IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2013

CORAM: ATUGUBA, J.S.C. (PRESIDING)

ANSAH, J.S.C.
ADINYIRA (MRS.), J.S.C.
OWUSU (MS.), J.S.C.
DOTSE, J.S.C.

CIVIL APPEAL

No.J4/29 /2012

27TH FEBRUARY, 2013

MATTHEW TAWIAH ARYEETEY	**PLAINTIFF/ RESPONDENT/ APPELLANT**
VRS	
SOCIAL SECURITY AND NATIONAL INSURANCE TRUST (SSNIT)	**DEFENDANT APPELLANT/ RESPONDENT**

J U D G M E N T

DOTSE JSC:

The issue which calls for determination in this appeal as a preliminary point is whether the appeal lodged by the SSNIT, the Defendant/Appellant/Applicant/Appellant hereafter referred to as the Defendant against the decision of the Court of Appeal dated 3rd May, 2011 as it were in favour of the Plaintiff/Respondent/Respondent/Respondent hereafter referred to as the Plaintiff is ***interlocutory*** or ***final.***

In this respect, I cannot but refer to the majority decision of this Court in the case of **Opoku and others v Axes Co. Ltd [2011] I SCGLR 50**, holding 2 where the majority Date-Bah, Baffoe-Bonnie and Aryeetey JJSC stated as follows:-

> *"The common law, over the years, had recognized two alternative tests or divergent views in determining whether an order was final or interlocutory. The first test, called the* ***"nature of the order approach"****) Lord Alverstone CJ test), was whether or not the order as made had disposed of the rights of the parties; if it did, it was final; if it did not, it was interlocutory. The second test, the* ***"nature of the application"*** *approach (Lord Esher MR test) was to place emphasis on the nature of the application made to the court, i.e.* ***an order would remain interlocutory so long as a different order made in the same proceedings could have kept the litigation in being****. It did not matter whether the order made would dispose of the litigation. The courts in Ghana had been consistent in rejecting the nature of the application approach in*

favour of the nature of the order approach. Dictum of Lord Denning J LJ in ***Salter Rex & Co v Ghosh [1971] 2 ALL ER 865 at 866;*** *and* ***Minister of Agriculture, Food and Forestry v Alte Leipzeger [2000] 1 ESC 13; [2000] 4 IR 32*** *per Hardiman J considered.* ***Attorney-General v Faroe Atlantic Co. Ltd [2005-2006] SCGLR 271 at 288-289; Republic v High Court (Fast Track Division) Accra, Ex parte State Housing Co. Ltd. (No 2) (Koranten-Amoako Interested Party) [2009] SCGLR 185 at 194;*** *and* ***Halle & Sonns SA v Bank of Ghana and Warm Weather Enterprise Ltd., Civil Motion No J7/11/2010, 15 December 2010****, unreported followed."*

Fortunately, when this case came up for review, the unanimous decision of the court speaking through its President, my respected brother Atuguba JSC whilst dismissing the application for review on 15th November, 2011 stated quite clearly that it was following the *"nature of the order"* approach in determining whether the order was final or interlocutory. This is how the court per Atuguba JSC put the issue to its final resting place:-

"The best known test for a final judgment is that it ***disposes of the rights of the parties in relation to the res litiga. In the course of the trial the res litiga may assume a new dimension wholly or partly depending on the permissible ramifications of litigation****. We are wholly unmoved by a contention that, when a part of a claim has been distinctly ascertained and judgment given as to the rights of the parties in relation to it, without the need for further litigation on adjudicatory process regarding the same, such a pronouncement of the court is anything but final."*

In order to detemine whether this court should adopt ***"the nature of the order***" approach or the ***"nature of the application"*** approach in this particular instance, it

is useful to examine into detail not only the decision of the Court of Appeal of 3rd May 2011, but the circumstances of the facts, giving rise to such a decision.

In order for a fuller and proper understanding of the approach that will be followed, it is deemed expedient to set out in clear detail the facts of this appeal.

The Plaintiff/Respondent filed a writ of summons on 11th July 2007 against the defendant claiming the following:

a. An order directed at the defendants to pay to the plaintiff his duly and legally entitled pension and social security benefits forthwith.

b. An order that the defendants reimburse Plaintiff for all expenses incurred and loans borrowed with interest as a result of the Defendants' failure to pay plaintiff's Social Security and pension benefits to him.

c. Interest on the due payments at the prevailing bank rate.

In the accompanying statement of claim the plaintiff stated that he is a retired Chief Executive Officer of NAS-MATSON Enterprise Ltd. Whilst the defendant is a statutory body engaged in the insurance business and pension scheme. The defendant in carrying out its business has Area and District Offices in all the Regions of Ghana.

The Plaintiff until his retirement in February 2007, was a contributor to the Defendants pension scheme, having contributed for 332 months.

According to the statement of claim, the plaintiff after retirement notified the defendant's office at Takoradi to process his pension.

According to the Plaintiff, the defendants invited him for an interview on 30th April 2007 and requested for his tax clearance certificate and Plaintiff duly forwarded the tax clearance certificate to the defendants.

The Plaintiff averred that the defendants later invited the Plaintiff again and assured him that his pension would be paid in ten (10) days.

However, the Plaintiff waited in vain and decided to engage his lawyers to write a letter to the Defendant to expedite action of the pension processing as he was facing financial difficulty.

The Plaintiff stated that as the defendant had failed to pay his pension on time he had to secure a loan at an interest from his bankers to live on hence Plaintiff's claim as per the writ of summons.

Entry of Appearance

The defendant entered conditional appearance on 24th July 2007.

Amendment

On 9th August 2007 the Plaintiff amended his writ of summons, relief and paragraph 11 of the statement of claim as follows:

> *"Interest on the due payments at the prevailing bank rate till date of final payment".*

Summary Judgment

The plaintiff filed a motion for summary judgment on 9th August 2007 and same was heard and granted on 15th August 2007 in the absence of the defendant and its Counsel.

Payments

The Defendant paid the plaintiff all his pension benefits and the excess refund and the Area Manager, Takoradi wrote to inform the Court on 22nd August 2007 of the payments.

Motion to set aside summary judgment

The defendant filed a motion on 3rd September 2007 to set aside the summary judgment obtained on 15th August 2007 and its entry of judgment on the ground that insufficient notice was given contrary to order 14 rule 2 (3).

The summary judgment was set aside by the Court on 10th December 2007 with no cost awarded. The case was to take its normal course.

Thereafter, the Defendants filed their Defence and contended in their Defence that the Plaintiff inflated his annual basic salary of 2003 from ¢48,000,000.00 to ¢499,000,000.00 in 2004, and in subsequent years as follows:-

2003 - ¢48,000,000.00

2004 - ¢499,000,000.00

2005 - ¢540,000,000.00

2006 - ¢550,000,000.00

The Defendants contended very forcefully that, the plaintiff being the sole owner of the business Enterprise inflated his last three years annual basic salary in order to take advantage of the scheme which the Defendants manage which is to the effect that the last three years annual basic salary of a member be used to calculate the pension benefits.

It is interesting to observe that, the Plaintiff was a former staff of the Defendants, and Judicial notice ought to be taken of that fact.

Secondly, the Defendants contended that, when these anomalies in the Plaintiff's computations were detected, the excess contributions made by the plaintiff were refunded to him with interest and the pension benefits paid to him in accordance with the Law in August 2007. Thereafter, the plaintiff filed his Reply in which he denied the assertions of the Defendant.

The matter went on for trial, and the Sekondi High Court, presided over by Agbevor J, on **23rd April 2010** delivered judgment against the Defendants and ordered the Defendants to pay the benefits to the plaintiff on the basis of the controversial and astronomical jumps in salary for the last three years as stated supra.

The defendants being aggrieved appealed against the decision of the High Court, Sekondi to the Court of Appeal on the **1st of June, 2010.**

It must be stated that, the judgment of the High Court had been delivered on **23rd April, 2010.**

It is on record that as the Defendants failed to file the requisite processes after being served with Form 6, the Court of Appeal on **10th January 2011** struck out the appeal pursuant to a Registrar's certificate for non-compliance.

Even though the representatives of the Defendants were in Court on the said 10th January 2011 when the appeal was struck out for non-compliance, the Defendants, did not take any steps to relist their appeal until 12th April, 2011.

On the 3rd of May, 2011, the Court of Appeal, Coram A. Asare-Korang (Presiding), Yaw Appau, A.M.A Dordzie (Mrs) JJA after hearing the parties dismissed the motion to relist in the following terms:-

> *"By Court: Having heard Counsel Mr. Sillo in support of the application and Mr. Ebow Quarshie in reply who cites two decided cases in opposition to the application, namely* ***Darkwa & Ors v Kwabi (1992-93) GBR*** *part 1 page 380 and* ***Lutterodt v Mensah Nyarko& Ors (1984-1986) 1 GLR 277*** *which decide that all appeals and application for leave to appeal are time bound and must be filed within the periods of time mandated by the rules of court, we are of the view that this application to relist an appeal struck out on the ground of non-compliance has been tardy since the application was filed more than 3 months after the appeal to the knowledge of the Defendant/Appellant/Applicant was struck out. The Defendant/Appellant/Applicant obviously decided to be complacent and to deal with the application at their own pace and convenience without regard to the rules. As stated by the Plaintiff/Respondent/Respondent, the Defendant/Appellant/Applicant has been indolent.*
>
> *The rules and the decided cases frown on the conduct of the Defendant/Appellant/Applicant and the application of the Defendant/Appellant/Applicant to relist its appeal being woefully out of time, it is hereby dismissed."*

Following dismissal of the application of the Defendants to relist by the Court of Appeal on 3rd May, 2011, the Defendants on 21st July, 2011 filed an appeal to this court with the following as the grounds of appeal:

a. The decision/ruling is against the weight of the evidence.
b. The Court of Appeal failed to adequately consider the case of the appellant
c. The Court of Appeal erred when it failed to exercise its discretion judiciously by declining to grant the appellant's application to relist the appeal.
d. Additional grounds of Appeal to be filed on receipt of the record of proceedings

It is important to also observe that, the relief the Defendants seek from this court has been stated thus:-

> *"The decision/ruling of the Court of Appeal dated 3rd May 2011 be set aside and the Court of Appeal ordered to relist and hear the appellant's appeal"*

Is the above decision of the Court of Appeal, dated 3rd May 2011 final or interlocutory? Learned Counsel for the Plaintiff, Mr. Ebow Quashie thinks that it is interlocutory and the filing of the appeal to this court on 21st July 2011 is in clear breach of the rules of this court as contained in Rule 8 (1) (a) (b) of C. I. 16.

Mr. Ebow Quashie captured his preliminary legal points thus:

> *"Before we deal with the grounds of appeal as set out in paragraph 3 of the Notice of Appeal we would wish to deal with a preliminary legal issue as to whether there is an appeal pending before this Honourable Court.*
>
> *It is provided under Rule 8 of C. I. 16 as follows:-*

"(1) Subject to any enactment governing appeals, a civil appeal shall be lodged within

a. Twenty-one days, in the case of an appeal against an interlocutory decision;

b. Three months, in the case of an appeal against a final decision unless the court below or the Court extends the period within which an appeal may be lodged."

Rule 82 of CI. 16 defines an "interlocutory decision" as ***"a decision which is not a final decision in a cause or matter".***

The instant appeal is an appeal against a ruling dismissing a Motion to Relist an Appeal which was struck out for non-compliance of a particular procedure i.e. filing of written submissions.

Your Lordships, there is no doubt therefore that the appeal was not determined on its merits to finality or came out with a final decision. The effect of the instant appeal if allowed would therefore mean a rehearing of the appeal by the Court of Appeal on the merits of the appeal.

In Republic ***v High Court Accra, Ex-parte State Housing Co. Ltd [2009] SCGLR 185*** *at Holding 3:*

"A judgment or Order which determines the principal matter in question is termed "final", whilst an order which does not deal with the final rights of the parties, but either (i) is made before judgment and gives no final decision on the matter in dispute but is merely on a matter of procedure; or … is termed "interlocutory".

To the extent that the ruling/decision appealed against was on a matter of procedure and this appeal if allowed would mean a restoration and rehearing of the substantive appeal before the Court of Appeal, Accra the proceedings before the Court of Appeal on 3rd May 2011 and the ruling of that day against which lies the present appeal were at best interlocutory proceedings and decision respectively. It did not bring to finality the issues in this cause or matter.

That being the case, it is submitted that an appeal against such ruling or decision ought to have been lodged within twenty-one days after 3rd May 2011, that is on or before 24th May 2011.

The instant appeal was however lodged on 21st July 2011 that is ***seventy eight (78)*** *days after the ruling of the Court of Appeal, Accra.*

It is submitted that the instant appeal being one against an interlocutory decision is clearly statute barred, woefully out of time and in blatant disregard of the rules of this Honourable Court.

There is therefore no appeal before this Honourable Court and the purported appeal filed ought not be entertained. Indeed the Defendants/Appellants have not properly invoked the Appellate jurisdiction of this Court in the instant case and prays the Court to decline to hear the purported appeal."

Learned Counsel for the Defendants, Joseph S. T. Siilo on his part, contended that, the decision of the Court of Appeal, dated 3rd May 2011 is **final** and not **interlocutory**. The salient points of his argument are captured as follows:

"*In the preliminary issue the Plaintiff asserts that the appeal is an interlocutory one but not final one. However the Plaintiff failed to sufficiently distinguish the*

interlocutory matter from a final one. In Atta ***Kwadwo & Ors. V Badu 1977 1 GLR 1***the Court of Appeal held at page 4 as follows:-

> *"The criterion for distinguishing a* ***fina****l from an* ***interlocutor****y order has come before, the Courts a number of times and the test generally accepted is that the judgment or orders to be final, must finally dispose of the rights of the parties."*

This criterion was also adopted in the ***State Gold Mining Corporation v Sissala (1971) 1 GLR 359.*** *The question as to whether a decision is final or interlocutory is not easy to answer. The decided English cases are not consistent and they are not always easy to reconcile. But as was pointed out by the Court of Appeal in its decision in* ***State Gold Mining Corporation v Sissala (1971)*** *supra where the authorities were reviewed, the better test is the first one which was first laid down by Lord Alverstone C.J.* ***In Bozson v Altrincham Urban District Council (1903) I. K.B. 547*** *and was expressly approved and adopted by the English Court of Appeal in* ***Isaacs & Sons v Salbastein (1916) 2 K.B. 139****, per Swinfen Eady L.J at p. 147, C. A. as follows:*

> ***"We have to look to the order from which the appeal was brought... Bozson v Altrincham Urban District Council supra puts the matter on the true foundation that what must be looked at is the order under appeal."***

The Annual Practice in its annotation on order 58, r. 4 states that this first test of Lord Alverstone C. J. is "generally preferred": see "The White Book" (1957 ed.) at p. 1250. ***And in Ghana our Superior Courts have shown a consistent preference for this first test of Lord Alverstone C.J., namely: does the judgment or order, as made, finally dispose of the rights of the parties?***

If it does it is final; if it does not, it is interlocutory. *Our courts have preferred to look at the order made and to decide whether the order finally disposes of the parties' rights, rather than to adopt the unreliable test laid down in* ***Salaman v Warner (1891) I.Q.B 734*** *which looks at the nature of the proceedings and answers the question, was the order made upon an application such that a decision in favour of either party would determine the main dispute?*

As was held in Ababio v Turkson (1950) W.A.C.A 35, a final judgment does not mean the last judgment, but the judgment determining rights finally, such as a preliminary judgment establishing the liability to account and directing accounts to be taken.

It is the view of the defendant that upon the authority of ***Ababio v Turkson*** *supra* ***that the motion to relist the appeal dismissed by the Court of Appeal on 3rd May 2011 was a preliminary judgment determining the right of appeal finally but not the last judgment which determines the substantive case."***

Learned Counsel for the Defendant continued his argument further as follows:-

…It is the opinion of the defendant that "the defendant's right of appeal at the Court of Appeal" had been determined by the dismissal of the motion to relist the appeal. After the appeal was first struck out for non-compliance with Rule 20 (1) of the C. I. 19 the defendant could still exercise the right to apply to the same Court of Appeal for relisting. However, when the motion to relist the appeal was finally "dismissed" by the Court of Appeal on 3rd May, 2011 ***this***

rendered the dismissal a final ruling determining the right of appeal at the Court of Appeal. The application could not be repeated at the Court of Appeal by the defendant but has to be appealed against. *The proceedings at the Court of Appeal were thus terminated by the dismissal of the motion. The consequence of the dismissal of the motion to relist the appeal was that the stay of execution that was granted by the Trial High Court, Sekondi lapsed and the plaintiff went into execution against the defendant. This is so notwithstanding that the dismissal of the motion to relist the appeal did not address the substantive appeal from the High Court, Sekondi."*

Concluding his arguments, learned Counsel for the Defendants, Mr. Siilo stated thus:

"*...It is submitted, My Lords based on the above authorities, that once an order of the Court does not specify whether it is final or interlocutory but only subject to interpretation, the order of the Court of Appeal dismissing the motion to relist the appeal on 3rd May 2011 was interpreted by the defendant to be final hence the filing of the appeal on the 78th day which is within the 3 months required to file an appeal against final orders. The defendant is persuaded by the authorities of Atta Kwadwo v Badu and Ababio v Turkson supra."*

From the above arguments, the issue that has to be decided as a preliminary one is **whether or not the decision of the Court of Appeal, dated 3rd May, 2011 and referred to in extenso supra is final or interlocutory.**

It is my contention that using the test and guidelines provided in the ***Opoku v Axes case*** referred to supra, this court will have to determine whether by the decision of

3rd May 2011 the rights of the parties had been decided in respect of the subject matter i.e. res litiga.

The Court of Appeal, in its decision of 3rd May 2011 made it quite abundantly clear that it had dismissed the Defendant's application to relist. That being the case, all the opportunities and avenues which the Defendants had expected would be opened to them to have a life line to pursue their rights of appeal against the earlier Sekondi High Court judgment of 23rd April 2010 had been completely, effectually and finally extinguished. This also meant that, the plaintiff, could have pursued execution processes to ensure that the benefits it obtained under the High Court judgment were enjoyed.

Using the ***"nature of the order approach"*** which was first propounded by Lord Alverstone C.J. in the celebrated case of **Bozson v Altrincham Urban District Council (1903) I K. B. 547** which was also approved by the English Court of Appeal in **Isaacs & Sons v Salbastein (1916) 2 K. B. 139**, it would appear that the rights of the parties had been finally disposed of and what this meant was that, assuming none of the parties, took any steps in the matter, the Plaintiff would be definitely entitled to enjoy the benefits of the judgment of the High Court of 23rd April 2010.

It is therefore my contention that, using that approach which has itself found expression in many Ghanaian cases notably the **Opoku v Axes and Republic v High Court, (Fast Track Division) Accra, Ex-parte State Housing Corporation Ltd (No. 2) (Koranten-Amoako Interested Party)** already referred to supra, the

decision of the Court of Appeal dated 3rd May 2011 is a final judgment and not an interlocutory one.

That being the case, the Defendants are therefore entitled to file their appeal against the said decision in terms of Rule 8 (1) (b) of the Supreme Court Rules 1996, C. I. 16 which states as follows:-

> "*Subject to the provisions of any other enactment governing appeals, a civil appeal shall be lodged within-*
>
> *"three months, in the case of an appeal against a final decision unless the court below or the court extends the period within which an appeal may be lodged"*

This is effect puts to rest, the contention by learned Counsel for the plaintiff, that the decision of the Court of Appeal of 3rd May, 2011 being interlocutory the Defedants filed their appeal to this court on 21st July 2011 out of time in terms of rule 8 (1) (a) of C. I. 16 which stipulates a 21 day period in respect of which appeals against interlocutory decisions in civil appeals ought to be filed.

Having now decided that the Defendant's appeal to this Court filed on 27th July 2011 against a decision of the Court of Appeal dated 3rd May 2011 is competent and not out of time, what then are the merits of the substantive appeal lodged in this appeal?

APPEAL TO THIS COURT

In arguing the appeal, learned Counsel argued grounds (a) and (b) of the grounds of appeal together, to wit:

a. **The decision/ruling is against the weight of the evidence.**

b. The Court of Appeal failed to adequately consider the case of the appellant

Going back to the basics, it is very clear that the initial appeal by the Defendants was struck out on grounds of non-compliance because, the Defendants had not filed their appellant's written submission within the time limits prescribed under Rule 20(1) & (2) of the Court of Appeal Rules C. I. 19 as amended. This rules states as follows:-

20. Written Submission

(1) "An appellant shall, within twenty-one days of being notified in the Form 6 set out in Part One of the Schedule that the record is ready, or ***within the time that the Court may on terms direct, file with the Registrar a*** *written submission of the appellant's case based on the grounds of appeal as set out in the notice of appeal and any other ground that the appellant may file.*

(2) ***where the appellant does not file the written submission in accordance with sub-rule (1),*** *the Registrar shall certify the failure to the Court by a certificate in the Form 11 A set out in Part One of the Schedule* ***and the Court may then order the appeal to be struck out."***

Before I proceed to a fuller discussion of this rule, it is perhaps instructive to note that, whilst the Sekondi High Court judgment was delivered on **23rd April 2010**, the appeal against that judgment by the Defendants to the Court of Appeal was filed on **1st June 2010**.

By ordinary rules of interpretation, an appeal as of right against that judgment would lapse on 22nd July 2010, see Rule 9 (1) (a) and (b) of the Court of Appeal Rules 1997 as amended which states thus:-

9. Time limits for appealing

(1) Subject to any other enactment governing appeals, an appeal shall not be brought after the expiration of

(a) twenty-one days, in the case of an appeal against an interlocutory decision;

Or

(b) three months in the case of an appeal against a final decision unless the Court below or the Court extends the time.

Since the High Court decision was a final judgment, the filing of an appeal against it to the Court of Appeal on 1st June 2010 was not only within time but also valid and competent at all times.

What should therefore be borne in mind is that, despite the striking out of the appeal for non-compliance with Rules 20 (1) & (2) of the Court of Appeal already referred to supra, **an application to relist the appeal would have had the effect to relist an appeal that had already been filed within time precisely on 1st June 2010 and no more.**

In my opinion, once the initial appeal was validly and competently filed within time, any process aimed at reviving it would have restored it to its original position i.e. date of filing. It would definitely take with it all the competencies or incompetencies of the original appeal.

Can An Appeal That Is Struck Out Under Rule 20 (2) Of The Court Of Appeal Rules Be Relisted?

The wording of rule 20 (1) of C. I. 19 as amended and referred to supra gives clear indications that the Court of Appeal, may upon terms direct the filing of a written statement of case by an appellant outside the statutory time limits prescribed under the rules of Court. This is the clear ordinary meaning attributable to the words ***"or within such time as the court may upon terms direct".***

This means that, an appellant, such as the Defendants, in this case may even apply to the court for extension of time to file their statement if they have for one reason or the other failed to file within the 21 days provided for doing so, or in the alternative apply to the court for the appeal if it had been struck out to be relisted.

Besides, there has developed a rule of practice whereby appellate courts exercise their discretion in applications brought before them to relist appeals that had been struck out for one reason or the other.

It is perhaps instructive at this stage, to consider analogous provisions that have been made in Rule 18 of the Court of Appeal Rules which deals with another specie of striking out for non-compliance.

18. Non-compliance with conditions of appeal

(1) "Where the appellant has not complied with any of the requirements of rules 11 (4), 12 or 13, the Registrar of the Court below shall certify these facts to the Court, which may then order the dismissal of the appeal with or without costs.

(2) Where the respondent alleges that the appellant has failed to comply with a part of the requirements of rules 11 (4), 12 or 13 and the Court is satisfied that the appellant has so failed, it may dismiss the appeal for want of prosecution or make the order that the justice of the case requires.

(3) An appellant whose appeal is dismissed under subrule (1) or (2) ***may apply by motion on notice for restoration of the appeal, and the Court may order the restoration of the appropriate terms."***

Even though the provisions under this Rule deal with non-compliance with fulfillment of conditions of appeal which I consider to be more serious breach of the Rules, Rule 18 (3) explicitly allows for restoration of appeal upon such terms as the court may deem fit.

By parity of reasoning, it is my opinion that, for good and sufficient reason, the Court of Appeal may relist an appeal that has been struck out for non-compliance under rule 20(2) of C. I. 19, such as happened in the instant case.

As I have already stated, the practice has developed whereby the Court of Appeal and the Supreme Court have for very good and substantial reasons either relisted or restored an appeal that has been struck out for non compliance under the rules.

In the particular instance, once I have held the view that the initial appeal to this court was valid and filed within time, it is appropriate to consider whether the Court of Appeal adequately considered the case of the Defendants and whether their brief and incisive ruling is against the weight of evidence.

As already stated supra, the Defendants filed their application to relist the appeal on 12th April, 2011 and supported it with a 9 paragraphed affidavit. Out of

abundance of caution, I reproduce paragraphs 3, 4, 5, 6, 7 and 8 of the said affidavit which states as follows:-

3. "That on 10th January 2011 the above appeal was struck out for non-compliance with section 20 (2) of C.I. 19 based on the registrar's certificate

4. That even though the Applicant deposed to an affidavit that the failure to file the written submission was due to the fact that the form 6 was not served on the lawyers of the Applicant, it could not cure the non-compliance.

5. That the Applicant's lawyers have subsequently collected the record of proceedings and are now ready with the written submissions.

6. That I am advised and I verily believe same to be true that the appeal has a reasonable chance of success and therefore if it is not pursued it would lead to a miscarriage of justice.

7. That I am further advised and I verily believe same to be true that a great hardship would be caused to the Applicant if it is not given the opportunity to pursue the appeal.

8. That if this Honourable Court grants this application the Applicant's written submission of case will be filed within time so that the case will take its normal cause."

In a supplementary affidavit, the Defendant's attached to their affidavit, the proposed statement of case, which contained in a comprehensive form, the nature of their case.

For example, in this proposed statement of case, the Defendants argued inter alia as follows:

"*According to the Defendant, the plaintiff in 2004, 2005, 2006 assumed the Directors remuneration as his salary and paid the Social Security Contribution on it. The Defendant observed from the 2002 and 2003 audited accounts that the amount stated under the Directors remuneration column was not paid to only the plaintiff. It covered other Directors and Directors expenses.*

Besides when plaintiff retired in 2007, and was not earning income the Directors remuneration column in the 2007 Audited Accounts still provided some amount. This means that the directors remuneration column is not only the salary of the plaintiff.

The Defendants also noticed that the plaintiff was the sole shareholder, Board Chairman and Managing Director of NAS-MATSON Enterprise Limited.

The Directors named in the Audited Accounts of the company were the plaintiff, Mark Ghartey Aryetey and Daniel Aryenor.

Mark Ghartey Aryetey was the plaintiff's son whilst Daniel Aryenor was the brother. The plaintiff therefore had dominant power in the company. DW1 indicated that an investigation report was sent to Head Office for advice.

The Actuarial Department which advises the defendant on risk management in respect of pensions advised that both section 36 (5) of the Social Security Act, 1991, PNDCL 247 and section 16 of the Social Security Regulations, 1973, LI 818 should be applied to pay the plaintiff's benefits".

The Defendants also argued that the judgment delivered by the High Court was against the weight of evidence in the following terms:

"The Plaintiff's salary inflation was detected through investigation at the time of processing the plaintiff's pension claim. This was however not detected at the time of collecting the contributions from the Plaintiff.

The extracts of contribution reports of works at NAS-MATSON from January 2003 to January 2006 (Exhibit 2 at pages 357 to 365 of the record) which are based on 17$^{1/2}$% contribution shows that whilst the Plaintiff was paying Social Security contribution of ¢700.000.00 before February 2004 the next-in-command, Mercy Yorkson and Jospeh Padi were paying ¢170,625.00 and ¢144, 375.00 respectively. Therefore there was already a big gap in salary between the Managing Director and the next highest paid staff in NAS-MATSON Enterprise.

Upon a close examination of Exhibit 2 it can be concluded that the Plaintiff was not worse of in salary to warrant the shift in salary from ***¢4million per month to ¢45 million per month in 2004.***

The motive for this shift in salary was to enable him benefit high pension.

This is also supported by the fact that the Plaintiff assumed the dramatic shift in salary from his 57th birth month. This cannot be seen as coincidental but intentional. This piece of evidence was downplayed by the trial Judge even though it is significant.

Exhibit 3 at pages 366-370 of the record further confirms the Plaintiff's assumed salary of ¢45 million per month in 2004, and 2005 and ¢50 million in 2006."

Continuing further, the Defendant's stated in their submissions as follows:

"...It is submitted that if the auditors intended to classify the ¢499 million in 2004, ¢450million in 2005 and ¢600 million in 2006 as salary for the Plaintiff, the said audited accounts would have clearly stated that it is the remuneration of either the Managing Director, sole shareholder or Board Chairman which would have been referral (sic) to the Plaintiff. This was not done. It was not an omission on the part of the Auditors but because the said amounts were not intended for only the Plaintiff."

Based upon the above excerpts from the proposed statement of case, it does appear to me sufficiently that, substantial issues of law had been raised and this should have convinced the Court of Appeal to exercise the discretion in favour of the Defendants by the relisting of the appeal.

This is because, the appeal if relisted would have enabled the court to pronounce on two critical legislations affecting pensions and social security benefits in this country, i.e. the Social Security Act, 1991, PNDCL 247 and Basis National Social Security Regulations, 2011 L.I. 1989.

Without prejudice to the substantive appeal, I am of the humble opinion that where substantial issues of law are raised especially touching and concerning legislation which has a profound effect on the social fabric of society, courts of law must afford parties within permissible rules of procedure to ventilate their case so as to develop and establish the legality or otherwise of the legislations concerned.

If the Court of Appeal had considered these basic principles it would have allowed the relistment thereby operationalise the Social Security Laws and Regulations to such an extent that judicial notice would have been taken of some of the issues raised.

Under the circumstances, the next point I would wish to consider is whether there is any time limit imposed on bringing an application to relist an appeal that has been struck out for non-compliance under rule 20 (2) of the Court of Appeal Rules C.I 19 vis-à-vis the cases of **Darkwa & others v Kwabi [1992-93] GBR** part 1 pages 380 and **Lutterodt v Mensah Nyarko & Others [1984-86] I GLR 277** upon which the Court of Appeal relied to refuse the Defendant's leave to relist.

I have combed the Court of Appeal rules but I have not seen any time limitation on the application to relist an appeal that has been struck out under rule 20 (2) of C. I. 19 already referred to supra.

I believe an applicant must act promptly to invoke the jurisdiction of the court and also show that he has a good course for the appeal to be relisted.

In the instant case, it is clear to me that the Defenants have good reasons for the appeal to be relisted to enable the substantial issues of law raised to be addressed.

Secondly, even though the Defendants have been tardy in bringing the application is it such an inordinate delay that they should be shut out in line with the cases relied upon?

The Court of Appeal, per Apaloo CJ addressed these issues in the case of ***Lutterodt v Mensah Nyarko*** already referred to supra, in the following terms in holding 2 of the report at page 278

> *"Whether the order relisting the appeal should be vacated or suffered to remain was entirely a matter for the exercise of the Court's discretion. On the evidence, the respondents had concealed relevant facts from the court at the hearing of the application. They also flouted or instigated the flouting of the court's lawful orders. Furthermore, equity demanded that a suppliant must act timeously.*

Although the rule under which an application to relist an appeal which was struck out did not prescribe any time limit when such application should be brought, time limits prescribed by the rules in cognate matters gave an indication of what time the law considered reasonable. *For instance under rule 10 of the Court of Appeal Rules, 1962 (LI 218) a person who was aggrieved by a judgment of the High Court and wished to have it vacated by the Court of Appeal must lodge his appeal within three months. If he did not do so within that period he had a further three months' grace but must show good and sufficient reason why he did not do so within that prescribed period. Also where an appeal was heard and decided ex parte against a respondent he might apply to set it aside within 21 days under rule 25 of LI 218. If he failed to do so within that period he had a further period of three months to apply to set it aside but that was on condition that he satisfied the court that good and sufficient cause existed for his being out of time. It was a fair inference that the legislative policy reflected in those rules was that after a period of six months from the delivery of judgment the matter must rest for all time.* ***This accorded with the policy-oriented maxim that it was in the public interest that litigation must have some end. In the instant case, on the facts the respondents had no good or sufficient reason for their delay of over one year. They therefore lost their right of appeal. Consequently, the order relisting the appeal would be set aside."***

From the above quotation and holding, it is clear that what the court will look at is the **Justice of the case** and invariably, every case will be determined on a case by case basis.

On the other hand, the Supreme Court, in the **Darkwa v Kwabi** case already referred to supra was a little bit more stringent with the computation of time. The Court, speaking with one voice through Wuaku JSC held on the material issue as follows:-

> *"The applicants became aware of the striking out of the appeal between 16/8/91 and 7/10/1991 and the delay to relist the appeal was too long. The rules of court ought to be obeyed otherwise a party would have an unqualified right to extension and defeat the purpose of the rules which was to provide a timetable for litigation."*

I cannot agree more with the rationale for the above decision. This is because various timelines specified in the rules of procedure for the courts were not provided for nothing. They are meant to be obeyed, and it is the responsibility of all courts to ensure compliance with the rules.

But then, the principle of law from the above two cases, the **Lutterodt v Mensah Nyarko**, and **Darkwa v Kwabi** is that, ***no specific timeline has been provided under the rules within which an application to relist must be brought****. However, under rule 20 (2) of C. I. 19 common sense dictates that such applications must be promptly brought once an applicant has been put on notice of the striking out.*

Thirdly, each case must be considered on a case by case basis. Under the circumstances of this case, I am of the opinion that, the fact that the plaintiff had once worked with the Defendant's establishment has in no small means contributed to some sort of either collusion or tardiness on the part of the Defendant's to pursue legitimate processes to ventilate their case.

In such a situation, I think it will be unjust and unfair to punish the Defendants for the tardiness in ensuring that appropriate steps were taken in the matter.

Even though I am of the firm view that the Defendants have good and sufficient reasons why the appeal should be relisted to enable it to be determined on the merits, I will set out in extenso what I consider to be deliberate actions by the Defendants Solicitors which slowed down the wheels of litigation in this case.

1. In the first instance, the Defendants Solicitor's were unable to file their statement of Defence on time which led to a summary judgment which was later set aside.
2. The High Court, Sekondi delivered judgment on 23rd April 2010, and it took the Defendants up to 1st June, 2010 to file the appeal. Even though this process was filed within time, it was not filed expeditiously in my estimation.
3. Thirdly, when the appeal was ready at the Court of Appeal, yet again the Solicitors of the Defendants defaulted in filing their statement of case within time as prescribed under rule 20 (1) and (2) of C. I. 19.
4. This default on the part of the Defendants led to the striking out of the appeal by the Court of Appeal on 10 January 2011.
5. The application to relist the said appeal was not filed until 12th April. 2011.
6. When the application to relist was dismissed by the Court of Appeal on 3rd May 2011, it took the defendants up to 21st July 2011 to file the instant appeal to this court.

Despite all the above acts of tardiness on the part of Defendants, Solicitors, I am of the considered view that, the sins of Counsel of parties cannot be visited on their clients.

See case of **Republic v Asokore Traditional Council, Ex-parte Tiwaa [1976] 2 G.L.R. 231,** holding I, per Apaloo C. J where he stated that *although certain faulty steps were taken by the Applicant's Lawyers in pursuit of her case, once the fault were those of her Lawyers, it would not be right to penalize her for the fault of her lawyers.*

CONCLUSION

Under the circumstances, and in view of matters raised and discussed supra, it is not considered worthwhile to consider the remaining grounds of appeal which has as it were sufficiently been dealt with.

In the result, the instant appeal succeeds, since it is considered as an appeal against a final and not an interlocutory judgment.

Secondly, since the issues raised in this appeal are substantial, this court is of the view that the justice of the case requires that the exercise of discretion of the Court of Appeal be interfered with.

This therefore means that the case is remitted to the Court of Appeal, for the substantive appeal to be dealt with on the merits.

J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

J. ANSAH

JUSTICE OF THE SUPREME COURT

S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

R. C. OWUSU (MS.)

JUSTICE OF THE SUPREME COURT

ATUGUBA, JSC

The facts of this purported appeal are that the appellant was sued in the High Court, Sekondi for the payment unto the respondent certain sums of money, rather huge, which he claimed were his just social security entitlements upon his retirement. The trial court gave judgment in favour of the respondent. The appellant appealed to the Court of Appeal but for failure to file a statement of the appellant's case within the

statutory period, the said appeal was struck out pursuant to the Registrar's Certificate in that regard.

The appellant unsuccessfully applied to the Court of Appeal for the relistment of its said appeal and has appealed therefrom to this court. A preliminary point of jurisdiction has however arisen as to whether the appellant's appeal to this court is competent.

The appellant's application to the Court of Appeal for relistment of its struck out appeal was refused on the 3rd day of May, 2011, but it filed its appeal therefrom to this court on the 21st day of July 2011.

The vexed question arising from the preliminary objection by the respondent to this appeal is whether the Ruling of the Court of Appeal dated 3rd May, 2012 refusing to relist the struck out appeal of the appellant is interlocutory or final.

It is trite learning that under Order 8 of the Rules of this Court, C.I. 16 an interlocutory appeal must be filed within an unextendable period of 21 days whilst an appeal from a final judgment must be filed within some extendable period of 3 months. If this appeal is interlocutory it is *ex concessis,* statute barred since it was filed *in flagrante delicto* of the period of 21 days.

Much judicial ink has been spilled over the test of finality of a judicial decision. Consequently it is trite learning now that an interlocutory decision is one that does not decide the rights of the parties in the cause or matter whereas a final one does so decide them.

Decision on the parties' rights

In my view a court decides the rights of the parties when it determines, wholly or partly, the substantive rights of the parties in the cause or matter over which the parties are locked in litigation before it. We so decided on review of *Opoku v. Axers Company Ltd* (2011) 1 SCGLR 150, Editorial Note.. See also *Pople v. Evans* (1968) 2 All ER 743, *Attoh-Quarshie v. Okpote* (1973) 1 GLR 59, *Kramo v. Afriyie* (1973) 1 GLR 95, *Amoako-Atta IV v. Nuamah* (1963) 1 GLR 432 S.C., *Ansah –Addo v. Addo* (1972) 2 GLR 400 C.A.

An appeal is a process intended to let the appellate court intervene in the case determined by the lower court and decide it on the merits. It is the merits that involve the rights of the parties. When the appellant's appeal was struck out by the Court of Appeal the implication was that the Court declined to reach the merits of the appeal and therefore the rights of the parties. The refusal of the Court of Appeal to relist the appellant's struck out appeal merely further entrenched the abstention of the Court of Appeal from reaching the said merits of the appeal and therefore the said rights of the parties

The refusal by the Court of Appeal to relist the said appeal was therefore interlocutory. For my part if the proceedings in the Court of Appeal or some other proof were available that the Court of Appeal dealt with the Registrar's certificate of non compliance with the conditions of appeal without hearing and considering the parties' cases with regard to the same I would have vacated the order of the Court of Appeal striking out the appellant's appeal *ab initio*. But there is no such proof.

For all the foregoing reasons I am sadly constrained to dismiss the appeal as being out of time.

W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

COUNSEL;

JOSEPH SIILO FOR THE DEFENDANT/ APPELLANT/ APPELLANT.

EBO QUARSHIE (WITH HIM MRS. ERSKINE) FOR THE PLAINTIFF /RESPONDENT/ RESPONDENT.