

BETWEEN : J.S.P. AUTO PARTS - Appellant;

AND : SIONE TEISINA FIFITA - Respondent.

BEFORE THE HON. JUSTICE FINNIGAN

Counsel: Mr 'Etika for Appellant,
Mr Fifita in Person.

Date of hearing: 14 April, 1999

Date of Judgment: 30 April 1999

JUDGMENT OF FINNIGAN, J

This is an appeal against a decision of a magistrate in a civil claim.

As preliminary matter, counsel for the appellant has complained that the transcript of the proceedings is seriously deficient. Mr Fifita the respondent did not disagree, he said only that what has been provided contains no substantial error. The centrepiece of this litigation is a written agreement, which was produced as Exh A. That was not provided with the transcript.

With the assistance of counsel, the Court has been able to dispose of this appeal without sending it back to the magistrate for a fuller transcript. However the magistrate and his clerk are duty bound to keep a full and accurate record of what is said in proceedings, and to provide with the transcript on appeal all the exhibits.

THE FACTS

Briefly, the facts are that the appellant repaired a motor car and the respondent agreed to pay. The price was agreed orally at \$2,000. The respondent paid \$1,000, and it was agreed between the parties and a third person, Vave, that Vave's forklift, worth NZ\$5,000, would be taken by the appellant as security for the other \$1,000. The appellant was to go that day and collect the forklift, then hold it for one month and in

default of payment by the respondent, sell it. The appellant did not collect the forklift, neither was the \$1,000 paid. The appellant sued on the initial repair agreement for the respondent's \$1,000 debt.

The magistrate held that the appellant had caused his own problems by not collecting and selling the forklift, as he had been entitled to do. He therefore refused to give him judgment. Whence this appeal. Mr Etika has submitted that the magistrate failed to decide the issue that was before him.

Mr Fifita has submitted that the magistrate was entitled to make what he did of the evidence of fact without interference by an appellate court. He pointed out that the appellant had agreed in the lower court that he had breached the agreement for security by not collecting and holding the forklift. He said he still intends to pay and had made an agreement with the appellant to pay him by September this year.

DECISION

Mr Fifita is undoubtedly correct in intending to pay the debt. There was a contract for repair of the car for \$2,000 and the money was due for payment. The arrangement for security is clearly separate from the contract for the debt. A creditor can let his security slip away, but does not by doing so give away his right to payment. The magistrate should have identified what it was the plaintiff was seeking. His task was to decide whether the claim to the \$1,000 was made out. He did not do so. The appeal succeeds.

Mr 'Etika invited the court to remit the case to the magistrate for rehearing, but Mr Fifita's submissions make that unnecessary. The contract is clear on the evidence, and the money is due for payment. Judgment is entered for the appellant in the sum of \$1,000, with lawyer's fee of \$100 and court costs of \$21. On the appeal, further costs are allowed to the appellant, which I fix at \$100.

NUKU'ALOFA, 30 April 1999

