# Albuisson v Fryars
# (2003) SLR 151

Conrad LABLACHE for the Plaintiff
Frank ELIZABETH for the Defendant

**Judgment delivered 25 July 2003 by:**

**JUDDOO J:** The Plaintiff claims for loss and damages resulting from the Defendant's breaches of contract in failing to renovate and equip a take-away "Sandy's Take-Away" before handing it over to the Plaintiffs management. The Plaintiff also claims that the Defendant prevented him from operating the said take-away as from 17 September 1998 and kept retention of the Plaintiffs goods and equipment on the premises. The Defendant resists the claim and has filed a counter-claim which is disputed.

The Plaintiff and his witnesses were called to give evidence in support of the plaint and in reply to the counterclaim. At the close of the Plaintiffs case, Learned Counsel appearing on behalf of the Defendant raise a submission of "no case to answer" and elected not to adduce further evidence.

A submission of "no case to answer" may be made either if no case has been established in law or the evidence led is so unsatisfactory or unreliable that the Court should hold without hearing the Defendant's evidence that the burden has not been discharged *Storey v Storey* (1961) P 63 CA and *Yuill vYuill* (1945). In pursuance thereof, I shall consider the Plaintiffs claim and the evidence adduced.

The Plaintiff's claim is twofold. Firstly, the Plaintiff alleges that there has been a breach of the terms of the contract when the Defendant failed to renovate and equip the Take-Away premises before handing over management to him. The agreement between the parties was drawn in writing as per exhibit P1. It is admitted by the Plaintiff that the said agreement does not include a clause whereby the Defendant was liable to renovate or equip the premises before handing over. It is the submission on behalf of the Plaintiff that such a term is to be implied.

The Court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an irresistible inference that the parties must have intended the stipulation in question. A term is also implied if it is necessary, in the business sense, to give efficacy to the contract. However, the Court will not imply a term merely because it would be reasonable to do so. As Lord Pearson stated in *Trollope & Colls Ltd v NW Metropolitan Hospital Board* (supra) at 267:

> The court will not … improve the contract which the parties have made for themselves, however desirable the improvement might be.

The evidence from the Plaintiff and his witness, Miss Louange, was that there were major renovation works being carried out including repairs to the roof, the plumbing system, put tiles on floor etc.  It is also the case that the Plaintiff and the Defendant had shared in these expenses as it is admitted that the Defendant had retained contractors to do the job but thereafter left to proceed overseas before the works were finished.  It is certain that such major renovation and repairs could not merely be implied under the existing terms of the contract, exhibit P1, by virtue of the fact that the business license was on the Defendant's name or by virtue of the nature of the business itself.  They were matters which went beyond the management agreement and for which the parties need to have been specific and have agreed as to which any particular renovation or repair was needed and which party ought to bear the responsibility and cost thereof. Having failed to do so the Court is not at liberty to impose liability thereto by mere implication.

The second limb of the Plaintiffs claim pertained to the Defendant preventing the Plaintiff from operating the Take-Away business as from 17 September 1998 and keeping retaining possession of the Plaintiffs goods and equipment on the premises.  In testimony, the Plaintiff relied on the list (annex 1) attached to its application for injunction filed in the course of the proceedings.  In reply to the averment that the items were left behind at the Take-Away premises, the Defendant admitted that certain equipment were left behind but averred that part thereof were taken away by the Plaintiff (Vide affidavit dated 4 December 1998).  It is certain from the overwhelming evidence adduced by the Plaintiff and his witnesses that the Plaintiff was thrown out of the premises on no uncertain terms when the Defendant came to the premises on 17 September 1998 in the company of two Police Officers and sought his eviction.

Former Police Officer Samson who accompanied the Defendant to the premises was precise.  In his words:

> He (Plaintiff) was working and shocked on the day when he saw Police Officers and the lady (Defendant) coming to remove him.  At first he did not want to leave the premises as he was working, but after a while when he saw the Police Officers he agreed to leave the premises......  He was forced to leave the premises. There was an order and we assisted the lady to remove that person.

Another witness to the incident was Pascal Nanon.  He was employed as a cleaner and helper by the Plaintiff at the material time.  The witness confirmed that the Plaintiff was only allowed to walk out of the premises, barehanded. Pascal Nanon was then instructed by the Defendant to remain on the premises to keep watch of the "machine for roasting chicken, juice machine, meat, vegetables that Mr Albuisson had bought." He added that the Defendant operated the Take-Away for two nights thereafter to sell all the foodstuffs which had remained.

Taking account of the above, I find that there is overwhelming evidence in support of the averment that the Defendant had called to the premises on 17 September 1998 and

forcefully removed the Plaintiff out of the premises in breach of their agreement. Had the Plaintiff been in breach of the payment of rent beforehand, it was open to the Defendant to proceed by service of a *"*mise en demeure" and seek a remedy before the appropriate forum.

For reasons given here above, I find that the submission of no case to answer succeeds on the first limb of the Plaintiffs claim pertaining to renovation and repair but fails to succeed on the second limb pertaining to the removal of the Plaintiff from the premises and retention of the equipment, utensils and foodstuffs in breach of the management agreement.

I shall now turn to the counterclaim. No evidence was adduced by the Defendant in support of the counterclaim. In *Supreme Court Practice* 1967 Vol 1 at 145, the author states:

> A counterclaim is substantially a cross-action: not merely a defence to the Plaintiff's claim. It must be of such a nature that the Court would have jurisdiction to entertain it as a separate action (*Bow Maclachlan & Co v The Camosun* (1909) AC 597: *Williams v Augius* (1914) AC 522) "A counterclaim is to be treated for all purposes for which Justice requires it to be so treated, as an independent action" (per Bowen C.J. *in Anon v Bobett* 22 QBDP 548). If after the Defendant has pleaded a counterclaim, the action of the Plaintiff is for any reason counterclaim may nevertheless be proceeded with. Thus, where the Plaintiff's claim was held to be frivolous, the Court still granted the Defendant "the relief prayed for in the counterclaim (*Adams v A* 45 Ch. D. 426 (1892) 1 Ch 369. In short for all purposes except those of execution, a claim and a counterclaim are two independent actions (per id Esher MR in *Stumore v Campbell & Co* (1892) 1 QB 314).

The averments in the counterclaim are denied by the Plaintiff in the pleadings by way of the "defence to counterclaim" filed. The admissions, if any made by the Plaintiff in his testimony were mostly qualified admissions to be viewed in the light of the evidence to be adduced by the counterclaimant. Accordingly, I find that the failure to adduce evidence on behalf of the counterclaimant to be fatal to the substance of the counterclaim. In the result, the counterclaim is dismissed with costs and I shall now turn to the award of damages under the plaint.

The Plaintiff claims as follows:

- Value of equipment — R35,000
- Loss of revenue from use of equipment at R500 per day — R10,000
- Loss of provisions purchased — R2,000
- Penalties suffered by and charges levied as a result of

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| | breach | R7,742.50 |
| - | Moral damages | R50,000 |

I find it just and reasonable to award the sums as follows:

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| (i) | the value of the equipment in full | R35,000 |
| (ii) | the loss of revenue for a reasonable period until the end of the month had the Plaintiff been properly notified (R500 x 14 days). | R7,000 |
| (iii) | Penalties for charges | R7,742.50 |
| (iv) | moral damages taking into account the forceful and abrupt manner in which the Plaintiff was compelled to leave the premises | R7,000.00 |
| | | **R56,742.50** |

the whole with costs.

**Record: Civil Side No 304 of 1998**