father was no longer living there full time. The aspects of the property that needed refurbishment were the following;

9.7. I the roof was leaking

9.7.2 the boundary fence had a hole in it, to the extent that dogs were coming in and out of it.

9.7.3 the yard around the house also needed maintenance.

9.7.4 the kitchen cupboards were falling off.

14.5 the floor tiles were peeling off.

[10] When she took occupation of the house, it had been evaluated at E460 000.00 (Four hundred and sixty thousand Emalangeni) and the land was El 05 000.00(One hundred and five thousand Emalangeni). The total value was E565 000.00 (Five hundred and sixty five thousand Emalangeni), that was in the year 2008. The Plaintiff applied that annexure AHI be adlnitted as an exhibit which was the City Council evaluation reflecting the above amount. In 2017 a meeting was held at the Fairview house, with all the other siblings in attendance. The Plaintiff claims, she made her intention to purchase the house to her siblings.

[l l] In fact, the Plaintiff told the Court that an indication that the house might come up for sale, was made after one of her brothers, Theo Henwood,

mentioned to the other 5 siblings that they should consider to have a conversation regarding the sale, as the joint ownership of the house would not work. Each one of them owned a one sixth share of the house. Apparently the other siblings agreed to this. The parties then agreed in principle that the house should be sold. As to who, when and for how much was it to be sold for were issues to be determined later.

[12] She was then tasked to do an evaluation of the house which came up to be in the sum El 300 000.00 (One million three hundred thousand Emalangeni). The evaluation was done by Masina Mabuza Evaluators in Manzini.

[13] According to the Plaintiff she only qualified for a bank loan of El 100 000.00(One million one hundred thousand Emalangeni). She continued to tell the Court that her siblings attempted to sell the house in the open market through advertising it in the local newspaper for a sum of El .6 million. Apparently that price could not attract any buyers. She again approached her siblings and offered the E 1.3 million as per the evaluation. The executor apparently refused this offer and was opposed to any discounts being made. She eventually purchased the house for El .5 million. A deed of sale was signed and she financed the house for that amount through the bank.

[14] Subsequent thereto, at some point when she visited the Master of the High Court in Hlathikhulu, she discovered in the Master's file that, the first Defendant had at some point signed a deed of sale for E800 000.00 (Eight hundred thousand Emalangeni). This apparently came as a shock to the her because she could not understand why the first Defendant was refusing her

offer of El .3 million, when she was amenable to sell it to an outsider for a lesser price. The deed of sale was also submitted in Court and was Inarked exhibit AH2.

[151 The Plaintiff told the Court that prior to her purchasing the house, she had already made a lot of improvements to it. She intimated that she would only list the detail, which she considers to have been major. The Plaintiff claims she erected the boundary wall, fitted new kitchen cupboards, did the landscaping and paving in the yard, she erected a new gate and she also installed new rain gutters, as the old ones had rusted and they were leaking. She also constructed the sewer pipes from the house to the sewer line because there was no connection between the house and the sewer line when she moved to the house.

[16]She proceeded to relate to the Coun that after she had erected the wall fence, it's value alone was E200 000.00 (Two hundred thousand Emalangeni). And that was the shortest side of the wall fence, it was not the complete wall fence. She continued to tell the Court that she also painted the house inside and outside. She emphasized that these renovations were necessary. They were not fanciful, but were necessary for the house to function properly. She then estimated the total improvements to have been over E500 000.00(Five hundred thousand Emalangeni). She repeatedly told the Court that she staffed keeping the receipts late after she began the process of renovations. When she started the renovations she did not find it necessary to keep the records. The receipts according to the Plaintiff add up to El 39 000.00 (One hundred and thirty nine thousand Emalangeni). They are part of the exhibits submitted in Court as part of her evidence.

[17] The Plaintiff also submitted a document from the City Council of Manzini being the evaluation for the period 2013 to 2015. It is marked AH3. The Plaintiff proceeded to tell the Court that, the value of the building went up

and the valuation was El 1 13 000.00 (One million one hundred and thirteen thousand Emalangeni).

[18] The Court was also told that Plaintiff approached the first Defendant with regard to her claim for the improvements of E200 000.00 (Two hundred thousand Emalangeni). The claim was allegedly rejected. For the reason that the Plaintiff also benefited from the improvements as she also stayed in the house rent free.

[19] Subsequently thereto, the Plaintiff approached the Master of the High Court, who advised her that there was an advert on the newspaper, calling upon creditors of the estate to claim and debtors to pay their dues. She thereafter filed her claim officially, to the first Defendant in her capacity as executor. In light of the impasse between the Plaintiff and the first Defendant regarding the claim, the Master was called upon to decide the matter. The Master directed that the Plaintiff must approach the Court. A letter from the Master which is at page 19 of the book of pleadings was handed in as an exhibit marked AH7.

[20] After the Plaintiffs testimony, she was crossed examined at length by the First Defendant's Counsel, Ml'. M. Manyatsi.

[21] I will summarise hereunder the highlights of the cross examination. A question was put to the witness as to why she thought she should live in the house for free, as she never lived there initially, but stayed with her mother.

The Plaintiff was steadfast in her response. She clarified that she used to visit her father in the same house ever since she was young, aged about 13 years old. She lived there in hel' teenage years, with her father and her other siblings. It was also put to her that she relinquished her rights to live there, on the 1 4 th November 201 8, when she agreed to inherit the Zakhele house. From that date, her other siblings were the owners of the Fairview house. Her response was that, in as much as that is true, the liquidation and distribution account was never implemented. Everything continued as before. The executor also continued to collect rentals from the Zakhele house, which in terms of liquidation and distribution account, is for Plaintiff.

[22] In as much as the first Defendant's Counsel, put it to the witness that by virtue of the fact that she appended her signature to the L&D [I] meaning that she accepted the inheritance reflected therein. By so doing she knew that she had relinquished her rights to stay in the Fairview house. The witness was unmoved in her response.

[231 A lot was said during the cross examination regarding the livestock and the farm at Hluthi and the fact that the rentals at Zakhele together with the rentals collected from the cottage of the Fairview house were used to cater for the farm's expenses. Forming part of the livestock at the farm, were also livestock that had been inherited by the Plaintiff. As such she could not claim to be oblivious to the running expenses of the farm. In my view, the evidence relating to the livestock and whether Felicity Henwood was compensated for the improvements that she herself Inade in the cottage, are not so material for. the determination of the application for absolution fron-n the instance.

[24] I will summarise hereunder, what I consider to be relevant to the application for absolution from the instance.

[25] It was raised with the Plaintiff during cross examination, firstly that she never sought permission to effect renovations. Secondly, that when she took

occupation of the house, it was liveable as she was able to live in it, in the state it was in for a while. Further, that it is not possible that the owner of the house who died in 2007and it was said at the tilne of his death, the house could have being in a dilapidated state. He was a man of means. He had assets including livestock , it could not have been likely for him to live in a house as deplorable as the state in which the Plaintiff paints it to have been.

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[1] Liquidation and distribution account

In response, the Plaintiff insisted that, during her father last days, he spent more time on the farm in Hluthi, than at Fairview. So it is possible that he was not prioritising the renovations at Fairview.

[26] It was also made an issue during cross examination, that the renovations, . which the Plaintiff allegedly effected, were for her own personal convenience. She effected them to enjoy the comfort they would add to the house. In other words, she personally benefited from them. The Plaintiff insisted that all of the renovations she effected were out of necessity. To demonstrate that, the executor encouraged and aided them. Whenever she visited the house, she applauded and encouraged the Plaintiff. At some point, she contributed EIO 000.00 towards the construction of the wall fence.

[27] It was also made an issue during cross examination that, the Plaintiff effected the renovations out of her own volution and peril. To this, the Plaintiff agreed. It was then concluded by Mr. Manyatsi that, since the Plaintiff had agreed that she renovated the house out of her own volution and peril, she then has no right to turn around and claim for the same improvements. To this, the Plaintiff answered that the reason why she sought the refund is that the owners, benefited financially from the improvements, as the property appreciated in value as a result thereof.

[28] It was also put to the witness that, she effected the renovations as a gesture of appreciating that she stayed in the house rent-free, for a considerable number of years. It was therefore her way of giving back to the owners of the house. The witness disagreed with this. She insisted that the l'enovations that she did improved the property. Consequently they enhanced the value and outlook of the propeny. The first Defendant's Counsel took an issue with response pertaining to the outlook of the house being a necessity. He put it to her that an outlook of a property can never be a necessity.

[29] It was also put to Plaintiff that when she took occupation of the house it was liveable. There were tiles on the floor, the kitchen had cupboards that were

intact. There was also fencing. To this, the Plaintiff responded by telling the Court that, in as much as the tiles were there, but they were plastic tiles. The flooring on the house was wooden. It was therefore necessary for her to change the tiles as some of the tiles were loose and coming off. She told the Coult that she used E 10 000.00 (Ten thousand Emalangeni) to replace the tiles. The Defendant's Counsel took an issue with this and put it to the witness that you replace what you found. There was no need for her to change the quality of the tiles and completely retile the house. To that, the witness said she does not agree.

[30] On the issue of rent, the Plaintiff insisted that the owners of the house never took it up with her during her entire stay that she was expected to pay rent. Therefore, it is not her fault that the owners(her siblings) of the property, neglected the issue. As such, there was no obligation on her part to pay rent also. At the time when they raised the issue which was in 2017, it is when she had already initiated negotiations to acquire the property. She thereafter embarked on a process to evaluate the house, and she subsequently purchased it. On the aspect of the valuations being exhibit AH3 and AH4 the first Defendant's Counsel, took an issue with the fact that, there is nowhere on the evaluation, where it stated that amounts stated therein were influenced by the improvements allegedly effected by the

Plaintiff. Her response was to the . affirmative. She confirmed that this was a government/municipal evaluation, and it did not have that conclusion.

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[31] It was also put to the Plaintiff that she was strategic and systematic in the way in which she effected the improvements. Over the years that she occupied the property she became attached to it, to the extent that she then formed an intention to own it, one day. The improvements which she effected were a result of such personal aspirations. The Plaintiff vehemently disagreed with this and insisted that the Defendant's Counsel cannot predict why she effected the improvements..

[32] On the aspect of exhibits AH5-AH6 which are the receipts that were adduced by the Plaintiff as evidence that she expended money on the property. It came

out from the cross examination that, they add up to the amount of El 26 788.94 (One hundred and twenty six thousand seven hundred and eighty eight Emalangeni ninety four cent), not the El 39 000.00 (One and thirty nine thousand Emalangeni) stated by the Plaintiff during her evidence in chief. It was also put to the Plaintiff that the receipts as they are, do not prove that improvements were made on the property. To this, the Plaintiff disagreed. She was then referred to page 18 of the book and was asked if the receipt there, state ex facie that she is the one who bought those items. The Plaintiff conceded that it does not. But, she then explained that when you buy cash, as a walk-in customer at hardware shops the receipt does not reflect your name, unless you hold an account at the store.

[34] Plaintiff was also asked whether she can establish a link between the receipts for the goods allegedly purchased and the renovations she claim were effected in the Fairview house. The Plaintiff conceded to this. She outrightly responded by saying the Defendant's Counsel is correct.

[35] That is by and large the summary of the cross examination.

[36] The Plaintiff's Counsel Mr. Ndlangamandla re-examined the witness and there is nothing much that changed from what she had said during her evidence in chief.

THE APPLICABLE LAW

[37] I find it proper that prior to stating the law on the subject matter of an application for an absolution from the instance, I must do so in context of what the claim before Court is. The Plaintiff's claim is for improvements that were allegedly effected by her on the property that was initially owned by the estate. As a result of the liquidation and distribution account it accrued through inheritance to her other 6 siblings, whose details have already been alluded to above. In terms of paragraph [81 of the Plaintiffs particulars of

claim, the improvements are said to be the total of E302 300.00 (Three hundred and two thousand three hundred Emalangeni).

[38] In terms of paragraph [9] of the Plaintiff's particulars of claim, the market value of the property as per the evaluation report by Masina Mabuza Properties stood at E 1.3 million (One million three hundred thousand Emalangeni). The Plaintiff makes an issue that the property was sold at a higher price of El .4 million (One million four hundred thousand). I fail to appreciate why this is an issue. This price was agreed t0[1] . So, whatever misgivings Plaintiff may have and whatever emotional discomfort she has regarding this, the price was agreed to by the parties through a deed of sale. What is relevant though, for purposes of this ruling, is that the Plaintiff alleges that the value of the property was increased by the improvements (my own underlining) and or renovations made by her. In the last sentence [2], she makes an averment that the first Defendant is liable to her for reimbursement/refund on the improvements/developments and fittings made to the property mentioned, for the total sum of E200 000.00 (Two hundred thousand Emalangeni). There is no explanation why she is claiming a lesser figure of E200 000.00 (Two hundred thousand Emalangeni), when in paragraph [8] she has detailed against each improvement and placed an amount, which total to E302 300.00 00 (Three hundred and two thousand three hundred Emalangeni).

[39] In analysing the evidence given in Court and trying to answer the requirements for application for absolution from the instance, that would entail the Court to assess whether at this point, the Plaintiff has made a case for a reimbursement of the money she expended on the improvements, to the standard that any reasonable man assessing the evidence she has given thus far would make a finding in her favour.

[40] It is a recognised procedure in civil trials that after the Plaintiff has closed its case, the Defendant before commencing his own case, may apply

1 See exhibit "AH6" WHERE THE Plaintiff in paragraph 1 concedes that she purchased (my underlining) the property for El.4 million.

2 Of paragraph 9 of the particulars of claim.

for a dismissal of the PlaintifPs claim. Should the Court accede to this, the judgement will be one of absolution from the instance. [3]

[411 The ancestor of legal authorities in this area of the law, is non other than Gascoyne v Paul & Hunter [5] ; where the principle was enunciated as follows:

> "When absolutionfrom the instance is sought at the close ofPlaintiff's case, the test to be applied is not whether the evidence led by the Plaintiff establishes what would finally will be required be to established, but whether there is evidence upon which a Court can apply its mind reasonably to such evidence, could or might (not should, or ought to) find for the Plaintiff".

[42] This implies that a Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all elements of the claim to survive absolution as without such evidence, no Court could find for the Plaintiff. [4] . When applying the test as laid above in context and to the matter at hand, what this test entails is that this Court must assess the evidence as given by the Plaintiff thus far and determine whether her evidence establishes what would be required to be established, for purposes of proving a case of a claim for improvements made on an immovable property. The Court would then be required to apply its mind reasonably to such as given by Ms. Henwood, to ascertain if in such a matter, on the evidence given thus far any Court applying its mind reasonably could or might (not should or ought to) find in her favour.

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3 Herbstien and Vanwinsen the civil proteas of the High Court of South Africa fifth addition volume 1 at page 920, 1970 tbd 1 1973

4 Marin and Trade Insurance Coitd v Van der schyff 1972 (1) SA 26 (A) at 37 G-38; see also Herbstien and Vanwinsen supra at page 920

[43] The Plaintiffs claim appears to be premised on unjustified enrichment. [5] It is trite that the burden of proof of enrichment rest on the Plaintiff and the burden of proving of contests is also on the Plaintiff. [6]

[44] To succeed in a claim based on unjust enrichment, a Plaintiff is required to comply with four general requirement; firstly, the Defendant must have been enriched; Secondly, the Plaintiff should have been impoverished; Thirdly, the Defendant's enrichment must have been at the expense of the Plaintiff; Finally, the Defendant's enrichment must have been proven to have been unjustified, which means that is was without a legal course.9

[45] It is a well-established doctrine of our law that no man may enrich himself at the expense or to the detriment of another. Following this principle even in the matter at hand, the onus was on Ms Henwood, through her own evidence or other form of acceptable evidence, before she could close her case. To adduce evidence upon which a reasonable man might find for her. The Court must then assess through what she has adduced so far, if there is a primafacie case that discharges her onus to establish a claim of unjust enrichment, as per the requirements set out above. This means at this stage she must have adduced prima facie evidence pointing to the direction that Defendant has been enriched, and that she has been impoverished, and that the first Defendant had been enriched at her expense and finally that the first Defendant enrichment must have been prima facie proven to have been unjustified and without legal course. This is what the Court must look for, from her testimony.

[46] In Gudu Grenade Operations (Pty) limited v Caterna (pty)limited 2003 (5) SA193 (SCA) the Court held at paragraph 2, as follows;

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5 See paragraph 6.4 of the Plaintiff particulars of claim

6 JD Botha and SIGNS (Pty) Limited v Malty Cranes and Platforms (Pty) limited Gauteng local division Johannesburg appeal case No. A3049/2019 at paragraph 25 ⁹ Supra JD Botha and SIGNS (Pty) Limited v Malty Cranes and Platforms (Pty) limited Gauteng local division Johannesburg appeal case No. A3049/2019 at paragraph 26

"the presumption Q/ enrichment arises when money is paid or goods are delivered. At that point the Defendant then bears the onus to prove that he has not been enriched; quoted with approval In African Diamond Exporters (Pty) limited v Baclays Bank International limited 1978 (3) SA 699 (A) at 713 G-H...

[47] It is therefore proper to do a survey of the evidence that has been presented this far, to see whether even on a prima facie basis meets the requirements of unjust enrichment, which the Plaintiff had an onus to demonstrate for the claim to succeed at the end of the day.

Has the estate as represented by the first Defendant been enriched? Unjustified enrichment is defined as a situation where one person receive benefit or value from another at the expense of the latter without any legal course for such receipt or tension of value or benefit of the former. [7]The evidence that was adduced by the Plaintiff in an effort to demonstrate that the property at Fairview received a benefit or value from the renovations which she allegedly effected, produced municipal council valuations which reflected that the price of the property from the time she took occupation of the property and over the years had increased considerably in value.

[481 Exhibit AHI in the face of it, is a computer printout which bears a heading reflected as "valuation movement report" for 3 rd June 2009. Next to the heading, it is inscribed "movements only". On the body of this document, it's written "summary". There is a couple of figures in the document which were unexplained. E 7000.00 (Sven thousand Emalangeni) below E7000.00 (Sven thousand Emalangeni) there is a couple of zeros then it reflects E70 000.00 (Seventy thousand Emalangeni). it continues to capture building against the date y[d] June 2009 and reflects E370 000.00 (Three hundred and seventy thousand Emalangeni). The total column with the heading reflects El 05 000.00 (One hundred and five thousand Emalangeni). The total column under the heading building shows E460 000.00(Four hundred and sixty thousand). There is also a figure that is hand written with a blue pen which

7 www.legaldictionary.com

is E565 000.00 (Five hundred and sixty five thousand Emalangeni). There is also another figure circled in a blue pen written 2009. I must pause and observe that, as this exhibit was handed in during the leading of the Plaintiff' s evidence in chief, at some point Counsel for the first Defendant raised an objection that the witness had simply handed this document, without speaking to it and it's contents. That objection comes to the fore in the analysis of this document. What I have just set out above, is what the Court observes on the face of the document. The witness did not tell the Court who prepared this document. Whether it was a person at the Municipality, she only mentioned that it is a municipal evaluation. Nothing was said as to who is the author? When was it done? She did not mention, the document is supposed to speak for itself. This particular exhibit (AHI) does not reflect that this evaluation is in respect of lot 213 Mendip Road, Fairview Township, in Manzini. Secondly, even if the Court would accept and condone the unexplained handwritten figure to be representing the value of the property at that time. It is not detailed what was valued in terms of the specific different components of the property. It only categorises the property as a and building. As to what aspects of the building come to E460 000.00 (Four hundred and sixty thousand Emalangeni) it is silent that is if we assume the deferential value that was going to be added by this evaluation was to reflect that in 2009 the property was worth E565 000.00 (Five hundred and sixty five thousand Emalangeni) whilst a detailed value would have helped as it would have possibly reflected the values of the different components of the building which the Plaintiff allegedly improved.

[49] An analysis will now be made in respect of exhibit "AH3". It is in the same format as exhibit "AH2". This document was said to be the evaluation in respect of the property in Fairview for the period 2013-2015. Again this document suffers from the same defect as AH 1. The Plaintiff only told the Court the document presentation valuation of the Fairview property. The document on it's own does not say so. However, where this document is different, at least it, shows it is in respect of the account of Mr. Henwood which one can assume refers to the deceased. Although, it is common cause that the late Mr. Henwood had more than one property. The document does not, on its own reflect that this particular evaluation related to that property at Fairview, whose improvements are under contention before Court. In as

much as this exhibit shows an improved value, It is also hand written. The person whose work has not been disclosed. It common course though that when you add up the two figures of the site and building, it add up to the sum of El, 1 13, 000.00 (One million one hundred and thirteen thousand Emalangeni). Which obviously shows a considerable increase from the evaluation in 2009. However, what it still oblique is what influenced the increase. There are infinite possible causes that can affect the value of a building. Especially in an upward trajectory. Again, for the increase in value to be attributable to the alleged improvements someone surely ought to have talked to the exhibits and linked the increase in value with the alleged improvements that were done by the Plaintiff. Also, the specific increased values should have been depicted in one form or the other. On this exhibit is silent on which features of the house increased in value which transpired to the over whole increase in the value of the property. There are no pictures. The name of the person who carried out the valuation in 2013 -2015 has not been mentioned and also what he says influenced his consideration for the upward trajectory has not been explained.

[50] The other exhibit that was also submitted by the Plaintiff as part of her evidence and as proof that the value appreciated during her stay in the house and through the improvements she effected, was exhibit AH4. This document is also similar to the others. However, this one has more information than the rest. At least on it, the name of the owner is clearly captured. The description of the property is there, as it clearly states the physical address as 213 Mendip Road. There is clearly a date, although it has truncated but it shows that it was done on the 30 th September 2021. This one shows value of El 220 000 (One million two hundred and twenty thousand Emalangeni).

[51] What is clear from this exhibit is that, the figures reflected in evaluation reports were on the upward trajectory in year 2021. They started from E565 000.00 (Five hundred and sixty five thousand Emalangeni) in the year 2009 to the value of El 220 000 in year 2021 (One million two hundred and twenty thousand Emalangeni). Assuming that the exhibit did not have the defects that I have already highlighted above, the impression would be

that the estate had been enriched in the increased value. But the matter does not

end there. The requirements for a claim for improvements and unjust enrichment are not only that the Defendant must have been enriched. The second requirement is that, the Plaintiff should have been impoverished by the enrichment. That is exactly where there is void which is a prevalent on both exhibits. The documents are silent as to how was the Plaintiff impoverished. All the exhibits are also silent as to how was the upward increase reflected in the evaluations attributable to Plaintiff. In other words, the impoverishment element even on a prima facie basis is not deducible.

[52] The Court accepts that the Plaintiff submitted receipts which I have already alluded to earlier in the judgment. They are exhibits AH5-36. I will not go to the depth of the contents of these receipts as they are self-explanatory. They are clearly for building materials they range from cement, to tools, paint brushes, tiles, tiling cement and so on. There are also receipts for services and transport expenses. The elephant in the room is that there is no connection between all the building materials reflected in the receipts and the improvements effected on the Fairview propeny. In as much as the receipts for the paint clearly depicts the Plaintiffs name it only ends there. No evidence even at a primafacie level has been led to demonstrate that the paint bought by Plaintiff was transported and used on the house in Fairview. The absence of that link causes a disconnect in the evidence, which inadvertently makes it to fail the test outlined above. Even on a primafacie basis, it is not clear whether the Plaintiff has been impoverished in the amount that she claims.

[53] The Plaintiff did not volunteer an explanation for herself or through her counsel as to why did she not at least call to the stand the contractor or the carpenter or painter who effected the alleged improvelnents on the property. That person or persons would have clearly connected the receipts to the work or improvements done on the property. That at least would have provided a prima facie proof that the work was done and was paid for by

Plaintiff. The evaluator was also key to connect the value and extent of the works carried out on the property with the amount claimed.

[54] When the Plaintiff referred to exhibit AH6 in second page, she told the Court that at the time she purchased the house the evaluation stood at El 300 000.00 (One million three hundred thousand Emalangeni). She then went on to tell the Court that the evaluation was inclusive of the improvements she effected. The evaluation of El 300 000.00 (One million three hundred thousand Emalangeni). was not produced nor handed in Court as evidence. This then begs the question, how does the Court then link her allegations that the improvements she effected were included in that evaluation, without that document being presented in Court. Also without the author of the evaluation giving evidence as to what was evaluated and what was the value before and after the renovations. In fact, that person would have been able to pinpoint the extent of the alleged improvements effected by the Plaintiff. Probably the evaluator or the evaluation report would have provided pictures, which would have been shown in Court,

CONCLUSION

[55] The evidence as presented by the Plaintiff in it's entirety, is lacking in the detail, nature and extent of the renovations. In as much as she listed the type of renovations that she did in the different parts of the house. Unfortunately, the Coult cannot visualize or discern what they were and their value thereof. Plaintiff could have done more than just listing what she did. Basic things like taking pictures of the way in which the property looked like when she moved in and comparing with pictures of what the property looked like when she moved out. There is no explanation why that was not done considering the receipts she presented shows that there were a lot of service providers. For instance, there is Legacy Logistics who is reflected on a receipt exhibit AH8. It shows that they supplied building blocks. No explanation has been tendered in Court why the Director or anyone representing Legacy Logistics was not subpoenaed to give evidence as to where these blocks were delivered. That would have easily provided prhna facie evidence that the blocks were used to construct the wall or any of the alleged improvements at the Fairview house. The list of possible witnesses is endless. There is V usi Thembu who also appears on exhibit AH8, who

was apparently paid a gate deposit and for window buglers. Further, on the face of the receipts, Plaintiff paid for total sum of E 7000.00. But how does the Court know that these payments were for the improvements at the house in Fairview?

[56] The other glaring piece that is missing to connect the puzzle, is the allocation of value to each of the respective improvements done as listed by the Plaintiff. Some sort of value must be attached to each type of the works that were carried out. There must be a basis for it. What was presented to Court was a list and respective prices no one talked to how the value was arrived at. Was it the cost of the material and labour? That tiding up of the evidence would have assisted the Plaintiff to Inake prima faci.a case.

[57] In as much as this Court is alive and mindful of the fact that, a trial Coult should be very chary of granting absolution at the close of the Plaintiff's case. [I l] However, the evidence that has been led by the Plaintiff thus far, dismally fails to meet the test as set out by Hams JA in the case of Gascoyne v Paul & Hunter 1971 TPD 170. The Plaintiff has completely failed to make out a prima facie case in the sense that, no evidence relating to all the elements of the claim has been adduced to survive an application for absolution from the instance. This Court has applied it's mind reasonably to the evidence presented so far and there is no ounce of evidence presented based on which it could or may find for the Plaintiff.

[58] It is this Coun's consideration that in the circumstances and for the foregoing reasons, the application for absolution from the instance must succeed with costs.

ORDER

[59] (a) The application for absolution from the instance is hereby granted.

(b) Costs to follow the event.

[11] See Mabuza v Phinduvuke Bus Service No. 66/201712018] SCSH 13 (30 May 2018) commenced by His Lordship Dr B.J. Odokey

B.W. MAGAGULA AJ

THE HIGH COURT OF ESWATINI

For the Plaintiff: MR. S.P NDLANGAMANDLA FROM M.P NDLANGAMANDLA ATTORNEYS

For the Defendant: MR. M. MANYATSI FROM MANYATSI AND ASSOCIATES