**IN THE COURT OF APPEAL, FIJI**
**[On Appeal from the High Court]**

**CIVIL APPEAL NO. ABU 114 OF 2020**
**[Lautoka Civil Action No: HBC 139 of 2020]**

**BETWEEN** **MUNESHWAR GOUNDAR**

***Appellant***

**AND** **PUSHPA KARAN NADAN NAICKER**

***Respondent***

**Coram** **Jitoko, P**
**Qetaki, JA**
**Morgan, JA**

**Counsel** **Mr. D. Naidu for the Appellant**
**Mr. Z. S. Mohammed for the Respondent**

**Date of Hearing** **8 November, 2023**

**Date of Judgment** **30 November, 2023**

# JUDGMENT

**Jitoko, P**

[1] I agree with the reasons and the conclusion arrived at and the orders of Qetaki, JA.

**Qetaki, JA**

**Background**

[2] This is an appeal against the judgment of the High Court at Lautoka, on 18 the day of November 2020 in Action No. HBC 139 of 2018 where it was held that the plaintiff is entitled to be paid by the defendant the sum of $63,500.00 for the loans made to the defendant less the repayment of $500.00. The Court awarded costs summarily at $7,000.00.

[3] The plaintiff had commenced this action by writ of summons dated 5th July 2018 seeking to recover from the defendant the sum of $68,250.00 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.

[4] The statement of claim at paragraph 2, sets out the full particulars of the sum of $68,250.00, which may be summarised as follows:

(a) Cash loan of $ 1,500.00 for the defendant's brother's wedding, namely Muni Ashwin Kumar, in the month of January, 2013.

(b) Cash loan of $15,000.00 for purchase of rental car business, on or about the month of April, 2016.

(c) Cash loan of $15,500.00 for purchase of hybrid car on or about the month of September, 2016.

(d) Cash loan of $20,500.00, for purchase of hybrid car on or about the month of September, 2016.

(e) Cash loan of $2000.00 for car insurance payment on or about the month of September, 2016.

(f) Carrying out video recording and photography for the defendant at a cost of $3,750.00 on or about the month of April, 2017, and not paid for.

(g) Cash loan of $10,000.00 for the defendant's wedding on or about the month of May 2017.

[5] It indicated that the amounts claimed are well known to the defendant, and the plaintiff has demanded of the defendant to settle the aforesaid debt and the defendant refuses to do so.

[6] In his statement of defence and counter-claim dated 31 July 2018, the appellant denies that he owes the amounts claimed. In July 2019, the appellant filed an amended statement of claim which replaced the statement of defence and counterclaim. It was an "extremely brief" statement of defence. The defendant merely denied the allegations in the statement of claim and put the plaintiff on "strict proof". The counterclaim was abandoned.

[7] The case was heard on 16 and 17 September 2020 before Stuart J, and judgment was delivered on 18 November 2020, which concluded, as follows:

> "***Conclusion***
>
> *24. Accordingly the plaintiff is entitled to judgment against the defendant in the sum of $63,500.00 for the loan 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 the payment of the invoice for $3750.00 for video and photography services at the defendant's wedding is dismissed.*

[8] The appellant filed a notice and grounds of appeal on 23 December 2020.

**Grounds of Appeal:** The appellant filed 4 grounds of appeal as follows:

> *Ground 1*
> *That His Lordship erred in law and in fact in not considering whether the contract between the applicant and the respondent embody all the essential requirements of a valid agreement , that is, there must be an offer, an acceptance, consideration and an intention to create legal relations.*
>
> *Ground 2*
> *That the trail judge failed to consider that the respondent and the applicant's mother were in de facto relationship and the trial judge has erred in failing to draw the correct inferences and has unfairly dismissed the applicant's evidence that the respondent never lend money to the applicant.*

*Ground 3*

*That His Lordship erred in law and in fact in holding that the respondent's money was used by the applicant to expand his rental company and there was no such evidence before the learned trial judge.*

*Ground 4*

*That His Lordship erred in law and in fact in failing to assess the credibility of the two witnesses for the respondent and further His Lordship failed to consider that the said two witnesses may have had an ulterior motive to testify in favour of the respondent.*

**The Law**

[9] Appeals in civil cases to this Court are made under section 12 of the Court of Appeal Act. In this case, the appeal is under section 12(1) (a), that is, from a decision of the High Court sitting in first instance.

Section 13 of the Act provides:

> *"For all the purposes of incidental to the hearing and determination of any appeal under this Part and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of Court.*

**Appellant's Case**

[10] **Generally:** On applicable laws, it is submitted that, the presence of the four elements essential to a valid agreement must be established. That is there must be an offer, an acceptance, consideration, and an intention to create legal relations: **Sen v Patel** [2020] FJHC 281, at paragraph 27 of judgment. The case **Balfour v Balfour** [1919] 2 KB 571, had set the foundation for contract law as it gave birth to the purpose behind the creation of intention to create legal relations. His Lordship (Lord Atkin) observed that,

> *"....agreements that are made between a husband and his wife, specifically personal family relationships, to provide maintenance costs, and other related capitals are generally not categorized as contracts because in general, the parties to the agreement do not intend to enter into an agreement*

*that should be attending legal ends. Therefore, a contract cannot be enforceable by nature if the parties to the same do not intend to create legal relations with each other."*

[11] More specifically, on **Ground 1,** the appellant submitted:

(a) That in the absence of any document or without being proven, that there was an intention to create legal relations, there is no basis in which to hold that the monies advanced were recoverable by the respondent. The appellant relied on the learned judge's statement in paragraph 7 of the judgment at the High Court, which states:

> *"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".* (Underlining added)

(b) That the appellant fell victim of a poorly drafted statement of defence, illustrated by the remarks made by the learned judge on the statement of defence at paragraph 19 of the judgment, which states:

> *"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……"* (Underlining added).

(c) That the appellant had admitted in examination in chief that he provided assistance whenever the defendant needed help. That supports the assertion that the monies advanced were intended to assist the defendant and not intended to create legal relationship between the plaintiff and the defendant. To illustrate the appellant points to the examination in chief of the respondent recorded at bottom of page262 and on top of page 263 of record, as follows:

*"Mr Singh: What was your communication with each other? How was your communication?*

*Witness: Well we had been open my Lord. Anything we shared we discussed so when he needed my assistance I was always available for him to help him out."*

Counsel submits (in context of above exchange) that the learned judge must have considered this whilst deciding the plaintiff's case.

(d) That sufficient doubt was raised in evidence at pages 264 to 267 of records, whether or not the plaintiff advanced monies as loans or reached out to assist his nephew, the defendant. The plaintiff, only later moved to recover the monies advanced as gifts.

(e) The learned judge's analysis leading to his acceptance of the evidence of the plaintiff that the plaintiff made the payment at the defendant's request, as loans to assist the defendant and his family, is not supported by the evidence. In the analysis (paragraph 20) the learned judge stated:

*"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 of interest."* (Underlining added)

(f) That the plaintiff carries the burden to prove that there existed an intention to create legal relations. A contract cannot be enforceable if the parties to the same do not intend to create legal relations with each other: Lord Atkin in **Balfour v Balfour** (supra).

[12] **Respondent's Reply**: The respondent's reply to the appellant's submissions on Ground 1, are summarised below:

(a) The defendant was not able to explain where he got the monies from. The learned judge accepted the evidence adduced by the respondent and his witnesses at the trial .The learned trial judge at paragraph 8 (page 6 of record) stated: The absence of any alternative explanation from the defendant about where he got the money, and his equivocal defence to the claims lead the judge to accept the plaintiff's evidence and that of his witnesses that the plaintiff was the source of the money the subject of the claims.

> *"... ... In the absence of any alternative explanation from the defendant about where he got the money, and given the equivocal 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."* (Underlining added)

(b) The monies advanced to the appellant by the respondent are in the nature of monies loaned to the appellant to be repaid on demand. Money that is paid by one person to another that is not in payment of a debt or for the purpose of property or services, is assumed to be a loan. At paragraph 13 of judgment, page 6 of record, the learned trial judge stated:

> *"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".* (Underlining added)

(c) That the learned trial judge did not err in failing to consider whether there was a contract between the parties.

**Discussion**

[13] The appellant's reliance on, Lord Atkin's formulation of the essential elements that must be present to constitute a contract, emphasizing the need for the parties to have an intention to create legal relations, is justifiable and legally sound: **Balfour v Balfour** (supra). However, to maintain that there was no intention to create legal relations between the

plaintiff and the defendant in this case, and under the circumstances the money cannot be recovered, as the claims cannot be sustained, is arguable. The learned judge was correct when he stated that the defendant in his defence:

(i) did not actually say that the money was a gift;
(ii) 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.

[14] The defence did not deny receiving any money from the respondent. In his defence he did not expressly state that the monies he received were gifts from the respondent. The appellant denied the claims in his defence and asked for 'strict proof'. He was equivocal, vague and evasive in his defence. He did not adequately address the subject matter of the respondent's claims.

[15] The appellant also submitted that the appellant fell victim to a poorly drafted statement of defence. That may be so, but, that cannot be taken in his favour. The appellant cannot distance himself from his defence. The Court did recognize that the defence was extremely brief .The learned judge in paragraph 19 of the judgment commented on the quality (or lack of it) of the statement of defence. It failed to address the crux of the claims and to clarify for the court the position of the appellant with regards to the claims.

[16] However, the respondent referred to the learned judge's findings in paragraph 8 and 13 of the judgment, where the learned judge, stated that he had no hesitation (in the absence of any alternative explanation from the defendant) in accepting the evidence of the plaintiff and the plaintiff's witnesses, that it was the plaintiff who was the source of the money. The learned judge also expressed that, equity does not generally favour the idea of gifts, and as such, 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. The learned judge did not err in failing to consider whether there was a contract between the parties. There was an understanding, perhaps not in writing between the appellant and the respondent under the circumstances.

[17] Chitty on Contracts" Vol.1 "General Principles" at paragraph 1-066 (page 144), in explaining the classification of contracts states:

> *"Contracts may either be expressed or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are expressed when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated..... Express and implied contracts are both contracts in the true sense of the term, for they both arise from an agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follows that the distinction between express and implied contracts has little importance. However, "[one] distinction exists.....in relation to the ease with which an express or implied contract may be established .Where there is an express agreement on essentials of sufficient certainty to be enforceable , an intention to create legal relations may commonly be assumed. It is otherwise when the case is that a contract should be implied from the parties conduct. It is then for the party asserting the contract to show the necessity for implying it."* (Underlining added)

[18] There is in my view, a relationship, supported by evidence, between the plaintiff and the defendant, in the nature of an implied contract. The conduct of the respondent in giving the various amounts to the appellant is not contested. An illustration or insight in what transpired during the moments when the respondent is being asked to give financial assistance to the appellant , may be usefully gauged from the examination in chief of the respondent, by Mr Singh his counsel, at page 262 -266 of record:

| | |
|---|---|
| *Mr Singh:* | *Why are you in court?* |
| *Witness:* | *My lord I have known Muneshwar Gounder for a number of years. He is related to me as well my lord. During the course of our relationship my lord he has borrowed money from me in a form of loan my lord on various occasions.* |
| *Mr Singh:* | *And what is your relation now, in other words behavior for relationship now, the condition of your relationship now?* |

*Witness:* *Not that good since I started asking for the money my lord.*

*Mr Singh:* *But prior before this claim what was or how was your relationship with the defendant?*

*Witness:* *It was really going well my lord. We have been interacting with each other well till his wedding my lord.*

*Mr Singh:* *When you say interacting with each other well, can you elaborate more how, how close were you in terms of your relationship?*

*Witness:* *We used to go to each other's place my lord. We used to sit together. We used to go out together. We used to have meetings in the restaurant and all so it's just being close relationship....*

*Mr Singh:* *What was your communication with each other? How was your communication?*

*Witness:* *well we had been open my lord .Anything we shared we discussed so when he needed my assistance I was always available for him to help him out.*

*Mr Singh:* *Now Mr Naicker did the defendant require any form of financial assistance from you?*

*Witness:* *Yes he did my lord.*

*Mr Singh:* *And you recall how occasions or what period did the defendant require financial assistance from you?*

*Witness:* *Yes my lord, it has been, he has been asking for financial assistance quite a number of times. The first one my lord was in January 2013.*

Continuation of examination in chief of plaintiff at page 265 of record:

*Mr Singh:* *Mr Naicker apart from the event in 2013, did you have any other dealing with Mr Munesh?*

*Witness:* *Yes my lord it was again in 2016 when he decided to buy his rental car business then he liaised with me discussed with me and then whatever he could he had, invested in the business and he asked me to help him further in financing him further as a loan to buy the business my lord.*

*Mr Singh:* *And who approached you this time?*

*Witness:* *Muneshwar Gounder.*

*Mr Singh:* *Did he himself approached you personally?*

*Witness:* *yes we had a meeting regarding the business.*

*Mr Singh:* *When you say meeting, can you elaborate further?*

*Witness:* *He normally we used to share, what we used to share the dealings like business dealings. I am a businessman he was also a businessman as well as a employee so when he started he wanted to buy his business he discussed with me and then we actually, I actually agreed that he should go ahead and buy the business and the business was worth from my recollection the business was worth $22,000 my lord and he paid $7000 from his side and he asked me for assistance and initially I could help him out with $5,000 to buy the business.*

Continuation of examination in chief of plaintiff (page 266):

*Mr Singh:* *And why did you agree to help him out?*

*Witness:* *Because he was desperate, wanting to buy the business my lord and then I knew that he would pay me back because he was going for that business and that he'd be able to pay. He was arranging for his loan and then he would be able to pay me back.*

[19] The above evidence in chief adduced by the plaintiff, clearly shows that the appellant and the respondent were in continuous relationship, and were regularly, engaged in discussing their business dealings , and that the appellant had approached the respondent, not once, but at various times, when he needed financial assistance on the condition that it would be paid back.

[20] The appellant in his defence had denied all the amounts claimed and subjected the respondent to "*strict proof*" of the payments alleged to have been made to the appellant at the various dates specified in the statement of claim. The learned judge had accepted the evidence of the respondent and those of his witnesses. On the other hand the learned

judge commented on the vagueness and uncertainty created by the appellant's defence. Clearly, on the conduct of the parties, it can safely be established that there is an implied contract for a loan to be repaid by the defendant/respondent, on demand. Ground 1, has no merit and is dismissed.

**Appellant's Case (Ground 2)**

[21] It is argued by the appellant, that:

(a) The learned judge should have carefully considered this factor (meaning the de facto relationship between the plaintiff and the defendant's mother), while deliberating on the issue of a valid agreement. That a reasonable person, looking at the records on the circumstances of this case, that there ought to be a presumption in favour of the appellant that a father was helping a son as the Man of the House. From the copy of records, nowhere, the respondent has rebutted that presumption or prima facie proved that indeed the monies advanced were actual loan. It is submitted that once the relationship broke down, to seek revenge, the respondent brought this action to recover the monies that were never intended as loan. Counsel referred again to the quality of the defence which the learned trial judge had commented on (see paragraph [12] (c) above. At paragraph [19] of judgment, the learned judge clearly indicates that the pleadings are not pleaded to reflect the case theory of the appellant. More so a poorly drafted statement of defence. "We submit that the learned judge formed an idea in his mind regarding the defendant's case theory but erred in correctly inferring the same with the evidence that was before him."

(b) The appellant drew support from the English case **Seldon v Davidson** [1968] 2 All ER 758. Where Edmund Davies LJ commented (at page 758):

*"Since the advancement of loans and 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 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 William LJ that on the bald state of affairs, proof of payment imports a primary obligation to repay the money in the absence of circumstances from which a presumption of advancement can or may arise.*

*William LJ has expressed the view that the loan be repayable on demand, I would say, if not repay 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 the borrower repudiates the loans and asserts that the advancement were by way of out-and-out gifts, the repudiation of the true nature of the transaction would upon any view render the loans immediately repayable.*

In applying the principles in the above case to this appeal, counsel submitted that, it is apparent that monies advanced was for the purpose of facilitating the needs of the family as the respondent was in de facto relationship with the appellant's mother.

[22] In replying to Ground 2, the respondent states:

(a) The respondent had a relationship with the appellant's mother but they were not living together and neither were they legally married. The appellant cannot base his claim on the fact that due to the relationship, the loan becomes a gift and not a loan. Judge Stuart in paragraph 6 of his judgment (page 7 of record) stated:

*"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....."*

(b) The relationship between the respondent and the appellant's mother has no relevance to the issues before the Court. The parties were not related nor do they have a mutual dwelling which gives rise to a domestic family relationship. The

judge had correctly decided that the money was given for it to be paid back on demand.

**Discussion**

[23] In this ground, counsel for the appellant seems to be saying that because the plaintiff and the defendant's mother were in a de facto relationship, the learned judge should have drawn 'correct' inferences based on that relationship. Further , it may be presumed ,that the correct inferences meant by the appellant, was that the plaintiff and the defendant are now "*father and son*" so to speak, and any assistance by advancing monies as in the circumstances of this case, the correct inference is that it is not a loan and never intended to be a loan. The appellant's arguments cannot be sustained for the reasons stated by the respondent, and the learned judge. It is not established from the evidence adduced by the plaintiff and his witnesses and by the defendant's evidence that the plaintiff was under a legal or an equitable duty and obligation towards the defendant, and for whom he had a duty under law to maintain and care for.

[24] Given the evidence of the respondent, the case of **Seldon v Davidson** (supra), is in my view is of little assistance to the appellant. Proof of payment imports a prima facie obligation to repay the money in circumstances from which a presumption of advancement can or may arise. In paragraphs 14, 15, 16 and 17 of the judgment in the High Court, the learned judge had, in my opinion correctly stated the position regarding *"presumption of advancement"*. This presumption can easily be rebutted.

[25] There was no evidence in the defence before the Court that the monies paid by the plaintiff to the defendant was a gift. The plaintiff's evidence is clear on this. He had paid the monies to assist help the defendant, and to be repayable on demand. The evidence on this aspect by the defendant was equivocal. He agreed that the plaintiff had helped him, but denied that the monies were loans. He does not have to repay. He relied on the argument that there was no contract and no legal intention to create legal relations with the plaintiff.

[26] There was no evidence establishing 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 .There were no other reason for the payments .The learned judge accepted the evidence of the plaintiff and his witnesses, that the payments were made at the request of the defendant, as loans to assist the defendant and his family. I agree.

[27] Ground 2 has no merit. It is dismissed.

[28] On **Ground 3,** the appellant contended:

*(a) That the learned judge ought to have considered whether or not there existed any evidence to prove that the monies advanced were for the purpose of expanding the rental company.*

*(b) During cross examination in page 303 of transcripts/record, the solicitor Mr Naivalu in cross- examination asks the respondent:*

*"Mr Naivalu: Did it not occur to you that these 5,000 of January 2016 as you alleged you handed him, did it not occur to you that because he had not repaid the 1,500 it was a risk giving him the next amount of money?*

*Witness: Not really My lord as I have mentioned several times earlier were are in a very cordial relationship my Lord and whatever transpired between even the whole family knows that the defendant owes me money so I did not think that far that it would come but it is today so, it's all based on trust and our understanding my Lord.*

*(c) Appellant submitted that there is no understanding that could be gauged from the record. There are no evidence of mutual understanding between the parties .There is no invoice or receipt tendered to show that indeed the monies advanced were or for the purpose of expanding the rental business. Inter vivos or commonly known as gifts is finely distinguished from loans and more clearly when parties are family members than intention to create legal relations must reflect on the judgment having been proven by the plaintiff. But in this case, it was not and that is the appellant's case theory.*

[29] On **Ground 3,** the respondent states that: The appellant misunderstood and misconstrued what the learned judge said in paragraph 9 (page 8 of record) of the judgment. The judge did not hold, rather it occurred to him at one point that the respondent is investing in the appellant's business, however, the judge said that this was not pleaded and there was no

evidence produced by the applicant to support this ground. The appellant has misconstrued/misinterpreted the decision of the learned judge which is orbita which is persuasive only and not binding on the parties. It cannot be a basis for a ground of appeal.

**Discussion**

[30] The respondent had itemised in his claim the areas where the monies he gave to the appellant at various times were directed, or the purposes for which the appellant sought financial help. The claims itemised under paragraph [4] (b), (c), (d), and (e) are linked to the Rental Car Business. The respondent and his witnesses had proven on the balance of probabilities at the hearing that the claims were valid. The judgment sum included the amounts paid to the appellant under those claims. However, the evidence of the plaintiff clearly established that the plaintiff had assisted the defendant in financing aspects of the Rental Car Business. Paragraph [17] above, and page 266 of record point to evidence that the defendant sought the assistance of the plaintiff in 2016 in respect of the Rental Car Business. Ground 3 has no merit. It is dismissed.

[31] **On Ground 4, the appellant submits that:**

*(a) This Court must not just supervise the decision of the learned judge of the High Court, but make a decision on the merits as the appellant has constitutional right to have the matter determined on the merits. The credibility of the two witnesses is questionable as they are related to the respondent. That the learned judge had reasonable grounds to believe or ought to have drawn inference that the witnesses are biased or subjective towards the respondent.*

*(b) This submission is, according to the appellant supported by a number of cases, including **Roberts v Chute** [2009] FJCA 4; ABU0040.2007 (17 March 2009), Unreported. Cases cited in this case include **Warren v Coombes** [1979] HCA 9;(1979) 142 CLR 531; **Cashman v Kinnear** (1973) 2 NSWLR 495,NSW Court of Appeal; **Kouris v Prospector's Motel Pty Ltd** (1977) 19 ALR 343; **Livingstone v Halvorsen** (1979) 53 ALJR 50.*

[32] **Respondents response to Ground 4:**

(a) The credibility of witnesses is not an appealable issue. It is solely dependent on the judge's prerogative. In **Ali's Civil Engineering Ltd v Prasad** [1995] FJHC 93; HBC 000J.1994b (19 May 1995) a decision of the High Court on an appeal from the Magistrates court. The learned judge sated:

> *"To sum up, the assessment of credibility of witnesses as I have stated is of prime importance; the trial magistrate had carefully scrutinised all the evidence before him and took full advantage of having seen and heard the witnesses, and had come to the conclusion that the plaintiff has not proved its claims against the defendant with which I agree."*

**Discussion**

[33] This ground is misconceived. Normally, witnesses are summoned or requested by the parties to a legal dispute in a court of law, essentially because the evidence that they will testify to, will be supportive of, and in advancement of the case for the party calling them. A witness may be subjected to cross-examination by the opposing counsel or party on any evidence they have given in examination in chief. Our civil and criminal justice systems makes allowances at a trial/hearings for that. The learned trial judge is best placed to comment on the witnesses and to observe their demeanour when giving evidence in Court. That opportunity is not normally available to appellate judges. The appellant did not draw the Court's attention to any evidence that might support the allegation that the respondent's witnesses had "ulterior motives' or from which an ulterior motive may be inferred. The learned judge had believed in the respondent and his witnesses, and in evaluating the evidence at the trial, at paragraph 6 of the judgment, he says:

> *"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……."*

[34] The case **Roberts v Shute** (supra) is an appeal against Orders made for property division in a matrimonial dispute under the Matrimonial Causes Act (Cap.51), which has now been repealed and replaced by the Family Law Act 2003.Counsel for the respondent did not file a cross appeal, however, had asked the Court to exercise its powers under the Court of Appeal Act (Cap.12) to consider increasing the award to Ms Chute rather than decreasing it as the appellant Mr Roberts, had sought in the appeal. This Court had the opportunity to comment on the Court of Appeal Rule 22 or its equivalent in other jurisdictions (paragraph [83]) and stated:

> *"Those authorities go most specifically to the scope of the power in terms of the capacity to hear and taken into account further or fresh evidence on appeal. This does not arise in the present case, the evidence before the High Court before that before this Court and upon which this Court relies."*

[35] That is also the position of this Court in this case. The cases confirm the power of the Court of Appeal to make a determination in favour of Ms Chute despite her not having filed an appeal or cross appeal. Appeal courts should always take care in overturning or interfering with the decision of a court below, where the trial court has had the opportunity of hearing witnesses and gauging their credibility, and especially where the trial court has a broad discretion in respect of its decision-making .This latter is particularly so in matrimonial causes or family law: **MAK and KN** (Fam Mag Ct Appeal No.06/SUV/0021,25 July 2008). Although the case before this Court is not a matrimonial cause of family law, the principle is equally applicable to this case.

[36] The appellate courts may draw inferences from the decision of the court below as was suggested in other cases cited in **Roberts's v Shute.** In **Kouris v Prospectus's Motel Pty Ltd** (supra), it was said:

> *"The Full Court of the Supreme Court was also bound to come to its own conclusion on the case and if it is different from that of the trial judge to give effect to it, even if the reasoning of the trial judge did not disclose any error of principle and was open on the evidence: at 357, per Murphy J.*

[37] In **Livingstone v Halvorsen** (supra), it was stated:

> *"The Court of Appeal took into account the trial judge's assessment of the reliability of the witnesses, but then came to their own view which differed from that of the trial judge. The appellant relied on statements in some of the reasons in **Edwards v Noble [1971]** 125 CLR 296 to support the contention that the Court of Appeal should not have interfered with the trial judge's decision. My view of the correct role of the appellate court is stated in **Kouris v Prospector's Motel Pty Ltd** ... ..."*

[38] In **Warren v Coombes** (supra), the Australian High Court said:

> *"...in general the appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed , are established by the findings of the trial judge: at 538, per Gibbs, ACJ, Jacobs and Murphy, JJy, at 551.*

[39] Having considered the above authorities, I am of the view that, given the facts and the circumstances of this case, especially the conduct of the parties and the totality of the evidence, this Court will not interfere nor draw inferences in the manner urged by the appellant, based on the evidence of the accused witnesses. Ground 4 fails. It has no merit.

**Conclusion**

[40] For the above reasons, the appellant's appeal is dismissed. The appellant is to pay the respondent costs, which is fixed at $2,500.00.

**Morgan, JA**

[41] I agree with the reasoning and conclusions of the judgment of Qetaki, JA.

***Orders of the Court:***

1. *Appeal is dismissed.*
2. *Orders of the High Court are affirmed.*
3. *Appellant to pay costs to respondent, fixed at $2,500.00.*

**Hon Mr Justice Filimone Jitoko**
PRESIDENT, COURT OF APPEAL

**Hon Mr Justice Alipate Qetaki**
JUSTICE OF APPEAL

**Hon Mr Justice Walton Morgan**
JUSTICE OF APPEAL