

**IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION No. HBC 139/2018

BETWEEN **PUSHPA KARAN NADAN NAICKER** (also known as Pushp Karan Naicker) of Votualevu, Nadi, businessman **PLAINTIFF**

AND **MUNESHWAR GOUNDER** trading as Sunrise Rentals Taxi & Tours of Malolo, Nadi, businessman **DEFENDANT**

APPEARANCES : Mr R Singh for the Plaintiff
Mr M Naivalu for the First Defendant

DATE OF HEARING : 16 & 17 September 2020

DATE OF JUDGMENT : 18 November 2020

DECISION

1. In this action, commenced by writ of summons dated 5th July 2018, the plaintiff seeks to recover from the defendant the sum of \$67,250 being the total of various amounts which he says he loaned to the defendant between January 2013 and May 2017, plus the value of video recording and photography work which, the plaintiff says, the defendant engaged him to undertake for his (the defendant's) wedding in June 2017. The statement of claim does not expressly seek interest on the amount claimed, but it does seek, in addition to the amount claimed and indemnity costs, *any other relief which in the opinion of this Honourable Court is just and expedient.*
2. In a statement of defence and counterclaim dated 31 July 2018 the defendant denies that he owes the amounts claimed. It is not completely clear from the statement of defence whether this denial is based on an assertion that the defendant did not receive money at all from the plaintiff, or whether it is based on a contention that any money received was not a loan recoverable by the plaintiff. In relation to the claim for payment for video and photography services the statement of defence asserts that this claim has already been decided against the plaintiff in the Small Claims Tribunal at Nadi.
3. In the counterclaim the defendant claims the following sums:
 - i. \$25,002.85 being rental at \$160.00 per week for the period from 9 August 2014 to 15 August 2017, when the plaintiff provided accommodation to the plaintiff.
 - ii. \$75,000 for general damages – it is not specified for what.

- iii. \$500,000 for defamation. The counterclaim does not specify when, or how the plaintiff is said to have defamed the defendant.
4. However this statement of defence and counterclaim was replaced by an extremely brief Amended Statement of Defence in July 2019, in which the defendant merely denied the allegations in the statement of claim and put the plaintiff to 'strict proof' (whatever that means) of the claims. The counterclaim was abandoned.

Evidence

5. Evidence for the plaintiff came from him, his older brother Maya Krishna Naicker and a friend Ms Mangamma Madhwan (from whom the plaintiff borrowed \$10,000 and \$20,000 respectively to advance to the defendant), Ms Yoki Salvin who manages a company (Addax Fiji Ltd) that supplied motor vehicles to the defendant, paid for by the plaintiff, and Ms Vinisha Nata, an employee of the plaintiff who witnessed one of the payments that the plaintiff said he made to the defendant.
6. Except for certain aspects of the plaintiff's evidence, which I will deal with separately, there is no need to discuss his or the evidence of the other witnesses (which I accept was given honestly and which I believe) in great detail because there is very little about it that is seriously contested by the defendant. While he contests the context for and details about how some of the payments were made to him and/or the purposes for which they were made, the defendant does not appear to dispute that he received from the plaintiff the following payments (the information in brackets is the plaintiff's explanation, not the defendant's) to assist him:

i.	In January 2013 (for his brother's wedding)	\$2000.00
ii.	In January 2016 (to purchase a rental car business)	\$5000.00
iii.	In April 2016 (borrowed from the plaintiff's brother)	\$10000.00
iv.	August – September 2016 (three payments to Addax Fiji Ltd for the purchase of two vehicles)	\$15000.00
v.	In September 2016 (borrowed from Ms Madhwan)	\$20000.00
vi.	In September 2016 (to pay insurance premiums)	\$2000.00
vii.	In June 2017 (borrowed from plaintiff's sister for the defendant's wedding)	<u>\$10000.00</u>
		\$64,000.00

Of this sum the plaintiff says the defendant has repaid only \$500.00, a payment made in December 2014 in part repayment of the first item.

7. While neither clearly admitting or denying that he received these sums, or the benefit of them, from the plaintiff, the defendant says that any money he did receive from the plaintiff were not *loans* that were repayable by him, but were *assistance* provided by the plaintiff (who he said was rich) that he was not expected or obliged to repay. The defendant did not actually say the money was a gift, but he seemed to rely on the fact that there was no documentation, or any evidence of an oral or written loan agreement, as an answer to the claim. The defendant does not agree

either that he repaid \$500.00 to the plaintiff in December 2014 as the plaintiff says happened.

8. It is clear that in the course of 2016 the defendant purchased and established a rental car and taxi/tour business. He admits to paying \$22,000 for the purchase of the business, which came with one car, and four additional vehicle permits. To keep the additional permits the defendant needed to buy four additional vehicles to use with them, and he required financial assistance to do this. Some of this he got from a bank loan, but it seems clear that the rest of the money he needed for the business was provided by the plaintiff. In the absence of any alternative explanation from the defendant about where he got the money, and given the equivocal and evasive nature of his defence, I have no hesitation in accepting the evidence of the plaintiff and the plaintiff's witnesses that he was the source of the money as set out above.
9. With regard to the amount claimed for video and photography work at the defendant's wedding in June 2017 the evidence is a bit more obscure than that related to the advances. The plaintiff owns a business that provides photography services for functions and advertising. The plaintiff says the defendant engaged the business to take video and still photographs of his wedding in June 2017, and apparently issued an invoice for \$3750.00 for this work. The invoice was not produced in evidence, and the court was not told the date of the invoice.
10. The defendant denies that he asked the plaintiff's business to undertake this work, he says the plaintiff did it from his own initiative and there was no arrangement for payment. Furthermore he says (and again this does not seem to be contested) that the plaintiff has not actually provided the video and photos that he says were taken. All the defendant has received is a USB stick, which he says does not work.
11. When the plaintiff first took formal steps to recover payment of the money he claims to have advanced he had his solicitors send a written demand to the defendant claiming the amount he said was owed. A copy of this demand dated 7 November 2017 (some 5 months after the wedding in question) was produced in evidence by the plaintiff. The demand is for \$64,500.00 and refers only to a *loan given to you to purchase the rental company known as Sun Rise Rentals Taxi and Tours, and purchase of two hybrid cars ...*. There is no reference to a sum owing for video and photography services, and the total sought does not appear to include this aspect of the claim.
12. No evidence or argument was led about the previous decision of the Small Claims Tribunal referred to in the original statement of defence, and I do not need to mention this again.

Law

13. Equity does not generally favour the idea of gifts, and so except where the presumption of advancement applies, and in the absence of evidence to the contrary, money paid by one person to another that is not in payment of a debt or

for the purchase of property or services, is assumed to be a loan. In the English Court of Appeal in **Seldon v Davidson** [1968] 2 All ER 755 Edmund Davies LJ commented (at p.758):

Since the advancement of loans and the making of gifts have been common transactions amongst mankind for many centuries, there is a remarkable paucity of authorities as to on whom the burden lies of distinguishing the one type of transaction from the other. ...

Accordingly, one is really driven back to consider this matter without the assistance of authority; and, being so unassisted, I ask myself what is to be inferred as to the nature of the transaction when the simple payment of money is proved or admitted between strangers. I entirely agree with Willmer LJ that on that bald state of affairs, proof of payment imports a prima facie obligation to repay the money in the absence of circumstances from which a presumption of advancement can or may arise.

Willmer LJ has expressed the view that the loan would be repayable on demand. I would say, if not repayable on demand, at least repayable within a reasonable time of a request for repayment; and, of course, if it be the case that mere loans were made, and later on the borrower repudiates the loans and asserts that the advancements were by way of out-and-out gifts, that repudiation of the true nature of the transaction would upon any view render the loans immediately repayable.

14. The presumption of advancement negates this assumption where the relationship between the payer and the recipient is such that the payer is under an equitable obligation to support, or make provision for the recipient, in which case, in the absence of evidence to the contrary, the payment will be assumed to be a gift.
15. These assumptions/presumptions provide a starting point only for any transaction. In both cases that starting point will become irrelevant if the evidence shows something else was intended. But the starting point may be very important in the absence of evidence of intent, or if such evidence is equivocal.
16. Relationships that would traditionally give rise to the presumption of advancement include payments or transfers of property by a husband in favour of his wife, and a father in favour of his children, but the presumption does not extend to the reverse of these, i.e. a wife is not presumed to have an obligation to support her husband, nor do children normally have a duty to support their parents such that transfers or property or payments of money are taken to be gifts rather than loans. The fact that the presumption does not apply to these latter situations does not of course mean that the existence of a duty to support cannot be shown, on the particular facts of the case, to be owed by a wife to her husband, a child to its father, or in some other relationship.
17. Apart from the application of such presumptions, whether payments such as were made in this case by the plaintiff to the defendant are loans or gifts, is a matter of fact to be decided by the Court on the basis of evidence presented.

Analysis

18. The defendant's position in this case is not as clear as it might be. It may be that he acknowledges receipt of the money that the plaintiff says that he paid him. But in any case, I am satisfied on the evidence I have heard that those payments were

made to the defendant at the times, in the manner and for the purposes listed in paragraph 6 above.

19. The real contest seems to be whether the payments made by the plaintiff were intended as a loan, or were gifts. Again, the defendant's position is not expressed as clearly as this, and there is in fact no mention in his defence or his evidence of the payments being intended as gifts. Nor is there any suggestion in the statement of defence (which, as I have commented above, was extremely brief and confined only to denials of the claim) or evidence that the payments were in satisfaction of a debt owed by the plaintiff to the defendant. At one point in the course of the hearing it occurred to me that the defendant's case might be that the plaintiff was investing in the defendant's business, but of course this has not been pleaded, nor was there any evidence or argument by the defendant to this effect. Furthermore, any such argument would not explain the payments made by the plaintiff to the defendant to assist in the cost of his and his brother's weddings.
20. In the absence of evidence or argument that either the payments were intended as a gift, or that the relationship between the plaintiff and the defendant was such as to raise a presumption of advancement, or that there was some other reason for the payments, I accept the evidence of the plaintiff that he made the payments, at the defendant's request, as loans to assist the defendant and his family. Counsel for the defendant in his closing submissions referred to the absence of any loan agreement, but the law does not insist on formal documentation, particularly when – as here – there is no claim for interest.
21. In the absence of any agreement otherwise, the loans were repayable on demand, which the evidence shows was made no later than 7 November 2017 when the plaintiff's solicitor wrote to the defendant demanding payment (see paragraph 11 above).
22. I am not convinced however about the claim by the plaintiff for payment for \$3750 for the photography and video services that the plaintiff says the defendant asked him to undertake, on a professional basis, for his wedding. As I have noted, no invoices (the plaintiff says there were two) were produced in evidence by the plaintiff. The defendant denies that there was any such request, and I note that the solicitor's letter of 7 November 2017 demanding payment of amounts claimed by the plaintiff does not include any reference to the amount said to have been due for these services conducted as recently as August 2017. I also note the defendant's assertion that the plaintiff has not provided the material he has been charged for, evidence on which the defendant was not challenged.
23. If this account had already been sent seeking payment I would have expected it to be listed in this letter as part of the amount the plaintiff was seeking. If, on the other hand, the invoices had not yet been sent, as the omission of this claim from the letter indicates might have been the case, perhaps it was something that the plaintiff decided only later to charge. This would call into question the plaintiff's assertion that the defendant had asked his business to undertake this work on a professional

basis (i.e. in the expectation of being paid). Although the plaintiff was not cross-examined about this by counsel for the defendant, the absence of an invoice/invoices with a date and details of the service supplied leads me to conclude, on the balance of probabilities, that this aspect of the claim is unproven.

Conclusion

24. Accordingly the plaintiff is entitled to judgement against the defendant in the sum of \$63,500.00 for the loans made to the defendant less the repayment of \$500.00 as set out in paragraph 11 above. The plaintiff has not claimed interest.
25. The claim for payment of the invoice for \$3750.00 for video and photography services at the defendant's wedding is dismissed.
26. I assess costs summarily at \$7,000.00



At Lautoka this 18th day of November, 2020

SOLICITORS:

Fazilat Shah Legal, Barristers & Solicitors, Lautoka, for the Plaintiff
Law Naivalu, Barristers & Solicitors, Lautoka, for the Defendant