

**Labiche v Francoise & Or  
(2004) SLR 57**

Bernard GEORGES for the Plaintiff  
Charles LUCAS for the Defendant

**Judgment delivered 21 June 2004 by:**

**PERERA J:** This is an action based on Article 555 (3) of the Civil Code. The Plaintiff avers that during the years 1994 and 1995, he, with the consent of the Defendants, the owners of Parcel C. 2145 at Anse Boileau erected a dwelling house thereon. He further avers that he occupied that house until 17<sup>th</sup> October 1998 when the First Defendant forcibly evicted him. He therefore claims R100,000 as the estimated value of the materials and labour invested in the building.

The First and Second Defendants deny that the said house was constructed by the Plaintiff with their consent. They aver that the Plaintiff, who is the uncle of the First Defendant, had no place to reside after he divorced his wife and that he assisted to erect the house by providing about R10,000 worth of building materials and his labour in exchange for free occupation of the house by him. The Defendants claim that balance materials and labour were provided by them. The Defendants further aver that the Plaintiff brought in another lodger, and that both of them burnt noxious materials in the house and the yard and constantly harassed them and their children. They further aver that the Plaintiff vacated the house on his own accord.

In a counterclaim, the Defendants aver that the acts allegedly committed by the Plaintiff during the occupancy of the house, namely the burning of noxious materials and harassing their family amounted to a faute and consequently claims R25,000 as damages. They also claim a further sum of R10,000 for littering the interior of the house and causing damage thereto.

According to the evidence of the Plaintiff, he was living at Foret Noire with his wife, but after the divorce, he was offered the land which forms the subject matter of this action, by the First Defendant his nephew, to build a house. He stated that there was an oral agreement that after his death, the house would pass on to the First Defendant. He completed the house, except for the plastering of the kitchen and the fixing of windows and ceiling thereof. The First Defendant had a permit to remove gravel. Hence the Plaintiff supplied only the cement. Together they made 500 bricks, out of which 250 bricks were taken away by the First Defendant. The Plaintiff claimed that he used the balance 250 bricks in constructing the house and also purchased more bricks at the rate of R5 each. He worked as the mason and carpenter and also hired two other men. The Plaintiff further claimed that he purchased the sliding doors and the other building materials. He further stated that apart from helping in digging the foundation, the First Defendant did not contribute anything either by way of materials or labour towards the construction. The Plaintiff produced a bundle of receipts (PI) in proof of purchase of

building materials during the period 1994 - 1995. Totalling a sum of R19, 945.05. This amount included payments for the electric and water connection to the house. He stated that he had lost receipts for items such as for corrugated iron sheets which he had left behind at his former wife's house at Foret Noire.

The Plaintiff denied that there ever was a condition that he could not bring anyone else to live with him in the house. He also denied littering the yard or the house. He stated that he left the house he constructed because he was beaten up by the First Defendant. He brought Ms. Cecile Bastille, a valuer to value the house but the First Defendant prevented her from entering the house. However, on his own assessment, the value of the materials and labour he expended was R100,000.

On being cross-examined, he stated that he brought some timber iron sheets from a chicken coop he demolished from the house. He stated that those materials were used to construct a shed for the house was being constructed, he stayed in the house of the First Defendant and paid for his meals.

He used corrugated iron sheets at Foret Noire. He stated that the First Defendant. When the First Defendant, but

Wilfred Accouche, a pickup driver testified that he transported a masonite to Anse Boileau, where the Plaintiff was building a house for him. He denied that he transported any building materials from the house. He stated that it was the Plaintiff who was building the house.

cement, bricks and masonite, and was paid by the First Defendant. He further

Michel Jules, a mason testified that he was employed by the Plaintiff at Anse Boileau. He however laid the foundation and four rows of bricks by the Plaintiff. During that time, he did not see the First Defendant.

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Alexis Bibi, another mason also testified that he was employed by the Plaintiff to construct the house. He took over from the stage after four rows of bricks up to the stage when the roof was built. He was paid Rs7000 by the Plaintiff.

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Didier Leon, testifying for the defence stated that he had been employed by the First Defendant on several occasions and made bricks at his premises. He had seen the Plaintiff once or twice at the residence of the First Defendant. The First Defendant was building a house close to his house, and he made bricks for the house. He however stated that those bricks were used for both houses. He was paid by the First Defendant for making bricks.

connected with the First Defendant. He stated that he had seen the Plaintiff. At that time, he used some of the bricks for both these houses.

Doris Appasamy, the Second Defendant testified that the Plaintiff came to reside with her after he had divorced his wife. He was given a room. The house was built by the First Defendant, and at the same time the house was also being repaired and extended. She admitted that the Plaintiff worked on the new house, and that he brought corrugated iron sheets at his expense.

came to reside with the Plaintiff. The house was being repaired and extended. They occupied the house. He brought two men to work on the house and timber joints, at his expense.

The Second Defendant further testified that the Plaintiff burnt

the house and burnt the house and burnt the house and burnt the house

littered the yard. She also stated that the Plaintiff left the premises as a result of an argument with the First Defendant regarding these matters.

The First Defendant corroborated the evidence of the Second Defendant, his concubine and stated that the Plaintiffs contribution was only the corrugated iron sheets and some timber. He had a block maker's licence, so the bricks were made by him. He claimed that the receipts the Plaintiff had produced for purchasing bricks and cement were for work done by him for others, as he was a self-employed mason. The First Defendant conceded that the Plaintiff's contribution towards the construction of the house was around R10,000.

As regards the alleged littering and burning of rubbish, he corroborated the Second Defendant and stated that the fumes emanating from the burning affected his son who was asthmatic.

In his cross-examination he stated that the house was built with the assistance of workers. He however maintained that he supplied the cement. He also stated that the Plaintiff supplied some of the corrugated iron sheets were purchased by joint contributions.

with the Plaintiff with the bricks and cement and also that the

On the basis of the evidence, it has been established on a balance that the First Defendant permitted the Plaintiff to build a house on his own house. I accept the Plaintiff's evidence that there was an agreement, a formal written one, that he could live there until his death. As the First Defendant was simultaneously repairing and extending his house, there was no necessity to build another house at that time, as claimed by the Plaintiff. Admittedly the First Defendant was a block maker by profession. He stated that around 600 bricks were needed to build the house. In this regard I prefer to accept the evidence of the Plaintiff that he contributed 250 bricks, which he himself assisted to make. The First Defendant in his own name during the relevant period of the case had purchased cement, bricks, electrical wiring, water pipes and the electric and water connections to the house. On the other hand I was unable to produce any receipts.

of probabilities that the Plaintiff's property close to his house, pending agreement, pending according to the evidence, his own house. Hence the balance in favour of the Plaintiff for the purpose of the case. The Plaintiff is a block maker by profession. In this regard I prefer to accept the evidence of the Plaintiff that he contributed 250 bricks, which he himself assisted to make. The First Defendant in his own name during the relevant period of the case had purchased cement, bricks, electrical wiring, water pipes and the electric and water connections to the house. On the other hand I was unable to produce any receipts.

As regards the dispute between the parties, which culminated in the Plaintiff leaving the house, I find that the reasons adduced by the Defendants are of no significance. I also do not find that there is any merit in the Defendant's claim that the Plaintiff burnt noxious material to cause harm to the Defendant. I believe the evidence of the Plaintiff that he was beaten up and left the house due to fear of being killed. I also find that there was no one who could not bring in any lodger.

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In terms of Article 555(3) of the Civil Code, if the owner of the property is obliged to preserve the structures, he must reimburse the third party:

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in a sum equal to the increase in the value of the property or equal to the cost of materials and labour estimated at the date of such reimbursement, after taking into account the present condition of such structures...

The Plaintiff has opted to claim the latter.

In making the award, I accept the sum of R19, 945.05 as the amount spent by the Plaintiff in respect of materials. However as the value has to be estimated at the time of reimbursement, I would allow a 5-fold increase in prices between 1995 and 2004. For the purpose of this calculation I would deduct R2,590 paid for the water deposit, electric meter and electricity connection. Hence  $R19, 945.05 \text{ less } R2,590 = R17,355.05 \times 5 = R18,222.80$ . With the sum of R2,590 aforesaid, the total amount under the head of materials would be R20,812.80. As regards labour, I accept the evidence of Alexis Bibi that he was paid R7,000 by the Plaintiff for his work. Michel Jules worked for only 21 days and laid the foundation and built four rows of bricks. On a comparison of the work claimed to have been done by Alexis, I would accept that his work was worth R1500. In addition I award a further sum of R500 as the hire charges of Wilfred Accouche, the pickup driver who transported building materials.

Accordingly, the total amount payable to the Plaintiff apart from his own labour would be R29,812.80. As regards the counter claim. Section 80(1) of the Code of Civil Procedure provides that –

Subject to Sub-Section (2), where a Defendant in any action wishes to make any claim or seek any remedy or relief against a Plaintiff in respect of anything arising out of the subject matter of the action, he may, instead of raising a separate action make the claim or seek the remedy or relief by way of a counter claim in the action.....

Although the counter claim is based on *faute*, Mr. Lucas, Learned Counsel for the Defendants submitted that the acts complained of were done by the Plaintiff during the period of his occupation of the house, and that hence the delictual claim arose from the subject matter of the action in the case. On an interpretation of Section 80(1), the cause of action in the main case is a claim for reimbursement for materials and labour supplied in constructing the house. Hence any claim or remedy arising there from could be the Defendant's cross claim against the amount claimed by the Plaintiff. I have already held that there was no contract between the parties that the Plaintiff was not entitled to bring anyone else to reside with him, nor that he purposely caused any harm to the Defendants to merit a claim for delictual damages. In any event, in the case of *Francis Labonte v. Paradise Resort Hotels Ltd* (C.S. 72 of 1992) I observed that Section 80(1) of the Code of Civil Procedure was more restrictive than Order 15 Rule 2 of the R.S.C. Rules of the United Kingdom, which permits counterclaims "in respect of any matter whenever and however arising". In the present case a delictual claim cannot therefore

be raised as "anything arising from the subject matter of the counterclaim is dismissed. Accordingly the

Judgment is therefore entered in favour of the Plaintiff in a sum of 29,812.80 together with interests and costs.

**Record: Civil Side No 102 of 1999**