

IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 466/2009

In the matter between:

MANTAI MDLULI

APPLICANT

VS

JUNE MDLULI

RESPONDENT

CORAM

OTA, J

FOR THE APPLICANT

M.H. MDLULI

FOR THE RESPONDENT

S. GUMEDZE

JUDGMENT

OTA, J

[1] This is a family feud. A feud that has effectively split the Mdluli family herein into two.

[2] The feud is over a 4 bedroom house, situate on Swazi Nation land in the Magubheleni Area, Shiselweni District, belonging to the Mdluli family. The Plaintiff Mantai Mdluli who claims ownership of the said

house, as per his pleadings, commenced this action against June Mdluli, his younger brother, of same parents, the Defendant, claiming *inter alia* the following reliefs:-

- a) Payment of the sum of E67,000-00 in lie of compensation,
- b) 9% interest per annum a tempore morae
- c) Costs of suit
- d) Any further and/or alternative relief.

[3] The Plaintiff Mantai Mdluli, testified in his own stead, and called one witness in support of his case. In his evidence, the Plaintiff told the Court that he presently resides at Mhlaleni in his own homestead. That his parental homestead is at Siyendle. That when his father passed away he gave each of his children a ploughing field at the parental homestead at siyendle. That Plaintiff decided to build a home on his own ploughing field at the parental homestead for his disabled son, one Patrick Mdluli, who was then residing with the Plaintiffs, mother.

[4] Plaintiff alleged that during the year 1994, he contracted PWI, Gerald Dlamini, a bricklayer, to build a four bedroom house, at the parental homestead in Siyendle for the use of said Patrick Mdluli and Plaintiffs wife, whenever she went to the parental homestead for harvesting. That on the western or left side of the house which was to be used by his wife, there is a room and a sitting room with a door leading outside. And on the right side of the house which was to be used by Patrick Mdluli, there is also a room and a sitting room, with a door leading outside. That PWI Gerald Dlamini, the bricklayer built the house from setting to roofing and that the Plaintiff provided all the building materials used in the said construction.

[5] Plaintiff told the Court, that when Patrick Mdluli left for school at the University of Essential Movement in South Africa, his elder brother one Sam Mdluli (deceased), came to him and requested that the Plaintiff let their mother use the house in the absence of Patrick. That Plaintiff consented and allowed their mother to use the left side of the house. Plaintiff also stated that when the Defendant got married, he sought permission from the Plaintiff to use the left side of the house which was being used by their mother. That the Plaintiff also granted

him permission and that the Defendant used the left side of the house for a few days, before moving out to his own stick and mud house. That as at that time their mother was still alive.

[6] Plaintiff alleged that the dispute began after the death of their mother in 2004. That the Defendant occupied the whole house after the passing of their mother, without the Plaintiffs permission. That at first the Plaintiff spoke to the Defendant about this issue. That the Plaintiff went to the Defendant's house at Matsapha but the Defendant did not listen to the Plaintiff, saying that the house belongs to him, the Defendant. That Plaintiff then reported the issue to the family council, but that the Defendant refused to attend the meeting of the family council when summoned to do so. That the family council then advised the Plaintiff to sue the Defendant to Court.

[7] Plaintiff further testified that before instructing an Attorney, that he hired G.S. Chiyanda consultants to evaluate the house. That the house was valued at E67,000-00. The Plaintiff tendered the evaluation report and it was admitted in evidence as exhibit A.

[8] Plaintiff told the Court that Defendant did not contribute 400 bricks to the house, as he alleges in his plea. That it is not true that the house was built by him and the Defendant for the use of their mother. That it is not true, as alleged in the Defendants plea, that the brick layer hired by the Plaintiff did not finish the construction. That it is not true that Sam Mdluli (deceased) was supervising the house. Plaintiff prayed the Court to order Defendant to compensate him in the sum of E67,000-00 as per the evaluation report, because the Defendant has been using the house for a long period without his permission. That the Defendant still occupies the house, thus Plaintiff and his children do not have a house anymore.

[9] Under cross examination, The Plaintiff told the Court that he stayed at the parental homestead whilst growing up, until he was hired by the police force. That in 1979 he *khontaed* at Logoba. That whilst attending school at Magubheleni High School, he stayed with one Macebo Dlamini at his homestead in Magubheleni, but that he used to go home to the parental homestead, during weekends. That he started school at Siyendle before going to Magubheleni High School. Plaintiff maintained that he was resident at Siyendle even after his father

passed away in 1977, until 1979, when he *khontaed* at logoba and that the Umphakatsi of Chief Fakudze of Siyendle, can confirm that he left the parental homestead in 1979.

[10] Plaintiff stated that it is not true that when the house was to be constructed that Sam Mdluli (deceased), called a meeting of the 4 brothers i.e Plaintiff, Defendant, one Petterson Mdluli (deceased) and Sam. That it is not true that all four brothers contributed to the construction of the house. That it is not true that Defendant contributed 400 bricks. That it is not true that Sam Mdluli brought the water, and cement sand to ensure that the house was constructed. Plaintiff insisted that he supplied the bricks and other materials for the construction from Matsapha, using his Toyota Dina and Isuzu bucky.

[11] Plaintiff told the Court that he reported this matter to the inner Council of the Umphakatsi, under Chief Fakudze. That when the inner Council was deliberating on the issue, the Defendant came and beat them up. That the inner Council members who were assaulted by the Defendant were one Dingane, Mr Nhlabatsi, Madelo Kuhlase and some

others. That the fact that they were beaten up was reported to one Noah, the Umgijimi.

[12] Plaintiff further told the Court that the Defendant asked their elder brother's children to come and assault him. That one Musa used his car to transport the said children from Matsapha to the parental homestead to assault the Plaintiff. Plaintiff insisted that he was speaking the truth.

[13] The Plaintiff called one witness Gerald Dlamini (PWI) who is a bricklayer, in support of his case. PWI told the Court that he knows both the Plaintiff and the Defendant, and that their parental homestead is at Magubheleni. He told the Court that Plaintiff hired him in 1994, to build the house in issue. That he started the house from setting up until roofing. That whilst building the house, the Plaintiff supplied him with all the building materials such as plasta sand, river sand, bricks etc. That the Plaintiff paid him E6,000-00 for his services.

[14] PWI told the court that it is not true that the Defendant contributed 400 cement blocks for the said construction. That he did

not see the said blocks. That to the best of his knowledge neither the Defendant nor the late Sam Mdluli contributed to the construction of the house. That it is not true that Sam Mdluli was supervising the construction, because Sam Mdluli was at work. That the allegation in the Defendant's plea that he did not finish the house is not true.

[15] Under cross examination, PWI told the Court that he knows that all the building materials were supplied by the Plaintiff, because the Plaintiff gave him a room to sleep in at the parental homestead when he hired him for the job, therefore, PWI was always there when the materials were put on site.

[16] PWI told the Court that he was already on site before a single brick was supplied, because he did the setting from the beginning and was thus on site before a single block was delivered. He insisted that when he got to the Mdluli homestead not even a single brick was there. He said that the bricks were brought by the Plaintiff using a truck. He admitted that the house tilts at the back and thus lets in water when it rains. He stated that he closed the space between the last block and the corrugated iron on the roof. That the only space

which was left open were the square ventilators which are on all sides of the house.

[17] In his defence the Defendant June Makhathini Mdluli testified and called two other witnesses in support. In his evidence in chief, the Defendant told the court that his parental homestead is at Siyendle. That the house in issue belongs to their mother Dayina Mdluli (nee Thwala).

[18] Defendant alleged that the house was built by himself, and his three other brothers namely, the plaintiff, Sam Mdluli (deceased) and Petterson Mdluli (deceased), for their mother. Defendant testified that it was Sam, who was their elder brother that went to meet him at his work place and told him that their mother's house had to be destroyed because it lets in rain water. Defendant said that he then went to a place called Mahlangatsha, opposite Mankahaya and bought 400 cement blocks from Thuthuka. That he gave the receipt to his brother Sam, who then collected the bricks and took them home. Defendant said that thereafter their mother's house was destroyed and another house was constructed for their mother.

[19] Defendant told the court that he does not know how much his elder brother Sam contributed. He told the court that he heard the Plaintiff saying that he was going to hire the bricklayer who built his house at Logoba to build the house at home. He said that it was Sam who bought the materials for the house. That usually Sam would come to him and tell him what materials were needed and the defendant would give the money to Sam to purchase the materials, like the Timber. Defendant further stated that Sam would then go to the Plaintiff in Manzini for his own contributions. That their late brother Petterson who worked for the Government also contributed.

[20] Defendant further testified that the bricklayer who was hired by Plaintiff to construct the house did not finish the house, consequently the house had a space on top which had to be filled with two courses of bricks. The defendant said he hired his own bricklayer one Ginger Nhlabatsi to finish the job. Defendant said that said bricklayer is still alive and can confirm his evidence.

[21] The Defendant told the court that he knows the Plaintiffs son Patrick Mdluli. That Patrick has never occupied the house at any stage.

That the house was being used by their mother. That at one stage he got home and found their mother using the house with his own younger son Sabelo. Defendant insisted that he never occupied this house as he has his own houses where his wife stays.

[22] Defendant told the court that the Plaintiff does not have and has never had a house at the parental homestead. That Plaintiff did not grow up at the parental homestead. That Plaintiff grew up at Magubheleni and after that the Plaintiff went to work for the Police Force. That plaintiff then went to work for some shops in Manzini. That when the Plaintiff got married the traditional ceremony was performed at the parental homestead. That when the Plaintiff resigned from the police force, their father was still alive. That their father told their aunt to *khonta* for the plaintiff at Timbutini. Defendant said he knows that the Plaintiff later *khontaed* at Logoba.

[23] Defendant said that it is not true that he refused to move out of the house when he was requested to do so, because he never stayed in the house as he has his own houses. That it is not true that the Plaintiff reported him to the family council and that when he was called

he refused to go. That it is not true that Plaintiff reported this matter to the local council and when Defendant was called, he refused to go and even assaulted the council members. Defendant maintained that he never assaulted anyone. He said that the people he allegedly assaulted are still alive and can confirm that.

[24] Defendant further testified that the Plaintiff never went to the Umphakatsi, Royal Kraal to report that the Defendant was refusing to move out of the house. That all the Plaintiff reported at the Royal Kraal was that he was disturbed at a meeting he had called at home. That the meeting the Plaintiff called at home was for the purposes of elevating Sam's younger wife to the position of the senior wife i.e. Inkhosikati. That Defendant did not attend this meeting because it was going to set Sam's wives against each other. Defendant further testified that if the Plaintiffs prayers were to ask the court to allow him take occupation of the house, that the Defendant will not object because he has his own houses. Defendant prayed the court to dismiss the Plaintiffs claim of E67,000.00.

[25] Under cross examination, the Defendant said that Sam never called a meeting involving him, Sam, Plaintiff and the late Petterson to discuss each person's contributions to the construction of the house. He said he could not recall when Sam approached him about the need to build the house, but that he recalls that their father passed away during that time.

[26] The Defendant insisted that he contributed 400 bricks to the construction but says that he cannot recall when he did this.

Defendant maintained that he gave the receipt for the 400 bricks to Sam to go and collect the blocks. He said he could not recall the price for each block or the total amount he paid for the 400 bricks because this happened a long time ago. He told the court that when he got home he found the blocks already there pegged, so he did not count them but he believes Sam did. That he did not ask Sam whether the blocks he found at the homestead were those he gave him the receipt to go and collect, but that their mother told him that the blocks were brought by a truck from Thuthuka block yard. When asked why he did not tell his attorneys at the stage of the pleadings that he gave the receipts for the blocks to Sam. Defendant insisted that when his

Attorneys were preparing his plea, he did inform them that he gave the receipt for the blocks to his brother Sam to go and collect the blocks.

[27] Defendant said that the Plaintiff came to his work place and told him that Sam approached him about the house, that it was then that Plaintiff said he had his own bricklayer who he was going to hire to build the house. The Defendant insisted that Sam approached the Plaintiff on the issue of building the house. He insisted that Plaintiff then approached him (the Defendant) on the same issue of building their mother a house. He said that there was a house destroyed in the parental homestead and the house in issue was built on the very same spot where the other house stood.

[28] Defendant said that the materials that Sam contributed to the construction were corrugated irons and that Sam also went to the forest to cut some logs and heap up timbers. That Sam showed him these materials. Defendant told the court further that he knows that PWI the bricklayer was instructed by the Plaintiff to construct the house from setting to roofing. Defendant said he does not know that

the bricklayer consulted the Plaintiff to supply materials for the construction when the need arose. That he does not know that the plaintiff paid the bricklayer, Pwl, E6, 000 for the said construction. That he does not know that Pwl stated that there was no other person who supplied him with materials for the said house besides the Plaintiff.

[29] Defendant told the court that at one stage he went with his brother Sam to purchase materials from Nhlanguano for the construction. That they bought 3 doors, 4 window frames and about 4 to 5 glasses. That he cannot remember the prices for these materials because this was a long time ago. Defendant said he contributed E500 to the purchase of these materials, that he cannot remember how much Sam contributed, but he thinks that Sam hired a car costing E250. Defendant said that it was Pwl who used these materials. The Defendant did not dispute that Pwl was staying at the parental homestead during the construction of the house, he however denied that it was only the Plaintiff that supplied the materials for the construction of the house.

[30] Defendant admitted that at no stage in his evidence in chief, did he say that he went with Sam to purchase materials, but that this was because his Attorney did not ask him any questions to this effect. He said he did not tell his Attorney that he spent E500 to purchase doors, window frames and glasses and that Sam contributed E250 for transportation. Defendant stated that there are a lot of other things he contributed to the construction that he did not tell his Attorney about, like painting the house. Defendant denied that the reason why he did not tell his Attorney all these facts is because it did not happen.

[31] Defendant admitted that his son Sabelo presently occupies the house in issue. He denied that he was the one who instructed Sabelo to continue staying in the house after he moved out. He denied that Sabelo is staying in the house on his instructions and that he instructed Sabelo not to vacate. He said that pursuant to paragraph 4 of his plea, that it was Sam and his mother who suggested that Sabelo stays in the house because when he (the Defendant) got home Sabelo was already there. Defendant maintained that the Plaintiff did not grow up at the parental homestead, but that Plaintiff was staying at Macebo

Dlamini's house. Defendant said he did not know that the Plaintiff used to go home to their homestead from Macebo's house during weekends.

[32] In his evidence in chief, Dwl Noah Andreas Dlamini told the court that he lives at Siyendle and that he is the Chief Runner in the area. That he knows the Plaintiff and Defendant. That on the 28th August 2006, the Plaintiff came to his homestead, in the company of one Bongani Mdluli and said he wanted to report certain people. This witness listed the names of the people whom the Plaintiff wanted to report which included the Defendant. DW1 told the court that since they do not try cases at Siyendle he agreed with the Plaintiff that they should take the matter to the Royal Kraal at Ngcoseni on the 30th of August 2006. That on the said day they did go to Ngcoseni, where Dwl was advised by the headman and the council to go back to Siyendle and sort out the matter with his own council.

[33] Dwl then requested the Plaintiff and his other brothers to come to Siyendle on the 7th of September 2006. That on the said day the parties came and the Plaintiff in relating his complaint to the council pointed at the Lomabilane homestead and said that they broke his car.

That the Plaintiff was referring to the Mdluli boys but that he cannot readily remember the names of the boys. DW1 told the court that the Plaintiff also complained to the council that he built a house and the house is his own, but that the Defendant was refusing him the house. DW1 said that at that juncture the Defendant raised his hand wanting to talk but that he denied Defendant audience. DW1 said that he and the council advised the parties to go home and sort out the problem. He said that Plaintiff never reported back to the council whether the matter was sorted out.

[34] DW1 said that nobody was assaulted on the day he was deliberating upon this issue with his council. DW 1 told the court that the Plaintiff grew up at Magubheleni at the Macebo Dlamini's homestead, near the school he was attending. DW 1 said he thought that the Plaintiff was a member of the Macebo family. That he only got to know later that the Plaintiff was a member of the Mdluli family at Siyendle.

[35] Under cross examination, Dwl confirmed that the Plaintiff came to report to him as the headman of the area, that the Defendant was refusing him permission to use his house he had built at the parental homestead.

[36] For his part DW2 Madelo Kuhlase told the court that he lives at Siyendle and that he knows the Plaintiff and Defendant. That he knows the parental homestead of the parties. Dw2 said he is the Community police of Siyendle. Dw2 told the court that it is not true that he was assaulted by the Defendant when this issue was being deliberated by the council. Dw2 said that his homestead is not far from the parties parental homestead. That the two homesteads are about 1.4 kms apart going by a distance of from about the bus rank in Mbabane to SBIS. That because of the proximity of the 2 homesteads, that he knows the family members of the Mdluli homestead, since he grew up in the area and still lives in the area. Dw2 told the court that the Plaintiff did not grow up with the Mdluli family. That he only saw the Plaintiff now that Plaintiff is old.

[37] Under cross examination Dw2 told the court that he is 56 years old. Dw2 admitted that he is younger than the Plaintiff. Dw2 said that even though he is younger than the Plaintiff he is however certain that the Plaintiff did not grow up at the Mdluli homestead, because he only saw the Plaintiff now that Plaintiff is old.

[38] At the close of the defence, I ordered counsel to file written submissions. The Plaintiff was ordered to file and serve his written submissions on the 16th of June 2011 and the Defendant was to file on the 17th June 2011. It is on record that both parties duly filed their written submissions as ordered by the court. I have carefully considered the written submissions filed and I commend both sides of counsel for the analysis of the evidence adduced which are contained therein. I however do not wish to reproduce the argument of each side in extenso, rather, I prefer to make references to those parts of the submissions as I deem necessary in the course of this decision.

[39] Now, in paragraph 6 of the written submissions filed on behalf of the Plaintiff, learned counsel for the Plaintiff identified the following issues for determination:

- (a) The lawful owner of the house
- (b) Whether or not the Defendant has directly or indirectly interfered with the Plaintiffs occupation of the house, if it is found that the house belongs to the Plaintiff.

[40] I thank Counsel for plaintiff Mr Mdluli, for the two issues evolved. I however prepare to modify the foregoing issues as follows:-

1. Whether the Plaintiff solely constructed the house in dispute?
2. Whether the Defendant is depriving the Plaintiff use of the said house?
3. If the Defendant is depriving the plaintiff use of the said house, then is the Plaintiff entitled to the reliefs claimed?

[41] Before dabbling into these issues raised, let me first state that I agree entirely with learned defence counsel as contended in the

Defendant's written submissions, that the onus is on the plaintiff to prove his case before the court. It is the position of the law that he who asserts must prove. This position of the law was demonstrated by **WA Joubert (editor) The Law of South Africa (first reissue 1999) volume 9, Butterworths, page 444 at para 639**, as follows:-

"---- he who asserts must prove - because if one person claims something from another in a court of law, he has to satisfy the court that he is entitled to it"

[42] This trite principle of law, as correctly urged by the defence, was also enunciated in the case of **South Cape Corporation (Pty) Ltd v Engineering Management Services Ltd 1977(3) SA 534 (A) at 548, per Corbett**

JA in the following terms:-

"As was pointed out by Davis AJA in Pillay v Krishna 1964 AD 946

at 952-3, the word onus has often been used to denote, inter alia, two distinct concepts (1) the duty which is cast on a particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be and (11) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his

opponent. Only the first of these concepts represents the onus in its true and original sense."

[43] It is also imperative to note here that the standard of proof required in a civil action is proof on the balance of probabilities, not proof beyond a reasonable doubt which is involved in criminal cases. This trite principle and as rightly urged by the defence, was aptly captured by **Masuku J** in the case of **Juluka Dlamini v Swaziland Government, civil case no. 3073/1996 (unreported)**, with reference to the statement of Lord Denning in the case of **Miller v Minister of Pensions (1947)2 All ER at 374**, as follows:-

"It must carry a reasonable degree of probability but not so high as is required in a criminal case. If evidence is such that the tribunal can say "we think it more probable than not" then the burden is discharged, but if the probabilities are equal it is not."

[44] Therefore the law demands that in deciding whether a certain set of facts given in evidence by one party in a civil case : before a court, in which suit both parties appeared, is preferable to another set of facts given in evidence by the other party, the trial judge after a

summary of the facts must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, then accept it in preference to the other.

[45] I will now proceed to consider the 3 issues I have identified ante, vis a vis the totality of the evidence adduced by each side of this contest with respect to each issue, to ascertain whether the Plaintiff has discharged the onus placed on him on the balance of probabilities.

[46] **ISSUE ONE:** Whether the Plaintiff solely constructed the house in dispute.

In this respect counsel for the defendant Mr Gumedze, submitted on page 9 of the Defendant's written submissions, that the evidence tendered by both parties are mutually destructive versions, because there is no version that has been proven to be the correct version between the case made out by the Plaintiff and that made out by the Defendant. For this contention learned counsel relied on the case of

National Employer's Mutual General Insurance Association v

Gary (1931) AD 187 at 199 where **Wessels JA** declared as follows:-

"Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the other false. It is not enough to say the story told by Clarke is not satisfactory in every respect, it must be clear to the court of first instance that the version of the litigant upon whom the onus rests is the true version."

[47] Defence counsel further relied on the dictum **of Eksteen J, in**

National Employers General Insurance Co. Ltd v Jagers 1984

(4) SA 437 (e) at 440 - F, where his Lordship stated thus:-

" Where the onus rests on the plaintiff as is the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not, the court will weigh up and test the plaintiffs allegation against the general probabilities"

[48] The foregoing to my mind only goes to confirm my views stated hereinbefore, that the fulcrum upon which the standard of proof in civil cases spins, is the balance of the preponderance of probabilities.

[49] Let us now proceed to ascertain whether the Plaintiff has discharged the onus of proof on the balance of probabilities. The Plaintiff's case on this issue is that he constructed the house in dispute, in that he not only hired the bricklayer who carried out the said construction and whom he paid the sum of E6,000 to construct the house, but that he also supplied all the materials for the said construction. Pwl's evidence substantiates the evidence of the Plaintiff on this wise. It is not disputed that Pwl is the bricklayer who constructed the said house from setting to roofing. This fact is conceded by the Defendant himself under cross examination, even though the Defendant alleges that Pwl did not finish the construction, a fact which is denied by Pwl. I will come to these matters anon. The paramount factor however to my mind remains that Pwl constructed the said house. It is also not disputed that Pwl was resident at the parental homestead of the parties at all material points in time of the said construction. Pwl maintained that he was always on site when

materials were delivered. That whenever he wanted materials for the construction he would approach the Plaintiff who would then supply him with the said materials. He maintained that apart from the Plaintiff none of the other brothers neither the Defendant, nor Sam or Petterson gave him any materials for said construction. His evidence on this wise remained unimpeached under cross examination. I find PwI to be a very credible and reliable witness, especially in the face of the fact that being the bricklayer who constructed the house and also being resident at the parental homestead of the parties all through the construction, PwI was thus in my view, in a position to know who supplied the materials for the construction of the said house.

[50] On the other hand the Defendants evidence as per his plea is that he contributed 400 bricks to the said construction and his late brother Sam's contribution was that he supervised the house. This was the case the Defendant put to the Plaintiff and his witness. The Defendant in his evidence in chief stuck to this line of defence like a postage stamp on an envelope, maintaining that he contributed the said 400 bricks to the construction. However, under cross-examination, the Defendant suddenly remembered that he also contributed other

materials to the said construction. He first told the court that whenever materials were needed for the said construction, Sam would come to him and he would give Sam the money to go and purchase the materials. Further down under cross examination, he in addition remembered that himself and Sam on one occasion went to Nhlngano together and purchased doors, window frames and glasses, for the house and that Defendant contributed E500.00 to the purchase whilst Sam paid the transportation fee of E250. [51] We must not lose sight of the fact that parties are bound by their pleadings. That is a trite principle of law. Since the Defendant's case as per his plea is that himself and his late brother Sam contributed to the construction of the said house, he was required by law to clearly and concisely state all material facts upon which he relies^ See **Herbstein and Van Winsen Civil Practice of the Supreme Court of South Africa (4th edition) page 20 and 21**. The Defendant himself in paragraph 3.2 of **his** plea, as appears on page 10 of the book of pleadingsj offered particulars as to the extent of his contributions in. honour of the above trite principle of law, to the effect that he contributed 400 bricks to the said construction; In paragraph 3.1 he alleged that his late brother Sam'**4**

contribution was that he supervised the house. It follows therefore that any evidence outside the facts pleaded herein, as the Defendant was wont to advance by **his** evidence under cross examination, go to no issue and ought to be disregarded. When asked under cross examination why he did not plead these material facts \ Defendant replied that he did not tell his attorneys about these facts and that there are other contributions h^ made, which he also did not tell his Attorneys about. When further asked why he did not advance these facts! in his evidence in chief, Defendant replied that he failed to do so because his counsel did not ask him any! questions pertaining to these facts. Irrespective of this explanation by the Defendant, I find that these facts which the Defendant failed to plead nor put specifically to the Plaintiffs witnesses, nor advance in his evidence in chief are an after-thought. I say this because the effect of failing to put one's case to the other party's witnesses and belatedly trying to raise same either in evidence of under cross examination, entitles the court to treat such, evidence as an after-thought and thus disregard it. Besides, Defendant's evidence appears to have been iri disharmony. He kept

changing his evidence as though striving for perfection, which raises doubts in my mind as to his credibility.

[52] More to the foregoing is that the evidence of the Defendant that he bought the said 400 bricks or blocks is not substantiated at all. His elder brother Sam whom he alleges to have given the receipt of purchase to collect; the said 400 bricks, is dead and cannot testify. His mother whom he alleges that he enquired from as to whether the 400 bricks he found at the homestead, are the 400 bricks he allegedly purchased for the construction of the said house, is also dead and cannot testify. The totality of the foregoing state of affairs, leave the Defendant's case with little probative value especially in the face of the over whelming evidence put forward by the plaintiff, especially the evidence of PWI to the effect that the Defendant did not contribute the said 40Q bricks, which is consistent with the case for the Plaintiff that the Defendant made no contributions to the construction of the said house.

[53] More to this is that Defendant's evidence that Pwl failed to finish the construction of the said house also stands unsubstantiated.

Defendant told the court that the said construction was finished by another bricklayer whom he hired, one Ginger Nhlabatsi, whom the Defendant says is alive and is in a position to confirm his allegation. The Defendant however failed to call the said Ginger Nhlabatsi as a witness to substantiate his claim. I am of the firm conviction that such a relevant witness ought to have been called to substantiate the Defendant's claim. Failure to call the said bricklayer left the Defendant's evidence in this regard, with little probative value, when juxtaposed with the evidence of Plaintiff and PwI, that PwI started the construction of the house from setting to finish, and that the Defendant made no contributions whatsoever to the said house.

[54] I am further bound to state here, that the Defendants allegations of Sam's contributions to the said construction, cannot also lie. In the first instance, his specific plea as to Sam's alleged contribution is that Sarri supervised the house. This fact is denied by both the plaintiff and PWI I have already held that, I find PWI a credible and reliable witness. PWI told the court categorically that Sam did not supervise the construction because Sam was at work. Furthermore, the evidence led as to the other contributions allegedly made by Sam go

to no issue. I have already found that the Defendant is bound by the particulars pleaded as to the extent of Sam's contributions which is that Sam supervised the house. In any event, I find the Defendant's evidence as to the extent of Sam's contributions inconsistent. I say this because in his evidence in chief, the Defendant told the court that he does not know the extent of Sam's other contributions. However, under cross examination he suddenly remembered that Sam not only supervised the house, but also paid E250 as transportation fee for some of the construction materials, bought corrugated iron sheets, water and cement sand, logs and timber, to mention but a few. I must say that I cannot rely on the Defendant's evidence on this issue. I say this because not only was this case not put to the Plaintiff and his witness, but it is inconsistent, waiving and doubtful in all its ways. The Defendant also appears to have kept changing his evidence on this wise with a bid to perfecting it along the way. It thus stands rejected. In the light of the totality of the foregoing, I prefer to believe the case for the plaintiff that both the Defendant and Sam made no contributions to the construction of the said house.

[55] As regards the alleged contributions made by Petterson (deceased), I am quick to note that there is no pleading whatsoever serving as a foundation for this allegation which the Defendant now advances in evidence. It is a trite principle of law, as I have already stated, that parties are bound by their pleadings. The extent of the defence as per the plea is that it was only the Defendant and the late Sam, aside from the plaintiff, that allegedly contributed to the construction. This fact is demonstrated in paragraphs 3, 3.1 and 3.2 of the Defendant's plea. The Defendant cannot now seek to set up a case that Petterson also contributed to the said construction. More to this is that the Defendant has failed to lead clear and concise evidence as to the extent of Petterson's alleged contributions. It is not enough to allege that Petterson also contributed. It was incumbent upon the Defendant to show through his evidence, the extent of the alleged contributions. On the whole this line of defence thus stands disregarded.

[56] Now, there was an allegation by the Defendant that the Plaintiff did not grow up at the parental homestead. This line of defence for whatever it is worth was canvassed by the Defendant with so much

frenzy and anxiety, that I cannot help the urge to address it, even though I fail to see it's relevance to the issues arising. It is indisputable from the evidence tendered that the Plaintiff grew up in the Macebo Dlamini's homestead at Magubheleni, whilst he was attending the High School there. It is however an obvious fact and commonsensical, that the Plaintiff must have resided at some place at the primary school level, prior to high school. The Plaintiff himself supplied the requisite answer under cross examination, to the effect that prior to high school, he was resident at the parental homestead in Siyendle whilst attending the primary school there. This fact was not impeached. Also not impeached and thus established is the fact that Plaintiff even whilst resident at Magubheleni with Macebo Dlamini, during high school, still used to go home to the parental homestead on weekends. When it was put to the Defendant under cross examination whether he knew that the Plaintiff used to go home to the parental homestead on weekends, all that the Defendant answered was that he did not know.

[57] There is also evidence that the Plaintiff stayed at the parental homestead after high school until he left to join the police force. There is also evidence that the Plaintiff *khontaed* at Logoba in 1979. I

however find that irrespective of the fact that the Plaintiff resided with Macebo Dlamini at Magubheleni whilst in High School, and irrespective of the fact that he eventually *khontaed* at Logoba where he built a homestead, that there is no evidence that shows that by reason of these facts, that the Plaintiff did not build the house in dispute. The evidence of Dw1 and Dw2 to the effect that the Plaintiff did not grow up at the parental homestead does not demonstrate this fact. Infact the evidence of Dw2 on this wise cannot be relied on as he obviously, a fact admitted also by Dw2 in cross examination, is younger than the Plaintiff and is thus in my view not in a position to attest to these facts as a certainty I say this because it is obvious that Dw2 would not know of the growing years of the Plaintiff before Dw2 was born. In any case, I find this line of defence not relevant to the issues here. And it thus stands disregarded.

[58] I find the need to point out here that there is no doubt that there emerged some discrepancies in the Plaintiffs case. By this I refer to his allegation that he was assaulted together with some council members by the Defendant whilst deliberating on this matter. The evidence of

Plaintiff in this regard was impeached by DW2, one of the council members allegedly assaulted DW2 told the court that he was never assaulted by Defendant as alleged by the Plaintiff. Defence counsel sought to make heavy weather of this state of affairs in the Defendant's written submissions, wherein he called upon the court to hold the plaintiffs claim of ownership of the house in dispute, as mendacious by reason of this fact. I do not agree with the defence that this discrepancy should defeat the overwhelming evidence led by Plaintiff and especially PW1, whom I find a credible and reliable witness. I see no reason why PW1 should lie that neither the Defendant, Sam nor Petterson contributed to the construction of the said house and none is urged in these proceedings. Besides nothing really turns on whether the Defendant assaulted the council members or not. The only relevant factor emerging from that portion of the evidence tendered is that the Plaintiff did report this matter to the council members. We must also not lose sight of the fact that it is not every inconsistency that has the effect of the adverse conclusion being drawn against a witness evidence.

[59] In the circumstances, in the face of the credible, reliable and unimpeached testimony of Pw1, that it was only the Plaintiff that supplied him with all the materials for the construction of the house, which testimony is consistent with the case for the Plaintiff on this issue, I find that the balance of probabilities clearly tips the scale of justice in favour of the Plaintiff. I thus prefer to believe the case for the plaintiff.

[60] On the whole, I have put the case for the Plaintiff and that for the Defendant on an imaginary scale of justice and I have weighed them, and I find that the case for the Plaintiff outweighs that of the Defendant. On the balance of probabilities therefore, I find that the Plaintiff has proved that he solely constructed the said house. In the same vein I prefer to accept Plaintiffs evidence as to how their mother came to be resident in the said house, which was upon a request made to him by their late elder brother Sam. This in my view is a more probable account in the face of my findings that the Plaintiff solely constructed the house in issue.

[61] ISSUE TWO

Whether the Defendant is depriving the Plaintiff use of said house.

The Plaintiffs case on this issue is that the Defendant unlawfully occupied the said house and unlawfully allocated the house to his family members without the Plaintiffs consent. That the Defendant remains in occupation of the house and refuses to either vacate or compensate the Plaintiff without any lawful cause. Plaintiff alleged that he reported this matter to both the family council and the headman umgijimi, of their area, DW1, Noah Dlamini. DW1 confirmed to the court that the Plaintiff did report to the chiefs kraal that the Defendant was denying him use of the house which he built on the parental homestead and that the Plaintiff was advised to go to the family council to have the matter resolved. However, DW1 said the Plaintiff did not report back to the chiefs kraal the outcome of the deliberations at the family council.

[62] It is my view that even though the evidence of DWI is consistent with the Plaintiffs case that there was dispute before the chiefs kraal and the family council between the Plaintiff and Defendant regarding the alleged refusal of the Defendant to move out of the Plaintiffs house, I however find that the evidence before me has established that the Defendant is not in occupation of the said house. The uncontroverted evidence is that it is Sabelo Mdluli, the Defendant's Son, that is in occupation of the said house. This fact is concede by the Defendant in his plea and in his evidence before the court. The fact that the Defendant has his own houses and the fact that it is not the Defendant that is in occupation of the house in dispute, but his son Sabelo are not impeached through out these proceedings.

[63] The Defendant's case as to how Sabelo came to occupy the house is clear. In paragraph 4 of his plea he alleged that it was his late brother Sam and late mother that decided that Sabelo should move into the said house to look after their late mother whilst she was still alive. The Defendant maintained this posture even in his evidence. Even though the Plaintiff alleges that it was the Defendant that put Sabelo in possession of the house and that the Defendant also

instructed Sabelo not to vacate the said house, the Plaintiffs case on this wise is however not maintainable. I say this because I see no evidence rendered to show that it was the Defendant that put Sabelo in occupation of the said house. I hold the view that the mere fact that Sabelo is obviously in occupation of the said house on his own, demonstrates, that Sabelo is an adult, not a minor for the court to presume that he occupied and continues to occupy the house on the Defendant's instructions. The mere fact that the Plaintiff reported to the Royal Kraal and the family council that the Defendant was depriving him use of the house does not prove that it was the Defendant that instructed Sabelo to occupy and keep occupying the house. The only fact which is inexorably apparent is that it is Sabelo Mdluli that is in occupation of the said house, and is thus the one depriving the Plaintiff use of the said house. I hold the view that the claim should have been brought against the person who it has been established, is occupying the said house, for ejectment and other reliefs, as there is no evidence establishing the Plaintiffs allegation that Sabelo is occupying the said house for and on behalf of or on the instructions of the Defendant. This fact was recognized by learned

defence counsel on page 10 of the Defendant's written submissions, where be submitted as follows:-

"The fact that Sabelo, a son to the Defendant is occupying a portion of the house and has been occupying a portion of the house is irrelevant. This is so because the Defendant has not been sued through the principle of vicarious liability. Further that, in order for the Defendant to be vicariously liable, the Plaintiff has to prove that Sabelo is a minor and occupies or occupied the house as a consequence of a directive of the Defendant"

[64] It follows therefore that Sabelo Mdluli should have been the proper Defendant or at least should have been cited as a party in these proceedings.

[65] As the case lies, the Plaintiff has failed to prove that it is the Defendant that is depriving him of use of the said house. This state of affairs renders a consideration of the third issue I raised otiose. In the circumstances the claim against the defendant will be dismissed as there is no case made out against him. Case dismissed. Costs to follow the event.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE 30th DAY OF June 2011

**OTA. J
JUDGE OF THE HIGH COURT**