

CIV/APN/164/86

IN THE HIGH COURT OF LESOTHO

In the Matter of :

GEORGE THABO MONAHENG Applicant

and

ROBERT MATJI 1st Respondent  
ANGELINA 'MATHABANG MALEKE 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 23rd day of October, 1995.

Applicant initially filed, with the Registrar of the High Court, a notice of motion in which he moved the court for an order framed in the following terms:

- "(a) Directing second Respondent to sign all papers necessary to effect the transfer of portion 618/1 Hooхло Area to applicant failing compliance therewith, an order authorising the Commissioner of Lands to prepare transfer papers without signature of second Respondent.
- (b) Directing First Respondent to re-erect the steel structure that he dismantled on a portion of 618 Hooхло Area.
- (c) Declaring the purported sale and lease agreement between First and Second Respondent to be a nullity.
- (d) Restraining First and Second Respondent from interfering with

applicant occupation of portion  
618/1 Hoohlo Area of site 618  
allocated to the late Lucas  
Maleke.

- (e) Directing First and Second  
Respondent to pay costs of this  
Application."

The application was opposed. Affidavits were  
duly filed by the parties. The matter was eventually  
placed, for hearing, before Sir Peter Allen, J. who,  
however, made a ruling that the application should  
convert into a trial and the notice of motion stand as  
summons. The pleas and the replication were duly  
filed. By consent of the applicant and the  
Respondents, hereinafter referred to as Plaintiff and  
Defendants, respectively, the following was  
subsequently made an order of the court:

- "1.) That Plaintiff withdraws his  
claim against 1st Defendant by  
agreement,
- 2.) That Plaintiff pay 1st  
Defendant's costs as agreed upon;
- 3.) That Plaintiff be allowed to  
apply for amendment of his claim  
documents and 2nd Defendant  
reserves his rights in this  
regard."

Plaintiff then applied, and was allowed, to amend  
his notice of motion, which stood as Summons, by  
deleting prayers (a) to (e) thereof and substituting  
the following:

- "1. Second Defendant to pay Plaintiff in terms of paragraph 6 of the agreement between Plaintiff as buyer and Lucas Mokhali Maleke as seller (annexure "A" before court) the sum of R10,728-96 being the monies plaintiff has paid for the butchery site in question plus interest thereon at the rate of 14% per annum as from 2nd July, 1980 to date of final payment.
2. Second Defendant to pay Plaintiff the sum of R5,536.00 in respect of the steel structure which belongs to Plaintiff and which steel structure Second Defendant sold to First Defendant plus interest thereon at 11% per annum a *tempore morae* to date of final payment.
3. Directing second Defendant to pay the costs of this action."

According to the particulars of claim as disclosed in the founding affidavit to the amended notice of motion which now stands as summons, Plaintiff and Lucas Maleke had concluded a written agreement (annexure "A") whereby the latter sold to the former a portion of his business site 618 Hooхло Area. The agreement read, in part :

"Whereas the Lessor is desirous of selling to the lessee his business site at Hooхло's No. 618 and the Lessee agrees to buy that portion, these two parties agree as follows:

1.

The site in question is No. 618 at Hooхло's as reflected on Maseru town plan of the Government department concerned, it is registered under Title Deed No.15523 dated 3/4.80.

2.

The portion agreed upon is on the west as indicated on the sheet annexed hereto measuring 98 metres perimeter.

3.

The Lessor undertakes to do all that is required by law to have this portion registered and transferred to the Lessee as soon as practicably possible.

4.

The Lessee undertakes to complete the butchery building which is situate on this site. He will install electricity and put in a big refrigerator at his own expenses.

5.

The agreements bind both the Lessee and the Lessor, their heirs or anybody else to whom the rights on this site may pass at any time.

6.

Should it happen that in any way whatsoever the registration of this site fails because it does not comply to law or for any other reason, all the money that the Lessee shall have paid for the butchery site in question shall be regarded as a loan to the Lessee and it will be refunded plus 14% interest per annum from the time the Lessee effects the first payment.

7.

All the expenses incurred for the registration of the portion of this site will be borne by the Lessee, but if the transfer registration fails the expenses already incurred by the Lessee will be regard as a loan which shall be dealt with in terms of section 6 above.

8.

The agreement reached on 2/12/80 No. 83 which was signed by the Lessee and the Lessor on 3/12/80 is not cancelled but clarified on sections which are considered not correct.

The agreement was made in Maseru on the 9th

day of July, 1981 and was signed by:

LESSEE : (Sgd) ??? MONAHENG WITNESS ????  
WITNESS ???? 9/7/81

LESSOR : (Sgd) L.M.?????????  
WITNESS (Sgd) K.Phaloli  
WITNESS (Sgd)J.Mochochoko  
2nd December, 1980

This is an agreement between L.M. Maleke  
and G. Monaheng on site No. 618 at Hoohlo's  
and this is as follows:

G.T.Monaheng has agreed to complete the  
butchery building on this site, install  
electricity and put in a big refrigerator.  
Maleke is to give him a portion of this very  
area measuring 97.87 paces perimeter.

(Sgd) L.M. ????

(Sgd) ????? MONAHENG

.3rd December, 1980."

In his allegations, Plaintiff carried out his  
part of the agreement and incurred expenses totalling  
an amount of M10,728-96 to which he was entitled, in  
terms of Clause 6 of the agreement (annexure A).  
Whilst the agreement (annexure "A") was subsisting,  
the second Defendant and the First Defendant, however,  
entered into a contract in terms of which the latter

erected a building on the part of site 618 Hooхло Area apportioned to the Plaintiff.

The particulars further alleged that, at the time Plaintiff and Lucas Maleke concluded the agreement (annexure "A"), there was a steel structure on site 618 Hooхло Area. Plaintiff bought that steel structure for M5,586-00. However, second Defendant subsequently sold the steel structure to First Defendant who had since disposed of it.

In the contention of the Plaintiff, the balance of convenience favoured a cash payment instead of transfer of the relevant portion of site 618 Hooхло Area and the return of the steel structure. Consequently, Plaintiff asked for judgment as prayed in his amended notice of motion which stood as summons.

In her plea to Plaintiff's amended notice of motion which stood as summons, Second Defendant denied the allegations contained in the particulars of claim. She denied, in particular, that she was liable to Plaintiff in the amount of M10,728.96 as alleged in the agreement (annexure "A") between Plaintiff and Lucas Maleke. According to Second Defendant, the steel structure attached to her immovable property viz. site 618 Hooхло Area. It, therefore, lawfully

belonged to her. She denied, therefore, plaintiff's allegation that he was entitled to the amount of M5,586-00 in respect of the steel structure. Wherefor, Second Defendant prayed that Plaintiff's claim be dismissed with costs.

In support of his case, Plaintiff testified as P.W.1. Briefly stated, his evidence was to the effect that he was a businessman and ran a pharmacy here in Maseru. He knew a certain Lucas Maleke who was also a businessman in Maseru. According to him, P.W.1 once approached Lucas Maleke with an offer to buy his business site 618 Hooхло Area but the latter declined the offer. However, in 1980 Lucas Maleke told him (P.W.1) that he wanted to build a butchery on his site 618 Hooхло Area. He was in financial difficulties and had, therefore, no funds to do so. Consequently, Lucas Maleke requested P.W.1 to assist him to erect the butchery building on site 618 Hooхло Area and in return he would apportion part of the site to him. P.W.1 accepted the offer.

The parties agreed that their verbal agreement would be reduced to writing. On 2nd December, 1980, Lucas Maleke accordingly brought a written document of the agreement to P.W.1. Both P.W.1 and Lucas Maleke signed the written agreement on the same day, 2nd December, 1980. Thereafter P.W.1 himself prepared a

more comprehensive document of the agreement. It was, on 9th July, 1981, signed by the parties and witnessed by their witnesses. P.W.1 handed the agreement (annexure "A") as exh "A" and part of his evidence in this trial.

According to him, P.W.1 assisted Lucas Maleke by paying for the materials which the latter required for erecting the butchery building. Some times P.W.1 himself paid for the materials and retained the payment receipts. At other times he gave money to Lucas Maleke who bought the materials and then handed the payment receipts over to him (P.W.1) for safekeeping. All the payment receipts were, therefore, kept in his (P.W.1's) custody. He handed them in as exhibit "B" and part of his evidence in this trial.

Site 618 Hooхло Area was surveyed and part thereof apportioned to P.W.1 by Lucas Maleke. There was, at the time, a steel structure erected on the part of the site apportioned to P.W.1. According to P.W.1, Lucas Maleke informed him that the steel structure had been erected, with his consent, by a group of five (5) people viz Messrs. Chaka Ntsane, Mafa Moletsane, Mangetana Khalikane, Sekese Mariti and Matsoso whose surname he (P.W.1) could not remember off hand. P.W.1 subsequently got in touch with the



five people who confirmed that the steel structure belonged to them. He offered to buy the steel structure and the owners thereof agreed. P.W.1 accordingly bought the structure for M5,586.00. As proof thereof, he handed in Exh "C" and Exh "D" being a written resolution by the owners to sell the steel structure and acknowledgement receipt of the amount of M5,586.00, respectively. The steel structure was, later on, sold by the 2nd Defendant to the 1st Defendant who had since disposed of it.

Before he could effect transfer of P.W.1's portion of site 618 Hooхло Area to him, Lucas Maleke passed away, on 7th August, 1982. He was survived by his wives and a son. His senior wife, Angelina Mathabang Maleke, (2nd Defendant) became his heiress, presumably because the son was, for one reason or another, unable to succeed as heir to the estate.

Following the burial of Lucas Maleke, P.W.1 met the 2nd Defendant and some members of her family at the butchery building on site 618 Hooхло Area. He drew their attention to the existence of exh "A", the written agreement concluded between him and the late Lucas Maleke. He gave them copy of the exhibit and after reading it, Mohopoli Maleke, the elder brother of the late Lucas Maleke, indicated that the family of Maleke would not dispute the agreement. 2nd Defendant

herself did not say anything on that occasion.

Later on, P.W.1 met 2nd Defendant in the presence of Mr. Harley, a practising attorney of this court, who was acting on behalf of a certain farmer creditor from the Orange Free State province of the Republic of South Africa. On that occasion P.W.1 again pointed out that he had been apportioned part of site 618 Hooхло Area which should, therefore, be transferred to him. P.W.1 and 2nd Defendant then arranged to go and see the Commissioner of Lands. They were accompanied, amongst others, by the 2nd Defendant's son and a certain Mr. Jessy who had apparently also been apportioned part of site 618 Hooхло Area by the late Lucas Maleke. At the office of the Commissioner of Lands, they were informed that, in order to effect transfer of portions of site 618 Hooхло Area, the first step was to establish who the heir to the estate of the late Lucas Maleke was. 2nd Defendant then completed certain forms after which the party dispersed.

The third occasion on which P.W.1 met 2nd Defendant about the transfer of portion of site 618 Hooхло Area to him was when he visited her at the home of a certain Lawrence Thabiso Letseka at the Central Prison residential quarters. He was again accompanied by Mr. Jessy. 2nd Defendant re-assured them that she

was still prepared to effect the transfers.

However, in 1986 2nd Defendant and Mr. Matji (1st Defendant) concluded a contract whereby the latter developed, and erected a building on, part of site 618 Hooхло Area apportioned to P.W.1. It was then that P.W.1 realised that the 2nd Defendant had changed her mind about transferring the portion of site 618 Hooхло Area apportioned to him. Hence the institution of the present proceedings for judgment as prayed in his amended notice of motion which now stands as summons.

In her testimony, P.W.4, Katleho Maleke alias Phaloli told the court that she was literate and lived at Moshoeshoe II location here in Maseru. In 1978 she and Lucas Maleke got married to each other according to Sesotho customary rites. She was present when her husband, Lucas Maleke, signed Exh "A", the agreement concluded between him and P.W.1. According to her, P.W.4 also signed Exh "A" as a witness. At that time she was still using a passport issued in her maiden surname "Phaloli". She and Lucas Maleke agreed that, in signing Exh "A", P.W.4 should use the signature that appeared in her passport. Hence her signature as "K. Phaloli" in Exh "A". P.W.4 denied the suggestion that her late husband, Lucas Maleke, was illiterate and could not, therefore, have signed Exh "A".

The evidence of P.W.2, David Mochochoko, was that he was literate and operated a business of butchery here in Maseru. He knew both P.W.1 and the late Lucas Maleke who also ran a butchery business in Maseru. He and Lucas Maleke were great friends and as such used to assist each other in their businesses. Indeed, he was the person who spoke on behalf of all the friends of the deceased at the funeral of Lucas Maleke.

According to P.W.2, He and Lucas Maleke worked closely together in their businesses of butchery. There was a time when Lucas Maleke told him that he wanted to erect a butchery building on his site 618 Hoohlo Area. He, however, had no funds to do so. In order to obtain the funds, Lucas Maleke thought of selling a portion of the site. P.W.2 encouraged the idea. He remembered one day Lucas Maleke showing him Exh "A" and asking him to sign it as one of his witnesses. The document (Exh "A") had already been signed by several people.

P.W.2 told the court that, in the course of their business dealings he had often seen Lucas Maleke sign documents and had no difficulty in identifying his signature. Of the signatures on Exh "A" P.W.2 positively identified that of Lucas Maleke who had signed as the seller. He denied, therefore, the suggestion that Lucas Maleke was illiterate and could

not have signed Exh "A". After reading it, P.W.2 did sign Exh "A" as second witness of Lucas Maleke. P.W.4 had already signed it as the first witness.

P.W.3, Teboho Jessy, testified that on 14th March, 1981 he and Lucas Maleke concluded a written agreement whereby the latter sold a portion of site 618 Hooхло Area to him. The agreement was signed by the parties on the same day, 14th March, 1981. He handed it in as Exh "E" and part of his evidence in this trial. In his evidence P.W.3 also denied the suggestion that Lucas Maleke was illiterate and could not, therefore, have signed Exh "E" and Exh "A".

P.W.3 confirmed the evidence that following the death of Lucas Maleke he met the 2nd Defendant on two occasions about the transfer of part of site 618 Hooхло Area apportioned to him. The first occasion was when he went to the office of the Commissioner of Lands where the 2nd Defendant was to sign transfer papers. He was in the company of P.W. 1, the 2nd Defendant's son, another relative of the 2nd Defendant and the 2nd Defendant herself. The second occasion was when he and P.W.1 visited the 2nd Defendant at the living quarters of the Central Prison. On those two occasions, the 2nd Defendant promised to effect transfer of the parts of site 618 Hooхло Area apportioned to them (P.W.1 and P.W.3). However, P.W.3

later on realised that the 2nd Defendant had changed her mind because a shopping complex was being erected on the parts of site 618 Hooхло Area that had been apportioned to himself and P.W.1.

In his evidence, P.W.6, Abner Mosaase, told the court that he was Commissioner of Lands until September, 1989 and as such responsible for the safe custody of the records of that office. He knew P.W.1 and the late Lucas Maleke, in his life time. To his recollection, P.W.6 received, in November, 1980, Lucas Maleke's application for conversion of a Title Deed of his site into a lease with the purpose of dividing the site into three (3) portions. He confirmed that one of the subdivisions was to be transferred to P.W.1. As he was no longer working at the office of the Commissioner of Lands, P.W.6 could not remember of hand if Lucas Maleke's Title Deed was eventually converted into a lease.

P.W.5, Mangetana Khalikane, told the court that he was an Agricultural Consultant in partnership with Chaka Ntsane, Setene Mariti, Mafa Moletsane and Tikoe Matsoso. He knew the late Lucas Maleke. At one time Lucas Maleke wanted to sell a site. The partnership was interested in buying the site. Whilst the negotiations were going on the partnership put up, with the consent of Lucas Maleke, a two stories steel

structure on the site. It, however, took a long time for Lucas Maleke to have the site transferred to the partnership which then resolved to sell the steel structure to P.W.1 at the price of M5,586-00.

In his evidence, P.W.5 told the court that at the time the resolution (Exh "C") was made by members of the partnership he himself had gone overseas to further his studies. His wife, therefore, signed Exh "C" on behalf of P.W.5. However, when P.W.1 actually paid the amount of M5,586-00 P.W.5 had already returned home. He himself was, therefore, able to sign, together with the other members of the partnership, Exh "D" which was the acknowledgement receipt of the amount of M5,586-00 from P.W.1.

In her defence, 2nd Defendant testified on oath as D.W.1. In as far as it is relevant, D.W. 1 told the court that she was the senior widow of the late Lucas Maleke. She lived at Kolonyama Ha Moramang. She confirmed that prior to his death in 1982 her husband, Lucas Maleke, was running a butchery business here in Maseru where he ordinarily lived with his other wives. He, however, often visited her at kolonyama when he would tell her about his commitments in Maseru. If he had concluded the agreement (Exh "A") Lucas Maleke would have told her about it. He never did. Indeed, Lucas Maleke was illiterate and

could not have signed Exh "A" as alleged. D.W.1 denied, therefore, the evidence that Lucas Maleke had concluded and signed the agreement (Exh "A") whereby he apportioned part of site 618 Hoochlo Area to P.W.1.

In her evidence that Lucas Maleke and P.W.1 never concluded the agreement (Exh "A") D.W.1 was supported firstly by D.W.2, Mohopoli Maleke, secondly by D.W.3, Julius Tjakate and thirdly by D.W.4 Lawrence Thabiso Letseka.

According to D.W.2, he was the elder brother of Lucas Maleke who always told him about his commitments. He never told him about the agreement (Exh "A") he had allegedly concluded with P.W.1. Lucas Maleke was, in fact, illiterate and could not have signed Exh "A". D.W.2 denied, therefore, the evidence that Lucas Maleke was, a party to the agreement (Exh "A") allegedly concluded between him and P.W.1.

In his evidence D.W.3 told the court that he was the son of the late Lucas Maleke whom he knew to be illiterate and could not sign his name. His business documents were always signed by his employees. D.W.1 was his (D.W.3's) mother.



Although at the time Lucas Maleke passed away, he was here in Maseru, D.W.3 did not actually stay with him. He was staying at the Central Prison where he was engaged as a civil servant. However, his late father always told him about his commitments. If he did conclude the agreement (Exh "A") Lucas Maleke would have told him about it. He never did. P.W.3 denied, therefore, that his father, the late Lucas Maleke, ever concluded the agreement (Exh "A").

According to him, D.W.4 was a civil servant, in the Government of Lesotho, engaged as the officer in charge of Quthing prison. He knew D.W.1 who was the elder sister of his wife. Lucas Maleke was, therefore, his relative. He remembered that in 1982 he was stationed at the Central Prison, here in Maseru, where he was the person in charge of the prison stores and as such responsible for buying meat for the prison. Lucas Maleke's butchery was supplying the prison with meat.

D.W.4 had no certainty as to whether or not Lucas Maleke was literate. However, on two occasions he did something which arose D.W.4's doubts as to whether he was literate. The first occasion was when Lucas Maleke came to the Central Prison and D.W.4 gave him certain forms which he had to fill in order to show how much meat he had supplied to the prison for the

month. Lucas Maleke told D.W.4 that his employees, and not himself, would be able to do it. He then took the forms to his business. Later on, Lucas Maleke returned to the central prison with the forms already completed. The second occasion was when D.W.4 was visiting Lucas Maleke who was ill. A young woman came and asked Lucas Maleke to supply her with meat on credit, for the weekend. He told the woman to go to the butchery where she would be attended to by the employees. When the woman requested him to make a note to that effect Lucas Maleke asked D.W.4 to do it and the latter complied.

It is worth noting that notwithstanding their allegation that Lucas Maleke was illiterate and his business documents were always signed by other people. D.W.3 and D.W.4 did not produce even one of Lucas Maleke's business documents signed by the other people. On the other hand P.W.1 produced Exh "A" which, according to him, bore the signature of Lucas Maleke as the seller and therefore, a party to the agreement (Exh "A"). Moreover, the evidence of P.W.1 that Lucas Maleke was able to sign his name was supported firstly by P.W.4, one of the late Lucas Maleke's junior wives who stayed with him, here in Maseru, and was actually present when he signed Exh "A" which she herself also signed as a witness; secondly by P.W.2, a business friend who also signed

Exh"A" as Lucas Maleke's witness; and thirdly P.W.3 who produced Exh"E", another written agreement concluded between him and Lucas Maleke and signed by the latter in his presence.

Considering the evidence as a whole, I find it reasonable to infer that P.W.1 has, on a preponderance of probabilities, proved that Lucas Maleke was able to, and did, sign the written agreement (exh."A"). The evidence of D.W.1, D.W.3 and D.W.4 that Lucas Maleke could not have signed the written agreement (Exh"A") cannot,, therefore hold water. In the circumstances, I am inclined to accept as the truth the evidence that P.W.1 and Lucas Maleke concluded the agreement (Exh"A")and reject as false D.W.1's version that they did not.

It is common cause, from the evidence of D.W.2, D.W.3 and , indeed, D.W.1 herself. that following his death the family of Lucas Maleke appointed D.W.1 to succeed in his estate as the heiress. According to her, ever since she took over the estate of the late Lucas Maleke as his heiress, D.W.1 never met P.W.1 in connection with the site, the subject matter of this dispute. She denied, therefore, the evidence that following the burial of Lucas Maleke, P.W.1 met her, about the transfer of a portion of site 618 Hoohlo Area, on three occasions viz. at the butchery building

on site 618 Hooхло Area, when they went to the office of the Commissioner of Lands and at the living quarters of the Central Prison.

It is to be borne in mind that in her evidence that, following the burial of Lucas Maleke, P.W.1 never met her, at the butchery building on site 618 Hooхло Area, in connection with the transfer of a portion thereof, D.W.1 was supported by D.W.2. The evidence of D.W.1 that she never went to the office of the Commissioner of Lands with P.W.1 and P.W.3 in connection with the transfer of a portion of site 618 Hooхло Area was likewise corroborated by D.W. 2 and D.W.3. I have, however, found, on evidence, that before his death Lucas Maleke had concluded, with P.W.1 the agreement (Exh "A") whereby the former had sold to the latter a portion of site 618 Hooхло Area. The undisputed evidence of P.W.6 that prior to his death, Lucas Maleke had started the process of dividing site 618 Hooхло Area into three portions, one of which was to be transferred to P.W.1 supported, in my view, the evidence that Lucas Maleke had, indeed, sold portion of site 618 Hooхло Area to P.W.1. When he passed away, on 7th August, 1982, Lucas Maleke had, however, not yet finalised the transfer of part of site 618 Hooхло Area apportioned to P.W.1.

Assuming the correctness of the evidence that

on site 618 Hoohlo Area, when they went to the office of the Commissioner of Lands and at the living quarters of the Central Prison.

It is to be borne in mind that in her evidence that, following the burial of Lucas Maleke, P.W.1 never met her, at the butchery building on site 618 Hoohlo Area, in connection with the transfer of a portion thereof, D.W.1 was supported by D.W.2. The evidence of D.W.1 that she never went to the office of the Commissioner of Lands with P.W.1 and P.W.3 in connection with the transfer of a portion of site 618 Hoohlo Area was likewise corroborated by D.W. 2 and D.W.3. I have, however, found, on evidence, that before his death Lucas Maleke had concluded, with P.W.1 the agreement (Exh "A") whereby the former had sold to the latter a portion of site 618 Hoohlo Area. The undisputed evidence of P.W.6 that prior to his death, Lucas Maleke had started the process of dividing site 618 Hoohlo Area into three portions, one of which was to be transferred to P.W.1 supported, in my view, the evidence that Lucas Maleke had, indeed, sold portion of site 618 Hoohlo Area to P.W.1. When he passed away, on 7th August, 1982, Lucas Maleke had, however, not yet finalised the transfer of part of site 618 Hoohlo Area apportioned to P.W.1.

Assuming the correctness of the evidence that

following the death of Lucas Maleke, D.W.1 was appointed to succeed him as heiress to his estate, it seems to me that P.W.1 had a motive to approach her in connection with the transfer of the part of site 618 Hooхло Area apportioned to him. The evidence of P.W.1 that following the death of Lucas Maleke, he did meet D.W.1 at the butchery building and when they went to the office of the Commissioner of Lands in connection with the transfer of part of site 618 Hooхло Area apportioned to him is, in my finding, more probable than the denial of D.W.1 in this regard.

Although D.W.1 denied that, following the burial of Lucas Maleke, P.W.1 and P.W.3 met her at the home of D.W.4, in connection with the transfer of portions of site 618 Hooхло Area, it is to be recalled that their evidence, that they did, was corroborated by D.W.4 himself. By and large, I am satisfied that following the burial of the late Lucas Maleke P.W.1 did meet D.W.1 as alleged and in her denial D.W.1 was, therefore, not being honest with the court.

According to him, P.W.1 had incurred expenses totalling M10,728-96 towards assisting Lucas Maleke to erect his butchery building. As proof thereof, P.W.1 handed in exh "B" being payment receipts for labour and purchase of materials. When, on 7th August, 1982, Lucas Maleke passed away neither the part of site 618

Hoohlo Area apportioned to him had been transferred to, or registered in the name of, P.W.1 nor had the M10,728-96 been refunded. Indeed, D.W.1 and the First Defendant had since entered into a contract whereby the latter admittedly developed his (P.W.1's) portion of site 618 Hoohlo Area. P.W.1, was, therefore, entitled to recover, pursuant to the provisions of Clause 6 of the agreement (Exh "A"), the M10,728-96 plus interest from D.W.1 on the ground that she was the heiress to the estate of the late Lucas Maleke.

D.W.1 pointed out that some of the receipts in Exh "B" were issued in the name of either Lucas Maleke or P.W.1 whilst others were issued neither in the name of P.W.1 nor in the name of Lucas Maleke. In the contention of D.W.1, the amounts reflected on the receipts that were not issued in the name of P.W.1 had been paid by Lucas Maleke out of his own money. She denied, therefore, the evidence that Exh "B" was proof that P.W.1 had paid the total amount of M10,728-96 towards assisting Lucas Maleke to erect the butchery building on site 618 Hoohlo Area. Consequently P.W.1 could not properly claim the whole of M10,728-96 as his entitlement.

It is to be remembered that, in his testimony, P.W.1 told the court on oath that pursuant to his agreement with Lucas Maleke he himself at times bought

the materials which he subsequently handed to Lucas Maleke. At other times Lucas Maleke obtained from him (P.W.1) the money with which he purchased the materials and/or paid the labourers. He (Lucas Maleke) would then hand the receipts over to P.W.1 for safekeeping. That explained why some of the receipts were not issued in his (P.W.1's) name.

It must be borne in mind that, in her own evidence, at the time the payments for labour and purchase of materials were made D.W.1 was not staying with Lucas Maleke. She was, therefore, not present. Her contention that the amounts reflected on the receipts not issued in the name of P.W.1 were paid by Lucas Maleke out of his own money was, for obvious reasons, mere speculation which could not, in my opinion, be accepted in the face of evidence to the contrary given by P.W.1, the person who was directly dealing with the late Lucas Maleke. Indeed, sight must not be lost of the fact that there was ample evidence indicating that, when he contemplated the erection of the butchery building on site 618 Hoochlo Area, Lucas Maleke had no funds to do so. For that reason he had to approach P.W.1 for financial assistance. It is, in my finding, sensible to accept as the truth the story of P.W.1 that he did, pursuant to the agreement (Exh"A"), advance the late Lucas Maleke with the amounts of money reflected on the



payment receipts comprising Exh."B" and reject as false D.W.1's version that he did not.

As it has been stated earlier, P.W.1 handed in Exh."B" as proof that in assisting the late Lucas Maleke to erect the butchery building on site 618 Hooхло Area he had incurred expenses to the tune of M10,728.96. It is significant to observe, however, that the last two (2) pages of Exh"B" are not payment receipts but quotations for the erection of a cold room and the installation of two (2) air conditioners. Only the remaining pages are payment receipts dating from the 2nd July, 1980 to the 2nd January, 1981. I have made a careful scrutiny of the payment receipts in Exh "B" and found that the sun total of the amounts therein reflected came to M5,580.69 and certainly not the M10,728.96 claimed by P.W.1.

The onus of proof that, in assisting Lucas Maleke to erect the butchery building on site 618 Hooхло Area, he had incurred expenses totalling M10,728.96 vested with P.W.1 on the well known principle that "he who avers bears the onus of proof". Assuming the correctness of my finding that the payment receipts, which he produced, per Exh"B", as proof of the expenses he had incurred, revealed the amount of only M5,580-69, I am not convinced that P.W.1 has satisfactorily discharged the onus of proof that

clearly vests on him viz. that he had assisted Lucas Maleke to erect the butchery building in the total amount of M10,728-96 which he was, therefore, entitled to claim from D.W.1 on the basis of her being the heiress to the estate of the late Lucas Maleke.


As regards the steel structure, D.W.1 did not really dispute the evidence that she had sold it to the First Defendant who had since disposed of it. D.W.1's contention was that as it was affixed to her immovable property, viz. site 618 Hoohlo Area, the steel structure was her own property. The evidence of P.W.1 that he had bought the steel structure which was, therefore, his property was, however, supported by P.W.5. According to him P.W.5 was one of the five (5) original owners of the steel structure. He and the other four (4) co-owners sold the steel structure to P.W.1 for M5,586.00. As proof thereof, P.W.5 handed in exhibits "C" and "D".

Notwithstanding her claim that the steel structure belonged to her, the evidence was, in my finding, simply overwhelming against D.W.1. That being so, it must be accepted that D.W.1 had unlawfully sold, to the First Defendant, the steel structure which was not her property but that of P.W.1. She had not right to do so.

It was not in dispute that the steel structure had since been disposed of by the First Defendant and could not, therefore, be restored to P.W.1. In the circumstances, P.W.1 was, in all fairness, entitled to claim from D.W.1 the amount of money he had spent to buy the steel structure i.e. M5,580.69 but not M10,728-96.

From the foregoing, I would find for the Plaintiff with costs as follows:

1. Second Defendant is to pay Plaintiff, in terms of Clause 6 of the agreement (Exh "A") between Plaintiff as Buyer and the late Lucas Maleke as Seller, the sum of M5,580.69 being the money Plaintiff has actually spent to assist the late Lucas Maleke toward the erection of a butchery building on site 618 Hoohlo Area plus interest as agreed by the parties, and
2. Second Defendant is to pay Plaintiff the sum of M5,586-00 in respect of the steel structure which lawfully belonged to the Plaintiff but second Defendant had wrongfully sold away, plus interest as prayed.

  
B.K. MOLAI  
JUDGE

23rd October, 1995.

For Applicant : Mr. Maqutu  
For 2nd Respondent: Mr. Mphalane.