NATIONAL HOUSING AND SAVINGS BANK, by and thru its President, Appellant, v. **JAMES D. GORDON,** Appellee.

MOTION TO DISMISS APPEAL FROM THE NATIONAL LABOUR COURT, MONTSERRADO COUNTY.

Heard: June 29, 1988. Decided: July 29, 1988.

1. An appeal may be dismissed where the appellant fails to have the records transmitted from the trial court to the appellate court within ninety (90) days, such failure being tantamount to an abandonment.

2. The failure to pay for the preparation of the records to be sent to the appellate court, or a failure to file such records, is tantamount to an abandonment of the appeal.

3. Where the appellant filed a bill of exceptions, which thereby deprives the trial court of jurisdiction over the case, but the appellant fails to have the records transmitted to the appellate court, a motion to dismiss will be granted and the trial court instructed to enforce its judgment.

4. Even though the failure to have the trial court's records transmitted to the appellate court is not a statutory ground for the dismissal of an appeal, the Court has the right to dismiss the appeal for reason of abandonment.

5. Silence means acquiescence to the charge and acceptance of its effects in law.

6. While an appellant may stand his own bond, yet the cash used for the purpose of indemnifying the appellee must be guaranteed and parted with to a third party for safety and security.

7. Where an appellant stands its own appeal bond and issues a manager's check drawn on itself, the security contemplated by statute is not satisfactorily established, thus rendering the bond fatally defective.

8. A bank may not stand its own bond and at the same time issue a manager's check drawn on itself, no matter how credible the bank may be.

9. The essence of an appeal bond is indemnification of the appellee in case the appeal

crumbles.

10. The question of the security of a appeal bond put up top indemnify the successful party is not a mere technicality but one that goes to the heart of the matter; it is an absolute guarantee of indemnification in case the appeal is unsuccessful.

11. The Court cannot do for parties that which the parties ought to do for themselves.

Appellee filed a motion to dismiss the appeal taken by appellant from a judgment of the National Labour Court, stating as the grounds therefor that the appellant had failed to ensure the transmission of the records of the trial court to the Supreme Court within the time allowed by statute, and that the appellant in standing its own bond had issued a manager's check drawn on itself, an act which appellee said rendered the bond defective.

The Supreme Court agreed with the grounds stated in the motion to dismiss, holding as to the first contention that although the statute did not state as a ground for the dismissal of an appeal the failure to have the records of the trial court transmitted to the Supreme Court, yet the failure of the appellant to have the records transmitted constituted an abandonment of the appeal, and that the Court, under such circumstances had the right to dismiss the appeal on the ground of abandonment. The Court ruled that this result obtained notwithstanding all of the steps required by the statute for perfecting an appeal had been taken.

The Supreme Court also held that the bond was defective because although the appellant had the right to stand its own bond, it could not as a bank issue a manager's check, as security to the bond, drawn on itself. The manager's check, the Court said, should have been drawn on another bank. The Court therefore ordered the appeal dismissed.

Roger Steele and Martha K Massoud appeared for appellant. Johnnie N. Lewis appeared for appellee.

MR. CHIEF JUSTICE GBALAZEH delivered the opinion of the Court.

Appellee filed a three-count motion to dismiss appellant's appeal contending, among other things, that since the rendition of final judgment in the matter appealed from on November 28, 1986, appellant had neither applied to the clerk of the Labour

Court for transcription of the records nor paid the requisite statutory fees to the clerk of the said court to ensure transmission of the trial records to this Court. Appellee asserted further that appellant had violated our Civil Procedure Law by electing to issue its own manager's check, drawn on itself, and thereby, in essence, continued to exercise control and authority over the funds intended for use as security, instead of parting with the said funds as is required by law. Finally, appellee said that appellant, being the appealing party, could not legally be a surety to its own appeal bond.

Appellant responded to the motion to dismiss its appeal by filing a four-count resistance in which it entirely refused and neglected to respond to the appellee's allegations in the motion that appellant had failed to ensure the transmission of the trial court records to this Court as provided by law. Instead, appellant seriously dwelt on the issue that it had secured its own appeal bond without parting with the funds which were meant to indemnify the appellee, as contended by the latter. Appellant contended that the grounds alleged by the appellee were not grounds for dismissal of an appeal since they were outside the basic statutory grounds provided for dismissing an appeal. It asserted that its appeal bond was not defective, since it was a cash bond of $30,000.00, meant to indemnify appellee if it lost the appeal, and that the fact that the check for said amount was drawn on itself made no material difference as it was a creditable bank of international repute. Additionally, appellant contended that as the bond was based on raw cash, it did not further require property valuation or surety, this being in keeping with the appeal statute. Appellant asserted further that the essence of the bond being to indemnify appellee, the appellant, as a reputable bank, stood by its check to indemnify the appellee and that it therefore needed no other processes to go through to secure a hearing of its appeal.

The two issues raised for our consideration by the motion and resistance are:

1) whether appellant's failure to transmit the records from the trial court to the Supreme Court within ninety (90) days, as required by the rule of court and statute, is ground for dismissal of its appeal.

2) Whether or not an appellant can stand his own appeal bond by maintaining cash to indemnify the appellee in case the appeal fails, without actually parting with the requisite funds.

We start with the first issue of whether or not an appeal may be dismissed where appellant satisfies all other conditions to have his appeal heard but thereafter he woefully neglects to have the records transmitted to the appellate court.

We answer this question in the affirmative, that is, that such an appeal may be dismissed, since the conduct of failure to transmit the records amounts to an abandonment of the appeal. Dayrell v. Thomas and Moore, 11 LLR 98 (1952). In that case this Court held that "failure to pay for preparation of the records to be sent to the appellate court, or failure to file said records, is tantamount to an abandonment of the appeal." In that case also, the appellant, like the appellant in this case, neglected to pay for transmission of the records of a trial to this Court, even though it had performed the other requirements for perfecting the appeal. The appeal was dismissed and the failure to transmit the records to the appellate court was considered an abandonment.

In an earlier case with similar facts as the case cited supra and the case at bar, this Court ruled as follows: "Where defendant excepts to an adverse judgment, prays for an appeal, and files an approved bill of exceptions and a legal appeal bond, thus depriving the lower court of jurisdiction, but defendant does not have the records sent to the appellate court, the appellate court will grant a petition by the successful party below to have the judgment of the lower court enforced." Baker v. Morris, 10 LLR 187 (1949).

Even if a failure to have the records of the appeal transmitted to this court is not a statutory ground for dismissing an appeal, every court has right to dismiss any cause for abandonment, either as to a plaintiff or an appellant, and no reasonable mind can say that the dismissal is unjustified when in fact without it a defendant or an appellee will be left without justice, either to be discharged from a complaint or to have the lower court judgment in favor of an appellee's enforced.

The appellant in this case failed to respond specifically to the charge of its failure to transmit the records of the trial to this Court. We take that silence to mean acquiescence by the appellant to the charge and acceptance of its effects in the law.

We next proceed to the second and final issue of appellant, that is, whether a commercial bank can stand its own bond and issue a check to indemnify the appellee in case the appeal fails, which check is drawn on appellant itself and without appellant parting with the funds.

While in a previous ruling this Court held that an appellant can stand his own bond, Tubman v. Greenfield, 29 LLR 200 (1981), decided during the March Term, 1981, we are nevertheless of the opinion that the cash to be used for indemnifying the appellee

in case the appeal fails must be guaranteed and parted with to a third party for safety and security. Thus, where the appellant stands his own bond, as in the instant case, and decides to issue a check drawn on itself, the guarantee, safety and security required to indemnify the appellee cannot be said to have been established to the satisfaction of this Court.

We expect that a bank or such other financial institution standing its own bond should have the requisite cash guarantee secured by another bank, to be used to indemnify the appellee where the appeal fails. Therefore, a bank, whatever its credibility may be in the business, may not stand its own bond and issue a certified manager's check drawn on itself, even though considered by this Court as cash. In such a case, there has been no guaranty of parting with the indemnity funds placed as security for a third party. It is like shaking one's own pockets to produce the sound of coins, and to say that one is a rich man if he is capable of paying a debt when it falls due at a later date without actually depositing the funds in the pocket of a recognizable third party to honour the debt when it falls due.

The essence of the appeal bond is indemnification of the appellee in case the appeal crumbles. Dennis and Dennis v. Holder, 10 LLR 301 (1950); Tubman v. Greenfield, 28 LLR 200 (1981), decided during the March Term, 1981; Leigh v. Bank of Monrovia, 22 LLR 360 (1973).

This court is satisfied that the question of the security of the bond put up to indemnify the successful party is not a mere technicality but one that goes to the heart of the matter; it is an absolute guarantee of indemnification in case the appeal is unsuccessful. Civil Procedure Law, Rev. Code 1: 51.16 and 51.8; Kerpai v. Kpene, 25 LLR 422 (1977); Jackson v. Eastman-Mason, 21LLR 216 (1972).

In this case, the drawing by appellant of the manager's check on itself instead of drawing same on another bank, was a fatal defect; and, therefore, this appeal must crumble. This Court cannot do for party litigants what they ought to do for themselves. Ammons v. Barclay, 18 LLR 212 (1968).

The appeal is therefore dismissed on the two issues discussed. The Clerk of this Court is mandated to send a mandate to the trial court to resume jurisdiction over the case and enforce its judgment. Costs are ruled against the appellant. And it is hereby so ordered.

Motion granted; appeal dismissed.