

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Appeal No: HBA 01 of 2015**  
(Magistrates Court Civil Action No. 500 of 2011)

**BETWEEN** : Ronesh Kumar  
Appellant

**AND** : MY Transport Company (Fiji) Limited  
Respondent

**BEFORE** : The Hon. Mr Justice David Alfred

**Counsel** : Mr F Haniff for the Appellant  
Mr R Singh for the Respondent

**Date of Hearing** : 20 May 2015  
**Date of Judgment** : 18 January 2016

**JUDGMENT**

1. This is an Appeal by the Appellant, who was the Defendant in the Court below against the judgment of the Resident Magistrate on 3 November 2014 whereby the Appellant was ordered to pay the Plaintiff (the present Respondent) the sum of \$11,737.00, interest thereon at the rate of 5% p.a from the date of judgment until full payment and costs of \$1,000.00 summarily assessed.

2. The Appellant's Grounds of Appeal are as follows:
  - (1) The Magistrate erred in law and in fact when he found the money given to the Appellant was a loan when it was recorded as expenses in the Plaintiff's accounts.
  - (2) The Magistrate erred in law in finding that the Appellant failed to produce a written agreement to show the Appellant was given the money as a benefit with his employment when the onus was on the Respondent to produce documents to establish it was given as a loan to the Appellant.
  - (3) The Magistrate erred in law in failing to give sufficient reasons for either accepting or rejecting Exhibit 46 as the Respondent's evidence was that no repayments had been made prior to the Appellant leaving its employment and no demand had ever been made for repayment while he was employed by the Respondent.
3. The Appeal commenced with Counsel for the Appellant submitting that the evidence did not show that the Magistrate's conclusion, that the moneys were loans from the Respondent to the Appellant, was correct. The moneys were not in physical payments. The Appellant in his evidence said no demand for payment was made on him during his employment.
4. At this juncture, both Counsel confirmed that Exhibit P46 is the table referred to in the Appeal Record.
5. The Appellant's Counsel continued that the Magistrate did not give reasons why he did not accept the Appellant's denial that he had signed page 2 of the table. The accountant who allegedly witnessed the signature did not give evidence and this was fatal to the Respondent's case. Counsel concluded by saying that the Respondent had failed to prove the moneys were loans.
6. Counsel for the Respondent submitted that the Appellant failed to show what the proper accounting practice should be in the absence of an expert.

7. In response to my question should not the Respondent have called such accountant, Counsel replied he could not answer why this was not done.
8. Counsel continued, saying there was no employment agreement. The Respondent had the burden in the Court below to prove the nature of these payments. The table was accepted by the Magistrate, who took the line that as it was adverse to the Respondent, it could not be a forgery. The Appellant had started repayment of the loan in 2007 while still in the Respondent's employ. The Respondent had never demanded repayment while the Appellant was in its employ because he was repaying and their relationship was very good. The first demand was by Exhibit P47, which was the lawyers' letter after the Appellant left the employ of the Respondent. Counsel asked for the Appeal to be dismissed with costs.
9. The Appellant's Counsel in his reply said the Respondent did not call the accountant to give evidence. The Magistrate reversed the burden which should have been on the Respondent.
10. At the conclusion of the hearing, I reserved my decision to a date to be announced. In the course of reaching my decision I have perused the following:
  - (a) The Appeal Record
  - (b) The Agreed Statement
  - (c) The Appellant's Written Submission
  - (d) The Respondent's Skeleton submission
  - (e) The Authorities cited
11. I now proceed to deliver my judgment. At the outset, I will state that I am confined in this appeal to the material which was before the learned Magistrate in the court below. There is really only one issue before me which is whether the moneys provided by the Respondent to the Appellant were a loan or a part of his employment benefit. If the former, it would be the normal expectation they would have to be repaid; if the latter they would not.

12. The single crucial piece of evidence that the Respondent was relying on to substantiate its contention that the moneys were a loan was Exhibit P46, a reconciliation statement it alleges was signed by the Appellant, an allegation which the Appellant strenuously denies. I note this document has what is alleged to be the Appellant's signature and states that the signature was witnessed by one, Arvind Segran (Segran) and also states the time and date as 9:50 am, 10/2/11. This date would be some time after the Appellant left the employ of the Respondent which according to the evidence of PW1, the CEO of the Respondent, was at the end of 2010.
13. The Appellant's stand as submitted by his counsel was that he never paid back any money. I note from the Notes of Evidence that PW1 stated "Continued advancing Loans to the Defendant despite the Defendant not paying.....". This is in consonance with what the Appellant is saying that there were no repayments by him.
14. It is trite that the burden of proof is on him who asserts. Therefore it is for the Respondent here to prove the fact of the loan not for the Appellant to prove the existence of benefits from employment.
15. Because Exhibit P46 was vigorously objected to by the Appellant, it behove the Respondent to call the witness to prove the authenticity of the signature. This was not done. No reason was given at all why the said Segran did not give evidence. The inference then is that if he were to be called, his evidence would not be favourable to the Respondent.
16. The authority usually cited for this proposition is the decision of the High Court of Australia in: *Jones v Dunkel And Another* 101 C.L.R page 299. The decision of the majority of the Court, may be paraphrased by me as follows:

*If evidence is available which may support a party's case (that party) and that evidence is not produced and there is no sufficient explanation for its*

*non-production, then the inference is that if it were produced it would not be favourable to that party.*


17. Here the Respondent provided no explanation at all for Segran's non-appearance in the court below. In fact Respondent's counsel in his oral submission before me stated he was not able to say why Segran did not give evidence. This effectively demolishes any contention of the Respondent that the table shows the fact of the loan or that some repayment of the loan had been made by the Appellant.
18. Therefore in the absence of the alleged witness coupled with the Respondent not calling any accountant or expert to show the proper accounting practice, there was no evidence before the Court below to substantiate the Respondent's claim.
19. This is the crux of the matter. In the Magistrate's analysis in para 13 of his written Judgment he says that Respondent relied mainly on the document, Exhibit P-46, which they claimed were the loans given to the Appellant.
20. Then in para 15 of the Judgment while the Magistrate fails to state unequivocally whether or not he accepted the document as genuine, he obliquely infers it must be genuine on, what to my mind is, the tenuous ground that if it were a forgery the Respondent would not have included the repayment figures as well.
21. Finally, in para 17 thereof, the Magistrate says that another ground that stands against the Appellant is his failing to produce any written agreement to show these benefits. With the greatest respect, I am unable to accept this reasoning. I would have thought that by the same token the Magistrate would have held against the Respondent for failing to produce any written loan agreement.
22. The Respondent has the responsibility of satisfying the court that it has fulfilled the requirement imposed on it in a civil action of proving on a balance of proba-

bilities that the moneys were loans and not something else. The evidence it has provided is so meagre that the court cannot form a confident opinion that these were indeed loans. The action must therefore fail for want of evidentiary proof.

23. On my review of the evidence at the trial and considering the Magistrate's Judgment, I am unable to uphold it. I find and so hold that the Respondent has failed on a balance of probabilities to prove that it made loans to the Appellant. In the result I allow the appeal, set aside the Judgment of the Magistrate and order the Respondent to pay the Appellant the costs of this Appeal which I summarily assess at \$1,500.00.

**Dated at Suva this 18<sup>th</sup> day of January 2016**



  
David Alfred  
**Judge of the High Court**  
Suva