

**LAUTOKA CITY COUNCIL v AMBARAM NARSEY PROPERTIES LTD,  
MOHAMMED YAKUB KHAN, MOHAMMED NASIR KHAN,  
MOHAMMED SABIR KHAN, MOHAMMED IQBAL KHAN,  
MOHAMMED MUKTAR KHAN, MOHAMMED AZAD KHAN**  
5 (ABU0031 of 2008)

COURT OF APPEAL — CIVIL JURISDICTION

MARSHALL J

10 18 February 2011, 5 April 2012

**Courts and judicial system — jurisdiction — abandonment of appeal — filing of  
record — preparation of record — documents required on appeal — leave to file  
fresh appeal — Court of Appeal Rules rr 17, 18, 18A.**

15 The appellant filed a notice of appeal against a judgment awarding damages to the first respondent. The Chief Registrar ordered that records be filed in 28 days or 14 days upon receipt of the judge's notes, whichever was the later. The record was not filed in time and was deemed abandoned.

**Held –**

20 A single judge does not have power to set aside the abandonment. Even if the Court did have power, it would not use it since, according to the rules, the deemed abandonment was required.

Leave granted for a fresh appeal to be filed.

25 *P. Kenilorea* instructed by *Mishra Prakash & Associates* for the Appellant

*C.B. Young* instructed by *Young & Associates* for the first Respondent

*N. Khan* instructed by *Natasha Khan Associates* for the second Respondents

30 [1] **Marshall JA.** On 20th December 2007 Justice Anthony Gates, then the Acting Chief Justice awarded damages to the Plaintiff company who owned Narsey Building at 19 Yasawa Street, Lautoka in the sum of \$1,444,083.83 for the period up to 31st March 2002 and loss of rental plus interest and costs. The 1st Defendant, Khan Brothers had been found to have been negligent in designing and constructing a supermarket next door. That caused the damage which resulted in the Narsey Building at number 19 becoming a total loss. The 35 2nd Defendants Lautoka City Council were alleged to have been negligent in giving approvals and then it was apportioned that Khan Brothers should pay 80% of the damages and Lautoka City Council 20%.

[2] The appeal events were

40 (1) Lautoka City Council files Notice of Appeal on 14th May 2008.

(2) On 12th June 2008 Chief Registrar ordered (1) Security for costs fixed in the sum of \$1200 to be paid in 21 days; (2) Records to be filed in 28 days or 14 days upon receipt of the judges notes if any whichever is the later.

[3] There was no problem with security for costs.

45 [4] The judge's notes were finally uplifted on 29th June 2010. That meant that the record had to be filed by the agents of the appellant by 12th July 2010.

[5] There were problems raised in the way of the appellants. They requested further time. They were given extensions. But the last extension expired on 11th October 2010 which was a public holiday. But the record was not filed on 12th 50 October 2010. It was out of time when deemed abandoned by the Registry on 13th October 2010.

## The relevant rules re producing the record in civil cases

### *The Court of Appeal Rules as relevant*

[6] Rule 18 together with 18A concerns the record and is headed ‘*Preparation and costs of the record*’. It says:

#### ***Preparation and costs of record***

18.-(1) (a) *The primary responsibility for the preparation of the record on appeal rests with the appellant, subject to directions given by the Registrar.*

(b) *The Registrar is responsible for the preparation of the transcript of the Judge’s notes.*

(2) *The record consists of the following documents –*

(a) *the notice and the grounds of appeal;*

(b) *the respondent’s notice (if any);*

(c) *any supplementary notice served under r 20;*

(d) *the judgment or order of the Court below;*

(e) *the originating process by which the proceedings in the court below were begun and any interlocutory or other related process which is the subject of the appeal and the pleadings;*

(f) *the official transcript of the Judge’s notes or record, if any, of such of the evidence given in the court below as is relevant to any question at issue on the appeal;*

(g) *any list of exhibits made under O 35, r 8 of the High Court Rules 1988;*

(h) *any affidavits, exhibits, or parts of exhibits, which were in evidence in the Court below and are relevant to any question at issue on the appeal.*

(3) *Before preparing the case record the appellant must lodge any copies of documents referred to in sub-r (2) for certification by the Registrar as a true copy of the documents of which they purport to be a copy.*

(4) *If there are any errors or deficiencies in the bundle of documents, the Registrar must within 7 days require the appellant to remedy them within 21 days.*

(5) *On preparation of the record, the appellant must consult all other parties directly affected by the appeal as to its contents.*

(6) *Any documents which a party objects to being included must be so indicated in the record for the purpose of adjustment of costs.*

(7) *Within 7 days of the expiry of the 21 day period mentioned in sub-rule (4) the Registrar must certify the record as being correct.*

(8) *The appellant must within 28 days of certification of the record serve a notice on all parties named in the notice of appeal that the case record is ready of collection from the appellant and must lodge 4 copies of the record with the Registrar.*

(9) *Following lodgment of the case records the Registrar must forthwith list the appeal for the next or any subsequent call-over date.*

(10) *If any provision if this Rule is not complied with, paragraphs (2) and (3) of r 17 apply as if the non-compliance were non-compliance with sub-rule (1) of that Rule.*

(11) *The fees for preparation, certification and copying of the record are as prescribed in Part I of the First Schedule.*

*(Substituted by LN 150 of 1999)*

#### ***Documents required on appeal***

18A. *The following documents must be filed before an appeal will be listed for hearing –*

(a) *notice and grounds of appeal; (b) a copy of the judgment or order appealed from;*

(c) *a certified copy of the record of the proceedings appealed from.*

*(Added by LN 150 of 1999)*

[7] Rule 18(1)(a) provides for and empowers the direction set out at paragraph 2(2) with the judges notes being uplifted on 29th June 2010. The order under r 18(1)(a) made in this case obliged the appellant to have all the other matters completed within 14 days. If the appellant has used the time that it takes the

registry to liaise over the judge's notes to prepare and have certified, where necessary, all the other required documents there should be no undue pressure in completing the record within 14 days of 29th June 2010.

[8] I note r (5) provides for consultation with the other parties and that r (6) allows a document to be included by the appellant but to be marked as '*objected to*' by one or other or all of the other parties to appeal. If there was a dispute about exhibits in the High Court trial, it was the appellant's duty to try and resolve it with the objecting respondent. It should have been pursued by the appellant so that when the judge's notes were completed the dispute was resolved or else able to be marked '*subject to objection by a party*'.

[9] It is the Registry's obligation not to certify the record until they are satisfied that it is correct. But they may give more time. Correctly, that is what they did in this case. But the extended date for compliance was not met. Significantly there was no further request for an additional time in which to make valid compliance.

[10] Rule 18(10) provides for sanctions. The sanction for breach of the order of the Registrar re the record is set out in r 17 and it is the same sanction which applies if the orders for security for costs are not met.

[11] Rule 17(2) says:

*'(2) If paragraph (1) is not complied with, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed before the expiration of –*

*(a) in the case of an appeal from an interlocutory order – 21 days; or (b) in any other case – 42 days,*

*calculated from the date the appeal is deemed to be abandoned.*

*(3) Except with the leave of the Court of Appeal, no appeal may be filed after the expiration of time specified in paragraph (2). (Substituted by LN 150 of 1999).'*

[12] I am surprised that nothing was done by the appellants to take advantage of the right to commence a fresh appeal without needing the leave of the Court. That right arises from r 17(2). But by a date about 22nd November 2010, inaction on the part of the appellants, put them into a position where they would have to obtain leave for a fresh appeal from the Single Judge. Their only way forward was to apply under r 17(3).

[13] After 13th October 2010 nothing happened until the former appellants represented by Mishra Prakash wrote to the Chief Registrar on 18th January 2011. The letter reads:

[14]

*'18th January 2011*

*The Chief Registrar*

*Dear Madam,*

*Lautoka City Council v Ambaram Narsey Properties Ltd & Anor. Fiji Court of Appeal Civil Appeal No ABU 0031 of 2008*

*We were somewhat taken aback that the appeal has been deemed abandoned. In fact we have been trying to get the record confirmed but Mr Young wants to see exhibits personally before he confirms his agreement to the record.*

*In fact we have been ready with the record as approved by you but we don't have three exhibits. We have asked for the same from Young & Associates but have not yet received the same. A copy of our letter requesting for the same dated 7th September 2010 is enclosed. Messrs Young & Associates on 1st September 2010 had said that our Copy Record did not include several exhibits. A copy of letter is enclosed.*

*We had also searched the Court of Appeal record and a search fee was paid but we have been trying our best to get a legible and comprehensive record done. Kindly refer*

to your letter of 27th September 2010 and our letter sending \$2,970.00 for photocopying charges and our letter dated 1st October 2010.

We also wrote to Young & Associates a letter of the same date. We emphasise the last sentence of the second paragraph of our letter which states as follows:-

5 'In the meantime could you please let us have your Reply to Submissions which you wanted in and Exhibits 4, 5, 6 and 7 and page 10 of Exhibits 35, 43 and 46.'

On the 5th of October 2010 Mr Young had appeared and Mr Young himself told the Court that the record has been complied but some exhibits were missing and the Court adjourned the matter for the next call over date which was to be given by the Registry to fix a hearing date.

10 Therefore we were surprised that the appeal was deemed abandoned and Mr Young had mentioned that he wanted to inspect the Fiji Court of Appeal file so that the exhibits etc could be finalized. We are happy for him to do that. Our Mr Mishra is going to be in Suva next week and wanted to finalise these aspects when we rang your Mr Ravendra Kumud yesterday. We would be grateful if this could be put before the Judge so that the order made by the Court that this be called in the next call over date stands the deeming  
15 of this appeal as abandoned be set aside.

Please note that we are obliged to consult the other side when it comes to preparation of the record and we have been doing our best to get the full and proper record with all the exhibits. We would be grateful for an urgent and quick response confirming that the appeal is on foot. As soon as Mr Young is able to inspect the record can be confirmed.

20 Yours faithfully

MISHRA PRAKASH & ASSOCIATES

Per: Signed

for Vipul M. Mishra.'

25 [14] The reference to the call over is irrelevant. That was on 5th October 2010 and the expectation was that the appellants would comply by 11th October 2010.

[15] As Single Judge I do not have power to set aside the abandonment. But if I had, I would not use it when by application of the rules the 'deemed abandonment' was required.

30 [16] The best I can do within jurisdiction to move this important appeal forward is to give leave under r 17(3) for a fresh appeal to be filed. I propose to do so.

## ORDER

35 [17] I order

(1) that pursuant to Court of Appeal r 17(3) the Lautoka City Council formerly 2nd Defendants in Civil Action HBC 139.96L do have leave to appeal.

(2) that the fresh appeal be filed within 42 days of the date of this ruling.

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*Leave granted to file appeal.*

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