THE NIGERIAN JURIDICAL REVIEW

Vol. 12 **(2014)**

FACULTY OF LAW
UNIVERSITY OF NIGERIA, ENUGU CAMPUS

THE NIGERIAN JURIDICAL REVIEW

Vol. 12 **(2014)**

FACULTY OF LAW
UNIVERSITY OF NIGERIA, ENUGU CAMPUS

EDITORIAL BOARD

EDITORIAL ADVISORY BOARD

Professor Obi Aginam
Senior Research Fellow & Head,
Governance for Global Health
United Nations University-International
Visiting Professor, IR3S
University of Tokyo; Adjunct
Research Professor of
Law, Carleton University,
Ottawa, Canada

Professor Dakas C. J. Dakas, SAN
LL.B (Jos), LL.M., Ph.D
Professor of Law,
University of Jos, Nigeria.

Ben Nwabueze
Distinguished Professor of Law,
Nigerian Institute of Advanced
Legal Studies,
Abuja, Nigeria

NIGERIAN JURIDICAL REVIEW

VOLUME 12 (2014)

To be cited as: **(2014) 12 Nig. J. R.**

ISSN: 0189 - 4315

CONTRIBUTIONS

The Journal welcomes articles in any area or related subjects for publishing considerations. Articles and correspondence should be forwarded to:

The General Editor,
Nigerian Juridical Review, Faculty of Law,
University of Nigeria, Enugu Campus, Enugu, Nigeria.
nigeriajuridical@unn.edu.ng, nigeriajuridical@yahoo.com

PUBLISHED BY
Faculty of Law, University of Nigeria,
Enugu Campus

PRINTED BY:
Sylva Prints, Enugu & Abuja
+234-08063978826; +234-08181610325
onyekasylvanus@yahoo.com; sylvanusonyekachi@gmail.com

EXERCISE OF DELEGATED POWER IN DISCIPLINARY PROCEEDINGS IN NIGERIAN ADMINISTRATIVE LAW - *MORENKEJI V OSUN STATE POLYTECHNIC & ORS* REVISITED[*•]

Abstract

The Court of Appeal in Morenkeji v. Osun State Polytechnic & Others upheld the delegation of statutory disciplinary power by the Rector of the Polytechnic to the Registrar without express statutory authority. This paper demonstrates that the decision was erroneous and a departure from well-established and crystallized principles of our administrative law as well as rules of trial. The paper also establishes that the in so far as disciplinary proceedings are concerned, the Osun State Polytechnic Law which requires a disciplinary action to be taken against an alleged erring student before referring him to a disciplinary panel is inherently flawed in that it puts the cart before the horse. This paper suggests an amendment of the law to correct this anomaly.

1. INTRODUCTION

From time immemorial, administrative officials and bodies have been involved in issues of discipline within their departments or establishments. This is because, discipline must be ensured for standards to be maintained. Again it is important for such establishments or departments to be seriously involved in maintaining discipline among its staff members and students because, whatever happens, the larger society bears the ultimate impact of the product of these establishments. The law therefore recognizes the power of establishments, be they professional

[*] **C. A. Ogbuabor,** Ph.D., LL.M., LL.B., (Nig) B.L., Senior Lecturer, Faculty of Law, University of Nigeria, Enugu Campus, Enugu, Nigeria, chukwunweike.ogbuabor@unn.edu.ng, +2348033379239.

[•] **Obinne Obiefuna**, LL.M (Essex), LL.B (Hons) (Nig) B.L., Lecturer, Faculty of Law, University of Nigeria Enugu Campus, obinne.obiefuna@unn.edu.ng, +2348033418922.

associations, higher institutions of learning or government departments and parastatals to discipline erring staff, members or students to the end that law, ethics, standards and decorum be maintained if societal balance is not to be torpedoed.

However, in ensuring discipline, the law insists on certain minimum standards and guiding principles, namely, that the rules of natural justice must be observed. This is particularly so in respect of the rule of *audi alteram partem*[1]. Similarly, the law insists that in the exercise of disciplinary powers, it is not exercised by every Tom, Harry and Dick in the establishment. Exercise of disciplinary powers is vested on particular individuals or officials or body of officials because confidence is reposed in their judgment. That is why the doctrine, *delegatus non potest delegare* is applied very strictly in this area. *Delegatus non potest delegare,* (that is, a delegate cannot sub delegate) is a doctrine of English law which is not exclusively referable to any particular branch of the law. It is a doctrine according to which exercise of discretionary power is delegated or vested in certain authority because the judgment of that authority is to be trusted. Accordingly, it is to be exercised by that authority in person and by no other except where the said authority has been expressly or impliedly authorized to sub-delegate the exercise thereof.[2]

The discussions and comments that follow hereunder are fallout of the decision of the Court of Appeal in *Morenkeji v. Osun State Polytechnic & 2 Ors.,*[3] which involved the dual issue of compliance with the rules of natural justice in the exercise of disciplinary powers by an administrative authority and the delegation of such functions (an aspect of the ultra vires doctrine). In reaching the decision in the above case, the Court of Appeal appears to have deviated from the crystallized and well established rules guiding the exercise of disciplinary powers by such authorities. We intend to show that the

[1] Literally "Hear the other party". Unlike section 36 (2) of the Constitution which admits of certain exceptions, section 36(1) which deals with *audi alteram partem* does not admit of any exception.

[2] See John Willis, "*Delegatus Non Protest Delegare*" 21 *Canadian Bar. Review* (1943) 257.

[3] (1998) 11 NWLR (Pt. 572) 145.

decision by its very nature appears erroneous and that the impression already created by the decision should be corrected at the earliest opportunity. We also intend to show that the Osun State Polytechnic Law and similar laws in the same mould are inherently flawed in that they put the cart before the horse. They require a decision to be taken in disciplinary proceedings before the person to be adversely affected has been given the opportunity to defend himself.

2. FAIR HEARING AS AN ASPECT OF DISCIPLINARY MEASURES OR PROCEEDINGS

Fair hearing in this regard is used to refer to the first leg of the rules of natural justice, that is, audi alteram partem (hear the other side)[4] as opposed to the second leg i.e. *nemo judex in re sua* (the rule against bias). In disciplinary proceedings, the rule of fair hearing is a cardinal rule. It is so fundamental that according to Byles J. in *Cooper v. Wandsworth Board of Works*[5], where it is omitted by the statute, "the justice of the common law will supply the omission of the legislature". The fundamental nature of the rule is said to be rooted even in the Bible for God did not condemn Adam in the Garden of Eden until he had formally accused him and given him an opportunity to explain his conduct. According to the court in *R v. Chancellor University of Cambridge, Ex Parte Dr. Bentley*, "even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam, (says God) where art thou? Has thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."[6]

[4] In Isiyaku *Mohammed v Kano Native Authority* (1968) 1 All NLR424 at 426, the Supreme Court stated that "a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing. There is no difference between the two…" This indirectly encapsulates both *audi alteram partem* and *nemo judex in cause sua*.

[5] (1863) 14 C. B. (N. S) 1 180.

[6] (1723 1. Str. 557 at 567 or 93 E.R. 698 at 704. It is noteworthy that *Morenkeji's Case,* just like the case of Dr. Bentley, arose out of disciplinary action in a higher Institution of Learning.

Unlike the second leg of the rules of natural justice which admits of certain exceptions[7], the rule of *audi alteram partem* admits of no exception. Even section 36(2) of the constitution 1999 which allows administrative officers to decide matters in which they are interested parties still insists that the *audi alteram partem* rule must be complied with.

This brings us to the nature of disciplinary actions or proceedings. Such proceedings or actions are unequivocally judicial in nature because by their very nature, they interfere with somebody's rights or prejudicially affects somebody's rights or at least, their circumstances demand that the persons affected or to be affected be treated fairly.[8] Being judicial, such action or measures no matter under what pretext they are taken must comply with the rule of fair hearing.

In a long line of cases, the Supreme Court has held that bodies or authorities exercising judicial or quasi- judicial functions must comply strictly with the rules of natural justice.[9]

3. THE ENGLISH COMMON LAW ON DELEGATION OF DISCIPLINARY POWERS

The English common law attitude to the delegation of disciplinary powers is typified in the decision in *Vine v. National Bank Labour Board*[10] and *Banard v. National Dock Labour Board*.[11] In the first case, the National Bank Labour Board, statutorily vested with

---

[7] The rule against bias has certain exceptions which include necessity as is seen in *Philips v. Eyre* (1976) LR 6 Q. B1; Statutory exclusion for example S. 36(2) of the 1999 Constitution and certain decrees for example S. 13(1) Decree No. 3 of 1984; and Waiver as seen in the *Secretary Iwo Central Local Government v. Adio* (2000) 2 SCNQR 752.

[8] See *Re H. K. (an Infant)* (1967) I All E. R. 226.

[9] See *The Council of Federal Polytechnic Mubi v. Yusuf* (1998) 1 N.W.L.R. (pt 533) 343 SC; *Animashaun v. U.C.H*. (1996) (Pt. 476) 65 SC; *Queen v The Governor in Council Western Nigeria Ex Parte Adebo* (1962) W.N.L.R. 93; (1962) All N.L.R. 917; See also M. C. Okany, "*Dr. Edet Akpan Udo v The University of Calabar*", *The Nigerian Juridical Review* vol. 3 1978 – 1988, p. 173.

[10] (1956) 3 All E.R. 939.

[11] (1953) 2 Q. B. 18.

disciplinary powers, sub-delegated it to a disciplinary committee, which after hearing the case filed against Vine dismissed him. Vine therefore challenged the validity of his dismissal on the ground that the sub-delegation of the disciplinary powers to the committee was ultra vires and void. It was held by the House of Lords that disciplinary powers of a committee cannot be sub-delegated because Vine was entitled to have his case heard and determined by the board established by statute for the purpose.

According to Lord Somervell, speaking for the House of Lords, when considering the validity of such sub-delegation, the court should consider (a) the nature of the function involved (b) the character of those to whom the power would be sub-delegated, and (c) the constitution of the board which, in the instant case, was constituted to inspire confidence and weigh fairly the interest of employers and employees.[12]

In the second case, *Banard v. National Dock Labour Board*, on similar facts, it was held by the a High Court and affirmed by the Court of Appeal that the board had no power to sub-delegate its disciplinary powers to the port manager or even to ratify a disciplinary action taken by him since such an action is void *ab initio*.

These decisions show that the very nature and character of disciplinary powers/measures renders it imperative for the repository of such powers to exercise it personally.

4. DELEGATION OF DISCIPLINARY POWERS IN NIGERIA

In reviewing the exercise of disciplinary powers in Nigeria, the courts have followed generally English law. Thus in *Katagum v. Roberts,*[13] the Supreme Court, per Brett Ag CJN, Bairamian and Coker JJSC, held that the power vested in the Minister under section 9 of the Pensions Act cannot be exercised by the Police Service Commission. In that case, following a correspondence between a police officer and the Police Service Commission concerning allegations of misconduct made against the officer, the Commission served him with notice of intention to retire him from the service of

[12] Above note 10, at p. 951.
[13] (1967) 1 All NLR 127; (1968) N M L R 167.

the police under section 9(1) of the Pensions Act. He sued the A-G Federation and members of the Police Service Commission for a declaration that the notice was illegal and ultra vires the Commission, contending that he was not given opportunity to be heard. The defendants brought a motion to dismiss the suit for want of jurisdiction and for failure to disclose a cause of action. The High Court refused to dismiss the suit whereupon the defendants appealed. In the Supreme Court, the issue was whether the Police Service Commission was the proper authority to exercise the power conferred by section 9 of the Pensions Act. Section 9 of the Pensions Act as amended in 1961 enables the Minister (that is, the Federal Minister responsible for pensions) to require a public officer who has attained the age of 45 years to retire, subject to six months written notice; while section 109 of the 1963 Constitution established the Police Service Commission. Section 10 of that Constitution vested it with powers of appointment, dismissal and disciplinary control over police officers. It was contended for the defendants/appellants that in view of section 156 of the Constitution which provided that existing laws shall take effect with such modifications as may be necessary to bring the law into conformity with the Constitution, section 9 of the Pensions Act has effect in relation to police officers as if "the Police Service Commission" were substituted for the "Minister" and in relation other public officers as if the "Police Service Commission" were substituted for the 'Minister'. The Supreme Court dismissing the appeal held that the power vested in the Minister under section 9 of the Pensions Act cannot be exercised by the Police Service Commission.

The Supreme Court has in *Nigerian Air Force v. James*[14] affirmed that disciplinary powers cannot be delegated or sub-delegated except as expressly authorized by the enabling statute.

[14] (2002) 18 NWLR (Pt. 798) 295. Cf the Court of Appeal decisions in the same case (2000) 13 NWLR (Pt 684) 406.

5. THE DECISION IN MORENKEJI V OSUN STATE POLYTECHNIC

Facts:- The appellant was a student of Osun State Polytechnic, Iree. He instituted this action against the Polytechnic (the 1st respondent herein), the Rector (2ndrespondent) and the Registrar (3rdrespondent.), seeking declarations that the incessant harassments, threat to life, beating and battery by the respondents and their agents and privies were violative of his fundamental rights; that his purported indefinite suspension from the 1st respondent was ultra vires, null and void; and an order reinstating him as a bona-fide student of the 1st respondent. The action was commenced under the Fundamental Rights (Enforcement Procedure) Rules.

The case of the appellant was that the respondents refused to swear him in as the President of its Students' Union even though he had won an election in that regard. He championed the reduction of school fees which was increased in January 1997 and this led to his harassment and intimidation by the respondents. There was an allegation of possession of firearms against a student which was reported to the Divisional Police Officer, Iree which led to the arrest of some students. When the applicant got to the police station to effect the release of the students, he was beaten by one Lukman Afolabi, the ex-Commandant of the Man "0" War of the Polytechnic and his team. The said Lukman Afolabi was an ex-student of the school who was on industrial attachment with the security department of the polytechnic at the material time.

On 19/3/97, the students held a congress meeting and resolved to disband the Man 'O' War and other such groups in the school. In furtherance of this, the appellant as President of the Students' Union wrote two letters to the 2nd respondent. Upon receipt of those two letters, the 2nd respondent suspended the appellant from the 1st respondent orally and subsequently followed with a letter of suspension without being heard.

The respondents on the other hand alleged that the election which the appellant claimed to have won was inconclusive as the entire Students Representative Council of the Faculty of Science disassociated itself from the said election. The respondents further alleged that the appellant verbally assaulted some officers of the 1st respondent, was involved in misconduct and anti-authority

activities, that he was a member of a group called Campaign for Democracy and that he externalized the internal affairs of the institution by distributing and circulating letters and anti-government leaflets.

After he had been suspended, the appellant was allegedly summoned to a meeting of the Students Disciplinary Committee but he refused to attend whereupon he was recommended for indefinite suspension. This decision was communicated to the appellant through a letter from the 3rd respondent.

After hearing addresses from counsel, the trial court dismissed the application and upheld the indefinite suspension of the appellant from the 1st respondent. Being dissatisfied, the appellant appealed to the Court of Appeal. In determining the appeal, the Court of Appeal had to consider *inter alia* the following statutory provisions, to wit:

Rules 3, 4 and 5 of the Rules and Regulations of the Students Guardian, Osun State Polytechnic, Iree, which provide as follows:

3. The Students' Disciplinary Committee shall consider the allegation of serious misconduct and make recommendations to the Rector. In cases of emergency the Rector may take temporary steps disciplinary action as he may deem fit pending the determination of the case by the Students' Disciplinary Committee (SDC).
4. The Student concerned shall be given the opportunity to appear before the Disciplinary Committee to defend himself.
5. After giving the opportunity of a hearing and after due consideration, the Disciplinary Committee may recommend a punishment of expulsion or suspension for a specified period.

Sections 9(c), 18 and 37 of the Polytechnic Iree Osun State Law, 1992:

9 The Council shall:

(c) have power to delegate, as the case may be, any of its powers not exclusively to be exercised by the Council itself and except powers to make, revoke, and amend bye-laws and regulations, to committees of council, or its chairman or the Rector as it thinks fit.

18(1) There shall be a Registrar of the Polytechnic who shall be appointed by the Council.

(2) The Registrar shall be the Chief Administrative Officer of the Polytechnic and responsible to the Rector for the day to day administration of the Polytechnic".

37(1) Subject to the provisions of this section, where it appears to the Rector that any student of the Polytechnic has been guilty of misconduct, the Rector may, without prejudice to any other disciplinary power conferred on him by this Law or Regulations made hereunder direct:

a. that the student shall not, during such period as may be specified in the directions, participate in such activities of the Polytechnic, or make specify; or
b. that the activities of the student during such period as may be specified in the directions be restricted in such manner as may be so specified.
c. that the student be suspended for such period as may be specified in the directions.

(2) case of expulsion shall be handled by students' Disciplinary Committee and be ratified by the Governing Council, and all the actions referred to in section 37 subsection (l) shall be referred to the Students' Disciplinary Committee for investigation.

Section 33(1)of the Constitution of the Federal Republic of Nigeria 1979:

33(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be

> entitled to a fair hearing within a reasonable time by a court or tribunal established by law and constituted in such a manner as to secure its independence and impartiality".

It was held by the Court of Appeal inter alia:

1. That the provisions of Section 37(1) of the Polytechnic Iree Osun State Law 1992, "vest the duty of determining whether an act of misconduct has been committed by the student, on the Rector, and once he is convinced that a student is so guilty he can on his own cause the suspension of the student from the institution, which is exactly what the 2nd respondent has done in this case.
2. By virtue of section 9(c) of the Polytechnic, Iree, Osun State Law, the Council of the Polytechnic shall have power to delegate any of its powers to Committees of Council or its Chairman or the Rector as it thinks fit. Section 18 of the same law establishes the office of the Registrar designated as the Chief Administrative Officer of the Polytechnic and responsible to the Rector for the day to day administration of the Polytechnic. A holistic interpretation of these provisions reveals that the Registrar could not have issued the letter of suspension without the instruction or directive of the Rector, the Council and the Board of Studies. Being a servant of the Polytechnic, the Registrar merely conveyed the decision of the management of Osun State Polytechnic to the appellant by Exhibit 'D', the letter of indefinite suspension.

6. COMMENTS ON THE DECISION

We shall in our attempt to x-ray this decision divide our comments into three broad sub-headings namely:-

- **A.** The issue of fair hearing
- **B.** The issue of improper delegation (or sub-delegation)
- **C.** The issue of proper or improper evaluation of evidence.

(a) The Issue of Fair Hearing

The Court of Appeal appeared to have misconceived the issue before it. The issue before the court was not whether the SDC complied with the fair hearing rule (we shall come to that later) but whether the Rector was right in disregarding the fair hearing rule by suspending the appellant without a hearing (the provisions of Rule 3 of the Student Guardian of Osun State Polytechnic and Section 37 of the Osun State Polytechnic Iree Law 1992 notwithstanding).This is the first real issue before the court and the court appeared to have glossed over that matter and justified the suspension without hearing on the ground that the said rule 3 empowers the rector to take temporary disciplinary steps and thereafter refer the matter to the SDC, which will now make a recommendation after observing the rules of fair hearing. Two issues arise here:-

(i) What is the proper construction to be placed on rule 3 of the Student Guardian Regulation?

(ii) Does the provision of Rule 3 imply that the Rector can or should take a decision without complying with the rules of fair hearing?

To some extent, the second issue is part and parcel of the 1st and we shall address them conjunctively. Rule 3 admits of at least two interpretations.

The first, which the Court of Appeal adopted affirming the trial court, is that the Rector can validly suspend a student temporarily in an emergency situation without a hearing and thereafter refer the matter to the SDC.

By the second interpretation, the tenor of rule 3 suggests that an allegation of serious misconduct must be referred to the Students' Disciplinary Committee but if while pending before that committee, an emergency arises, the Rector can now take a temporary disciplinary measure pending the determination of the matter by the SDC.

In our humble view, both interpretations are plausible but the interpretation that is most plausible is the third interpretation according to which the Rector can validly suspend a student temporarily in an emergency situation before referring the matter to

the SDC but in so doing, the Rector must accord the student concerned a fair hearing before taking his decision. Thus, in our humble view, the rule of fair hearing is an implied provision that must be read into the provisions of rule 3 of the Students Guardian Rules and Regulations of Osun State Polytechnic. In our humble view, the provisions of rule 3 do not preclude fair hearing before such temporary step can be taken. This is where the Court of Appeal got it wrong because the issue remains, even if the statute empowered the Rector to suspend, whether it is not an implied provision that he must at least hear the person to be affected before suspending him? The answer must be that it is an implied provision because of the nature of the action or function he exercise which not only affects a person's rights and obligations but his status prejudicially. In *Kotoye v. CBN*[15] the Supreme Court had held that the rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice had been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given such an opportunity of hearing. Once an appellate court comes to the conclusion that the party entitled to be heard before a decision was reached but was not given the opportunity of a hearing, the order/judgment thus entered is bound to be set aside.

Secondly, on the issue of fair hearing, one must consider the issue of notice of proceedings of the SDC. According to the Court of Appeal, the appellant was invited to appear before the Disciplinary Committee but he failed to honour the invitation. The appellant cannot therefore complain of lack of fair hearing.

The issue of fair hearing is a very fundamental one and any complaint against it must be thoroughly investigated and the circumstances of it fully examined before a just decision can be arrived at. Any attempt to gloss over it will always result in injustice because to get to the root of the matter, a reviewing court must consider the totality of the circumstances. In the present case, a question that needs to be answered is "whether the purported notice was in fact a notice or a summons to appear before the S.D.C?" To answer this question, the said notice will be reproduced.

[15] (1989) 1 NWLR (Pt. 98) 419 at 448.

Invitation to meeting of the SDC"
Please attend a meeting of the SDC tomorrow 9/4/97 at 10.00am in the Governing Council Room.
Please be punctual
Thank you
Abiodun Oloyede
Distribution
Amusan Johnson
F. Olatunde
Okunola Ganiyat Bolanie
Please see overleaf for the allegation against you.

President

1. Rudeness and insubordination to the Deputy Rector and Acting Dean, Student Affairs.
2. Membership of Campaign for Democracy (CD)
3. Unlawful circulation of anti-government release.
4. Externalization of the internal affairs of the institution.

Above is the full tenor of the purported notice.

There is no doubt that this is an invitation for a meeting which appellant may or may not attend and NOT an invitation nor a summons to appear before a disciplinary panel, the mention of certain allegations overleaf notwithstanding. In fact, evidence before the court showed that appellant was invited to a meeting and not to appear for disciplinary action against him.

Another important and salient but silent point is the reason for appellant's absent at the said meeting. It is a cardinal rule of our justice system that a person who has already formed an opinion and taken a stand or decision on a matter before a hearing cannot act without bias[16]. In this case, the Rector had already formed an opinion as well as taken a decision by suspending the appellant without a hearing. The SDC has only a recommendary role to play and the Rector was not bound to accept their recommendation at

[16] See *Kenon v Tekam* (2001) 7 NSCQR 147 at 167 – 168, per Ayoola JSC. According to his Lordship, "unfairness of a trial comes in two broad categories – one is procedural unfairness… substantive unfairness arises where the judge approaches his adjudicative functions with a mind influenced by considerations other than the facts in evidence (emphasis mine).

any rate. The power of disposal action remains that of the Rector. In this scenario where the person with power of disposal action has already formed an opinion and taken a decision, what manner of justice will a committee that is answerable to him do?

We submit that in these circumstances, whatever the SDC might purport to do can only be a sham. Indeed, we are not even told what the constitution or membership of the SDC was and this must be held strictly against the respondents. It is therefore not difficult to see why the appellant could not attend the meeting of the SDC. A decision had already been taken against him and the SDC procedure was merely to give the decision the imprimatur of regularity.

We humbly submit that by its very nature, the disciplinary procedure of the Osun State Polytechnic Law is faulty in that it places the cart before the horse and to that extent, it ought to be amended. If not, the complaint of lack of fair hearing must keep re-occurring and it is a hurdle which can hardly ever be jumped over by the authorities in the circumstances.

(b) The Issue of Improper Delegation (Sub-Delegation)

It is not in doubt that the letter of suspension Exhibit 'A' was issued by the 3rd respondent, the Registrar. It is also not in doubt that the Registrar is not the appropriate authority to hand down such a decision. That power is a power that has been delegated to the Rector by s. 37 of the Polytechnic Law. Can the Rector then sub-delegate that power to the Registrar without any express authority for doing so? The answer is definitely in the negative. As already stated, disciplinary powers by its very nature cannot be sub-delegated except by express authority. This is not the case here. It is important to note that in this case, there was no affirmative evidence, whether by way of affidavit evidence or otherwise before the court to show that the Rector authorized the 3rd respondent to issue the letter. The only material placed before the court in this respect was the submission of counsel to the respondent that:

> The signing of Exhibit 'C' by the 3rd respondent cannot invalidate it as the 3rd respondent was only acting as the secretary of the 1st respondent and he issued the letter on behalf of the 2nd respondent

> as the Chief Executive and manager of the 1st respondent, as at the time there was not in existence a Council of the 1st respondent, and the 2nd respondent was the management as the power of the council has been delegated to him by section 9(c) of the Polytechnic Law which provides that "the council shall have powers to delegate, as the case may be any its power not exclusively to be exercised by the Council itself and except powers to make, revoke and amend bye-laws, and regulations, to committees of Council or its Chairman or the Rector as it thinks fit.

It is an established and well settled principle of our law that counsel's submission, no matter how erudite can never take the place of evidence and facts before the court. Counsel's submission never constitutes evidence upon which the court can act[17]. For the Court of Appeal to merely rely on this piece of submission to reach a verdict is not commendable.

Dealing with the issue of delegation of authority especially in disciplinary proceedings in *Bamgboye v. University of Ilorin*[18], the Supreme Court had in a well considered judgment decided that

> Generally, a statutory disciplinary power cannot be delegated. Such power can be delegated where there is an express statutory authority to delegate. Sovereign law-makers who grant statutory disciplinary power to a body or authority can also authorize such a body or authority to delegate such power. In the instant case where the power of Council was delegated to it by the university, i.e. the 1st respondent, the Council cannot delegate this power to the Senior Staff Disciplinary and Appeals Committee which is itself a delegate of the Council.

This more than anything puts the seal on the question. Section 37(1) vested that power on the Rector as a delegate without any express authority to sub-delegate it to anybody. If it were the intention of the legislature to grant him such powers, it would have said so.

It is also of some importance that the Court of Appeal appeared not to have actually rendered a decision on this very important issue - in fact, one of the two pillars of the appeal. It merely reproduced

---

[17] See *Ilori v. Benson* (2000) F.W.L.R. (Pt. 26) 1846 at 1863: *Vassiler v. Paas Industries Ltd* (200) F.W.L.R. (Pt. 19) 418.

[18] (1999) 10 NWLR (Pt. 622) 290.

sections 9 (c) and 18 of the Polytechnic Law and the views of the learned trial judge. Apparently, it adopted the said views but this is not clear from the report and is a far cry from the expectations.

Importantly, Exhibit "G", (otherwise Exhibit 'D') or 'C') the letter of suspension was not reproduced to enable us see the tenor. Only a snippet of it was reproduced, and that snippet states that:

> Management noted with regret that in spite of its magnanimous posture, you have chosen to take the belligerent way. Management also noted your refusal to apologize for your misdeeds, your externalization of issues that are purely internal and your master - minding the distribution of anti-government release: all of which constitute gross acts of misconduct.

The point here is that even, if the court decided to act on the submission of counsel, still, it would still be clear that it was not the appropriate authority that acted in that case. The 3rd respondent was said to have acted as secretary on behalf of the Management, which is not and can never be the same thing as the Rector. There was no material placed before the court to show the composition of the management, who constituted it, what its powers were, etc. In the same vein, the laws cited did not in any way disclose the position of secretary as an establishment in the institution let alone taking such sensitive decision. It is our humble submission that the Court of Appeal appeared to have acted without evidence and went ahead to misconstrue the statute.

(c) The Issue of Improper Evaluation of Evidence

When an aggrieved party complains of improper evaluation of evidence, he is in effect saying, the right inferences were not made from established facts. The facts do not in fact support the inferences or conclusions made by the trail court.

According to the Supreme Court in *Sagay v. Sajere*,[19] the requirement that a judgment must clearly demonstrate that the conclusions arrived at in the case were not based on intuition and whim of the judge but on evidence, properly evaluated and the law is

[19] (2000) 2SCNQR (Pt. 1) 35 at 356.

not an insistence on mere form but derives from the need to ensure and demonstrate that substantial justice has been done in the case. Now, what are the facts in this case? And what are the inferences referred to? One or two examples will suffice.

One of the issues joined by the parties was whether the appellant was the Students Union President. The appellant in paragraph 4 of his statement of facts alleged that "on winning the said election the respondent refused to organize or conduct a swearing in ceremony for the Executive Council of the Students Union under the leadership of the applicant on the expressed ground that they were yet to determine whether he will be anti-authorities or confrontational particularly when he was not the candidate favoured by the respondents to win the said election.[20]

The respondents countered this averment in paragraphs 5-7 of their counter affidavit wherein they alleged that the said Students Union election was inconclusive as the entire student's representative council of the Faculty of Science dissociated themselves from the said election, Exhibit "A", letter from Faculty of Science annexed. That based on the inconclusiveness of the said election and the disagreement between the entire student body, the Rector of the Polytechnic met the student leaders and advised them to resolve the issue and report back to him after which an arrangement will be made for swearing in of the new executive of the students union and that up till now the disagreement among the students had not been resolved as regards the president elect.[21] In resolving this is issue, the court stated as follows:-

> .... Paragraph (4) of his statement has been debunked by paragraphs 5-7 of the counter affidavit, which exhibited a letter written to the school management in which over forty students of the faculty of science disassociated themselves from the campus student unionism... even though the applicant discredited the said paragraphs 5-7 of the counter-affidavit in his reply to the counter-affidavit, he did not exhibit any document in support thereof especially paragraph 3(c) of the reply to the counter-affidavit. To this end I would say the allegation that applicant was elected and

[20] At p. 155.
[21] At p. 157.

> thus victimized was not proved, for the evidence of fact have been successfully debunked....

Improper evaluation of evidence manifested itself here in at least two instances. First, Exhibit 'A' the letter from students of Faculty of Science dissociated itself from "campus students unionism" NOT the elections that produced the appellant. Second, the moment the Court of Appeal came to the conclusion that the applicant discredited the said paragraphs 5-7, it became immaterial to start looking for exhibition of any document. Indeed, it is contradictory for the court to hold in one breath that paragraphs 5-7 have been discredited and in another breath hold that paragraph 4 of the statement of fact has not been proved. Importantly, the court appeared to have forgotten that even the respondent through the SDC in their invitation to the applicant acknowledged the appellant as the 'President'.

On the issue of whether the appellant was assaulted by the respondents, their servant and privies, the respondents in paragraphs 19 and 20 of their counter affidavit stated as follows:-

> 19. That the respondents did not know anything about the assault allegedly inflicted on the applicant as the incident occurred out of school campus.
>
> 20. That the respondents have not by themselves or through their agents assaulted the applicant.

The Court of Appeal held that paragraphs 19 and 20 above are effective denial or traverse of the allegation of assault. This conclusion is of course not tenable even by simple rules of traverse. At best, the paragraphs exhibited an ignorance of what happened and this cannot amount to a denial. If anything, it affirmed the appellant's allegation. The court's conclusion that because an incident occurred outside the campus of the institution, it was not or could not have been perpetrated by agents of the respondents is laughable.[22]

Similarly, the court's finding of fact that there was anomaly in the election process of the applicant is totally unsupported by the

[22] At p. 159.

evidence and was uncalled for.[23] Ditto for the presumptions made by the court in favour of the Oba against the appellant.[24]

Again, the finding that the 3rd respondent was acting as secretary of the 1st respondent and issued the letter on behalf of the 2nd respondent as Chief Executive and manager of the 1st respondent as there was not in existence a Council of the 1st respondent, and that the 2nd respondent was the management and the power of the council has been delegated to him by s.9(c) of the Polytechnic Law appears not be supported by evidence and cannot be anything farther from the truth. S 9(c) provides:-

> The Council shall have power to delegate, as the case may be, any of its powers not exclusively to be exercised by the council itself and except power to make, revoke and amend bye-laws and regulations, to committees of council, or its chairman, or the Rector as it thinks fit.

The question that begs for answer here is, "can a non-existent person delegate function?" The answer is obviously in the negative. The tenor of section 9(c) shows that the Council shall have power to delegate ..... as it thinks fit, to either a committee of its own, or its chairman or to the Rector. The position and establishment of secretary was not mentioned in the law. The concept of management as to be deciphered from the law cannot be a one man affair as assumed by the Court of Appeal. The construction placed on section 9(c) by the court appears to be a warped interpretation.

7. CONCLUSION

Our irresistible conclusion is that the judgment of the Court of Appeal in *Morenkeji v. Osun State Polytechnic* was wrong and erroneous not only on the grounds of improper and unlawful sub-delegation of authority and breach of the rule of fair hearing but also on the ground of improper evaluation of evidence. The decision was delivered before the Supreme Court decision in *Bamigboye v. University of Ilorin* and it is doubtful whether the decision would have been the same if Bamigboye had come earlier.

---

[23] At p. 160.
[24] *Ibid*.

It seems to us that the Osun State Polytechnic Law is by its innate structure flawed in that it puts the cart before the horse. It requires a decision to be taken before a hearing in a matter that peremptorily requires compliance with fair hearing. It therefore needs to be reviewed and corrected to rectify this anomaly. It also seems to us that the best course of action for administrative agencies in the same position such as the Rector in the above case in the exercise of their disciplinary powers is to always have their enabling statutes properly construed before applying it. Possibly, the services of legal experts aside from in-house lawyers should be engaged in the construction before application.