

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

**CIVIL APPEAL NO. ABU 099 OF 2020**  
**[Suva High Court: HBC 351 of 2009]**

**BETWEEN** : **RAIWAQA BUSES LIMITED** *Appellant*

**AND** : **SAKIUSA SOLI** *1<sup>st</sup> Respondent*

**KAMINIELI TUIMAVANA** *2<sup>nd</sup> Respondent*

**NEW INDIA ASSURANCE COMPANY LIMITED** *3<sup>rd</sup> Respondent*

**Coram** : Qetaki, RJA

**Counsel** : Ms. S. D. Prasad for the Appellant  
Mr. D. Singh for the 1<sup>st</sup> Respondent  
No appearance for the 2<sup>nd</sup> Respondent  
Mr. S. R. Krishna for the 3<sup>rd</sup> Respondent

**Date of Hearing** : 23 April, 2025

**Date of Ruling** : 27 June, 2025

## **RULING**

### **(A). Background**

[1] On 13<sup>th</sup> March 2024, the 3<sup>rd</sup> Respondent, New India Assurance Company Limited, through their Solicitors Messrs Krishna & Co of Lautoka field an Interlocutory

Summons pursuant to Rule 18 of the Court of Appeal Rules 1949 etc. and the Inherent Jurisdiction of the Court, returnable on 15<sup>th</sup> March 2024. It seeks the following Orders:

1. *Leave to be granted to New India to file a Supplementary Copy Record.*
2. *New India's Written Submissions (After Trial) filed in Suva High Court Civil Action No. HBC 351 of 2009 be included in the Supplementary Copy Record.*
3. *New India to lodge a Supplementary Copy Record for vetting with the Court of Appeal Registry within 14 days of through grant of the above Order.*
4. *Alternatively, leave be granted to New India to refile all necessary appeal document and the Records of the High Court to include New India's Written Submissions (After Trial) filed in Suva High Court Civil Action No. HBC 351 of 2009.*
5. *The appellant to pay for the costs of this Application.*

[2] The Application is supported by the Affidavit of one Nilesh Virendra Kumar, Legal Practitioner who is a partner at Krishna & Co. Barristers & Solicitors, Lautoka, sworn on 12<sup>th</sup> March 2024, which sets out the circumstances under which the application was made. The full text of the said Affidavit is reproduced below:

**"AFFIDAVIT OF NILESH VIRENDRA KUMAR**

***(in support of Summons to file Supplementary Copy records)***

*I, Nilesh Virendra Kumar of 27 Naviti Street, Lautoka, Legal Practitioner, make oath and say as follows:*

1. **THAT** *I am a Partner at Krishna & Co., and swear this Affidavit in Support of the Summons to file Supplementary Copy Records.*
2. **THAT** *I am familiar with this matter, and I depose to the contents of this Affidavit from either my personal knowledge of the matters contained in this Affidavit, or where matters are not known personally to me, I have ascertained their truth and sources specified. Where the contents are not within my personal knowledge, they are true to the best of my information, knowledge and belief. In identifying the sources of my information, I am not to be taken to be waiving any legal privilege for myself or any other party. I understand the affidavits should contain only factual evidence and should not contain legal submissions.*
3. **THAT** *on 19<sup>th</sup> September 2023, The Appellant's Solicitor, M A Khan Esquire circulated the content of the Copy Record.*

*Annexed herein and marked as "NK-1" is a copy of the email correspondence.*

4. **THAT** on 26<sup>th</sup> September 2023, our good office had advised the Appellant's Solicitor that we approve to the contents of the Copy Records however we wish to add our First Named Third Party Submissions (After Trial), to be part of the Copy Record.

Annexed herein and marked as "NK-2" is a copy of the email correspondence.

5. **THAT** the Appellant on 27<sup>th</sup> September, 2023 advised our good office that the submission cannot be included in the Copy Records as it was not served onto their office.

Annexed herein and marked as "NK-3" is a copy of the email correspondence.

6. **THAT** our office vide letter dated 29<sup>th</sup> September 2023 advised the Appellant's Solicitor that since the Written Submission has been filed at the High Court Registry, it ought to be included in the Copy Record.

Annexed herein and marked as "NK-4" is a copy of the letter.

7. **THAT** our last correspondence with the Appellant regarding the copy record list was on 29<sup>th</sup> September 2023.

8. **THAT** on 28<sup>th</sup> February 2024 our office received a Notice of Call Over on the present appeal matter.

Annexed herein and marked as "NK-5" is a copy of the Notice of Call Over.

9. **THAT** upon the perusal of our files we became aware that our filed copy of the First Named Third Party Submissions (After Trial) has been misplaced.

10. **THAT** on the 4<sup>th</sup> day of March 2024, our good office wrote to the Senior Court Officer requesting if we could obtain a copy of the First Named Third Party's Submission (After Trial) in order for us to incorporate the same in the Supplementary Copy Record.

Annexed herein and marked as "NK-6" is a copy of the said letter.

11. **THAT** we were informed by the Court of Appeal Registry that the court files does not have a copy of the First Named Third Party's Submission (After Trial) filed in *Sakiusa Soli v Raiwaqa Buses Limited and Kaminieli Tuimavana and The New India Assurance Company Limited Suva High Court Civil Action No. HBC 351 of 2009*.

12. **THAT** on the 5<sup>th</sup> day of March 2024, our office had written to the Senior Court Officer Suva High Court, requesting for a copy of the Court's copy of the First Named Third Party's Submission (After Trial) filed in *Sakiusa Soli v Raiwaqa Buses Limited and Kaminieli Tuimavana and the New India Assurance company. Limited Suva High Court Civil Action No. HBC 351 of 2009*.

Annexed herein and marked as "NK 7" is a copy of the said letter.

13. ***THAT*** we advised the Suva High Court Registry that our agents on the 10<sup>th</sup> day of September 2020 filed the said submissions.

*Annexed herein and marked as “NK 8” is a copy of our Agent's letter dated 10<sup>th</sup>, September 2020.*

14. ***THAT*** that the Suva High Court Registry advised our good office that they do not have a copy of our First Named Third Party's Submission (After Trial) filed in *Sakiusa Soli v Raiwaqa Buses Limited and Kaminieli Tuimavana and the New India Assurance Company Limited Suva High Court Civil Action No. HBC 351 of 2009.*

15. ***THAT*** we humbly pray to this honourable court for leave to be granted to the First Named Third Party's Submission (After Trial) filed in *Sakiusa Soli v Raiwaqa Buses Limited and Kaminieli Tuimavana and the New India Assurance Company Limited Suva High Court Civil Action No. HBC 351 of 2009 as both the Court Registry and our good office is unable to locate the filed copy of the submissions.*

16. ***THAT*** in the interest of justice, I pray for Order in Terms of the Summons filed herein.”

(The highlighted paragraphs are for emphasis.)

[3] On 26<sup>th</sup> March 2024 the Appellant filed an Affidavit in Opposition to the Affidavit. Of the 3<sup>rd</sup> Respondent. The Appellant's Affidavit was sworn by a Krishan Kumar of Raiwaqa, Company Director. Part only of the said Affidavit is reproduced below:

- “5. Regarding paragraphs 1 to 8 of the Affidavit in Support, I have no comments to offer.
6. As for paragraphs 9, 10, 11 and 12 of the Affidavit in Support, I raise no objections as the 3<sup>rd</sup> Respondent has acknowledged and confirmed the absence of the mention submissions.
7. I object to the contents of para graph 13 of the Affidavit in Support, and state that the letter constitutes a private matter between the Counsels for the 3<sup>rd</sup> Respondent and the mentioned agent. It does not sufficiently evidence that a submission was filed.
8. In response to paragraph 14 of the Affidavit Support, I acknowledge its contents and offer no further comments. I understand that the Registry must have rightfully advised that there are no such submissions in the records. If filed, the said submissions should have been served on other parties.
9. I strongly object to the claims made in paragraphs 15 and 16 of the Affidavit in Support. I further state that the inclusion of a document not filed nor disclosed to other parties would unfairly prejudice the Appellant's case and contravene principles of fair hearing. The 3<sup>rd</sup> Respondent's attempt utilize their personal circumstances to undermine the Appellant's rights and obstruct the course of justice is unwarranted and unjust.

10. *I further state that I oppose the Summons to File Supplementary Copy Records as my Solicitors are ready to proceed with the hearing of the matter.*
11. *The copy records, comprising all documents filed in the High Court Civil Action No. HBC 351 of 2009, were compiled and submitted for vetting at the Court of Appeal Registry by our Solicitors with mutual consent.*
12. *These copy records were duly certified by the Chief Registrar on 29<sup>th</sup> January 2024.*
13. *During the call over on 4 March 2024, Mr. Krishna, Counsel for the 3<sup>rd</sup> Respondent, expressed his intention to file a Supplementary Record to include the 3<sup>rd</sup> Respondent's Submission filed in the Suva High Court. He stated his lack of possession of said Submission and requested the Registry to provide a copy.*
14. *On 6<sup>th</sup> March 2024, Mr. Krishna reiterated the absence of his submission in the Registry's records and his own lack of a personal copy, relying on an invoice from his city agent as evidence of filing.*
15. *My Solicitor objected, citing the inappropriateness of introducing a new document without its presence in the Registry's records. Ms. Kajal, the senior court clerk, confirmed the absence of such a copy in the Registry's record. His Lordship granted a seven-day extension to Counsel for the 3<sup>rd</sup> Respondent for the necessary application.*
16. *The Counsel for the 3<sup>rd</sup> Respondent served a copy of the Summons and Affidavit in Support of Nilesh Virendra Kumar, filed on 13 March 2024, to my Solicitor's office on 14<sup>th</sup> March 2024.*
17. *The objection is raised against the 3<sup>rd</sup> Respondent's Application as the referenced submissions are not part of the official court record.*
18. *Mr. Krishna himself admitted during the previous court session dated 6 March 2024 that the registry had no record of their filed submissions, and such is explicitly stated in paragraphs 11 and 14 of their supporting affidavit.*
19. *Furthermore, Mr. Krishna acknowledged during both the previous court sessions dated 4 March 2024 and 6 March 2024 that his office does not possess a filed copy of the mentioned submissions, a fact also stated in paragraph 9 of their supporting affidavit.*
20. *It is important to highlight that the said submissions were not made available to my Solicitors.*
21. *The letter from their agent mentioned in paragraph 13 and annexed as "NK 8" in their affidavit is a private matter between the Counsels for the 3<sup>rd</sup> Respondent and the said agent.*
22. *If indeed filed, there should be acknowledgement from the other involved parties, which is absent.*

23. *Therefore, the authenticity and genuineness of the mentioned submission are in question.*
24. *Inclusion of a document not filed nor disclosed to other parties would prejudice the Appellant's case and violate principles of fair hearing.*
25. *Furthermore, I believe the issue at hand does not pertain to personal matters for the counsel representing the 3<sup>rd</sup> Respondent. Therefore, the affidavit should be sworn by an authorized representative of the 3<sup>rd</sup> Respondent, rather than a partner lawyer from the firm representing the 3<sup>rd</sup> Respondent.*
26. *In the interests of justice and the administration of justice, the Appellant prays to this Honourable Court to strike out the 3<sup>rd</sup> Respondent's Summons with indemnity costs, as the Appellant is entitled to a fair hearing."*

[4] On 8<sup>th</sup> May 2024, the 3<sup>rd</sup> Respondent filed a reply to the Appellant's Affidavit in Opposition, part of which are reproduced below:

- “4. **THAT** in response to paragraph 6 of the Affidavit in Opposition, I reiterate paragraphs 9, 10, 11, 12 of my Affidavit in Support filed on 13<sup>th</sup> March 2024 and state that the copy of the First Named Third Party Submissions (After Trial) was duly filed at the Suva High Court Registry and further state that the said submissions was filed by our agent on our behalf on 10<sup>th</sup> September, 2020.

Reference is made to annexure “NK 8” of the Affidavit in Support of Nilesh Virendra Kumar sworn on 12<sup>th</sup> March 2024 and filed in support of this application on 13<sup>th</sup> March 2024.

5. **THAT** in response to paragraph 7 of the Affidavit in Opposition, I deny the contents of the said paragraph and state that the letter written by our agent, is sufficient evidence to show that the First Named Third Party Submissions (After Trial) was filed at the Suva High Court Registry.
6. **THAT** in response to paragraph 8 of the Affidavit in Opposition, I deny the contents of the said paragraph and state that *the discretion lies with the parties to serve a copy of the Written Submission, unless and until the court gives directions for service to be done onto the remaining parties.*
7. **THAT** in response to paragraph 9 of the Affidavit in Opposition, I deny the contents of the said paragraph and state that the inclusion of the First Named Third Party Submissions (After Trial) will not cause any prejudice to the Appellant and/or any other party to the proceedings.
8. **THAT** that the said submissions, compromises submissions and/or evidence given or provided in the High Court proceeding, *Sakiusa Soli v Kaminieli Tuimavana, Raiwaqa Buses Limited, New India Assurance Company Limited and Land Transport Authority, Suva High Court Civil Action No. 351 of 2009, to which all parties are aware and/or have knowledge of and is nothing new.*

9. **THAT** in response to paragraph 10 of the Affidavit in Opposition, I state that interlocutory applications can be filed by either party, despite the parties being ready for Hearing. It is not impediment that such applications can only be filed and/or made when parties are not ready for Hearing.
10. **THAT** in response to paragraph 11 of the Affidavit in Opposition, I deny the contents therein and state that we did not consent to the compiled list made by the Appellant.

Reference is made to annexure “NK 4” of the Affidavit in Support of Nilesch Virendra Kumar sworn 12 March 2024 and filed in support of this application on 13<sup>th</sup> March 2024.

11. **THAT** in response to paragraph 12 of the Affidavit in Opposition, I cannot confirm the certification date of the copy records, as we were not aware of the same being certified as the Appellant after receiving our letter dated 29<sup>th</sup> September, 2023 did not respond and/or provide us its position regarding our queries raised pertaining to the Copy Record List.
12. **THAT** in response to paragraph 13 of the Affidavit in Opposition, when the matter was called for “call-over”, our Mr. S. Krishna informed the Honourable Court that we intend to file a supplementary copy record, as the copy record certified did not incorporate the First Named Third Party Submissions (After Trial).
13. **THAT** our Mr. S. Krishna further advised the court that our office was unable to locate our filed copy of the submissions and had sought the Suva High Court Registry's assistance.
14. **THAT** the Appellant was well aware of our intentions to including our First Named Third Party Submissions (After Trial) vide our letter dated 29<sup>th</sup> September, 2023 which is annexure “NK 4”, in my Affidavit in Support sworn on 12<sup>th</sup> March 2024 and filed in support of this application on 13<sup>th</sup> March 2024.
15. **THAT** in response to paragraph 14 of the Affidavit in Opposition, upon seeking the assistance of the Suva High Court Registry, it came to our notice that the registry as well did not have a copy of First Named Third Party Submissions (After Trial).
16. **THAT** in response to paragraph 15 of the Affidavit in Opposition I deny the allegations contained therein and state that the First Named Third Party Submissions (After Trial) is not a “new document” as alleged by the Appellant. The submission only contains material presented in *Sakiusa Soli v Kaminieli Tuimavana, Raiwaqa Buses Limited, New India Assurance Company Limited and Land Transport Authority Suva High Court Civil Action No. 351 of 2009*.
17. **THAT** that I confirm the contents of paragraph 16 of the Affidavit in Opposition.
18. **THAT** in response to paragraphs 17, 18 and 19 of the Affidavit in Opposition, I reiterate and state that upon being informed by the Registry of their position, we had presented and/or enclosed to the Registry of our

***Agents letter dated 10<sup>th</sup> September 2020 which clearly stated that the First Named Third Party Submissions (After Trial) was filed at the Suva High Court Registry.***

19. ***THAT*** in response to paragraph 20 of the Affidavit in Opposition, I deny the contents therein and again repeat that parties have the discretion to serve their respective submissions onto the other parties to the proceedings, the said discretion will not be applicable if the Court gives directions for the service of the written submissions.
20. ***THAT*** in response to paragraph 21 of the Affidavit in Opposition, the Appellant is repeating itself by stating that the letter received from our agents is considered to be a “private matter” as earlier mentioned in paragraph 7 of the Affidavit in Opposition.
21. ***THAT*** our position is that, the letter shows and/or proves that our agent did in fact attend to the filing our First Named Third Party Submissions (After Trial) at the Suva High Court Registry.
22. ***THAT*** in response to paragraph 22 of the Affidavit in Opposition, there would not be an acknowledgement, as the said submissions was not served onto the remaining parties to the proceedings.
23. ***THAT*** in response to paragraphs 23 and 24 of the Affidavit in Opposition, I deny the contents therein and state that the parties will not in any way be prejudiced by the inclusion of the First Named Third Party Submissions (After Trial), as the contents of the said submission discloses only the material and evidence presented in the High Court proceedings *Sakiusa Soli v Kaminieli Tuimavana, Raiwaqa Buses Limited, New India Assurance Company Limited and Land Transport Authority Suva High Court Civil Action No. 351 of 2009.*
24. ***THAT*** in response to paragraph 25 of the Affidavit in Opposition, I deny the contents therein and state that the issue at hand is best addressed by the Solicitor in carriage of the matter who would have a better knowledge of the filing of pleadings and submissions as opposed to having our client depose the said Affidavit.
25. ***THAT*** in response to paragraph 26 of the Affidavit in Opposition, I deny the contents of the said paragraph and state that parties would be awarded a fair hearing in the present matter before this Honourable Court, as the submissions which we intend to incorporate will not have any prejudicial effect.
26. ***THAT*** we humbly pray to this honourable court for leave to grant to the First Named Third Party to include the unfiled copy of the First Named Third Party's Submission (After Trial) filed in *Sakiusa Soli v Raiwaqa Buses Limited and Kaminieli Tuimavana and the New India Assurance Company Limited Suva High Court Civil Action No. HBC 351 of 2009* as both the Court Registry and our good office is unable to locate the filed copy of the submissions.
27. ***THAT in the interest of justice, I pray for Order in Terms of the Summons filed herein.”***

(The highlighted paragraphs are for emphasis.)



## **(B) Rule 18 Court of Appeal Rules**

[5] 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 direction 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) *any supplementary notice served under Rule 20; the judgment or order of the Court below;*
- (c) *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;*
- (d) *the respondent’s notice (if any);*
- (e) *the official transcript of the Judge’s notes or record, if any, of such evidence given in the court below as is relevant to any question at issue on the appeal;*
- (f) *any list of exhibits made under Order 35, Rule 8 of the High Court Rules 1988;*
- (g) *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 paragraph 2 for **certification by the Registrar** as 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 from the expiry of the 21 days period mentioned in paragraph (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 for 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 of this Rule is not complied with, Rule 17(2) and (3) apply as if the non-compliance were non-compliance with paragraph (1) of that Rule.*
- (11) *The fees for preparation, certification and copying of the record are prescribed in Part 1 of Schedule 1.*

*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.”*

(Highlighted paragraphs for emphasis)

**(C). 3<sup>rd</sup> Respondent’s Case**

- [6] The 3<sup>rd</sup> Respondent submits that the Affidavit of Nilesh Virendra Kumar has outlined the reasons why there is a need to have a supplementary copy record. It also relied on its legal submissions filed on 27 August 2024 and 15 October 2024 respectively.
- [7] In its initial written submissions, the Appellant quotes from a *Rule 18 (1) to (6)* which is titled “*Preparation and costs of record* “. There are no indications as to the source of the Rule or its currency and relevance to the 3<sup>rd</sup> Respondent’s case. It would appear that the 3<sup>rd</sup> Respondent was mistaken , as from the text, it could be deduced that it is a Rule of the former Supreme Court now High Court.
- [8] The Applicant relies on the principles enunciated in the case **Khan v Permanent Secretary for Public service Commission** [2000] FJCA 20; ABU0003U.98S (12 May 2000) and **Public Service Commission v Lepani Matea** , which regarded the Court’s consideration of the principle of natural justice in the exercise of the Court’s discretion , to ensure that justice is done.
- [9] The 3<sup>rd</sup> Respondent submits, that, what is appropriate in terms of *natural justice* depends on the circumstances of each case. Further, that natural justice and fairness

are fundamental principles that ensure decisions are made in a manner that is just and equitable. These principles are primarily applied to safeguard individual rights and ensure that decision-making processes are fair and impartial.

[10] The 3<sup>rd</sup> Respondent submits that, the written submissions (After Trial), requested by it for addition/ inclusion in the copy record is not a new document but rather the same submissions which the High Court Judge relied upon when delivering its ruling.

[11] It submits that Courts need to act fairly: **R v Controller of Prisons, Ex Parte Kaumaitotoya** [1984] FJSC 42; Judicial Review 5 of 1984 ( 1<sup>st</sup> August 1984), where the Court referred to S.A de Smith’s Review of Administrative Action, 3<sup>rd</sup> Edition at page 208, which emphasize the need to:

*“act fairly”, as the concept “has often been used by Judges to denote an implied procedural obligation....it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative.”*

[12] The 3<sup>rd</sup> Respondent submits that any prejudice caused to any person by an order allowing the application to include the Written Submissions (After Trial), is capable of being compensated by money: **Singh v Singh** [2024] FJHC 409; HBC 114.2022 (10 June 2024), per Wickramasekara, Acting Master, who made reference to the decision in **Sundar v Prasad** [1998] FJCA 19; ABU0022U.97S (15 May 1998).

[13] In conclusion, the Applicant submits that making of the order outweighs the prejudice to the Appellant.

### **Additional Written Submissions**

[14] In its written submissions filed on 15 October 2024, in reply to the Appellant’s submissions the 3<sup>rd</sup> Respondent, submits:

#### **Filing Date and evidence**

(a) That the written submissions which they are requesting to be incorporated is not a “new document” and /or new evidence but rather the same submission which the High Court Judge relied upon when delivering its Ruling.

- (b) That the case **Khan v Permanent Secretary for Public Service** (supra) highlights the rules of natural justice and fairness as fundamental principles that ensure that decisions are made in a manner that is just and equitable. These principles are to safeguard the interests of individuals and the principles would be breached if the application is refused.

Agents Letter

- (c) The reliance on the same does not contradict the requirements under Rule 18 (2) (e) and (h) as the document intended to be incorporated already has been part of the originating process of the proceedings in the High Court and is evidences presented in court below and are relevant to any question at issue on appeal.

Acknowledgement of Absence

- (d) Contact with the Registries was due to their inability to locate their copy of the relevant document.

Request of Inclusion of unified copy

- (e) The request is due to their inability to locate their copy of the document. If the submission is included in the Supplementary Record the Appellant will not be prejudiced as the said submissions already has been presented in the first court of instance (the Suva High Court).

Consent to Copy Record

- (f) On 26<sup>th</sup> September 2023 we advised the Appellant's Solicitors that we are approving the content of the Copy Record however we wish to add our First Named Third Party's Written Submission, to be incorporated into the Copy Record. As consistent with Rule 8)5) we did respond to the Copy Record list circulated by Appellant's office and had provided our comments.

Discretion to Serve Copies

- (g) There have been circumstances wherein the parties have filed Affidavits and Submissions in the court below and service have not been effected onto the other parties however during the vetting stage of the copy record, the said Affidavit and Submissions are included in the copy Record list upon

certification. The dilemma faced by the Third Respondent and both the registries are unable to locate the submissions (After Trial) in the matter.

Repeated Claims

- (h) The Appellant's submissions on this point compromises submissions and/or evidence given or provided in the High Court proceedings on this matter, to which all parties are aware of and/or have knowledge of and is not new and/or of any prejudicial effects onto the other parties.

Lack of New Information, Court Discretion and Interlocutory Applications

- (i) The letter written by the agent (in Exhibit) is sufficient to show that the First Named Third Party Submissions (After Trial) was filed at the Suva High Court Registry. The court did not give a direction for service to the other parties.

Appellant Misleading the Court

- (j) The Appellant is misleading the court by stating that the 3<sup>rd</sup> Respondent has been inconsistent. This is not so as 3<sup>rd</sup> Respondent had indicated clearly to the Appellant its intention to add the written submissions (After Trial).

**(D). Appellant's Case**

[15] The Appellant submits that on 4 March 2024 Ms. Prasad, counsel for the Appellant had informed the Court that copy records had been compiled and certified by the Chief Registrar, and served on all parties. Krishna, Counsel for 3<sup>rd</sup> Respondent sought leave to file supplementary copy record to include his High Court Submission which he said was filed after the trial in the High Court.

[16] The Appellant submits that counsel for Mr. Krishna told the Court that he does not have a copy of the filed submission and requested the Court Registry to provide a copy of the filed submission.

[17] The Appellant submits that on 6 March 2024, Mr Krishna informed the Court that both the High Court Registry and the Court of Appeal Registry did not have any copies of his filed submissions, and that he himself did not have any copies of his filed submissions, and that he himself did not have a physical copy of the submission.

- [18] The Appellant submits that Mr Krishna was relying on an invoice provided by his city agent which stated that the submission had been filed.
- [19] The Appellant submits that Ms. Prasad raised an objection stating that introducing a new document into the copy records is inappropriate given the absence of copies within the Court Registries.
- [20] The Appellant submits that Ms. Kajol, the Senior Court Clerk, confirmed the lack of a copy in the Registry's possession.
- [21] The Appellant submits that the 3<sup>rd</sup> Respondent filed Summons to file Supplementary Copy Record and Affidavit in Support on 13 March 2024.
- [22] The Appellant submits that the Appellant filed an Affidavit in Opposition on 26 March 2024.
- [23] The Appellant submits that the 3<sup>rd</sup> Respondent filed an Affidavit in reply to the Appellants submission in Opposition on 8 May 2024.
- [24] The Appellant relied on the case **Lautoka City Council v Ambaram Narsey Properties Ltd** [2012] FJCA 26; ABU0031.08 (5 April 2012).
- [25] The Appellant submits that in light of his Lordship Justice William Marshall's opinion highlighted on the application of Rule 18, the following issues should be addressed:

(i) *Filing date and evidence:*

*The Respondent claims the First Third Party's submissions (After Trial) were filed on September 10, 2020 (Paragraphs 13 and 14 of their Affidavits). However, both the High Court and Court of Appeal Registries in Suva do not have record of these submissions (paragraphs 11, 14 and 15 of the Respondent's Affidavits). This discrepancy questions the validity of the Respondent's filing claim.*

(ii) *Agents Letter:*

*The Respondent relies on the agent's letter dated September 10, 2020, as proof of filing (paragraphs 4 and 18). The Appellant asserts that this is a private matter and not conclusive evidence of filing. The reliance on the agent's letter as proof of filing contradicts the requirements under Rule 18(2)(e) and (h), which outlines the necessary documents that must be included in the record. The Appellant's assertion that this letter is a private matter and is not*

*conclusive evidence of filing (Paragraphs 7 and 21 of Affidavit in Opposition) is valid as the rules necessitate certified and official documents rather than private correspondence.*

(iii) *Acknowledgement of absence:*

*The Respondent/Applicant had acknowledged that the filed copy of the submission (After Trial) cannot be located in their office as well as in the Court Registry (paragraphs 9 and 15 of Affidavit). Yes, they still claim that the submissions were duly filed and that it should be included in the record (paragraphs 4, 5, 6, 15, 19, 20 and 21.*

(iv) *Request for inclusion of unified copy:*

*The Respondent requests the inclusion of an unfiled copy of the submissions in the case record due to the absence of the filed copy (paragraph 15 and 25) which contradicts their earlier claim of having filed the submissions on September 10, 2020. The Respondent's attempt to introduce a unified copy without proper certification or acknowledgement from the Court Registry breaches the rules for a correct and certified record.*

(v) *Consent to Copy Records:*

*The Respondent denies consenting to the compiled list made by the Appellant - (paragraph 11). They initially approved the contents of the Copy Record on September 26, 2023, and requested the addition of their submissions-paragraph 4. This contradiction undermines the respondent's stance on the matter. Rule 18(5) requires consultation with other parties on the contents of the record, and this was done by the Appellant.*

(vi) *Prejudice and fair hearing:*

*The Respondent claims that including the submissions will not prejudice the Appellant or other parties- paragraph 7 and 22. The Appellant argues that introducing an undisclosed document would indeed prejudice their case and case and violate fair hearing principles- Affidavit in Opposition, paragraphs 9, 23, 24, and 26. This concern is valid as it impacts the fairness and integrity of the appeal process.*

(vii) *Discretion to serve copies:*

*The written submissions in dispute should have been served on the other parties if they were genuinely filed- Affidavit in Opposition, paragraph 8. The Respondent's position is challenged by Rules 18(2) (f) and (h) specify the inclusion of affidavits and exhibits that were in evidence in the Court below, emphasizing the need for transparency and fairness in the appeal process.*

(viii) *Repeated claims:*

*The Written submissions was not served to the other parties and the Respondent relies on the letter from its agents which states that it was filed, does not address the core issue of the missing filed copy in the Court Records. The Appellant's opposition highlights the need for adhering to the rules for a complete and certified record.*

(ix) *Lack of new information:*

*The Respondent's claim that the submissions contain no new information and are based on evidence from the High Court proceeding - paragraphs 8 and 16. This assertion does not align with the Appellant's concern about the undisclosed nature of the document- Affidavit in Opposition, paragraphs 9 and 23). This does not alter the requirements under Rules 18(3) to submit certified copies for verification.*

(x) *Court's Direction and Interlocutory Applications:*

*The Appellant points to the importance of following proper procedures for filing and serving submissions to ensure fairness – Affidavit in Opposition, paragraphs 8 and 20. Rules 18(1) (a) places the primary responsibility on the Appellant to prepare the record subject to directions from records. The Appellant's objections is to ensure all documents are properly certified and included.*

[26] The Appellant submits in conclusion that:

- (a) *The inconsistencies in the Respondent's affidavit raise questions about the validity and handling of the First named Third Party Submissions (After Trial). The Appellant's opposition is based on ensuring adherence to fair hearing principles and preventing prejudice by introducing a unified document into the case record.*
- (b) *In the interest of justice and the administration of justice, the Appellant prays that the 3<sup>rd</sup> Respondent's summons be struck out with indemnity costs.*

### **Analysis**

[27] The case **Lautoka City Council v Ambaram Nursey Properties Ltd** (supra) per his Lordship Justice William Marshall's opinion, provides a guide on the application of Rules 18 and 18A. The Appellant has raised pertinent points which the Court is to consider in the circumstances of this case- see paragraphs [21] and [22] above. The 3<sup>rd</sup> Respondent has responded to those issues in its second Affidavit.



- [28] In my view, the first issue to be considered is, whether the Written Submissions (After Trial) is a document that comes within the class or type of documents specified in Rule 18(2) (a) to (h). It is important to make a determination on that in view of the wordings of the said Rule 18(2).
- [29] A careful perusal and consideration of Rule 18(2) indicate that the following types/class of documents are permitted for inclusion in the record:
- (i) Documents that relate to the origination or commencement of the appeal (Rule 18(2), (a), (b) and (c)).
  - (ii) Document relating to interlocutory proceedings in the appeal proceedings (Rule 18(2) (2) (e)).
  - (iii) Evidence and exhibits at the trial/hearing of the case whose judgment is being appealed (Rule 18(2) (f), (g) and (h)).
- [30] No document other than documents specified under Rule 18(2) qualify to be included in the record. Is the Written Submissions (After Trial) of a nature that must be included in the record? The type and nature of the Written Submission (After Trial) need to be ascertained, that is, whether it is a document that must or may be required for inclusion in the record. Was the document filed in the Court of Appeal Registry? If so, when? By whom? Is there a filed copy available?
- [31] Paragraph 6 of the Affidavit of Nilesh Virendra Kumar in support of Summons to file Supplementary record is to be viewed with some reservation, as it may be questionable and appears to be self-serving, when considered with paragraphs 9, 10, 11, 12, 13 and 14 of the same affidavit. Instead of confirming the date and time on which the 3<sup>rd</sup> Respondent's Agents purportedly filed the written submissions (After Trial), and producing a filed copy of the document, the 3<sup>rd</sup> Respondent's Solicitors had involved the Court Registry and its staff in a frantic search for a document that probably was never filed at all as there is no proof of its filing by the Agent, and the Affidavits on behalf of the 3<sup>rd</sup> Respondent had not established that the document was actually filed.

- [32] On 29<sup>th</sup> September 2023 the Solicitors for 3<sup>rd</sup> Respondent notified the Appellant's Solicitors that *"since the written submissions had been filed at the High Court Registry, it ought to be included in the Copy Record"*. (Paragraph 6 of Affidavit of NV Kumar) At Paragraph 9 of the same Affidavit the deponent stated: *"That upon the perusal of our files we became aware that our filed copy of the Third Party Submissions (After Trial) has been misplaced"*.
- [33] There is no indication of when it was misplaced, and the circumstances under which it was misplaced. There is no date indicated as the date of when they became aware that the document has been misplaced. Was the document with the Solicitors on 29<sup>th</sup> September 2023? There is a gap of approximately 5 months between 29<sup>th</sup> September 2023, (the date when 3<sup>rd</sup> Respondents Solicitors advised the Appellant's Solicitors of the filing of the document in the High Court Registry), and 4<sup>th</sup> day of March 2024 (the date when 3<sup>rd</sup> Respondent's Solicitors wrote to the Senior Court Officer requesting a copy of the written submissions which was purportedly filed by their Agents.)
- [34] The 3<sup>rd</sup> Respondent submits that the addition of the Written Submissions (After Trial) does not contradict the requirements under Rule 18(2) (e) and (h) as the said document has already been part of the originating process of the proceedings in the High Court and is evidences presented in court below and are relevant to any question at issue on appeal. In reality, the document does not exist in the sense that there is no confirmation or proof of filing in either of the registries, and neither of the parties nor the Registries have a filed copy.
- [35] One cannot rely on the Agent's communication to its principal as in this case, as proof of filing. The 3<sup>rd</sup> Respondent is proposing that a unified Copy be included, if so, how does one authenticate that the contents are the same as the purported written submissions which is missing? A legal submission is not part of the origination process as claimed. It does not come within the ambit of documents described in Rule 18(2).
- [36] By its nature, a legal submission is tailor made , and perhaps slanted , to support the view or agenda of the party relying on that legal submissions, having regard to the evidences and issues raised in the proceedings. If the purported document is not

prejudicial to any of the parties including the Appellant, why was it not served initially on the parties including the Appellant, after it was purportedly filed as claimed?

### Natural Justice Principles

[37] The principles of *natural justice* enunciated in **Khan v Permanent Secretary for Public Service Commission** (supra) may assist, however, whether or not it applies, and the extent and scope of its application will be dependent on the circumstances and facts of each case. **Public Service Commission v Lepani Matea** (CA 16/98; 29 May 1998), at page 10, in context, sees the application of the requirement of *natural justice* in disciplinary cases, where an employer dismisses an employee without giving the employee a fair opportunity to be heard before an employer or a body determines a matter that affects him or her adversely. This is not such a case. Further, the document the subject of the request to be added to the copy record does not qualify to be so included under Rule 18(2).

[38] Arguments about *natural justice* and the need to ensure a fair trial by giving the 3<sup>rd</sup> Respondent an opportunity to properly lay and present before this Court its case, are justified and applicable, when pleadings and other items specified in Rule 18(2) are not included in the copy record, by reasons other than, not coming within the documents contemplated by the Rule 18(2).

[39] The issue here is whether the Written Submissions (After Trial) qualifies to be included in the record, under Rule 18(2)? It has not been proven that the document was in fact filed in either the High Court or the Court of Appeal Registry. The email from the Appellant's agents to the 3<sup>rd</sup> Respondent's Solicitors cannot be accepted as proof of filing of the document; and the 3<sup>rd</sup> Respondent does not have a copy of the Written Submissions (After Trial).

### Whether document is new or old

[40] The 3<sup>rd</sup> Respondent submits that the written submissions they are requesting to be incorporated is not a 'new document' and/or new evidence as claimed and/or alleged by the Appellant but rather are the same submissions which the High Court Judge relied upon when delivering its Ruling. Whether the written Submissions (After Trial)

is a “*new document*” or an “*old document*” cannot be ascertained under the circumstances. There is no certainty that the document was filed. The document was certainly not served on the other parties to the litigation, and there are implications. The Appellant has not pointed to any evidence that the learned trial judge relied on that submission in his judgment.

### Prejudice

[41] The 3<sup>rd</sup> Respondent submits that that the document which they intend to incorporate is not prejudicial, as based on that submissions the presiding judge delivered his Ruling on 30<sup>th</sup> September 2020. In Singh v Singh (supra) which made reference to the case Sundar v Prasad (supra) this Court discussed the test of “*no prejudice*”, and how the balance is to be assessed between the interests of the party seeking amendment and the other side which incurs the cost. It discusses amendment to pleadings. Generally is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of every party’s case. For that reason, amendment of pleadings which will have that effect are usually allowed, unless the other party will be seriously prejudiced thereby.

[42] Here, the pleadings are unaffected. The test seems to be, whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to other parties. If that test is met leave to amend may be given even at a very late stage of the trial. In this case, the document that the 3<sup>rd</sup> Respondent request should be added is not a pleading that needs amendment or a document of a nature authorized by Rule 18(2) to be included in the record.

[43] The Appellant is emphatically opposed to the Summons for Supplementary record made by the 3<sup>rd</sup> Respondent in terms stated in the Affidavit of Opposition sworn on its behalf. The Appellant’s interests and the interest of the 1<sup>st</sup> Respondent will suffer prejudice should the requested Orders are allowed.

### Conclusion

[44] The 3<sup>rd</sup> Respondent’s request that the Written Submissions (After Trial) prepared and submitted for and on behalf of the 3<sup>rd</sup> Respondent at the trial, be added in a

Supplementary record. The written submissions does not come within Rule 18(2) and it cannot be accepted as part of the record as it is in breach of Rule, 18 (2) if permitted as urged by the 3<sup>rd</sup> Respondent.

- [45] Rule 18(1) places the responsibility for the preparation of the record on the Appellant. In my view, the Appellant has complied with the statutory requirements and had consulted the Respondents as required under Rule 18 (5). It was at that consultation stage, that the Respondent had signified his approval of the record. There were no errors or deficiencies in the record. The 3<sup>rd</sup> Respondent, did not object to or disagree with the record submitted by the Appellant. He asked for inclusion of the written submission (After Trail) as Supplementary record. The 3<sup>rd</sup> Respondent did not object to the record. He asked for a supplementary record or an addition to what has been agreed to. That request cannot in my view be lawfully entertained under the said Rule.
- [46] In view of the foregoing, the facts and circumstances of the application made by the appellant and the legal authorities, I am of the firm view that the application is not made out. There is no proof that the document sought to be added to the record was filed in Court. There is no sustainable legal argument to compel the document's inclusion as part of the record under Rules 18 and 18 A of the Court of Appeal Rules. The Summons to file Supplementary Copy Records filed by the Appellant is dismissed. Costs to be paid by the Appellant as summarily assessed.
- [47] The record has already been certified and it is for the Appellant and the Registrar to do the needful in terms of Rule 18(7), (8) and (9) as appropriate.

**Order of Court**

1. *Summons to file Supplementary Copy record is dismissed.*
2. *Third Respondent to pay costs to the Appellant and First Respondent in the sum of \$1,500.00 each, to be paid within 21 days from the date of the Ruling.*



A stylized, handwritten signature in blue ink, consisting of a large, sweeping 'A' followed by a series of loops and a horizontal line at the end.

**Hon. Justice Alipate Qetaki**  
RESIDENT JUSTICE OF APPEAL

**Solicitors**

M A Khan Esquire for the Appellant  
Daniel Singh Lawyers for the 1<sup>st</sup> Respondent  
Krishna & Co for the 3<sup>rd</sup> Respondent