

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

CIVIL ACTION NO. HBC 98 of 2018

BETWEEN : **KAREN ANDREW** of 77 Oramzi Road, Girranween, NSW 2145
Australia. (Retired) **PLAINTIFF**

AND : **ABINESH VIKASH PRASAD** of Maro, Sigatoka. **1st DEFENDANT**

AND : **RAMENDRA PRASAD and JANENDRA PRASAD**, both of Maro,
Sigatoka as the administrators of the Estate of Hari Prasad. **2nd DEFENDANTS**

AND : **THE DIRECTOR OF LANDS** **3rd DEFENDANT(NOMINAL)**

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. E. Maopa, for the plaintiff
Ms. J. Naidu, for the 1st defendant.
Ms. S. Begum, for the 2nd defendants.
Mr. J. Mainavolau, for the 3rd defendant

DATES OF TRIAL : 17th to 20th April 2023.

WRITTEN SUBMISSIONS: Filed by the plaintiff on 22nd May 2023.
Filed by the 1st defendant on 23rd June 2023.
No written submissions filed by the 2nd defendant.

DATE OF JUDGMENT : 25th July 2023.

JUDGMENT

Introduction:

1. This is a writ action commenced by the plaintiff on 18th May 2018 against the 1st and 2nd defendants in which, as per the amended statement of claim filed on 04th February 2019, the Plaintiff is seeking the following reliefs.
 - i. *Special damages in the sum of FJ\$ 196,556.61.*
 - ii. *General damages for breach of contract, misrepresentation and fraud.*

- iii. *A declaration that the plaintiff has 100% interest and or shares in the newly built concrete dwelling house on Crown Lease No. 20866 and occupied by the 1st defendant at Maro, Sigatoka.*
 - iv. *An injunction against the 1st and 2nd defendants not to sell, transfer, assign or deal with the existing concrete dwelling house and or the house site being built on Crown Lease no. 20866 and now occupied by the 1st defendant and his family at Maro, Sigatoka.*
 - v. *An injunction not to sell, transfer, assign or deal with the Motor Vehicle registration no. IY 193.*
 - vi. *An order that the 1st and 2nd defendants preserve and maintain in good condition the said Concrete dwelling house occupied by the 1st defendant and his family at Moro, Sigatoka and the Vehicle Registration IY 193.*
 - vii. *Interest (under Law Reforms Miscellaneous provisions) Death & Interest Cap 27.*
 - viii. *Costs on indemnity basis.*
 - ix. *Further or any other reliefs this court deems just.*
2. No claim is made against the Registrar of Title, the 3rd defendant (nominal). Likewise, no substantial claim is made against the 2nd defendants, except for interim injunctive reliefs granted as per the ruling dated 20th September 2019 by Jude Nanayakkara-J, as he then was, in favour of the plaintiff.
 3. The basis of the substantial claim against the 1st defendant appears to be the breach of a verbal agreement between the plaintiff and the 1st defendant. The main relief sought against the 1st defendant is in the form of special and general damages.

Agreed Facts

4. As per the minutes of pre-trial conference, the plaintiff and the 1st defendant have recorded the followings as agreed facts.
 - a. *The Plaintiff is resident of NSW Australia and now retired. The 1st defendant is a resident of Fiji and he lives at Maro sigatoka.*
 - b. *The 2nd defendant is the administrator of the Estate of late Hari Prasad, of Moro, Sigatoka and he is the registered lessee of the Agricultural Lease LD 4/11/ 1012 being lot 3, State Lease no. 20866 in plan no N 1948 Malomalo , Nadroga, Sigatoka, where the house which is one of the cause for the dispute is situated.*
 - c. *The plaintiff and the 1st defendant with his family befriended each since 2016 and the plaintiff when visits Fiji once or twice in a year stayed with the 1st defendant and his family and the plaintiff was provided with shelter and accommodation during all her visits to Fiji at their Farm-house at Maro, Sigatoka and the plaintiff had visited Fiji several times in the year 2016.*
 - d. *The plaintiff sent money to the 1st defendant in a sum of FJ \$ 6,500.00 via Western Union for the cultivation , a further sum of FJ\$ 122,703 52 via bank transfers, Money Gram and Western Union for the construction of the new concrete dwelling house, and further sums of \$ 16,565.30, \$ 6,000.00 which formed the sub total of \$23,165.30 .*

- e. *The lease on which the new concrete dwelling house is built was registered in the name of the 2nd defendant on 24th April 2017 to be effective from 1st January 2016.*
 - f. *The 1st defendant had reported to the Police about the plaintiff's trespassing and being very argumentative and abusive nature towards him.*
5. The residence of the parties, the facts that the 2nd defendant is the Administrator of the Estate of late Hari Prasad, and the registered lessee of the State Lease No. 20865 are admitted between the plaintiff and the 2nd defendant.

Agreed Issues

6. The Parties have raised 63 issues, most of which appear to be redundant and will not warrant scrutiny in view of the admissions recorded and the pivotal (3) issues mentioned in paragraph 17 below, answers to which, in my view, would duly dispose the matter in hand.

A. The Trial:

7. At the 4 days trial, one Ms. Lelani Turisa Kedreate (PW-1) a front Office Receptionist at 'Likuri Island Resort' (formerly known as 'Robinson Crusoe Island), Ms. Lanieta Tawalo, a Women Police Officer from Sigatoka Police Station (PE-2) and the plaintiff Ms. Karen Andrews (PW-3) gave evidence in support of the plaintiff's case.
8. The 1st defendant's wife Ms. Ranjleen (D1- W1), the 1st defendant Abinesh Vikash Prasad (D1-W-2) and the second named 2nd defendant Mr. Jalendra Prasad (D2-W1) gave evidence on behalf of the defence. On behalf of the plaintiff annexures from "Pex-1" to "Pex-12" were marked, while "Dex=1" to "Dex-4" were marked on behalf of the 1st defendant and the tab 1 of the 1st DBO was marked as "2Dex-1" on behalf of the second defendants.
9. Both the plaintiff and the 1st defendant have filed their written submission, and I am thankful to both the learned counsel for the same. No written submission was filed on behalf of the 2nd defendant.

B. The Background history in brief:

10. The following are the brief facts extracted from the amended statement of claim.
- i. *That the plaintiff and the 1st defendant with his family befriended each other since 2013.*
 - ii. *That the plaintiff normally when came to Fiji once or twice a year, visited the 1st defendant and his family and stayed with them in Maro, Sigatoka.*
 - iii. *Sometimes in early 2016 the plaintiff and the 1st defendant mutually agreed that the plaintiff would provide funds to the 1st defendant to cultivate Cassava in the land next to where he lived and once the crops are harvested the plaintiff would be repaid the*

money loaned from her and the remaining and the future revenue would be for the 1st defendant to supplement his income and to improve his family's quality life.

- iv. The plaintiff says that accordingly she had sent FJ\$ 6,500.00 for the cultivation of Cassava, but alleges that the 1st defendant failed, refused and ignored to further cultivate and repay her despite being given notice dated 17th September 2017 and used the money not for the purposes mutually agreed.
- v. That when she visited Fiji sometimes in July 2016 she decided to build a house for herself and her husband to stay whenever they came to Fiji in future.
- vi. That the 1st defendant offered the plaintiff a portion of his family land to build a new dwelling house and accordingly agreed that the plaintiff would build her house in the said land to be allocated by the 1st defendant, upon completion of which the plaintiff and her husband would stay there whenever they visit Fiji, while the 1st defendant and his family would be allowed to live in the house as caretakers and look after the house between their visits.
- vii. That the defendants had failed to inform the plaintiff that the land is a Crown freehold and under the Estate of Hari Prasad and the plaintiff was sending money to the 1st defendant for the construction of the house when there was no valid registered lease under the name of 1st or 2nd defendants and she had sent FJ\$ 122,703.52 to the 1st defendant for the construction of new house.
- viii. That the 1st and 2nd defendants with the full knowledge that there was no proper lease for the land, colluded with each other to accept money from the plaintiff for the construction of the new house, they benefitted from the construction of the new house, they used the money to obtain a lease in the name of the 2nd defendant and finally fraudulently acquired the new dwelling house without informing the plaintiff the necessary requirements to build the said house.
- ix. That the 1st defendant towards the end of December 2016 by informing the plaintiff that that he would divorce his wife Ranjleen loaned from the plaintiff a sum of FJ\$ 4082.74 in December 2016, and FJ\$ 10,000.00 in April 2016 both for legal fees and thereafter FJ\$ 30,000.00 for the final settlement of the divorce case, but he did not divorce his wife and still living with their children in the said new house.
- x. That the 1st defendant in November 2016 needed further money to buy a Car and she loaned FJ\$ 16,565.30 and in March and April 2017 an additional sum of FJ\$ 6,600.00 was loaned totalling to FJ\$ 23,165.30 to be repaid at the rate of \$200.00 per month. The 1st defendant bought a car registration no. IY 193.
- xi. That on 10th March 2018 when the plaintiff came to Fiji and went to see the house, the 1st defendant chased her out from the compound claiming the house belongs to him. The actions of the defendants are deceitful and dishonest in obtaining financial benefits from the plaintiff's kindness and honesty. She claims that she suffered and continue to suffer financial loss, frustration and mental distress.

11. Following are the brief facts, *inter alia*, gathered from the amended statement of defence filed by the 1st defendant.
- i. *In the year 2016 the plaintiff came to Fiji and stayed with them, on several occasions, provided her with their hospitality and it was during that period both the plaintiff and the 1st defendant started having an extra marital affair.*
 - ii. *The money given by the plaintiff, as stated in paragraph 8 of the amended SOC, was a gift due to the close relationship they had with each other and the plaintiff never loaned the 1st defendant any money.*
 - iii. *The money sent as per paragraph 10 of the amended statement of claim for Cassava plantation is not disputed and it was sent by the plaintiff as a gift to help his family to have a stable income.*
 - iv. *That the 1st defendant and his wife had already started making plans for their dwelling house in January 2016 by levelling their Father's land and when the plaintiff came in July 2016 she informed the 1st defendant that she would help in building the house as she considered them as her family.*
 - v. *That he was not the owner of the property to offer a piece of it to the plaintiff, and it was owned by his Father and uncle (the 2nd defendants respectively) who had offered the 1st defendant to build his house.*
 - vi. *The money given for the construction of the house was a gift given while they were in a relationship and there is no agreement between them that the house is built for the plaintiff and he on his own accord built the house in his family land utilizing the monies given as a gift by the plaintiff.*
 - vii. *That the plaintiff knew that the land is the 1st defendant's family land and she being aware of it offered to help the 1st defendant in building his house on the portion given by his family to him and at no stage the plaintiff showed any interest to know as to who the registered owner(s) of the land or the status of the lease and she only offered her money to him through their close relationship.*
 - viii. *The plaintiff had made the 1st defendant to believe that the monies were not to be repaid as it was her gift to him on account of his relationship and for their hospitality. Therefore, he accepted the monies sent and he would not have taken the money if it was to be repaid.*
 - ix. *All the monies sent by her were for the sole use of the 1st defendant to construct the house as it was a gift to him by the plaintiff. In relation to the allegation of fraud in paragraph 21 of the amended SOC he put the plaintiff for the strict proof thereof.*
 - x. *That he denies the contents of the averments in paragraphs 22 to 25 of the amended SOC, except for the receipt of money as stated therein. He says that the dispute he had with his wife was later reconciled and their relationship did not break irretrievably. There was no discussion with the plaintiff with regard to the divorce and*

the monies so received were also used for the construction of the house. That he has not been charged with any allegation of fraud by the police.

- xi. That plaintiff made the 1st defendant to believe that the money was not to be repaid as he and the plaintiff were involved in an extra marital affair. Accordingly, the 1st defendant prays for the claims to be dismissed with indemnity costs.*

C. The Evidence:

The Plaintiff's witnesses:

PW-1.

12. The evidence of the PW-1, namely, Lelani Kadreate , the Receptionist at the Resort where the plaintiff used to stay whenever she came to Fiji ,is not in dispute. Her evidence shows that it was at this Resort the 1st defendant's wife Ranjleen (1D-W-2) also worked as a cook on a particular day of the week. And it was here the 1st defendant's wife (1D – W2) had met the Plaintiff for the 1st time. It was with the PW-1, the plaintiff had gone to see the house on 10th March 2017. Her evidence as to how & when she met the Plaintiff, how the plaintiff met the 1st defendant's wife Ranjleen and what happened on 10th March 2017 is not disputed. I find this evidence will not assist in arriving at appropriate answers to the pivotal issues highlighted bellow. Because, she does not know the purpose for the transfer of money or under what circumstances the money was transferred by the plaintiff to the 1st defendant.

PW-2.

13. The evidence of the Police officer (PW-2) is wholly on as to what happened on the day (10th March 2017) when the plaintiff visited the house in question. Nothing in her evidence is disputed and I find her evidence too will not assist the court in determining the pivotal issues pertaining to the transfer of money by the plaintiff to the 1st defendant. Thus, I shall not reproduce the evidences of the PW1 and PW-2.

PW-3.

14. It is the evidence of the plaintiff (PW-1) that should throw some light in the adjudication of the matter in hand as she bears the onus of the proof of her case on preponderance of evidence. However, I shall not reproduce here the entirety of her evidence, except for most relevant parts of it. I also may quote some portions of her evidence as and when needed during my analysis bellow.

b. The Plaintiff, Ms. Karen, now 65 years of age and retired had met Leilani (PW1) at Robinson Crusoe Island in the year 2013, where the plaintiff used to stay when holidaying in Fiji and by that time she had made 4 trips to Fiji, having started from the year 2010.

c. She met Ranjalin, the 1st defendant's wife at the same Resort where Ranjleen used to work on Curry nights (Sunday nights) as a Cook and used to spend the night there and go home in the Monday mornings. They had the dinner with her friend Hellen. They became Facebook friends and was in touch for 12 months. Ranjalin invited the plaintiff to her house when she comes to Fiji next time and accordingly when she

visited Fiji again in the year 2014, she and her friend Hellen, visited Ranjleen's house, had lunch there, met the Mother & Mother in Law, went to the School and intercontinental Hotel and when finally came home in the evening she met the 1st Defendant, who had then come back from work.

- d. On the next day the plaintiff, her friend, the 1st defendant Abinesh and his wife Ranjleen went to Mud pool and came home and had lunch there again. When she came again in 2015 they spent few days at first Landing, where the 1st defendant and his wife also joined and she paid for the hotel for them as well.
- e. Then she came to Fiji 5 times in the year 2015 commencing in February and she stayed with them at their home. She never had any interest in buying a land in Fiji and she knew that it was very difficult for non-Fijians to buy a land in Fiji. But , during further discussions , she said to Ranjalin that in future she would may like to have a house in Fiji as she was visiting Fiji frequently and would be nice to have a place of her own to stay as she had a strong desire for her Husband to come with her to Fiji. During the conversation Abinseh said to her that he has some land where she could build her house.
- f. Initially she agreed with Abinesh on his proposal to have the land cleared and to cultivate Cassava for which she agreed to advance money \$6,500.00 as a loan and upon harvest he would repay the loan in instalments and further income would be uses for the benefit of his family.
- g. She did not have any formal agreement as she considered them as her family members and it was only a verbal agreement. In a further conversation in the Car when they went for shopping they asked about her dreams for future and that was the time she told them that at some point of time it would be nice if she could build a house in Fiji.
- h. Accordingly, having taken a plan from internet, she decided to pay for the construction and provided money to build the house as she was building for herself and her husband and the 1st defendant and his family were supposed to stay in the house in her absence as caretakers. She says that she spent around \$ 190,000.00 to \$ 200,000.00 for the House.
- i. Apart from spending for the house, she gave money for the Car, household items including several electrical items, bought valuable gifts for the birthdays and other occasions, sponsored the 1st defendant to Australia and finally gave around 40,000.00 being the legal fees for the divorce case, including \$30,000.00 as final settlement to his wife for divorce.
- j. Thy (the 1st defendant & his wife) finally cut off the communication, did not invite her for warming ceremony, and she believed that it was because they didn't want to repay her the money that she had loaned to them for the farm. Car, building the house and divorce.
- k. She vehemently refuted the allegation that she had an affair with the 1st defendant, Abinesh and stated that she did not ever have such an affair. She also admits that she

took Abinesh's side as she was very upset over what Ranjalin was saying about their relationship and therefore she assisted Abinesh in his divorce matters as he had discussed about it with her when he was in Australia sponsored by her. Though, Abinesh had promised to return the monies after the pending case on a land issue is over, he failed to do so. She admitted that she had no consent from the land department to build or approval from the RBF for her to invest in Fiji.

15. Under cross-examination on behalf of both the defendants the plaintiff said, *inter-alia*,
- i. She had been coming to Fiji from 2010 and met Ranjleen for the 1st time in the year 2013 at Robinson Crusoe when she was sitting around the Bar and Office area for the better reception of Wi-Fi, where Ranjleen also was there, probably, for the same purpose, when she was working as a part-time employee there. That the plaintiff being asked by Ranjleen, if she wanted to become Facebook friends, she and her friend Helen became Facebook friends with Ranjleen.
 - ii. That she was told about the building of the house during 2016 trip while they were in the Car. When it was put to her by the defence counsel that she being an educated person she jumped to build the house, she promptly accepted it. Vide page (74). She also confirmed that she spent \$190,000.00 plus, and admitted that she spent such an amount without any proper documentation.
 - iii. She said that she wanted to build something nice for her and they (1st defendant's family) will have the benefit of living in the house when she was in Australia. Subsequently, she being asked whether she expected them to be on the road when she comes to Fiji, her answer was **"No it was 4 bedroom home. So there was more than sufficient room and the Master wing would be the for my husband and I me and my husband. The other 3 bedroom were for the family"**. On further questioning she stated that they will stay as caretakers and when the question was repeated whether they have to be on the road when she comes from Australia, her answer was "No".
 - iv. She refuted the allegation of extra marital affair with the 1st defendant but admitted that she funded the 1st defendant for divorce matter and she was doing so as Ranju was making accusations.
 - v. When she was shown some photographs and asked questions such as "were you comfortable to lie with Abinesh in this nature? You were yet lying down in his lap very comfortably when he was drinking something Alcoholic? And he was cheering you (lifting her), her prompt answers were affirmative. When she was specifically asked in page 90 **"And it is because this physical relationship you continued to give money to Abinesh to build the house?"** She answered affirmatively **"I continued to give money to Abinesh to build the house"**. She did not deny it.
 - vi. During the re- examination, answering the question posed by the court **"But, you started paying for the house before any benefit come from the Cassava plantation?"** Her answer was **"Yes"**.

1st Defendant's Evidence:

16. The 1st defendant in his evidence has categorically admitted the receipt of several amounts of monies at various stages for the purpose of cultivation, construction of the house, car and divorce proceedings. He also admitted the receipt of various kinds of expensive gifts and household items as averred by the plaintiff. He maintained the position that all the monies he received was not as a loan but as gifts given owing to the relationship the plaintiff had built up with him and the monies were never expected to be returned to her. He does not deny the discussions for the construction of the house and stated that the monies were given to help his family in improving their living standard.

D. The Issues:

17. The principal issues that beg adjudication through this trial are;

- a. *Whether the monies given by the plaintiff and, admittedly, received by the 1st defendant is a loan facility?*
- b. *Whether the said monies were given as gifts?*
- c. *Whether the plaintiff is entitled to the reliefs prayed for in the prayer to the amended statement of claim?*

E. Discussion:

18. It is to be observed on careful perusal of the amended Statement of Claim, that nowhere in it a single word is uttered that the monies given for the construction of the house was a loan facility, except for stating that the money given for the Car was as a loan facility. (Vide paragraph 26).
19. Likewise, no single specific issue was raised to the effect *whether the monies given for the construction of the house was a loan facility?* It is only in relation to the monies given for the car and cassava plantation issues have been framed whether those payments are loan facilities? The main issue that seeks an answer is, ***whether the monies given for the house was a gift?***
20. The plaintiff in her amended SOC never showed her purported position that the monies given for the construction of the house was a loan, rather reiterated that she was genuinely helping the 1st defendant and his family and that she wanted a house in Fiji for her to stay as and when she comes to Fiji with her husband.
21. It is also to be observed that the plaintiff in her evidence never uttered a single word that the 1st defendant or his wife Ranjleen ever requested a LOAN facility from her during the time material. Likewise, not even a suggestion was made by the learned counsel for the plaintiff to the 1st defendant or to his wife during their cross examination that either or both of them requested financial assistance as a loan or otherwise.
22. It is crystal clear from the evidence of the plaintiff that from the day one, for the reason best known to her, she wanted to assist the 1st defendant's family. Accordingly, she commenced her mission by giving money for cultivation. Though, she, purportedly, expected to receive back in \$200.00 on account of the initial sum given for cultivation, she subsequently showed no interest in recovering that money. Though, the 1st

defendant had actually attempted to repay \$800.00 she has not taken it by saying the money is for him. Vide pages 164 & 165 of the transcript.

23. The plaintiff claims to recover a sum of \$196, 556 .61, being the total sum she sent and, admittedly, received by the 1st defendant over a period of time. The basis of the claim is that the money was given to her as a loan to build a house and other purposes. The pleaded causes of action were the breach of agreement/misrepresentation/fraud. Neither a cause of action on her, purported, entitlement for recovery of any damages or on unjust enrichment was pleaded nor was a specific issue raised on it. It was only in the written submissions the plea unjust enrichment was brought up. Her whole claim is based on the, purported, loan transaction.
24. In the prayer to the amended statement of claim, the reliefs prayed for are special damages in a sum of \$ 196, 556.61 and the general damages. As per the prayer, she is not asking to recover the money on the basis it was a loan. However, she has not adduced any written agreement or a statutory declaration signed and given by the 1st defendant, to substantiate her claim that what the 1st defendant had obtained from her was a loan.
25. The 1st defendant vehemently denied receiving the monies from the plaintiff as a loan. He maintained that the monies were given by the plaintiff to him as a gift as she was having an affair with him.
26. In 2013, the plaintiff and Ranjleen became Facebook friends. Their friendship grew further and the plaintiff continued to visit Fiji and stay with Ranjleen and her family. Her first visit to Ranjleen's house was in 2014 and it continued till 2016 in which year she made 5 trips to Fiji and stayed there. During this process she befriended with the 1st defendant Abinesh and all what happened thereafter is in clear and uncontroverted oral and documentary evidence, which does not require any further elaboration. See the annexures marked as D1-Ex-2(Photographs)
27. It is notable that at the time when the plaintiff started to send money to the 1st defendant there was no agreement or arrangement that he would return the money back to the plaintiff. The 1st defendant has received the money from the plaintiff without any obligation to return it. He did not know and/or was not told that the plaintiff was giving the money to build the house as loan. Even the plaintiff did not tell the defendant's wife that she was giving the money to the 1st defendant as a loan. Plaintiff could have liaised with Ranjleen as well when she was parting with such a colossal amount. The plaintiff, for reason known to her, did not communicate with Ranjleen on this affairs.
28. To be fair by the plaintiff, I must put on record that it was not a wrong on her part to dream about or to be desirous of having a house in Fiji as she stated. But, she being an educated and matured person should have been more vigilant in throwing her hard-earned in a venture like this. She knew or ought to have known that, particularly, she being a foreigner, buying and owning a property in another country is a difficult and complicated task. She admitted that she jumped to build the house without adhering to the formalities and now seems to be regretting on it. What is on the land goes with the land. She not being an owner of the land in question should not have financed to build on some one's land unless she had entered into a valid agreement with necessary approvals from the respective departments.

29. Plaintiff's evidence was not convincing on her purported claim of loan facility to the 1st defendant and her stance taken at the trial in relation to the allegation of extra marital affair with the 1st defendant is not acceptable in view of cogent evidence adduced by the defence through several photographs, where the plaintiff appeared to be in close intimacy and compromising positions. The 1st defendant's evidence was coherent, consistent and straightforward as to the nature of the financial remittance. I had the opportunity to observe his demeanour while he was giving evidence, and I noticed that he was unshaken and answered the questions under cross examination without any hesitation or pause, despite the risk of destroying or damaging the marital relationship with his wife Ranjleen by disclosing his sexual ties with the plaintiff. He said that he used to have Sex with the plaintiff in Fiji and when he was in Australia as a guest of the plaintiff. This was further substantiated by none other than his wife Ranjleen in her evidence. I, therefore, find him as a truthful witness, and I accept his evidence.

His conscience may have, subsequently, got him to admit or undertake that he should pay back the plaintiff. But the fact remains that the monies he so received was not a loan facility as pleaded by the plaintiff and stated in her evidence. However, I must also put on record that this judgment shall not be a hurdle if he decide to repay.

30. If the plaintiff wanted to enjoy the house, constructed utilizing her money, during her future visit to Fiji, she could have avoided an intimacy with the 1st defendant to such an extent. She proceeded to finance the, purported, divorce as well. If she was really fond of the 1st defendant's family and wanted to continue to help them, while enjoying her stay with them, she could very well have verified from Ranjleen about the purported divorce before the payment for divorce.
31. If it was a loan, the plaintiff should have look at the 1st defendant's capacity to repay the sizable money she was giving to him. Payment was not a single one. She was giving money to him over a period around one year. During this period there was no talk of a loan facility to build the house. Plaintiff could have analysed the ground realities to avoid becoming a victim, if there was any fraud, cheating or misrepresentation.
32. The plaintiff in her evidence claims the monies given to the 1st defendant on the basis that it was a as a loan. But I don't find any specific pleadings and/ or issues for the court to try the matter on the basis that the money given for the house was a loan. There is no evidence by the plaintiff that the 1st defendant or his wife asked her if she could lend some money to build a house.
33. If the plaintiff wanted to have her dream of having a house in Fiji for her to stay, she could very well have materialized that dream by maintaining the healthy relationship with the family. If not for the illicit relationship, the plaintiff would probably have had the opportunity of enjoying the portion of the house she got built spending her money.
34. There was no any promise or arrangement by the defendants that they would repay the monies they receive from the plaintiff if it was a loan. The monies were given to the 1st defendant without any security or promise to return it. The 1st defendant simply received the monies without any obligation to repay it because he had an affair with the plaintiff. She may have remitted the money to the 1st defendant with the only hope of having a

permanent place for her to stay in Fiji when she visits Fiji. But the method adopted by her in materializing her dream failed.

35. On the evidence, I find that the defendants did not request the plaintiff to lend money to build a house. At the time when the 1st defendant received the money, he did not give any promise that he will return it. I reject the plaintiff's evidence that she lent the money to the 1st defendant upon their promise that they would repay.
36. There is no evidence that the defendants cheated, committed fraud, misled, or misrepresented to the plaintiff or unduly influenced her into giving the monies to the 1st defendant. The overall evidence suggest that the money given was a gift with no expectation to have it back.
37. Gift, in law, a present or thing bestowed gratuitously. The term generally restricted to mean gratuitous transfers *inter vivos* (among living) of real or personal property. One cannot really give somebody a gift for no reason because you do have a reason for giving the gift. You are bringing attention to yourself by giving a gift, so the reason is to get attention.
38. In this case, the plaintiff gave the money as gift. The reason being that through an affair with the 1st defendant she seems to have thought that she would be able to have both the 1st defendant and the house for her to stay. She got the 1st defendant's attention towards her by giving monies and other benefits.
39. The plaintiff and the 1st defendant had full capacity to give and receive gift. I should emphasise that there was no evidence whatsoever demonstrating that the 1st defendant and/ or his wife Ranjleen unduly influenced the plaintiff into giving monies as loan. Given the fact that the plaintiff had sexual ties with the 1st defendant, she was giving monies to 1st defendant without any obligation to return it, so that he had accepted the money as gift.
40. In any event, the plaintiff's interest also defeats the requirement of the section 59 of the Indemnity, ***Guarantee and Bailment Act [Chp 232]*** Laws of Fiji, which states as follows;

59. No action shall be brought-

(a).....

(b)

(c)

(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or

(e)

unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised.

**inserted by 22 of 1918. (Emphasis mine)*

41. The plaintiff hereof has not adduced any written deed or agreement as evidence to substantiate her claim against the defendants.

42. In the case of *Mohamed v Khan, HBC 67 of 2014; 5th June 2014* the Court struck out the claim of the plaintiff on account of the failure to comply with the mandatory requirement of section 59 of the *Indemnity, Guarantee and Bailment Act*.

43. I prefer to follow Justice Mohamed Ajmeer's decision (as he then was) in *Wanigasekera V Sharma [2020] FGHC 168; HBC 161 of 2018 (26th February 2020)* where the facts were similar, except for the fact that the plaintiff who remitted money therein was a male and the defendant who received it was a female.

F. Conclusion:

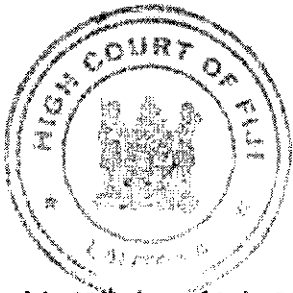
44. On the evidence adduced, and for the reasons set out above, I find that the monies given by the plaintiff to the 1st defendant were gifts and not given as a loan. The pivotal 3 issues in paragraph 17 above are answered "No" "Yes" "Yes" respectively in favour of the 1st defendant. I would, therefore, dismiss the claim. Considering the circumstances, I would not make an order for costs and parties shall bear their own costs.

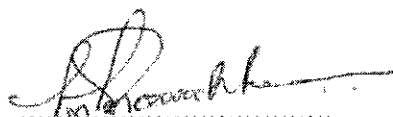
G. Counter Claim:

45. The 2nd defendants counterclaimed a sum of \$ 30,000.00 for unnecessary mental anguish, frustration and on account of legal fees incurred. However, the 2nd defendants had failed to lead sufficient evidence in respect of their counterclaim. As such, I would dismiss their counterclaim as well without costs.

H. Final Orders.

1. Plaintiff's claim dismissed.
2. 2nd Defendants' counterclaim also dismissed.
3. No order as to costs.




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A.M. Mohamed Mackie
JUDGE

Dated on this 25th day of July 2023 at Lautoka

SOLICITORS

For the Plaintiff: Messrs Babu Singh & Associates – Barristers & Solicitors
For the 1st Defendant: Messrs Jyoti Legal, Barristers & Solicitors
For the 2nd Defendants: Messrs Zoyab Shafi Mohamed Legal- Barristers & Solicitors