

SUPREME COURT OF NIGERIA

9TH JULY, 1999. SC. 97/1993.

**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, S. U. ONU,
U. A. KALGO, S. O. UWAIFO, JJSC.**

CLEMENT C. EBOKAM APPELLANT
AND
EKWENIBE & SONS TRADING COMPANY LTD. .. RESPONDENT

APPEALS - Final order - Time-within which to appeal - Order of striking out in the instant case is a final decision - And the appellant had three months according to s. 25 (2) (a) of the Court of Appeal Act - Within which to appeal - The appeal is therefore competent.

CONSTITUTIONAL LAW - Appeal - Ground of Law - A sole ground of law - Is sufficient to sustain an appeal - Having regard to the provisions of ss. 220(i) (b) and 221(i) of the 1979 constitution.

JUDGMENTS - Decision - Of a court of first instance - Tests for determining whether it is interlocutory or final - The nature of the order test in *Bozson's case* - Has been approved and applied.

JUDGMENTS - Interlocutory decision - Or final decision - How to determine - Whether a decision is final or interlocutory.

JUDGMENTS - Orders - Non suit - Striking out - Where the learned trial judge struck out the two applications before him as having failed - And neither party succeed in his application - It has the same effect - As in an order of non-suit.

JUDGMENTS - Arbitration - Final decision - Applications relating to Arbitration proceedings - Where the trial judge held that the applications failed and struck them out - And the parties had no other rights anywhere to claim regarding the arbitration - The decision must be treated as final.

ORDERS - *Non-suit - Effect of an order of non-suit*

FACTS

In the Lagos State High Court, holden in Lagos, the respondent, filed an application to set aside an arbitration award made by an arbitrator appointed by the said court in accordance with an agreement signed by the parties herein. While the respondent's application was still pending, the appellant filed his own application to enforce the arbitration award. These two applications were then consolidated and heard together by the learned trial judge. In a reserved ruling, the learned trial judge concluded that both applications failed and struck them out because the relevant record of proceedings before the arbitrator with the exhibits which is vital to the hearing of the consolidated applications was not sent to the court. The appellant dissatisfied with the ruling appealed to the Court of Appeal. The respondent raised a preliminary objection to the hearing of the appeal on the grounds that the appeal was not properly before the court and that the court lacked jurisdiction. The learned counsel for the respondent also contended that the ruling appealed against was interlocutory and not final and since the appeal was filed more than 14 days after the date of its delivery by the trial judge, and no leave was obtained from the trial court or the Court of Appeal before it was filed, the appeal was incompetent and should be struck out.

The Court of Appeal heard the preliminary objection and came to the conclusion that the order made by the learned trial judge was interlocutory. The appeal was accordingly struck out as being incompetent. The appellant has further appealed to the Supreme Court raising five issues but the appeal was decided on two main issues.

ISSUES FOR DETERMINATION

(1) *Whether in the circumstances of the case the ruling of the learned trial judge was interlocutory or final; and*

(2) *Whether the appeal of the appellant could be saved in the Court of Appeal if one of the grounds of appeal was found to be a ground of law alone, having regard to the provisions of s. 220 (1)(b) of the 1979 Constitution and s. 25(2)(a) of the Court of Appeal Act 1976.*

HELD (Unanimously allowing the appeal per lead judgment of **KALGO JSC**)

Constitutional law - Appeal

1. Ground 2 in the Notice of Appeal filed by the appellant in the Court of Appeal without particulars reads:-

"The learned trial judge erred in law when he wrongly relied on the decided case of Inyang Versus Uche (1944) 10 W.A.C.A. 40 and held that failure of the Arbitrator to report to the court which appointed it and transmit all records before it to the court vitiated the award".

In the Court of Appeal, the learned counsel for the respondent conceded that this ground is a ground of law. The Court of Appeal rightly in my view agreed with him but held that "the one ground which is a ground of law alone would have been sufficient to sustain the appeal if the appellant had filed his appeal within the prescribed period or had obtained leave to file the appeal out of time". I entirely agree with the Court of Appeal on this having regard to the provisions of s. 220 (1) (b) and S. 221 (1) of the 1979 Constitution. (p. 2166 E)

Decision - Of a court of first instance

2. In England the position is now very clear in that the nature of the order test in Bozson's case is very much preferred and applied. To this extent, it would appear that the Bozson's case has overruled Salaman v. Warner case. In this country, the nature of the order made test has been approved and applied in our courts. In the case of Omonuwa v. Oshodin (1985) 2 N.W.L.R. (pt. 10) 938 at 937 Karibi-Whyte J.S.C. in his leading judgment said:-

"In Standard Discount Co. v. Le Grange and Salaman v. Warner, the test applied was the nature of the application to the court, and not the nature of order made. In Salter Rex and Co. v. Ghosh (1971) 2 ALL E.R. 865, Denning M. R. considered the test of the nature of the order applied in Bozson v. Altrincham U.D.C. (supra) and observed that although Lord Alverstone C.J.'s test in Bozson's case may be right in logic, Lord Esher's test of the nature of the application in Salaman v. Warner was right in experience. Bozson v. Altrincham U.D.C. (supra) has been approved

2156 Ebokam v. Ekwenibe & Sons Trading Co. Ltd (1999) 7 KLR
and applied in our court and I think this is good reasoning". (underlining mine)

I also agree with this view. Furthermore this was demonstrated by the number of decided cases in this country after the Bozson's case, B some of which included:- Blay v. Solomon (1947) 12 W.A.C.A. 177; Ude v. Agu (1961) All N.L.R. 66; In all these cases, the Bozson's test was approved and applied. (p. 2168 D)

C *Interlocutory decision - Or final decision*

3. It would appear however that in the Omonuwa case which does not apply to first instance cases, Karibi-Whyte J.S.C. did not altogether disqualify the Salaman v. Warner (supra) test, but agreed that the test as laid down by Lord Alverstone in Bozson's case (supra) has been constantly D applied in our jurisdiction. Finally, he came to the following conclusions when he said at page 936 that:-

"There is clearly no doubt that the principle established in all the above cited cases is that where the decision of the court does not E finally determine the issue or issues between the parties or does not at once affect the status of the parties for which ever side the decision is given, it is interlocutory".

and on page 938 of the same report, added:-

F *"All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court disposes of the rights of the parties, (and not merely an issue) in the subject matter of an order or appeal the determination of that court which is a final decision on the issue or issues before it, which does not G finally determine the rights of the parties, is in my respectful opinion, interlocutory".*

I entirely agree with these propositions and what I gather from them is that where the decision of the court under consideration clearly and wholly H disposes of all the rights of the parties in the case, that decision is final. But where the decision only disposes of an issue or issues in the case, leaving the parties to go back to claim other rights in the court, then that decision is interlocutory. And in order to determine whether the decision

is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order. (p. 2169 B)

Judgments - Orders

4. However what is important in this case is that the learned trial judge decided in his ruling to strike out the two applications as having failed. This essentially meant that neither party succeeded in his application. It appears to have the same effect as in an order of non-suit at the end of a trial. (p. 2174 B)

Judgments - Arbitration

5. It is pertinent to observe in the circumstances of this case that apart from the applications filed by the parties in the trial court, there was no other claim pending in that court or any other court to which they have any rights to claim in respect of the arbitration. The appellant only filed an originating summons praying the trial court to appoint an arbitrator, and after the appointment of the arbitrator, that was the end of the summons. It seems to me therefore that whichever way the learned trial judge dealt with the applications, his decision would be final because the parties had no other rights anywhere to claim except in those applications. And since the learned trial judge held that the applications failed and he struck them out, he had, in my respectful opinion, determined their rights in the applications as they have no other rights elsewhere regarding the arbitration. This must be so, because the determining factor as to whether or not an order or judgment is interlocutory or final is not whether a court has finally determined an issue but it is whether or not it has finally determined the rights of the parties in the claim before the court. See Omonuwa's case (supra). In this case the rights of the parties before the trial court have been properly determined when the trial court decided rightly or wrongly to shut them up by striking out the two applications. That decision must be treated as final because there is nothing pending in that court or any other court concerning the arbitration proceedings to which they could go to in order to claim any rights.

I so hold. I do not agree with the Court of Appeal that the learned trial judge did not decide anything. It is my view that he did when he examined the grounds of the respondent's application and having found that the record of the arbitration proceedings was insufficient to enable him to determine the applications effectively he struck out both applications. That action in the circumstances of this particular case extinguished the rights of the parties in the arbitration and becomes a final decision. (p. 2174 C)

C Orders - Non suit

6. I will equate his action to non-suiting the parties and non-suit is a final order giving the parties involved two options of either to appeal against the order or start the action all over again. (p. 2175 B)

D

Appeals - Final order

7. In the light of all what I have been saying above, I hold that the order striking out the consolidated applications in this case, is, having regard to the circumstances of this case, a final decision or order, and not interlocutory. Consequently, the appellant, had three months according to s. 25(2)(a) of the Court of Appeal Act., from the date the ruling was delivered by the trial judge, within which to appeal. The ruling was delivered on the 26th of July, 1990 and the appeal was filed in the Court of Appeal on 22nd October, 1990. The appeal was filed within time and it is therefore competent on all grounds. I resolve both issues in favour of the appellant. (p. 2175 C)

G NOTABLE POINTS OF INTEREST
KALGO JSC

1. The decision in Omonuwa v. Oshodin should not relate to court of trial

H The test that looks at the nature of the order made was the one enunciated by Lord Alverstone C.J. in the Bozson's case but Eso J.S.C. did not altogether discard or disqualify the test in the Salaman's case. He said on p. 295 of the report that:-

"There is no doubt that I see nothing obnoxious in the Salaman v. Warner test, as a test; but I think it is more practicable and more certain to keep to just one test - the Bozson v. Altrincham test which has been preferred in this country for so long."

Still in the Akinsanya case, Eso J.S.C. discussed Omonuwa v. B Oshodin case extensively and said on p. 296 of the report thus:-

"I have held the view and it is my conclusion that the decision of this court in Omonuwa v. Oshodin should not relate to the problem arising in the court of trial".

Earlier on p. 294 of the report, he observed:-

"I have no difficulty in agreeing with Chief Williams at this stage, therefore, that in this country in so far as the court of first instance is concerned, the nature of the order test should be adhered to and the test as pronounced by Alverstone C.J. in Bozson v. Altrincham should be upheld by the courts. There is no more magic in the Bozson v. Altrincham test. It is a matter of practical convenience to stick to one test if it has been accepted for so long, and there is really nothing wrong with it".
(Underlining mine)

I also agree with this view and will apply the nature of the order test in this appeal which concerned the order of the court of first instance. (p. 2170 D)

2. The relevance of the record of proceedings of an arbitration

I have no doubt in my mind that the decision of the learned trial judge to hold that the applications failed and to strike them out was influenced by the absence of the relevant record of proceedings before the arbitrator. I agree with him that without the proper record of those proceedings, he could not effectively and properly deal with the applications. It would be the duty and responsibility of the parties to present all the necessary documents to enable the applications to be properly considered. This was not done and the trial judge had no alternative but to strike out the applications. He did not adjourn the applications for the parties to submit proper record of proceedings before him but he held earlier that failure of the arbitrator to submit the arbitration proceedings vitiated the whole

award on the authority of Inyang v. Udo (1944) 10 W.A.C.A. 40. I have read Inyang's case and I found that this proposition is not altogether correct. (p. 2173 G)

B BELGORE JSC

3. Finality of a decision - What it means

Finality of a decision is in the sense that the court giving the decision has nothing more to do with the case. It has as far as that case is concerned decided the matter one way or the other and any further proceedings on it before that court will make it functus officio. In the instant case there is nothing to proceed upon after the trial court had ruled, the case had been disposed of. It is therefore a final decision. (p. 2175 H)

D ONU JSC

4. When a court is said to have determined the parties rights

I am of the considered view therefore that since the learned trial Judge held that the applications failed and he struck them out, he had by that singular act determined the parties' rights in those applications as their rights subsisted nowhere else regarding them. This must be so because as borne out by the preponderance of decided cases from which I respectfully borrow a leaf, the determining factor is not whether a court has finally determined the rights of the parties but it is whether or not it has finally determined the rights of the parties in the claim before it. See Omonuwa v. Oshodin (1985) 2 NWLR (part 10) 925. (p. 2176 F)

UWAIFO JSC

G *5. The time of examining the nature of the order test*

The test the courts in this country should adopt was finally put to rest by this court in Akinsanya v. U.B.A Ltd (1986) 2 NSCC 968; (1986) 4 NWLR (pt. 35) 273. The test is: an order or judgment is final when it finally disposes of the right of the parties; that is to say, the order or judgment given by the court is such that the matter would not be further brought back to itself. This test operates whether or not the order or judgment is wrong, or whether an appeal court may order the matter to be sent back

for a hearing or rehearing. The time of examining the test is when the order or judgment is given. (p. 2180 C)

REPRESENTATION

C. Uwensuyi-Edosomwan Esq. for the appellant

B

G. E. Ezeuko Esq. SAN. with P. A. Mbahon Esq. for the respondent

CASES REFERRED TO

Omonuwa v. Oshodin (1985) 2 N.W.L.R. (pt. 10) 938 at 937

C

Blay v. Solomon (1947) 12 W.A.C.A. 177

Ude v. Agu (1961) All N.L.R. 66

Obi v. D.P.P (No. 2) (1961) All N.L.R. 458

Adegbenro v. Akintola (1962) 1 All N.L.R. 442

Aqua Ltd v. Ondo State Sports Council (1988) 4 N.W.L.R. (pt. 91) 662 D

Akinsanya v. U.B.A. Ltd. (1986) 4 N.W.L.R. (pt. 35) 273

Oguntemehin v. Omotoye (1956) 2 F.S.C. 56

Afuwape v. Shodipe (1957) 2 F.S.C. 62

Alaye of Effon v. Fasan, (1958) 3 F.S.C. 68

E

Ojora v. Odunsi (1964) N.M.L.R. 12

Akinsanya v. U.B.A Ltd (1986) 2 NSCC 968; (1986) 4 NWLR (pt. 35) 273

F

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979; ss 220 (1) (b) and 221 (1)

Court of Appeal Act, cap 75 Laws of the Federation of Nigeria 1990 s. 25(2)

G

LEAD JUDGMENT BY KALGO JSC

This appeal is against the ruling of the Court of Appeal (Lagos Division) delivered on the 23rd day of March, 1993, striking out the appeal of the appellant. The Court of Appeal held that the ruling of the learned trial judge delivered on 26th of July 1990 appealed against, was an interlocutory and not a final decision and no leave of the trial court or

the Court of Appeal was obtained before filing the appeal which was filed about two and a half months after the delivery of the said ruling.

In the trial court, the Lagos State High Court, holden in Lagos, the respondent filed an application to set aside an arbitration award made by an arbitrator appointed by the said court in accordance with an agreement signed by the parties to this appeal. While the respondent's application was still pending, the appellant filed his own application to enforce the arbitration award. These two applications were the consolidated and heard together by the learned trial judge Famakinwa J. and in his reserved ruling delivered on 26th July, 1990, concluded thus:-

"For my reasoning in this case the logical conclusion in respect of the consolidated applications is that both applications failed. As I did not consider it necessary in the circumstances of the application to deal with the submissions of both counsel, I would strike out the two applications." (underlining mine)

The applications were thereafter struck out and the appellant, dissatisfied with the whole ruling, appealed to the Court of Appeal on fifteen grounds. The Notice of Appeal was filed on the 22nd of October 1990.

In the Court of Appeal, the parties filed and exchanged briefs in accordance with the rules of that court. In his brief, the respondent raised a preliminary objection in limine to the hearing of the appeal on the grounds that the appeal was not properly before that court and the court lacked jurisdiction to entertain it. The learned counsel for the respondent also submitted in the brief that the ruling appealed against was interlocutory and not final and since the appeal was filed more than 14 days after the date of its delivery by the judge, and no leave was obtained from the trial court or the Court of Appeal before it was filed, the appeal was incompetent and should be struck out counsel relied on the cases of:-

Bozsons v. Altrincham UDC (1903) K.B. 217; Blay v. Solomon (1947) 12 W.A.C.A. 175; Udey v. Agu (1961) 1 All N.L.R. 65; Omonuwa v. Oshodin (1985) 2 N.W.L.R. (pt. 10) 925 Ocean Steamship (Nig) Ltd v. O. Sotominu (No. 2) (1987) 4 N.W.L.R. (pt. 67) 996. The preliminary objection was then heard by the Court of Appeal, who after hearing counsel

for both parties came to the conclusion per Ubaezonu J.C.A. that:-

"In the light of all the above, the decision or order of Famakinwa J. appealed against is not a final decision or order but interlocutory. Being an interlocutory decision, or order the appellant ought to have appealed within 14 days of the decision or order appealed against pursuant to S. 25 (2) (a) of the Court of Appeal Act, 1976. The order of the lower court was made on 26th July 1990. The appeal was filed on 22nd October 1990. The appeal was filed without leave on 22nd October 1990 i.e. about two and a half months out of time. The appeal is not properly pending before this court and is therefore incompetent. This court has no jurisdiction to entertain an incompetent appeal".

It finally found that the preliminary objection succeeded and the appeal was accordingly struck out. Hence this appeal.

The appellant filed six grounds of appeal with particulars, and on the 3rd of December 1993 he filed a brief of argument in support of his appeal. The respondent also filed a brief on 21st December 1994. Both parties exchanged their respective briefs between themselves.

In his brief, the appellant formulated five issues for determination of this court to wit:-

"1. Whether the Court of Appeal Justices, adopt the correct approach when they held that Ground 2 of the grounds of Appeal was ground of law but then failed to relate it to section 220 (1) (b) of the Constitution of the Federal Republic of Nigeria 1979 which permits an appeal in grounds of law without seeking for leave.

2. Did the Court of Appeal Justices, adopt the correct approach when they held rightly that Nigeria adopts the "Nature-of-the-Order Test" but failed to relate the said "Nature-of-the-Order Test" made to a case such as this when the High Court judge abdicated his responsibilities by asking the parties to pack and get out of his court and never pronounced on the case before him.

3. Did the Court of Appeal Justices not contradict themselves when on the one hand they held that Honourable Mr. Justice v. Famakinwa "decided nothing and was not prepared to decide anything" and yet turned round to hold because the judge sent the parties and their counsel pack-

ing from his court, it was an interlocutory decision.

4. Is it not the law, (at least viewed from common sense) that when a judge sends parties and their lawyers packing from his court and does not intend at anytime again to treat with them in respect of the subject-matter for which they were sent packing, that the act or conduct of such a judge is a final decision? What then is the legal position when the judge in keeping to the oath of his ought to make Order but refuses (not omits) to make one? We shall refrain from comments on the latter question.

5. Is it not correct to state that the Court of Appeal did not give proper Interpretation to the AUTOMATIC TELEPHONE & ELECTRIC COMPANY LTD. V. FEDERAL MILITARY GOVERNMENT (1968) 1A N.L.R. P429, where the Supreme Court of Nigeria held that where a judge did not give judgment but expressed an OPINION, that that OPINION so expressed amounts to a final decision in law and therefore appealable as of right without leave?"

For the respondent three issues were set out as follows:-

"1. Whether the Court of Appeal Justices were wrong under the circumstances of the case in holding that the ruling of the High Court Judge in this case was an interlocutory decision.

2. Having held that the judgment appealed against is an interlocutory decision, whether the appeal of the appellant could have been save by mere fact that one of the un-abandoned grounds of appeal is a ground of Law by virtue of S. 220 (1) (b) of the Constitution of Nigeria 1979, and taken into consideration the provisions of S. 222 (b) of the same Constitution and S. 25 (2) (a) of the Court of Appeal Act 1976.

3. Whether the Court of Appeal left undecided any issue raised in the Preliminary Objection, or in the proceedings which is worthy of resolution".

At the hearing of this appeal both counsel for the parties adopted their respective briefs and conceded that the main issue to be determined is whether the decision of the learned trial judge to strike out the applications before him was an interlocutory or final order. On this, the learned counsel for the appellant submitted that since the learned trial judge de-

cided in his ruling that the two applications failed and he struck them out, the effect was that he had considered the merits of both applications before striking them out. Learned counsel further submitted that with the striking out of both applications, the learned counsel for the respondent could not go back to the court to have the arbitration award enforced and to that extent, the order was final and not interlocutory. The learned counsel for the respondent referred the court to the final order of the learned trial judge, and submitted that the trial judge did not decide the applications on merit and that his decision to strike out the applications was interlocutory and not final. B C

I think it is worth while in this case to set out the gist of the background of the facts giving rise to this appeal. Following the dissolution of the partnership between the appellant and the respondent, the appellant filed an originating summons in the trial court praying for the appointment of an arbitrator to settle some dispute which arose between the parties to the partnership concerning the sharing of the assets after the dissolution of the partnership. The trial court appointed an arbitrator for the purpose by an order dated 23rd of March, 1987. By that order, Messrs Uche Chigbo & Co. of No. 4 Old Hospital Road Onitsha, Nigeria was appointed as sole arbitrator. Thereafter the arbitration commenced and after some prolonged delay, the arbitrator announced his award on 24th November, 1988. D E F

The respondent was not happy with the whole conduct of the arbitration and the award itself and on the 18th of December, 1988, the respondent filed a motion on notice praying the trial court to set aside the award and remit the award to the arbitrator to arbitrate within the limits of the submissions made to him. The application enumerated a number of allegations in the conduct of the arbitration which were listed as grounds for the application. G

While the respondent's application to set aside the arbitration award was pending, the appellant also filed an application by motion on notice on the 2nd of May, 1989, to enforce the arbitration award. H

The learned trial judge decided to consolidate the two applications and hear them together, which he did. (see pp. 202 of the record of

appeal). He also ordered the counsel for the parties to file their written submissions on the matter within specified period. Both counsel complied with the order. The trial judge then came out with the ruling which is now being considered in this appeal.

B I now go back to the issues formulated by the parties in their
 respective brief for the determination of this court in this appeal. It is my
 respectful view that of the 5 issues set out by the appellant, issues 2, 3, 4
 and 5 can be merged into one and argued together, as they are all dealing
 C with the nature of the ruling appealed against. Issue 1, can stand on its
 own. In the respondent's brief only issues 1 and 2 are proper issues as
 issue 3 did not arise at all. It appears to me therefore that only two issues
 are relevant for determination in this appeal and these are:

(1) Whether in the circumstances of the case the ruling of the
 D learned trial judge was interlocutory or final; and

(2) Whether the appeal of the appellant could be saved in the
 Court of Appeal if one of the grounds of appeal was found to be a ground
 of law alone, having regard to the provisions of s. 220 (1)(b) of the 1979
 E Constitution and s. 25(2)(a) of the Court of Appeal Act 1976.

I shall discuss issue 2 first.

**Ground 2 in the Notice of Appeal filed by the appellant in the Court
 of Appeal without particulars reads:-**

F *"The learned trial judge erred in law when he wrongly relied
 on the decided case of Inyang Versus Uche (1944) 10 W.A.C.A. 40 and
 held that failure of the Arbitrator to report to the court which appointed
 it and transmit all records before it to the court vitiated the award".*

G In the Court of Appeal, the learned counsel for the respon-
 dent conceded that this ground is a ground of law. The Court of
 Appeal rightly in my view agreed with him but held that "the one
 ground which is a ground of law alone would have been sufficient to
 sustain the appeal if the appellant had filed his appeal within the
 H prescribed period or had obtained leave to file the appeal out of
 time". I entirely agree with the Court of Appeal on this having
 regard to the provisions of s. 220 (1) (b) and S. 221 (1) of the 1979
 Constitution. What then is the prescribed period in this case. The 1979

Constitution did not provide for the prescribed period for filing the appeal but the Court of Appeal Act. (cap. 75 of Laws of Nigeria 1990) s. 25 (2) reads:-

"The periods for the giving of notice of appeal or notice of application for leave to appeal are:-

(a) in an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision;

(b)"

Therefore if the decision of the learned trial judge is an interlocutory one, the appellant should file his appeal in the Court of Appeal within 14 days of the decision, but if the decision is final, he should file his appeal within 3 months thereof. The answer to this will entirely depend upon the outcome of the discussions on issue No. 1.

There is no doubt that the gravamen of this appeal lies on whether the decision of the learned trial judge was interlocutory or final. It is well established by a myriad of decided cases both in England and in this country that there are two distinct tests to be applied in deciding whether a decision of a court of first instance is interlocutory or final. The two classical authorities upon which these tests are formulated are Bozson v. Altrincham U.D.C. (1903) 1 Q.B. 547 and Salaman v. Warner (1891) 1 Q.B. 734. In the Bozson's case, at p. 548 Lord Alverstone C.J. said:-

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, an interlocutory order".

In Salaman v. Warner case at p. 735 Lord Esher M. R. put the matter thus:-

"Taking into consideration all the consequences that would arise from deciding in one way or the other respectively, I think the better conclusion is that the definition which I gave in Standard Discount Co. v. La Grange is the right test for determining whether an order for the purpose of giving notice of appeal is final or not. The question must

depend on what would be the result of the decision of the divisional court assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, Finally dispose of the matter in dispute, I think that for the purposes of these rules, it is final.

B *On the other hand, if their decision, if given one way will finally dispose of the matter in dispute but, if given in the other, will allow the action to go on, then it is not final, but interlocutory." (underlining mine)*

C There is no doubt that looking at the two test in Bozson's and Salaman's cases set out above one would say that the principles enunciated therein are slightly dissimilar to each other. In other words they are not saying the same thing. For while the test in Bozson's case looks at the nature of the order made, the test in Salaman's case looks at the nature of the proceedings in which the order is made.

D **In England the position is now very clear in that the nature of the order test in Bozson's case is very much preferred and applied. To this extent, it would appear that the Bozson's case has overruled Salaman v. Warner case. In this country, the nature of**
 E **the order made test has been approved and applied in our courts. In the case of Omonuwa v. Oshodin (1985) 2 N.W.L.R. (pt. 10) 938 at 937 Karibi-Whyte J.S.C. in his leading judgment said:-**

"In Standard Discount Co. v. Le Grange and Salaman v. Warner, the test applied was the nature of the application to the court, and not the nature of order made. In Salter Rex and Co. v. Ghosh (1971) 2 ALL E.R. 865, Denning M. R. considered the test of the nature of the order applied in Bozson v. Altrincham U.D.C. (supra) and observed that although Lord Alverstone C.J's test in Bozson's case may
 G *be right in logic, Lord Esher's test of the nature of the application in Salaman v. Warner was right in experience. Bozson v. Altrincham U.D.C. (supra) has been approved and applied in our court and I think this is good reasoning". (underlining mine)*

H **I also agree with this view. Furthermore this was demonstrated by the number of decided cases in this country after the Bozson's case, some of which included:-**

Blay v. Solomon (1947) 12 W.A.C.A. 177; Ude v. Agu (1961)

All N.L.R. 66; Chike Obi v. D.P.P (No. 2) (1961) All N.L.R. 458; Adegbenro v. Akintola (1962) 1 All N.L.R. 442; Aqua Ltd v. Ondo State Sports Council (1988) 4 N.W.L.R. (pt. 91) 622 Akinsanya v. U.B.A. Ltd. (1986) 4 N.W.L.R. (pt. 35) 273; Omonuwa v. Oshodin (supra), Akaniya Oguntemehin v. Omotoye (1956) 2 F.S.C. 56 Afuwape & ors v. Shodipe & ors (1957) 2 F.S.C. 62; Alaye of Effon v. Fasan, (1958) 3 F.S.C. 68; Ojora & ors. v. Odunsi (1964) N.M.L.R. 12.

In all these cases, the Bozson's test was approved and applied. It would appear however that in the Omonuwa case which does not apply to first instance cases, Karibi-Whyte J.S.C. did not altogether disqualify the Salaman v. Warner (supra) test, but agreed that the test as laid down by Lord Alverstone in Bozson's case (supra) has been constantly applied in our jurisdiction, finally, he came to the following conclusions when he said at page 936 that:-

"There is clearly no doubt that the principle established in all the above cited cases is that where the decision of the court does not finally determine the issue or issues between the parties or does not at once affect the status of the parties for which ever side the decision is given, it is interlocutory".

and on page 938 of the same report, added:-

"All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court disposes of the rights of the parties, (and not merely an issue) in the subject matter of an order or appeal the determination of that court which is a final decision on the issue or issues before it, which does not finally determine the rights of the parties, is in my respectful opinion, interlocutory".

I entirely agree with these propositions and what I gather from them is that where the decision of the court under consideration clearly and wholly disposes of all the rights of the parties in the case, that decision is final. But where the decision only disposes of an issue or issues in the case, leaving the parties to go back to claim other rights in the court, then that decision is interlocutory. And in order to determine whether the decision is final or

interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order.

In Akinsanya v. U.B.A. Ltd (1986) 4 N.W.L.R. (pt. 35) 273 Eso J.S.C. in his leading judgment discussed various English decisions which dealt with this point and examined the effect of those decisions on the views and opinions of our courts on the matter particularly the recent Supreme Court case of Omonuwa v. Oshodin (supra). However, after quoting extensively from the decision of the Federal Supreme Court in the case of Ude & Ors. v. Agu & Ors (supra) on the difference between the two tests mentioned above, the learned Justice had this to say on p. 293 of the report:-

"And so, it has been that the courts in this country have adopted the test that looks at the order made as against the test that looks at the nature of the proceedings. It is also clear that before Omonuwa v. Oshodin, the two tests have been regarded as contradictory". (Underlining mine)

The test that looks at the nature of the order made was the one enunciated by Lord Alverstone C.J. in the Bozson's case but Eso J.S.C. did not altogether discard or disqualify the test in the Salaman's case. He said on p. 295 of the report that:-

"There is no doubt that I see nothing obnoxious in the Salaman v. Warner test, as a test; but I think it is more practicable and more certain to keep to just one test - the Bozson v. Altrincham test which has been preferred in this country for so long."

Still in the Akinsanya case, Eso J.S.C. discussed Omonuwa v. Oshodin case extensively and said on p. 296 of the report thus:-

"I have held the view and it is my conclusion that the decision of this court in Omonuwa v. Oshodin should not relate to the problem arising in the court of trial".

Earlier on p. 294 of the report, he observed:-

"I have no difficulty in agreeing with Chief Williams at this stage, therefore, that in this country in so far as the court of first instance is concerned, the nature of the order test should be adhered to and the test as pronounced by Alverstone C.J. in Bozson v. Altrincham should be

upheld by the courts. There is no more magic in the Bozson v. Altrincham test. It is a matter of practical convenience to stick to one test if it has been accepted for so long, and there is really nothing wrong with it". (Underlining mine)

I also agree with this view and will apply the nature of the order B
test in this appeal which concerned the order of the court of first in-
stance.

Having established the above principles, I now proceed to exam-
ine what transpired in this appeal and see how the principles could be C
applied to the facts and circumstances of this case.

For a clear understanding of the proceedings of the trial court, it
might be reasonable to set out the reliefs prayed for by the respondent in
his motion together with the grounds thereto. The respondent in the D
motion prayed the trial court for the following orders:-

"1. That the awards made by the sole Arbitrator Mr. Uche Chigbo
of Messrs Uche Chigbo & Co. of No. 4 Old Hospital Road, Onitsha be
set aside OR

2. The award be remitted to the said arbitrator to arbitrate within E
the limits of the submission."

The grounds upon which the application is made also read:-

"1. The arbitrator misconducted himself by deliberately and per-
sistently despite objections acted *ultra vires* by exceeding his jurisdiction F
not in any event contemplated by the submission and in spite and despite
the defendant's objection on the 21st of May, 1987.

2. The arbitrator misconducted himself when he invented and
widened the area of dispute on his own by stating as follows:
"Arbitrator strongly feels that the worth of the partnership at determi- G
nation is the centre of dispute that led to the statement of accounts not
being signed by the plaintiff" a proposition not supported by the plaintiff's
claim and/or the submission marked in the proceedings as Exhibit 'A'.

3. The arbitrator misconducted himself when he abandoned the H
submission of the parties or dispute between the parties and proceeded to
make the following unwarranted awards to the plaintiff to wit:

(a) 291,243.00 being his share of the revised net worth of the

business at the time of his withdrawal.

(b) 235,101.00 as 1/15th of good will he left in the business when the above awards did not form part of the dispute submitted to the arbitrator and when the partnership ceased to exist at its dissolution.

B 4. *The arbitrator misconducted himself when he awarded various sums of money against the defendants totalling N95,425. including his fees of N88,925.00 as a result of his inclination of what the arbitrator termed the worth of the partnership at the time of dissolution and based his fees at 1% of the said value.*

C 5. *There is a patent error of Law on the face of the award when the arbitrator award the sum of N23,101.00 on his proposition that the plaintiff left a good will in the business when evidence showed conclusively that the partnership ceased to exist on the dissolution of the partnership leaving each party to engage or carry on his own separate business.*

D 6. *The arbitrator misconducted himself when he refused to admit a vital evidence i.e. the defendants ledger in proof of the actual capital contribution to the partnership by the plaintiff and thereby wrongly dismissed the defendant's counter-claim.*

E 7. *The arbitrator misconducted himself when he bluntly refused despite repeated oral and written demands to deliver to the defendants a signed copy of his award showing the reasons upon which his award is based."*

F The motion filed by the respondent which is straight forward merely prayed for an order "to enforce the award in these proceedings made on the 24th day of November, 1988 by the 2nd respondent".

G The learned trial judge in his ruling under consideration examined both applications in the light of the submissions before him. He started with the motion to set aside the award presented by the respondent. He set out all the grounds upon which the application was based as above and then dealt with the grounds one by one having regard to what H was presented or made available to him.

There is no doubt that throughout his consideration of each of the grounds of objection, the learned trial judge complained of in suffi-

ciency of the record of the arbitration proceedings. He pointed out that although he discovered from the application before him that both parties gave evidence in the arbitration proceedings and tendered exhibits, those proceedings were not filed in the applications and that as a result of the absence of the proceedings, he could not effectively deal with the applications. He ended up by saying thus:-

"From the forgoing reasoning, the materiality of the record of the proceedings with the exhibits is vital to the hearing of the 2 consolidated applications. Equally it is impossible to deliberate on the application to enforce the award when the records of the proceedings is not sent to this court. Thus this court is not in a position to get at the reasoning how the award was arrived at. In the face of this glaring irregularity which goes to the root of the applications, to set aside the award and to enforce the award, the basis is non-existed (sic) to consider the marathon-submissions of both counsel in the applications." (Underlining mine) He then proceeded to say on the same page that:-

"I am in no doubt in my mind that the whole exercise in the arbitration from the beginning to the end is a waste of precious time and money. Equally the whole exercise in the matter is an exercise in futility." Thereafter he concluded the ruling by saying that both consolidated applications have failed and would be struck out. He did not consider the written submissions submitted by learned counsel on the matter. And after striking out the applications, he added:-

"To think for the parties and their counsel, it is obvious in the case that they may have to settle this matter out of court or to begin a new exercise afresh."

I have no doubt in my mind that the decision of the learned trial judge to hold that the applications failed and to strike them out was influenced by the absence of the relevant record of proceedings before the arbitrator. I agree with him that without the proper record of those proceedings, he could not effectively and properly deal with the applications. It would be the duty and responsibility of the parties to present all the necessary documents to enable the applications to be properly considered. This was not done and the trial judge had no alternative but to

strike out the applications. He did not adjourn the applications for the parties to submit proper record of proceedings before him but he held earlier that failure of the arbitrator to submit the arbitration proceedings vitiated the whole award on the authority of Inyang v. Udo (1944) 10 W.A.C.A. 40. I have read Inyang's case and I found that this proposition is not altogether correct.

However what is important in this case is that the learned trial judge decided in his ruling to strike out the two applications as having failed. This essentially meant that neither party succeeded in his application. It appears to have the same effect as in an order of non-suit at the end of a trial.

It is pertinent to observe in the circumstances of this case that apart from the applications filed by the parties in the trial court, there was no other claim pending in that court or any other court to which they have any rights to claim in respect of the arbitration. The appellant only filed an originating summons praying the trial court to appoint an arbitrator, and after the appointment of the arbitrator, that was the end of the summons. It seems to me therefore that whichever way the learned trial judge dealt with the applications, his decision would be final because the parties had no other rights anywhere to claim except in those applications. And since the learned trial judge held that the applications failed and he struck them out, he had, in my respectful opinion, determined their rights in the applications as they have no other rights elsewhere regarding the arbitration. This must be so, because the determining factor as to whether or not an order or judgment is interlocutory or final is not whether a court has finally determined an issue but it is whether or not it has finally determined the rights of the parties in the claim before the court. See Omonuwa's case (supra). In this case the rights of the parties before the trial court have been properly determined when the trial court decided rightly or wrongly to shut them up by striking out the two applications. That decision must be treated as final because there is nothing pending in that court or any other court concerning the arbitration proceed-

ings to which they could go to in order to claim any rights. I so hold. I do not agree with the Court of Appeal that the learned trial judge did not decide anything. It is my view that he did when he examined the grounds of the respondent's application and having found that the record of the arbitration proceedings was insufficient to enable him to determine the applications effectively he struck out both applications. That action in the circumstances of this particular case extinguished the rights of the parties in the arbitration and becomes a final decision. I will equate his action to non-suiting the parties and non-suit is a final order giving the parties involved two options of either to appeal against the order or start the action all over again. B C

In the light of all what I have been saying above, I hold that the order striking out the consolidated applications in this case, is, having regard to the circumstances of this case, a final decision or order, and not interlocutory. Consequently, the appellant, had three months according to s. 25(2)(a) of the Court of Appeal Act., from the date the ruling was delivered by the trial judge, within which to appeal. The ruling was delivered on the 26th of July, 1990 and the appeal was filed in the Court of Appeal on 22nd October, 1990. The appeal was filed within time and it is therefore competent on all grounds. I resolve both issues in favour of the appellant. D E F

Accordingly, I allow this appeal, set aside the decision of the Court of Appeal delivered on 29th March, 1993 and order that the appeal of the appellant filed in the Court of Appeal on 22nd October 1990, be now restored and be heard and determined on merits by a different panel of the Court of Appeal. I award N10,000.00 cost in favour of the appellant. G

BELGORE JSC

Finality of a decision is in the sense that the court giving the decision has nothing more to do with the case. It has as far as that case is concerned decided the matter one way or the other and any further H

proceedings on it before that court will make it functus officio. In the instant case there is nothing to proceed upon after the trial court had ruled, the case had been disposed of. It is therefore a final decision. I therefore agree with my learned brother, Kalgo, J.S.C., that this appeal has merit and I also allow it. I award the appellant N10,000.00 as costs in this appeal.

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Kalgo, J.S.C. I agree with him, though not without difficulties, to allow the appeal and remit the case back to the Court of Appeal for hearing on its merit. I also award N10,000.00 costs in favour of the appellant against the respondent.

ONU JSC

I had the privilege of a preview of the leading judgment of my learned brother Kalgo, J.S.C just read. I am in entire agreement with it that the appeal ought to be allowed for the reasons given therein.

In its consideration of the arbitration proceedings commenced before it by originating summons, the trial court at the end of the day struck out the two applications before it in the manner of a non-suit for want of sufficient materials with which to proceed and it minced no words in stating so in its ruling. I am of the considered view therefore that since the learned trial Judge held that the applications failed and he struck them out, he had by that singular act determined the parties' rights in those applications as their rights subsisted nowhere else regarding them. This must be so because as borne out by the preponderance of decided cases from which I respectfully borrow a leaf, the determining factor is not whether a court has finally determined the rights of the parties but it is whether or not it has finally determined the rights of the parties in the claim before it. See Omonuwa v. Oshodin (1985) 2 NWLR (part 10) 925 where this Court (per Karibi-Whyte, JSC) after referring to earlier En-

glish and Nigerian decisions such as Standard Discount Co. v. La Grange (1877) 3 CPD 67 at 71; Salaman v. Warner (1891) 1 QB. 734; Bozson v. Altrincham U.D.C. (1903) 1 KB. 547; Blay v. Solomon (1947) 12 WACA 175; Salter Rex & Co. v. Gosh (1971) 2 All E.R. 865; The Automatic Telephone & Electric Co. v. Federal Military Government of the Republic of Nigeria (1968) 1 All NLR 428 and Dr. Chike Obi v. D.P.P (No. 2) FSC 56 (1961); D.P.P. v. Chike Obi (1961) All NLR 458, to mention but a few, held as follows:-

"The defect in relying on the nature of the order made (though still a workable test) as distinguished from the nature of the application from which the order is made is that the former ignores the issue or issues giving rise to the application and consequently the order, and fastens on the order which is the result of the application. All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court disposes of the rights of the parties, (and not merely an issue) in the case. Where only an issue is the subject-matter of an order or appeal the determination of that court which is a final decision on the issue or issues before it, which does not finally determine the rights of the parties is in my respective opinion, interlocutory." (Underlining is mine for emphasis).

In the case in hand, the trial court had finally decided the parties action when rightly or wrongly, it shut the parties out by striking out their application. To this end, the learned trial Judge (Famakinwa, J.) in his Ruling dated 26th July, 1990 had held as follows:-

"From the foregoing reasoning, the materiality of the record of the proceedings with the exhibits is vital to the hearing of the two consolidated applications. Equally, it is impossible to deliberate on the application to enforce the award when the records of the proceedings is (sic) not sent to this Court. Thus, this Court is not put in a position to get at the reasoning how the award has (sic) arrived at. In the face of the glaring irregularity which goes to the root of the applications to set aside the award and enforce the award, the basis is non-existent (sic) to consider the marathon submissions of both counsel in the applications. I am in no doubt in my mind that the whole exercise in the arbitration from the

beginning to the end is a waste of precious time and money. Equally, the whole exercise in the matter is an exercise in futility."

That decision, in my opinion, must be regarded as final because there was nothing left before that court or before any other court concerning the arbitration proceedings for the determination of any purported rights they could lay claim to. It was final as final could be.

It is for these reasons and those articulately set out in the leading judgment of my learned brother Kalgo, JSC that I too rule that the appeal was filed within time and the issues formulated were rightly resolved in the appellant's favour. I accordingly allow the appeal, set aside the decision of the court below and make similar consequential orders inclusive of those as to costs as made by my learned brother Kalgo, JSC.

D

UWAIFO JSC

I read in draft the judgment of my learned brother Kalgo JSC and I fully agree with him that there is merit in the appeal for the reasons he has given.

The learned trial judge, Famakinwa J., ordered an arbitration and appointed an arbitrator for the dispute between the parties. After the conclusion of it and the arbitrator made his award, the appellant wanted the award enforced. He approached the learned trial judge with a motion to this effect. The respondent wanted the award set aside and he also brought a motion in this regard.

Both applications were consolidated for hearing. The learned trial judge, sitting in the High Court Lagos on 26 July, 1990 gave a ruling on the applications. He made a number of remarks therein. I may mention just a few before stating his final conclusion. He said: "An Arbitrator's failure to take evidence and send a record of proceedings before him to the Court which appointed him is fundamentally wrong and vitiates the award". Later he said: "Failure to produce the exhibits and records of proceedings is fatal to the 2 applications." Again, he said: "I am in no doubt in my mind that the whole exercise in the arbitration from the beginning to the end is a waste of precious time and money. Equally the

whole exercise in the matter is an exercise in futility."

In the end, the learned trial judge concluded his consideration of the two applications as follows:

"The whole exercise has been needed (sic: messed?) up by the Arbitrator. I have read the pieces of record of proceedings put together. B It is my considered opinion that it could not even pass for a record of proceedings at all. The whole package was put together in untidy form. For my reasoning in this case the logical conclusion in respect of the consolidated applications is that both applications failed."

The learned trial judge then said he would strike out the two applications C but thereafter proffered unsolicited advice to both parties and counsel that "it is obvious in the case that they may have to settle this matter out of court or to begin a new exercise afresh."

As far as the learned trial judge was concerned, the arbitration D award would not be enforced by any order by him and yet it would not be set aside by him; but whichever, the parties could well forget that any arbitration had taken place. The question is, was this a final order or an interlocutory one made by the learned trial judge? E

The appellant felt it was a final order and on that basis filed a notice of appeal outside 14 days from the date of the ruling but within 3 months. If it was interlocutory, the appeal would have had to be filed within 14 days by virtue of s. 25(2) (a) of the Court of Appeal Act unless F an order extending the time was obtained. The respondent felt the order was interlocutory and on that basis raised a preliminary objection to the notice of appeal on the ground that it was incompetent having been filed outside 14 days without the leave of court. The Court of Appeal on 29 G March, 1993, after a long discourse of the two tests for determining whether an order was final or interlocutory, came to the conclusion that the order made by Famakinwa J. was interlocutory. It struck out the appeal as being incompetent.

The argument of Mr. Uwensuyi-Edosomwan before this court H is that by the order, there was nothing left for the court again to decide. The matter would not come back to it in any event. Mr. Ezeuko SAN thought otherwise at first but I think in the end he could not maintain his

stand.

I do not see any difficulty in coming to a decision that the order made by the learned trial judge was final. By what he said and concluded, he was done and over with the applications before him. He had
B in fact decided the fate at least of one of them in which he held that the arbitration was incompetently done and that he would not make a order to enforce it. That was the order against which an appeal was brought. As for the other application, he also refused it when he decided he would
C not set the award aside. No appeal has been brought against that. But the learned trial judge told the parties, albeit by way of advice, that they could either go and commence the arbitration afresh or get the matter settled out of court.

The test the courts in this country should adopt was finally put
D to rest by this court in Akinsanya v. U.B.A Ltd (1986) 2 NSCC 968; (1986) 4 NWLR (pt. 35) 273. The test is: an order or judgment is final when it finally disposes of the right of the parties; that is to say, the order or judgment given by the court is such that the matter would not be
E further brought back to itself. This test operates whether or not the order or judgment is wrong, or whether an appeal court may order the matter to be sent back for a hearing or rehearing. The time of examining the test is when the order or judgment is given.

I too come to the conclusion that the Court of Appeal was in
F error to have held that the order in question of the trial court was interlocutory. It was certainly a final order. I accordingly allow this appeal and abide by the consequential orders made by my learned brother Kalgo
G JSC.

H