FOR BETTER OR FOR WORSE? NEW CHANGES INTRODUCED INTO THE COURT OF APPEAL AND SUPREME COURT RULES.

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A: Introduction

On 1st October, 2020, the Rules of Court Committee made certain changes in the rules of procedure that guide how appeals are filed and heard before the superior appellate courts, that is, the Court of Appeal and Supreme Court in Ghana. The Rules entered into force on 9th November, 2020. The new changes made, especially in the Court of Appeal Rules, have radically transformed the appeal process and it is yet to be seen how these changes will affect the rights of parties before our appellate courts; for better, for worse or neither.

B: Court of Appeal Rules – Changes introduced by C.I 132 [1]

The changes that have been made in the Court of Appeal Rules are discussed below.

Changes to Rule 27

1. *Application for stay of execution to be filed at the Court of Appeal.* – Under the new amended rules, a person who files a civil appeal and wants the execution of the judgment or order stayed until the final determination of the appeal must file the application for stay of execution at the Court of Appeal and not at the trial court that first handled the case, that is, the Circuit Court or High Court.

Previously, a person who appealed from a lower court to the Court of Appeal needed to file for stay of execution first, at the lower Court. It was only when the lower court refused to grant the stay or granted it with onerous conditions that were tantamount to a refusal that the party had to repeat the

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1 See: Court of Appeal (Amendment) Rules, 2020 (C.I 132)

application at the Court of Appeal.

2. *Automatic stay of execution shall be for seven days after the judgment or decision*. – Under the new amended rules, there is only one automatic stay of execution for seven days after the judgment or decision is given by the lower court. Previously, there was an automatic stay of execution for seven days after the judgment or decision was given by the lower court plus another period of seven days if the trial court refused to grant the application for stay of execution pending appeal.
I believe the further automatic stay for seven days after the refusal by the trial court has been taken off the Rules because the right to make the application to the trial court in the first instant has been taken away.

3. *Application for stay of proceedings pending appeal has been taken out of the Rules.* - It is interesting to observe that applications for stay of execution and stay of proceedings were hitherto treated like 'Siamese twins' in Rule 27. However, the most significant change introduced by C.I 132 is that, Rule 27 is now silent on applications for stay of proceedings pending appeal.
The question is: should parties not have the option to apply for stay of the proceedings in respect of which they have filed appeals? In my considered view, most appeals will be rendered nugatory if proceedings are not stayed at the trial court to abide the determination of the appeal by the Court of Appeal.

Considered differently, one may argue that by omitting stay of proceedings from Rule 27, the import is that an appeal shall operate as stay of proceedings. It will be interesting to see how the Court of Appeal applies its new nebulous Rule 27 to decline jurisdiction in applications for stay of proceedings pending appeal. In the event that the Court of Appeal allows applications for stay of proceedings, then just like its twin sister application for stay of execution, the application ought to be brought before the Court of Appeal and not the trial court.

Changes to Rule 27A

No grant of stay of proceedings in interlocutory appeals, whether civil or criminal. The entire Rule 27A has been revoked. This means that, a party cannot apply for, and the Court of Appeal cannot grant, stay of proceedings in interlocutory appeals in all cases, whether civil or criminal. A little history about the now-revoked Rule 27A will help to throw light on the discussion. Rule 27A was not originally included in the Court of Appeal Rules of 1997 [2] ; it was introduced into the Rules a year later, in 1998, by C.I 21. It is unclear what mischief, if any, Rule 27A caused in the adjudication of appeals in the last 22 years to warrant being jettisoned in its entirety. This is a worrisome development and it savours of a reincarnation of *Ex parte Abodakpi* [3] in a much worse form.

In the recent 2018 Supreme Court case of *Ex parte Magna International Transport Ltd*, [4] the apex court seized the opportunity to depart from its previous decision in *Ex parte Abodakpi*. In *Ex parte Abodakpi*, their Lordships had held that the High Court had no jurisdiction to entertain an application to stay proceedings when an interlocutory appeal had been filed at the Court of Appeal. In departing from the said decision, the Supreme Court held in *Ex parte Magna International Transport Ltd* that Rule 27A did not give exclusive jurisdiction to the Court of Appeal in applications for stay of proceedings in interlocutory appeals and that, before the transmission of the record of appeal, a party may apply first to the High Court, failing which they may repeat the application before the Court of Appeal. The decision in *Ex parte Magna International Transport Ltd* was received as a welcome development as it brought much needed succour to many a languid practitioner. It is intriguing, therefore, that barely two years after the decision, the Rules of Court Committee has revoked the entire Rule 27A and curtailed any jurisdiction the High Court had under the Rules and *Ex parte Magna International Transport Ltd* to entertain applications for stay of proceedings pending appeal.

Now that Rule 27A has been revoked, legal practitioners must be prepared for the unfortunate situation where proceedings are not stayed pending interlocutory appeals, so cases are heard to conclusion before the trial court, but judgment is given in favour of the appellant by the appellate court, thereby rendering the judgment idle and useless. Such was the situation that confronted the

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2 (C.I 19)

3 Republic v. Fast Track High Court, Accra, Ex parte Daniel Kwasi Abodakpi, Civil Motion No. J5/15/2005 dated 25th October 2005 unreported.

4 Republic v High Court (General Jurisdiction), Accra; Ex parte Magna International Transport Ltd (Ghana Telecommunica tions Co. Ltd Interested Party) Civil motion No. J5/66A/2017 dated 7th November, 2018.

Supreme Court in the *Footprint Solutions case* [5] . In that case, the plaintiff made part payment of GHS20,000 towards the purchase of a printer, but the printer could not work as expected so the plaintiff sued the defendant at the High Court, Kumasi, for the recovery of the money paid. When the defendant was served with the writ, he entered conditional appearance and filed an application for the case to be transferred to Accra as that was the place the defendant carried on business and the printer was to be used. The High Court dismissed the application and the defendant filed an appeal against the ruling at the Court of Appeal and also filed a motion for stay of proceedings at the Court of Appeal. While the interlocutory appeal was pending, the plaintiff applied for summary judgment at the High Court and the same was granted. The defendant then filed another appeal before the Court of Appeal against the grant of summary judgment and filed an application for stay of execution pending appeal at the High Court. The result was that there were two applications in the same matter pending at the same time – the one for the stay of execution before the trial High Court and the other for a stay of proceedings before the Court of Appeal.

The record showed that the application for stay of proceedings before the Court of Appeal was filed first, on 7th July, 2009. This was before the grant of the summary judgment by the High Court on 22nd July, 2009. On 25th January, 2010, the Court of Appeal ordered a stay of all proceedings in the High Court and rejected the argument made by the plaintiff that there was nothing to stay in view of the High Court having given final judgment in the case on 22nd July 2009 (per the application for summary judgment). The plaintiff then appealed against this decision of the Court of Appeal to the Supreme Court.

The Supreme Court held that the Court of Appeal was justified in staying all processes in the High Court pending the determination of the appeal. The Supreme Court went further to state that, apart from the Court of Appeal's jurisdiction under Rule 27A of C.I 19 to grant the order to stay the proceedings pending before the High Court, the Court of Appeal could also exercise its inherent jurisdiction, which "is innate to the Court itself" to grant the order for stay of proceedings.

If, as the Supreme Court held in the *Footprint Solutions case*, the Court of Appeal's jurisdiction

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5 Footprint Solutions Co. Ltd. v. Leo & Lee Company Ltd. Civil Appeal No. J4/52/2011, dated 24 May 2013, unreported

to grant stay of proceedings pending an interlocutory appeal is derived from both its inherent jurisdiction as well as the Rule 27A, then it is submitted that, the Rules of Court Committee's decision to revoke Rule 27A from C.I 19 is largely academic. Parties may still be able to apply for stay of proceedings pending the hearing of interlocutory appeals under the inherent jurisdiction of the Court of Appeal. It is further submitted that, the Rules of Court Committee did not think through the far-reaching ramifications of their decision to revoke Rule 27A on the due process of law and the fair administration of justice before embarking on that venture. It is left to be seen how the revocation of Rule 27A will affect our citizens' access to justice in our appellate courts.

Changes to Rule 28

All applications made after an appeal has been filed must be made to the Court of Appeal. Rule 28 of C.1 19 has been revoked. Under the old Rule 28, whenever a party in any appeal proceedings wanted to make an application and the party had the option of applying to the trial court or the Court of Appeal, the party had to make the application first to the trial court and if it was refused, then the party could repeat the application before the Court of Appeal. However, with the revocation of Rule 28, as soon as an appeal is filed, all applications to be made in the interim pending the determination of the appeal must be made to the Court of Appeal. The trial courts have been left in the cold in that regard. Again, just as the revocation of Rule 27A, the revocation of Rule 28 makes nonsense of the Supreme Court's recent decision in *Ex parte Magna International Transport Ltd.*

Changes to Rule 29

The issue of whether a decision or order is final or interlocutory must be decided by the trial court and its decision shall be final. Rule 29 has been amended. Therefore, the determination of finality or otherwise of a judgment or order must be made by the trial court. Whatever decision the trial court gives is final and binding on the parties and must be used to determine the time within which an appeal may be brought. Previously, such a determination could be made by the trial court or the Court of Appeal. [6] But under the new amendment, the Court of Appeal's jurisdiction in deciding

whether a decision or order is final or interlocutory has been taken away.

In practice, most of the questions regarding whether a decision is final or interlocutory for purposes of determining the time for filing appeals are raised before and determined by the trial courts as well as appellate courts. Consequently, the reason for conferring jurisdiction for the determination of such issues solely on trial courts in the new Rule 29 is not easily discernible. This is more so as the new Rule 28 (discussed above) provides that as soon as an appeal is filed, all applications to be made pending the determination of the appeal, including applications for stay of execution, must be made to the Court of Appeal. At what point then, will a party be able to file an application before the High Court (or any other trial court) when there is an appeal pending before the Court of Appeal?

Changes to Rule 34

No review of the decision of the Court of Appeal even in exceptional cases. Rule 34 has been revoked. Under the previous provision, the Court of Appeal could review its judgment or order under exceptional cases and in the interest of justice. However, that jurisdiction has now been taken away. This state of affairs is not surprising because the previous provision was rarely used by parties. But all things considered, should the rare usage of a provision be enough reason for its revocation? I do not think so. One can never be sure of situations that may arise in future that may necessitate the application of such rules.

For instance, I was recently involved in a matter at the Court of Appeal in which the Court relied on a High Court decision as the basis for its ruling. As if that was not bad enough [7] , the panel added that, that decision of the High Court had "not been appealed against". In fact, the panel was wrong as there had been an appeal pending against the said High Court decision since 2018! Such a blatant blunder could have been corrected on an application for review but now that Rule 34 has been

6 See: Ataa Ashie Nikoi v. Charles Quist Civil Appeal No. J4/18/2011 dated 24th May, 2013, SC (unreported); Daniel Elias Williams Joseph v. Okomfo Anokye & anor Civil Appeal No. J4/12/2012 dated 27th February, 2013, SC (unreported)

7 The President, H.E Nana Addo Dankwa Akufo-Addo had occasion to admonish superior court judges against citing decisions of lower courts as law at a swearing –in ceremony for six Court of Appeal judges held in August, 2020: "The situation, where judges proffer judgments on the basis of decisions from lower courts and cite them as law is not accept able…" Ironically, two judges out of the three – member panel were part of those sworn in by the President in August, 2020. See the full story at https://presidency.gov.gh/index.php/briefing-room/news-style-2/1640-president-akufo-addo-swears-in-six-6-justices-of-the-court-of-appeal

revoked, the affected party's recourse only rest in a further appeal to the Supreme Court, with its attendant costs and delays. To my mind, Rule 34 should have been left to stand for whatever it is worth since other more obsolete provisions such as taxation of costs are still part of the rules.

C: Supreme Court Rules – Changes introduced by C.I 131 [8]

Changes to Rule 22

1. An appeal shall not operate as stay of execution of the decision or judgment unless the Supreme Court so orders. This means that an application for stay of execution is to be filed at the Supreme Court. The Court of Appeal or other appellate forum has no jurisdiction to entertain any such application any more as it used to be the case previously.

2. No provision is made for applications for stay of proceedings pending appeal. It is interesting to observe that applications for stay of execution and stay of proceedings were hitherto treated like 'Siamese twins' in Rule 20 of C.I 16 [9] as it was in Rule 27 of C.I 19. However, the most significant change introduced by C.I 131 is that, Rule 20 is now silent on applications for stay of proceedings pending appeal.

The question is: should parties not have the option to apply for stay of the proceedings in respect of which they have filed appeals to the Supreme Court? In my considered view, most appeals will be rendered nugatory if proceedings are not stayed at the previous appellate forum or court to abide the determination of an appeal lodged at the Supreme Court.

D: Conclusion and Other general comments on C.I 131, 132 and 133.

The first observation is the use of "Court" in the Rules without any regard to the Interpretation sections of the principal enactments. In both C.I 16 and C.I 19 for instance, "Court" means the Supreme Court and the Court of Appeal respectively. Again, under both C.I 16 and C.I 19, "court

8 See: Supreme Court (Amendment) Rules, 2020 (C.I 131)
9 The Supreme Court Rules, 1996

below" means the court or body from which an appeal or other cause or matter is brought and the court from which the appeal is brought respectively. But, under C.I 131 and C.I 132, the words used are "Court", "court" and "Court below", thereby creating a matrix of confusion and making nonsense of the Interpretation sections. It portrays a job done in haste with little attention to detail.

The second observation is the publishing of the signatures of the Committee members in the Rules as issued and sold to the general public. That is a most dangerous oversight that ought to be rectified as soon as possible. In this day and age of the use of electronic signatures, any signatures carelessly exposed in the public domain could easily become fodder for criminals.

In conclusion, it is unclear what policy or procedural reasons were behind some of the changes and revocations in the Rules. Perhaps, a webinar by the Rules of Court Committee to throw light on the factors that informed the changes will be very useful.

Postscript: The new positions stated in the Rules are shown in italics.