**ARCHIBONG UMO UDO**

**v.**

**CROSS RIVER STATE NEWSPAPER CORP. & ANOR.**

COURT OF APPEAL, CALABAR DIVISION

21ST FEBRUARY 2001

CA/C/77/99

**LEX (2001) - CA/C/77/99**

OTHER CITATIONS

2PLR/2001/63 (CA)

**BEFORE THEIR LORDSHIPS**

DENNIS ONYEJIFE EDOZIE, J.C.A

OKWUCHUKWU OPENE, J.C.A

SIMEON OSUJI EKPE, J.C.A

**BETWEEN**

ARCHIBONG UMO UDO

AND

1. CROSS RIVER STATE NEWSPAPER CORPORATION

2. ATTORNEY-GENERAL OF CROSS RIVER STATE

**ORIGINATING COURT**

CROSS RIVER STATE HIGH COURT, CALABAR JUDICIAL DIVISION

**REPRESENTATION**

BASSEY F. ETUK Esq., – For the Appellants.

J.E. EFA S.S.C. 1 Ministry of Justice, Calabar – For the Respondents.

**ISSUES FROM THE CAUSE(S) OF ACTION**

ADMINISTRATIVE AND GOVERNMENT LAW – ADMINISTRATIVE PANELS OF INQUIRY:- Need to observe rules of fair hearing – Pillars - nemo debet esse judex in propria causa – Meaning of – How determined

ADMINISTRATIVE AND GOVERNMENT LAW – ADMINISTRATIVE PANELS OF INQUIRY:- Membership of panel and allegation of likelihood of bias – How determined - Pecuniary interest as the commonest and the most offensive type of disqualifying interest – Duty of court where same is proved

ADMINISTRATIVE AND GOVERNMENT LAW – ADMINISTRATIVE PANELS OF INQUIRY:- Rule of audi alteram partem – Stipulation that a party must be given an adequate opportunity to answer the case made against him – Effect of failure thereto – How satisfied in administrative proceedings

ADMINISTRATIVE AND GOVERNMENT LAW – ADMINISTRATIVE PANELS OF INQUIRY:- Nature of – Whether acting in an administrative and not in a judicial or quasi-judicial capacity concerned with the determination of one’s civil rights and obligations in the context of section 33 (1) of the 1979 constitution – Proper duty of panel – Whether extends to affording a party opportunity to confront every adverse witness

ADMINISTRATIVE AND GOVERNMENT LAW – ADMINISTRATIVE PANELS OF INQUIRY:- Where terms of reference of the panel of inquiry included allegations of crime – Whether fatal to findings thereon – Implication for non-criminal allegations handled by the panel

CONSTITUTIONAL LAW – FAIR HEARING:- Rule that once a person is accused of the commission of a criminal offence, he must only be tried by a court of law established under the constitution where the complaints of his prosecutors can be ventilated in public in accordance with the law and where his constitutional right of fair hearing would be assured – Effect of failure thereto

CONSTITUTIONAL LAW:- Fair hearing and section 33 of the 1979 Constitution which provides for the fair hearing of a case - The two pillars or principles of natural justice contained therein – Likelihood of bias and fair hearing – How determined

CRIMINAL LAW AND PROCEDURE - FAIR HEARING:– Allegations of crime – Whether a panel of inquiry has jurisdiction to investigate same – Section 33(4) of 1979 Constitution considered

EMPLOYMENT AND LABOUR LAW:- General law that the court will not grant specific performance of a contract of service – Special circumstances leading to exceptions thereto

EMPLOYMENT AND LABOUR LAW:- Normal measure of damages recoverable by an employee whose contract has been wrongly terminated – How calculated – When a claimant will be entitled to re-instatement in his office and in addition damages representing his salaries during the period of his purported dismissal

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ACTION - PARTIES TO AN ACTION:- Non-joinder or mis-joinder of parties – Whether ground for an action to be defeated - An objection as to non-joinder or mis-joinder of parties – Whether deemed waived if not taken at the earliest opportunity

APPEALS:– Grounds of appeal – Proper drafting of - Need to avoid arguments and comply with Order 3 rule 2(3) of the Court of Appeal Rules

APPEALS:– Ground of appeal alleging misdirection on part of court – Rule that that where misdirection is alleged the passage in the judgment where the misdirection is alleged to have occurred must be quoted and also full and substantial particulars of the alleged misdirection - Need to provide particulars

APPEALS:– Issue for determination – Meaning of

APPEALS:– Issues for determination – Use of sub-issues – Attitude of court thereto – Distinction between formulating an issue for determination with a slant favourable to own case and misstatement or mutilation of the facts

APPEALS:– Issues for determination – Rule that the court has the jurisdiction to modify, reject or reframe the issues formulated by the parties if in its view those issues will not lead to the proper determination of the appea – When proper for court to invoke same

APPEALS:- Rule that appellate courts ought not to interfere with findings fact of the trial court which had the unique opportunity of seeing and hearing the witnesses give evidence and observing their demeanour in the witness box – Exceptions thereto

APPEALS - FRESH ISSUES:- Issue not canvassed in the court below nor was it ruled upon by that court – Fresh point of law – Need for leave of court to be sought and obtained - Need for same to satisfy conditions precedent before it could be heard

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EVIDENCE:- Rule that where evidence of a witness is not inadmissible in law, uncontradicted and unchallenged, a court of law can act on it and accept it as a true version of the case he seeks to support – Legal effect

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EVIDENCE:- Appraisal or evaluation of evidence – Failure of trial court thereto – When the appellate court is deemed to be in as good a position as the trial court to reappraise such evidence and make appropriate findings thereon – Legal effect and proper order

EVIDENCE:- Evidence which was not controverted – Duty of court to accept same as true and to act upon such unchallenged evidence before it

JUDGMENT AND ORDERS:- Declaratory reliefs – Rule that the court does not grant declarations of right either in default of defence or indeed on admissions without hearing evidence and being satisfied by such evidence – Legal effect

JUDGMENT AND ORDER – JURISDICTION:- An order of dismissal of action – Whether open to a court which has held that it lacked jurisdiction to entertain the suit

PLEADING – AVERMENT AND TRAVERSE:- Averment that a defendant denies an averment in the statement of claim and will put the plaintiff to the strictest proof thereof – Whether not a proper traverse but an admission of facts purportedly traversed - Whether a defendant is not deemed to have admitted a point if it is clear from his statement of defence read as a whole that he did not intend to admit the facts

**MAIN JUDGMENT**

**DENNIS ONYEJIFE EDOZIE, J.C.A:** (DELIVERING THE LEADING JUDGMENT):

In suit No. C/131/85 filed at the Calabar High Court, the appellant as plaintiff claimed against the respondent as defendants reliefs adumbrated in paragraphs 15 and 16 of the 6th amended statement of claim as follows:-

"15(a) That the panel of enquiry constituted by the Secretary to the Military Government and Head of the Civil Service of the Cross River State to conduct an Administrative Enquiry into the allegations of administrative and financial mismanagement in the Cross River State Newspaper Corporation was incompetent to conduct such inquiry by reason of likelihood of bias on the part of the said panel against the plaintiff.

(b) That the findings and recommendations of the said panel are null and void and of no effect by reasons of the non-compliance and non-observance of the rules of natural justice by the panel in the conduct of the inquiry and/or that the panel exceed (sic) its jurisdiction in that it heard and received evidence and/or representation from a number of persons behind the back of the plaintiff and thus failed to observe the rules of law and that of natural justice.

(c) That the dismissal of the plaintiff from service of Newspaper Corporation by the Military Governor-in-Council of the Cross River State based on the findings and recommendations of the panel is null and void and of no effect.

(d) That the surchage of N30,360.00 representing cost of 96 bad reels of newsprint imposed on the plaintiff by the Military Governor-in-Council of Cross River State based on the findings and recommendations of the panel is null and void and of no effect.

16(a) SPECIAL DAMAGES

(i) Previous special damages N425,223.74

(ii) Elongated salaries and allowances N186,230.45  
N611,454.19

(b) General damages of N100,000.00 for wrongful dismissal and breach of his fundamental rights."

After the exchange of pleadings which were subsequently amended, each party called three witnesses in support of its case. From the appellant’s 6th amended statement of claim (statement of claim for short) and the evidence led in support thereof, the appellant, an accountant by profession with a B.Sc. degree in accountancy and MBA, was first appointed into the establishment of the 1st respondent on 7/5/77 as an internal auditor on salary grade level 10. Thereafter, he rose through promotions to the position of Chief Accountant in 1979 on salary grade level 15. Following an advertisement in the Nigerian Chronicle Newspaper of 2/2/83 exh. 2 for the post of the General Manager of the 1st respondent and an internal advertisement to the same effect, the appellant applied for the position and after an interview, he was by a letter dated 15th June 1983 signed by the Secretary to the State Government exh. 1 appointed to that position of the General Manager of the 1st respondent corporation on salary grade level 16 with effect from 1st July, 1983 subject to the staff conditions of service exh.12.

This appointment was short lived for barely one year after, by another letter dated 4/6/84 exh.3, the appellant was sent on a compulsory indefinite leave pending the investigation of an administrative panel of inquiry set up by the government to investigate allegations against the appellant. The administrative panel constituted of 5 members duly sat and carried out its assignment and at the end submitted its report exh.11 to the Government. A white paper exh.8 thereon was issued by the Government on the basis of which the appellant was dismissed from service as per letter dated 17/10/84 (exhibit 9) with effect from 4/6/84. It is the appellant’s case that the 5 members of the panel of inquiry were biased against him; the panel was turned into an inquisition, did not give him opportunity to defend himself, nor made available to him copies of the allegations made against him and that the 545 reels of newsprint in respect to which he was surcharged was bought in 1983 at the instance of the board of the 1st respondent without fraud.

The respondents defended the claim based on their further amended statement of defence supported by the testimony of three witnesses they called. Their defence was that the panel of inquiry was open to the public, was not biased against the appellant and that witnesses did not give evidence at his back. At the end of the oral evidence, parties by their counsel submitted written addresses and after due consideration of the entire proceedings, the learned trial Chief Judge, Ecoma C.J. of the blessed memory, in a judgment delivered on 21/6/94 dismissed the appellant’s claim with N250 costs to the respondents. Against that judgment, the appellant filed a voluminous notice and grounds of appeal covering twenty-two pages of the typed script with altogether 12 grounds of appeal supported with copious particulars. Both parties filed and exchanged briefs of argument. The appellant filed an appellant’s brief and reply brief while the respondents filed a respondents’ brief. Seven issues were raised in the appellant’s briefs and these are:-

"1. (Grounds 1, 2 and 9)

(a) Did the learned trial Chief Judge in his judgment comply with the rule in Odofin’s case and other numerous decisions on how to evaluate evidence in civil cases?

(b) Was the learned trial Chief Judge justified to speculate outside the pleadings and evidence before him and to impose strange and unusual burden of proof on the appellant in this case?

(c) Did such an unwarranted exercise not occasion a serious miscarriage of justice?

2. (Grounds 3 and 4)

Was the trial court justified in holding that the members of the administrative panel of inquiry had jurisdiction to try the appellant of criminal offences.

3. (Grounds 5 and 6)

(a) Were there no proper parties before the trial court in this case?

(b) Assuming (but not conceding) that all proper parties to the suit were not joined, could the fact of non-joinder occasion the dismissal of the plaintiff’s/appellant’s case?

4. (Grounds 6 and 7)

Is an employee whose employment had a statutory flavour as in the appellant’s case and who was wrongfully dismissed not entitled to his benefits during the period he was away from work?

5. (Ground 10) In the absence of any averment and rebutting evidence from the defendants/respondents in respect of the declaration sought to nullify the surcharge of N30,360.00 was the lower trial court justified in dismissing the claim even after it rightly observed that the respondents did not counter-claim the said amount against the appellant?

6. (Ground 11) Is a party claiming special damages and who pleaded sufficient particulars and led evidence, albeit unchallenged in support thereof not entitled to succeed?

7. (Ground 12)

Is the appellant not entitled to succeed on the preponderance of evidence?"  
In relation to issue No. 1 it was pointed out that the appellant pleaded facts and led evidence in respect of the regularity of his appointment, bias against him by four of the members of the panel of inquiry, the impropriety of the surcharge imposed on him and his financial entitlements, which facts were not debunked in the respondents’ pleadings or evidence. It was submitted that where the evidence of a witness is not inadmissible in law, uncontradicted and unchallenged, a court of law ought to accept such evidence on the following authorities:- Iriri v. Erhurhobara (1991) 2 NWLR (Pt.173) 252, 255; Gukas v. Jos International Breweries Ltd. (1991)6 NWLR (Pt.199) 614; Ikuomola v. Oniwaya (1990) 4 NWLR (Pt.146) 617. It was further submitted that pleadings not supported by evidence do not constitute evidence vide:- Balogun v. Amubikanhun (1985)3 NWLR (Pt.11)11, 27; Ojukwu v. Filla 14 WACA 629 and SALAMI V OKE (1987) 9-10 SCNJ 27, 43. Appellant stressed that the court below failed in its primary duty of evaluating the evidence adduced by the parties as it ought to have done vide the cases of Odofin v. Mogaji (1978) 4 SC 91 at 94 and Chief Mrs. F. Akintola v. Solano (1986) 4 SC 141 at 173. It was contended that the court below by holding that the allegation of bias was not proved had speculated in an enormous dimension and misplaced the burden of proof which had caused a miscarriage of justice. The following cases were cited and relied upon:- Balogun v. Akanji (1988) 2 SC (Pt.1) 199, 232; Onobruchere v. Esegine (1988) 2 SC 365, 397-8; Atolagbe v. Shorun (1985) 1 NWLR (Pt. 2) 360, 361. Referring to the case of Adigun v. Attorney-General of Oyo State (1987) 3 S.C. 250 and section 33(2) of the 1979 Constitution, counsel for the appellant submitted in his brief that if the court below had properly evaluated the evidence before it, it would have come to the irresistible conclusion that the appellant’s right to fair hearing had been breached which would have been sufficient to nullify the proceedings. Finally, counsel contended that in the absence of evaluation of evidence by the court below, this court has power to re-evaluate the evidence and make the necessary findings and for this proposition counsel alluded to the following cases – Kalu v. The State (1988) 4 NWLR (Pt.90) 503; Okpuruwu v. Okpokam (1988)4 NWLR (Pt. 90) 554.

With respect to issue No. 2, it was argued that the court below was wrong in holding that the panel of inquiry had the jurisdiction of trying the case of surcharge resulting from the fraudulent practices being criminal in nature having regard to the decision in Garba v. University of Maiduguri (1986) 3 SC 128; Sofekun v. Akinyemi (1980) 5-7 SC 1 at 173; Ted Kayode Adams v. The State (1966) NMLR 11; and Denloye v. Medical AND Dental Practitioners (1965) 1 All NLR 306. On the question of joinder discussed under issue 3, it was submitted that the allegation that Akwa Ibom State was not a party and as such the court lacked jurisdiction to hear the case was not pleaded and furthermore that non-joinder or mis-joinder of a party cannot defeat an action vide the case of Ayankoya v. Olukoya (1996) 35 LRCN 280, 285. Counsel submitted that the proper order to make if the court lacks jurisdiction to adjudicate over a matter is that of striking out rather than dismissal as the court below had erroneously done in the case in hand. The case of Oloriode v. Oyebi (1984) 5 SC 132 was cited in support of the proposition.

Regarding the contention as to whether the appellant’s appointment was statutorily flavoured, which is the subject –matter of issue No.4, counsel to the appellant, in his brief of argument referred to the appellant’s letter of dismissal, Exh.1, and section 2(1) of the Edict No. 2 of 1977 to contend that the appellant’s appointment was protected by statute and consequently, that the nullification of his dismissal will entitle him to salaries he was not paid during the period of dismissal. Counsel cited the cases of Chukwumah, v. Shell Petroleum Development Company of Nigeria Ltd. (1993) 4 NWLR (Pt. 289) 512; University of Calabar v. Iniobong A. Inyong (1993) 5 NWLR and Olaniyan v. University of Lagos (1985)2 NWLR (Pt. 9) 599.

On the failure by the court below to grant the declaration sought with respect to the surcharge imposed on the appellant as canvassed in the 5th issue for determination, it was argued that in the absence of a rebuttal evidence by the respondents, the declaration ought to have been granted; the case of Animashaun v. University College Hospital (1996) LRCN 2051 was cited and relied upon.

Dealing with the appellant’s issue concerning proof of special damages, it was submitted that since the appellant was not cross-examined on the computations of his monetary claims, he was entitled thereto. It was contended that in a claim for special damages the standard of proof required in establishing the amount of damages where the evidence in support is unchallenged is discharged upon a minimal proof. The following cases were relied upon:- Odulaja v. Haddad (1973) 11 SC 357, 364-5, Adejumo v. Ayantegbe (1989) 3 NWLR (Pt. 110) 417, 435; Elf v. Sillo (1994) 19 LRCN 153, 155. Counsel referred to the case of Adeleke v. Rhand AND Anor. (1983) FNR 390-400 on the need for trial courts to make some assessment of damages even if they decided against the plaintiff in the event of the Appeal Court holding a contrary view and submitted that this court is entitled to make an assessment of the appellant’s claims and award same since the court below made no assessment to that effect despite the abundance of materials placed before it. Finally, in regard to the 7th and last issue for determination in the appellant’s brief, learned counsel concluded that the appellant was entitled to judgment on his claim based on the preponderance of evidence. The respondents’ brief contains four issues for determination as follows:

(i) Whether the administrative panel of inquiry was properly constituted?

(ii) Whether the administrative panel of inquiry in the discharge of its functions and its deliberations observed the rules of natural justice and fair hearing?

(iii) Whether in the circumstances of this case, the appellant was properly disengaged from his employment?

(iv) Whether the appellant had discharged the burden of proof placed on him by law?

On the question of the composition of the panel of inquiry raised under issue 1, respondents maintain that the panel was properly constituted as the Military Governor of the State had the power to set up the panel. It was contended that no objection was raised on the composition of the panel and since the court found as of fact that the panel was duly constituted, that finding cannot be interfered with by the appellate court unless that finding was unreasonable or perverse vide the cases of Ogboru Ozoma AND Ors. v. Dick Abejobu AND Anor. (1995)8 NWLR (Pt.416) 764 at 766; Monoprik Nig. Ltd v.Kalu Agbai Okenwa AND 2 Ors. (1995) 3 NWLR (Pt.383) 325 at 329; Christopher Akomagwuna v. Savannah Bank of Nig. Ltd.(1995) 3NWLR (Pt.383) 346; Ekpenyong Asuquo AND Ors v. Chief Effiom Etim AND Ors (1995) 7 NWLR (Pt.405) 104 at 108; Akpakpuna v. Nzeka (183) 2 SCNLR 1 and Woluchem v. Gudi (1981) 5 SC 291 at 326. Respondents contend that the appellant has not shown in his brief that the findings of fact made by the learned trial Chief Judge as to the composition and constitution of the administrative panel of inquiry were perverse, unreasonable, unsound or not borne out of the evidence before him and therefore there is no justification for this court to interfere with the findings. With respect to the second issue, counsel referred to the case of Chief (Alhaji) Moshood K.O. Abiola v. Federal Republic of Nigeria (1995) 7 NWLR (Pt. 405) 5 on what constitutes bias and submitted that from the records there is nothing to show that the panel of inquiry was biased against the appellant who submitted a memorandum to the panel, appeared before it and was given a hearing. The allegations against the appellant and terms of reference of the panel were made known to the appellant, it was further contended. Counsel cited the cases of Nwaubani v. Golden Guinea Breweries Plc (1995) 6 NWLR (Pt.400) 184 at 187; Isiyaku Mohammed v. The State (1968) All NLR 24, University of Nigeria Teaching Hospital Management Board AND Anor v. Hope Chuyelu Nnoli (1994) 8 NWLR (Pt. 363) 376 at 402 and Union Bank of Nigeria Limited and Anor v. Benjamin Nwaokolo (1995)6 NWLR (Pt. 400) 127 at 130 to contend that the appellant’s right to fair hearing was not compromised.

In regard to the third issue which poses the question whether the appellant was properly disengaged from service, it was submitted that the appellant did not lead evidence as to the terms and conditions of his contract of employment. It was contended that the Cross River State Corporation Staff Conditions of Service 1983 pleaded by the appellant in paragraph 14 of his statement of claim was not tendered in evidence and by section 148(d) of the Evidence Act it is presumed that the document if tendered would be unfavourable to him vide the case of Bamgbose v. Jia LG (1991) 3 NWLR (Pt. 177) 67. Counsel argued that in the absence of the conditions of service of the appellant’s employment with the 1st respondent the court cannot speculate as to what was the nature of the appellant’s employment to determine whether or not it was of a statutory flavour since not all appointments in statutory corporations are protected by statute. It was submitted that the mere fact that the 1st respondent is a statutory body does not mean that the conditions of service of its employees are of a special character. Counsel cited the following cases – Adegbite v. College of Medicine of the University of Lagos (1973) 5.S.C. 149; Nigerian Produce Marketing Board v. Adewunmi (1972) All NLR (Pt. 2) 433; International Drilling Co. v Ajijola (1976) 2 SC 115; Sule v. Nigeria Cotton Board (1985) 2 NWLR (Pt.5) 17; Udemah v. Nigerian Coal Corporation (1991) 3 NWLR (Pt. 180) 477 at 489. Adverting to the last and 4th issue for determination, the respondents in their brief submitted that the appellant did not discharge the burden of proof placed on him to show that his dismissal was wrongful nor protected by statute.

Referring to section 2(1) of Edict No. 2 of 1977 of Cross River State, counsel argued that the onus was on the appellant to show that the Military Governor-in-Council in dismissing the appellant did not have the recommendation of the board of the 1st respondent and that he failed to do (sic). Moreover, counsel argued that it was never the case of the appellant at the lower court that the Board of the Corporation never recommended to the Military Governor-in-Council that the appellant be dismissed and therefore that issue cannot be canvassed on appeal. It is the contention of the respondents that the court below made a specific finding that the appellant failed to discharge the burden of proving his case and that though the appellant challenged that finding in his ground of appeal, no issue was formulated thereon and as a result the ground is deemed abandoned vide the case of Akomagwuna v. Savannah Bank of Nigeria Ltd. (1995) 3 NWLR (Pt. 383) 346. Finally,on the compliant by the appellant that the court below did not properly evaluate the evidence adduced at the trial, respondents disagreed and submitted that evaluation was in substantial conformity with the principle laid down in the cases of Mogaji v. Odofin (1978) 4 SC 91 and Woluchem v. Gudi (1981) 5 SC 291 at 294. Having reviewed the submissions of counsel as contained in their briefs, let me pause and reflect on the appellant’s grounds of appeal and the issues raised for determination. A careful perusal of the grounds of appeal shows that the drafting leaves much to be desired. As already highlighted, the twelve grounds of appeal span over twenty-two pages of typed foolscap size sheet of the record of proceedings. The grounds are unnecessarily voluminous, verbose, and vague.

"For instance ground 3 reads:

"The learned trial Chief Judge obviously misdirected himself on the burden of proof and thus came to conclusions which were perverse and which paid no regard to the pleadings of the parties."

Then followed a host of seven lengthy particulars (A to G) none of which pinpointed at any statement on which the learned Chief Judge allegedly misdirected himself on the burden of proof. The law is that where misdirection is alleged the passage in the judgment where the misdirection is alleged to have occurred must be quoted and also full and substantial particulars of the alleged misdirection:- See Anyaoke AND 3 Ors v. Felix Adi(1986) 2 NWLR (Pt.3) 731 at 741; Okeke Amadi v. Okeke Okoli (1977) 7 SC 57; Adeniji v. Saka Disu (1958) SCNLR 400; (1958) FSC 104; Atuyeyeye v. Ashamu 1 (1987) NWLR (Pt.49) 267, 279; Nsirim v. Nsirim (1990) 3 NWLR (Pt.138) 285 at 297. By the rules and practice of the courts, it is not intended that an appeal should be argued in the ground of appeal as the appellant’s counsel seemed to have done by incorporation in the grounds of appeal nearly all the authorities cited in his brief of argument. The nature or form a ground of appeal is as prescribed by order 3 rule 2(3) of the Court of Appeal Rules Cap 62, vol. 4 Laws of the Federation 1990 which reads thus:-

"The notice of appeal shall set forth concisely and under distinct heads the ground upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively."

The appellant’s grounds of appeal fall short of the above requirements. Nor are the issues formulated unobjectionable. Issue No. 1 comprises three sub-issues. An issue in an appellate court is a proposition of law or fact framed in a manner with an aim to determine the merit of an appeal: See Chukwuma Okwudili Ugo v. Amanchukwu Obiekwe (1989) 1 NWLR (Pt.93) 566 at 580. The issue for determination must be a concise statement of the complaint of the appellant raised in the grounds of appeal and must not be argumentative or rendered in such a manner that they become meaningless. It cannot be overemphasized that a proper issue for determination in an appeal ought to be a mirror of the facts of the case as ascertained in the court below. Although in formulating an issue for determination, a party is entitled to do so with a slant favourable to his own case but he cannot misstate or mutilate the facts: Commerce Assurance Ltd. v. Alli (1992) 3 NWLR (Pt.232) 710 at 720. It is the law that the court has the jurisdiction to modify, reject or reframe the issues formulated by the parties if in its view those issues will not lead to the proper determination of the appeal: See Ogbunyiya v. Okudo (No. 2) (1990) 4 NWLR (Pt.146); Bankole v. Pele (1991) 8 NWLR (Pt.211)) 523. By the force of these authorities, I will reframe the issues for determination and proceed to consider the merits of the appeal on the basis of the issues, thus:-

Issue 1. Whether having regard to the composition, proceedings and terms of reference of the panel of inquiry, the principles of natural justice were not compiled with (grounds 1,2,3,4, AND 9)

Issue2. Whether the appellant’s declaratory reliefs were rightly dismissed on the ground of non-joinder of parties? (grounds 5,7,8)

Issue3. Whether the appellant is entitled to his claims?

The first issue I have formulated above deals with the principles of natural justice. The provision in section 33 of the 1979 Constitution which provides for the fair hearing of a case contains the two pillars or principles of natural justice.

The first is that a man may not be a judge in his own cause usually expressed in the latin maxim- nemo debet esse judex in propria causa. In the case of Akoh v. Abuh (1988) 3 NWLR (Pt. 85) 696 at 720,the nature of interest in a case which can disqualify a person from adjudicating over a case was considered. The Supreme Court held that pecuniary interest is the commonest and the most offensive type of disqualifying interest but not the only one. It was held that a fore knowledge, a previous knowledge of the facts of the pending case is something reasonably likely to bias or influence the mind of a judicial officer, a Judge or Magistrate in a particular case. In the case of the University of Calabar v Esiaga (1997) 4 NWLR (Pt. 502) 719 at 745, it was held that bias can arise from three situations- firstly, it could be as a result of pecuniary interest in the litigation, secondly, it could arise from blood filial or other form of personal relationship with one of the parties and thirdly, a mere natural aversion or revulsion to the facts of the case could give rise to bias on the part of a judge who is incapable of suppressing his natural and instinctive tendencies. Bias is a very serious attack on the person and integrity of a Judge and a counsel who decides to attack a Judge on that must show concrete evidence in support of the charge. If it may be fairly inferred by reasonable persons sitting in court from the circumstances, that there is a real likelihood of bias against one of the parties on the part of the trial court, it must follow irresistibly that that party’s right to a fair hearing had been contravened and the decision on the issue between the parties by the trial court in such circumstances cannot stand. The second principle of natural justice is the right to be heard expressed in latin as audi alteram partem:- See Professor Onwumechili AND Anor. v. Akintemi AND 2 Ors. (1985)3 NWLR (Pt. 13)504. The rule of audi alteram partem postulates that the court or tribunal must hear both sides at every material stage of the proceedings before handling down a decision. It is a rule of fairness and a court cannot be fair unless it considers both sides of the case as may be prescribed by the parties: See Ekuma v. Silver Eagle Shipping Agencies (Nig) Ltd. (1987) 4 NWLR (Pt. 65) 472; by the rule of audi alteram partem, a party must be given an adequate opportunity to answer the case made against him. See Union Bank of Nig.Ltd. v.Ogbeh (1991) 1 NWLR (Pt.167) 369; Finnih v. Imade (1992) 1 NWLR (Pt. 219) 511; Adeniyi v. Governing Council Yaba College of Technology (1993) 6 NWLR (Pt. 300) 476. The rule of fair hearing is not technical doctrine but a rule of substance. The question is not whether injustice has been done because of lack of hearing but whether a party entitled to be heard before deciding had in fact been given an opportunity of hearing. Once an appellate court comes to the conclusion that a party was entitled to be heard before a decision was reached but was not given the opportunity of a hearing, the decision is liable to be set aside. See Kotoye v. C.B.N (1989) 1 NWLR (Pt. 98) 419 at 448. The burden is on the party alleging the breach of the audi alteram partem rule to prove same. See Udemah v. Nigeria Coal Corporation (1991) 3 NWLR (Pt. 180) 477.

In the instant case, the appellant in his evidence-in-chief testified that on his being asked to proceed on indefinite leave with immediate effect, he left his office without access to vital documents which he could have used in his defence during the inquiry: that the panel did not give him an opportunity to defend himself nor make available to him the allegation made against him. He further testified that the members of the panel were interested parties and biased against him in that the chairman of the panel Chief E.B. Udo made utterances at the proceedings of the panel indicating he was interested in the position of the General Manager of the 1st respondent corporation. He also addressed the press and the staff of the corporation alleging that he the appellant was the person wielding power to the detriment of others which statement was carried in the Sunday Chronicle of July 1983 vide exh. ‘4’.The appellant further alleged that three other members of the panel, namely, Messrs A. Akpa, B.A. Bassey, B.I. Inyang were also interested parties because their named relations were dismissed from the services of the corporation while he appellant was the General Manager. As can be seen from the foregoing, the appellant’s complaints touch on the two pillars of natural justice as analysed above. In his judgment, the learned Judge, Ecoma C.J. at P. 223 et seq of the record observed and held as follows:-

"His contention in respect of bias did not fill me with confidence to enable me come to the conclusion that there was bias. There was nothing to show that government took pains to find out the names of persons who at one time or the other had some misunderstanding with the plaintiff. It will be observed that the members of the panel were drawn from different establishment in order to ensure impartiality.

If the plaintiff was not satisfied with the composition of the panel or with any member, it was his duty to have raised his objection at the very early stages of the sitting of the panel and stating his reasons. There is no evidence before me that the plaintiff ever objected to the composition of the panel on the ground of bias although all the facts alleged by him were known to him at the time of the enquiry if he objected at all, there is no evidence as to who (sic) he objected to and who in fact gagged him. He has not discharged his burden what is more, this facts (sic) was never pleaded.

I am therefore, at pains to hold that the administrative panel of inquiry was not properly constituted. It was properly constituted and I so hold.  
The next issue to consider is whether the administrative panel of inquiry observed the rules of natural justice .

In the instant case, exhibit 11 at pages 2-5 have shown how the inquiry was conducted. The venue for sitting was specified so were the times of sittings, period covered by the inquiry. Exhibit 11 also revealed the receipt of memoranda.  
  
It is to be noted that in addition to these, the panel heard all those who had submitted memoranda. It is known that the plaintiff was recalled several times to testify and he cross-examined other witnesses. It would not therefore be true to say that the plaintiff did not cross-examine the witnesses. From the facts before me, I agree with the submission of counsel for the defendants that by its very composition the panel was not biased against the plaintiff and heard him as well as other witnesses without fear or favour."

In the above excerpt, the learned trial Chief Judge made two important findings of fact, firstly, that the first arm of the principle of natural justice was not violated in that there was no proof of bias against the panel of inquiry and secondly, that the second arm of the rule of natural justice had not been contravened as the appellant was given a hearing. I am prepared to agree with him with respect to the second finding. There is overwhelming evidence that the appellant was given a fair hearing. In his evidence under cross-examination, the appellant admitted that he was invited to give evidence before the panel of inquiry and he testified on the 14th April 1987 although according to him, he was not allowed to cross-examine all the people who made allegations against him. He further admitted submitting a memorandum to the panel of inquiry. It must be borne in mind that the panel of inquiry was acting in an administrative capacity. It was not taking evidence on oath and so there was no question of the right to cross-examine witnesses. In the case of Baba v. Nigerian Civil Aviation Training Centre, Zaria AND Anor.(1991) 5 NWLR (Pt. 192) 388 at 424, the Supreme Court in discussing the observance of fair hearing by an administrative body had this to say:-

"In the Afini panel, the appellant was not on trial. No one was yet on trial. This is obvious from the terms of reference, exh. G, and the report exh. ‘E’. In such a proceeding the need for a hearing is satisfied by an opportunity to make written representation to the investigating body. See on this, R. v. Judge Ampellat (1915) 2 K.B. 223; R. v. Housing Appeal Tribunal (1920) 3 KB 334; Local Government Board v. Arlidge (1915) A.C. 120. Indeed, in Miller v. Minister of Health (1946) K.B. 626, it was held that at that stage, the administrative body could get information from other sources and was not obliged to disclose it to the person to be affected by it although it might be prejudicial to his own case."

As stated earlier, the panel of inquiry was acting in an administrative and not in a judicial or quasi-judicial capacity. It was not concerned with the determination of one’s civil rights and obligations in the context of section 33 (1) of the 1979 constitution. The duty of the panel was merely to explore or investigate the facts with no intention or power to decide. The essential thing is that the panel gives a fair opportunity to the person to be affected to present his own side of the case. And that is satisfied by an opportunity to make representation whether written or oral. See Adedeji v. Police Service Commission (1967) 1 All NLR 67; Lagunju v. Olubadan in Council (1952) 12406; Adigun v. Attorney General Oyo State (1987) 1 NWLR (Pt. 53) 678. If therefore, as alleged by the appellant, he was not allowed to cross-examine witnesses who testified against him (which is not conceded), then by his submission of a memorandum to the panel of inquiry, he was accorded an opportunity of being heard. In regard to the first finding on the issue of bias, I am unable to agree with the court below. The appellant alleged bias against members of the panel. In his evidence-in-chief, he said concerning the chairman of the panel on p.156 line 14 et seq of the record as follows:-

"Chief E.B. Udo (Chairman) was biased, prejudiced, malicious against me. In his utterances and actions, he said he graduated over 20 years ago but was never made a Permanent Secretary or a General Manager of the Government. That it was the first Military Government (sic) Navy Captain Edet Akpan Archibong from my local government Itu who demoted him from the post of Permanent Secretary to that of Secretary Administration and Finance. That he has been promised a position as a General Manager and also the very quarters I was living, if he succeeded to flush me out of the newspaper corporation. He, further, while the panel was still on, addressed the press and the staff of newspaper corporation and prejudged me as the man who (sic) wielding power to the detriment (sic) as was carried in the Sunday Chronicle of July 1983. This is the newspaper – Mr. Obot has no objection – exh. ‘4’

In exh. 4 which is the publication in the front page of Sunday Chronicle of 1st July, 1984, captioned ‘Probe panel advises chronicle staff’, it was stated inter alia, thus:

"Workers of the Cross River State Newspaper Corporation have been advised to learn from the revelations of the probe panel currently investigating alleged cases of administrative and financial mismanagement in the corporation. The chairman of the panel, Chief E.B. Udoh gave the advice last Wednesday in an address which signaled the end of the public hearing of the panel ... Chief Udoh pointed out that the startling revelations made during their investigation were examples of indiscipline and abuse of office prevalent in the society. The panel chairman remarked that the administration of the General Manager now on leave Mr. A.U. Udoh was a typical situation of where a man wields power to the detriment of his fellow man"

Despite the above testimony of the appellant, the newspaper publication exh. 4, there was no evidence by the defence in rebuttal of the damaging statement credited to the chairman of the panel of inquiry. It is settled law that where evidence of a witness is not inadmissible in law, uncontradicted and unchallenged, a court of law can act on it and accept it as a true version of the case he seeks to support. Iriri v. Erhurhobara (1991) 2 NWLR (Pt. 73) 252 at 275. In his judgment the learned Chief Judge made no reference to exh. 4. He merely stated that the facts, presumably referring to the oral testimony of the appellant alleging bias against the chairman of the panel of inquiry were not pleaded. With much respect to the learned chief Judge, the facts testified to were pleaded in detail in paragraph 6 of the appellant’s statement of claim and cannot be disregarded on the ground that evidence led is not supported by the pleadings. I am of the view that the court below did not properly evaluate the evidence under consideration. Where a trial court fails in its appraisal of evidence and the appellate court is in as good a position as the trial court to reappraise such evidence and make appropriate findings thereon, it will do so instead of ordering a retrial; See Tinubu v. Khalil AND Debbo Trans.Ltd (2000) NWLR (Pt. 677) at 183; Fashanu v Adekoya (1974) 6 S.C. 83; Nneji v. Chukwu (1988) 10 NWLR (Pt. 81) 184. As earlier stated, bias or the likelihood of it may arise from pecuniary or any other type of interest. Such other interest may arise from personal relationship with one of the parties to the case or may be inferred from his conduct or utterances during the hearing of the matter. In discussing the test of real likelihood of bias the Supreme Court in the case of Abiola v. Fed. Republic of Nigeria (1995) 7 NWLR (Pt. 405) p1 at pp23, 24, had this to say:-

"The courts have laid down many times, where the conduct of a Judge or tribunal is impugned, that they are not concerned with the question whether an adjudicator was in fact biased – See Allison v. G.M.E (1894) 1 Q.B. 750 at page 758; R. v. Queen’s County Justices (1908) 2 I.R. 285 at 306; R.V. Halifax Justices Ex. Parte Robinson (1912) 76 J.P 233 at pp 234-235; R. v Caenarvan Licensing Justices Ex parte Benson (1948) 113 J.P 23 at page 24 and R. v. Barnsley Licensing Justices (1960) 2 Q.6. 167 at 187. The reason for this attitude of the court is that it would be unseemly for the court to purport to pry into the state of mind of any judicial officer – See 47 Law Quarterly Review at pp 407 – 408.

Where even the evidence adduced has posited strongly to the inference that an adjudicator was in fact biased, the courts have confined themselves to determining whether a likelihood of bias has been established. The question is always answered by inference drawn from the circumstances.

The test of a real likelihood of bias which the courts have applied is based on the reasonable man who is fully apprised of the facts involved. Thus, in the case of Metropolitan Properties C (F.G.C) Ltd v. Lannon AND Ors (1968) 3 All ER 304; Lord Denning MR remarked as follows on page 310 thereof-

".. in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be who sits in judicial capacity. It does not look to see if there was real likelihood that he would or did in fact favour one side at the expense of the other.

The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right–minded persons would think that in the circumstances there was a real likelihood of bias on his part then he should not sit. And if he does sit, his decision cannot stand See R. v. Huggus (1895-99) All E.R. Rep.914. (1895) 1 Q.B.563; R. v. Sunderland Justices (1901) 2 K.B. 357 at page 373 per Vaughan Williams L.J. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough see R. v. Camborne Justices ex parte Pearce (1954) 2 All E.R. 850, (1955) 1 Q.B. 41 at pp 48-51; R. v. Nailsworth Licensing Justices exparte Bird (1953) 2 All E.R. 652. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would or did favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking ‘the Judge is biased." (Italics supplied)

Applying the above test to the facts and circumstances of this case, it is my view that the chairman of the panel of inquiry, by his utterances at the proceedings of the panel and the newspaper publication exhibit 4 concerning the appellant had opened his mouth too wide such that a reasonable person present at the enquiry and hearing those utterances would have formed the impression that the panel of inquiry was biased against the appellant. Appellate courts ought not to interfere with findings fact of the trial court which had the unique opportunity of seeing and hearing the witnesses give evidence and observing their demeanour in the witness box. There are however exceptions to this rule one of which is that where such findings are in fact inference from findings properly made, the Court of Appeal is in as good a position as the trial court to come to a decision. See Chief Frank Ebba v. Chief Warri Ogodo (2000) 17 WRN 95; (1984)1 SCNLR 372; (1984) 4 S.C. 84 at 98; Fabunmi v. Agbe (1985) 1 NWLR (Pt. 2) 299 at 314; Fatoyinbo v. Williams (1956) SCNLR 274; (1956) FSC 87.

An appellate court will also interfere with the findings of fact where such findings are perverse. A decision is said to be perverse (a) when it runs counter to the evidence or (b) where it has been shown that the trial court took into account matters which it ought not to have taken into account or shuts its eyes to the obvious or (c) when it has occasioned a miscarriage of justice; See Incar Ltd. v. Adegboye (1985) 1 NWLR (Pt. 8) 453 and Ramonu Atolagbe v. Shorun (1985) 1 NWLR (Pt. 2) 360; (1985) 4 S.C. (Pt. 1) 250 at 282. It is my view that the appellant has established a case of bias against the panel of inquiry and the finding to the contrary by the court below is perverse. The corollary is that the proceedings and findings and recommendation of the panel of inquiry are null and void.

Still on natural justice, another issue highly contested in this appeal is the jurisdiction of the panel to entertain the subject-matter of its terms of reference. By section 33(4) of the 1979 Constitution, it is provided that whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal. Following from this, learned counsel for the appellant had contended that as the terms of reference of the panel of inquiry included an allegation of crime against the appellant, the panel was without jurisdiction to entertain it. This proposition was restated recently by the Supreme Court in the case of Military Government of Imo State v. Nwauwa (1993) 2 NWLR (Pt. 490) 625 at 706 where it held:-

"It is well settled that once a person is accused of the commission of a criminal offence, he must only be tried by a court of law established under the constitution where the complaints of his prosecutors can be ventilated in public in accordance with the law and where his constitutional right of fair hearing would be assured. No other tribunal, investigating panel or committee will do; See D.O.G. Sofekun v. Chief N.O.A Akinyemi AND Ors. (1981) 2 NMLR 135; (1980) 5-7 S.C.1 at 18. Denloye v. Medical and Dental Practitioners Disciplinary Committee (1968) 1 All NLR 306; Federal Civil Service Commission v. J.O. Laoye (1989) 2 NWLR (Pt. 106) 652. Accordingly, the panel was incompetent to ‘try’ as it were the respondent and to find him ‘guilty’ on criminal charges. The determination of the guilt or innocence of any person accused of the commission of a criminal offence is within the exclusive jurisdiction of a court of law constituted in the manner prescribed under the Constitution of the Federal Republic of Nigeria, 1979. It seems to me that what the state government should have done was to refer the criminal allegations of misappropriation of sundry public funds to Nigeria Police for investigation and prosecution if necessary but not to vest the panel with any authority to deal with the same."

If in the instant case, the terms of reference of the panel of inquiry included allegations of crime against the appellant, then findings thereon would be declared null and void but that may not necessarily nullify the findings in respect of the non-criminal allegations which could be severed to sustain the dismissal of the appellant. As contained in the government white paper exh. 8, the terms of reference of the inquiry are as follows:-

(i) To investigate allegation of tyranny, tribalism and mismanagement against the general manager in particular and management in general in order to ascertain the truth about each allegation and apportion responsibility thereof.

(ii) To investigate the personnel practices and management in the corporation.

(iii) To investigate the financial management of the corporation, identify short-comings in financial procedures, practices, revenue generation, loans, expenditures patterns and economics and make necessary recommendations to place the corporation on a sound financial basis.

(iv) To investigate the production quality and circulation of the Nigerian Chronicle newspapers and make appropriate recommendations."

On a careful examination of the above terms of references as considered, I am unable to say that any of these alleges the commission of a crime against the appellant. Consequently the contention of the appellant cannot be sustained.

Another issue agitated in this appeal is the question of the burden of proof which the appellant alleges the court below wrongful placed on him without regard to the pleadings. It was contended that an averment that "the defendant denies paragraph 5 of the statement of claim and will put the plaintiff to the strictest proof thereof" is not a proper traverse but an admission of facts purportedly traversed on the authority of Messrs Lewis AND Peat (N.R..I) Ltd. v. Akhimen (1976) 3 S.C. 175. With respect to learned counsel to the appellant, I can find no evidence of misplacement of burden of proof on the appellant. Whereas the defendant is expected to deny every material averment in the statement of claim expressly or by necessary implication, he is not deemed to have admitted a point if it is clear from his statement of defence read as a whole that he did not intend to admit the facts; see Pan Asian African Co.Ltd. v. National Insurance Co. (Nig) Ltd. (1982) 9 S.C. 1 at 48. At any rate, it must be borne in mind that the principal reliefs sought by the appellant are declaratory in nature. The court does not grant declarations of right either in default of defence or indeed on admissions without hearing evidence and being satisfied by such evidence. See Bello v. Emeka (1981) 1 S.C. 101; Motunwase v. Sorungbe (1988) 4 NWLR (Pt. 92) 90; Ogunjumo v. Ademola (1995) 4 NWLR (Pt. 389) 254 at 269; Ogundairo AND Ors. v. Okanlawon AND Ors.(1963) 1 All NLR 358. The conclusion I have reached with regard to the first issue formulated by me which I have been discussing, is that though the proceedings and terms of reference of the panel of inquiry, were in keeping with the principles of natural justice, the panel of inquiry was manifestly biased against the appellant resulting in the nullification of its proceedings.

I will now advert to my second issue for determination which poses the question whether the appellant’s claims were rightly dismissed on the ground of non-joinder of parties. Before considering this, it is pertinent to observe that the question of locus standi of the appellant was raised in ground 5 of the grounds of appeal which without its particulars reads:-

"5. The learned trial Chief Judge erred in law when in his judgment he dismissed the declaratory reliefs alleging that because the plaintiff did not sue in representative capacity he lacked the locus standi to claim the declaratory reliefs as per his writ of summons/statement of claim because the granting of the said relief would affect persons who were not made parties to the suit..."

A careful perusal of the appellant’s brief of argument shows that no issue was formulated on the above ground 5 nor arguments advanced thereon. A ground of appeal on which an appellant failed to formulate an issue is discussed (sic) [deemed] to have been abandoned. Authorities are legion but suffices it to refer to Modupe v. State (1988)4 NWLR (Pt. 87) 130 at 138; Olowosago v. Adebanjo (1988) 4 NWLR (Pt. 88) 275 and Ogundele v. Adeleye(1992) 8 NWLR (Pt. 260) 409. That being the case, ground 5 of the grounds of appeal is hereby struck out. On the question of non-joinder the court below on page 234 of the record line 13 et seq had this to say:-

"What I think further weakens the plaintiff’s claim in this regard is the creation of Akwa Ibom State. It is known that the dismissal of the plaintiff took place in 1984. From 1984 to 1987 when Akwa Ibom State was created out of the Cross River State, the Cross River State Government would normally be responsible to the plaintiff, all things being equal.

With the creation of the State, all Akwa-Ibom State indigenes in all departments including newspaper corporation were disengaged. It therefore seems to me that even if the plaintiff were to continue to be the General Manager of the corporation, he would have ceased to do so on the creation of Akwa – Ibom State.

This finding and the fact that the plaintiff ceased even if he was still in service to be the staff of the 1st and 2nd defendants but that of Akwa-Ibom State is detrimental to his case. That the Akwa Ibom State is not joined as a party and that the court lacks the jurisdiction to hear this matter has not been countered by the plaintiff and must be seemed to have admitted:-

Green v. Green (1987) 7 S.C.N.J.212; See also A.G. Lagos State v. Dosumu (1989) 3 NWLR (Pt. 111) 552 held 2."

In the above excerpt the court below held, inter alia, that the non-joinder of Akwa-Ibom state in the suit was fatal to appellant’s case as the court lacked the jurisdiction to entertain it. This issue is raised in the appellant’s 3rd issue for determination and the contention is that if the Akwa Ibom State Government was a necessary party it was the responsibility of the respondent to have timeously taken steps to have it joined as a co-defendant. With respect to the court below the non-joinder of Akwa Ibom state in the suit was not an issue in the pleadings. That being so, that issue cannot at close of those pleadings be, so to speak invented by the court below: See Overseas Construction Co. (Nig.) Ltd v. Creek Enterprises (Nig) Ltd. (1985) 12 S.C. 158, 192-193. The Supreme Court in the case of Babayegu v. Asharu (1998) 1 LRCN 4225 at 4239 reiterated that the only reason which could make a person a party to an action is that he should be bound by the result of the action and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party. In the case of Leonard Okoye AND Ors. v. Nigeria Construction and Furniture Co. Ltd AND Ors.(1991) 5 L.R.C.N. 1547, the Supreme Court further held:-

".. In my view, failure to join a necessary party is an irregularity which does not affect the competence or jurisdiction of the court to adjudicate on the matter before it. However the irregularity may lead to unfairness which may result in setting aside the judgment on appeal."

An action cannot be defeated on the grounds of non-joinder or mis-joinder. It is settled law in all the courts that where an action has not been properly constituted whether as regards joinder of the causes of action or as to parties, it has been procedurally beneficial and prudent to raise objection to the defect in the action before or at the hearing of the action: See Kalu v. Odili (1992) 5 NWLR (Pt. 240) 130. An objection not taken at the earliest opportunity may be regarded as waived: Ayankoye v. Olukoye (1996) 35 LRCN 28; Obeombe v. Wemabod Estates Ltd (1977) 5 S.C. 115. Another glaring error in the passage of the judgment of the court below quoted above, is that having held that it lacked jurisdiction to entertain the suit the court nevertheless proceeded to dismiss it. The only order that the court can make if it comes to the conclusion that it has no jurisdiction, or that the plaintiff has no locus standi is an order striking out the case: See Oloriode v. Oyebi (1984) 5 S.C. 132; Tinubu v. Khalil AND Dibbo Trans. Ltd (2000) 11 NWLR (Pt. 677) 121 at 182; Okoye v. Nigerian Construction AND Furniture Co. Ltd. (1991) 6 NWLR (Pt. 197) 501; Ejuku v. Leko (1994) 4 NWLR (Pt. 340) 625; Gombe v. P.W. (Nig) Ltd. (1995) 6 NWLR (Pt.402) 402; Yakubu v. Governor of Kogi State (1997) (Pt. 511) 66. In answer therefore to the question under consideration, I hold the court below was in grave error to have dismissed the appellant’s suit on the grounds that it lacked jurisdiction on the ground of non-joinder of Akwa-Ibom State as a co-defendant.

It now remains to consider the last issue for determination which is whether the appellant is entitled to the reliefs prayed for in paragraphs 15 and 16 of his 6th amended statement of claim. One of those reliefs set out in the introductory part of this judgment is a declaration that his dismissal by the respondents was null and void and by implication specific performance of contract of service. As a matter of general principle of law, specific performance of a contract of service will not be ordered by the court where the master brings the master servant relationship to an end; see Francis v. Municipal Council of Kuala Lumpvr(1962) 3 All ER 633; Chief Okenla v. J.M. Beckley and Ors (1971) 2 All N.L.R. 174. There are however recognized exceptions as restated by the Supreme Court in the case of Chukwmah v. Shell Petroleum (1993) 4 NWLR (Pt. 289) 512 at 537 thus:-

"The general law is that the court will not grant specific performance of a contract of service. Therefore, a declaration to the effect that a contract of service still subsists will rarely be made. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court. There is a long line of cases in support of this proposition: Olaniyan and Ors v. University of Lagos (1985) 2 NWLR (Pt. 9) 559; Shitta-Bay v. Federal Public Service Commission (1981) 1 S.C. 4; Enwerem v. African Continental Bank Ltd. (1978) 4 S.C. 99; Francis v. Kuala Lumpvr Councillors (1962) 3 All E.R. 633; Hanson v. Radcliff U.D.C (1922) 2 CH. 507. Such special circumstances have been held to arise where the contract of employment has a legal or statutory flavour thus putting it over and above the ordinary master and servant relationship. Equally so, where a special legal status such as a tenure of public office is attached to the contract of employment."

The appellant in paragraph 16 of the statement of claim, prayed for special and general damages. In law, the normal measure of damages recoverable by an employee whose contract has been wrongly terminated is the amount he would have earned under the contract for the period until the employer could have lawfully terminated it, less any amount he could reasonably be expected to earn in other employment. However, where the employer has a right to terminate the contract before the expiry of the term, damages should be assessed only up to the earliest time at which the employer should validly have terminated the contract: See Ihezuchukwu v. University of Jos (1990) 4 NWLR (Pt. 146) 598 at 610; Nigerian Produce Marketing Board v. Adewunmi (1972) 1 All NLR (Pt. 2) 870, Western Nig. Development Corporation v. Abimbola (1966) NMLR 31 at 382; International Drilling Co. (Nig.) Ltd. v. Ajijola (1978) All NLR 97. It was held in the cases of Shitta-Bay v. Federal Public Service Commission (1981) 1 S.C 40; Olaniyan AND Ors v. University of Lagos AND Anor (1985) 2 NWLR (Pt. 9) 599, that where an employee’s service is protected by statute and his employment was wrongfully terminated, he would be entitled to re-instatement in his office and in addition damages representing his salaries during the period of his purported dismissal.

The question that arises is whether the appellant’s appointment is protected by statute. There is authority for the view that employment in a body or company does not have statutory flavour merely because government has shares in it. It does not matter whether government has majority share in that company nor does it matter that it is a statutory corporation. See Oguike v. Natural Steel Development Authority (1976) NMLR 123. The fact that the other contracting party is a creature of a statute does not elevate the employment of its employees to that with a statutory flavour; Fakuade v. O.A.U.T.H (1993) 5 NWLR (Pt. 291) 43; Ideh v. University of Ilorin (1994) 3 NWLR (Pt. 330) 81. An employment is said to have a statutory flavour when the appointment has been protected by statute: Imoloame v. W.A.E.C. (1992) 9 NWLR (Pt. 265) 303. There is an employment protected by statute when the appointment and termination are governed by statutory provisions as was the case of Olaniyan v. University of Lagos supra and Shitta-Bay v. Federal Civil Service Commission. Except in employment governed by statute wherein procedure for employment and discipline of an employee are clearly spelt out, any other employment outside the statute is governed by the terms under which the parties agreed to be master and servant.

In regard to the appellant’s conditions of service with the 1st respondent corporation, the first paragraph of the appellant’s letter of appointment exh. 1 reads:-

"I am pleased to inform you that on the recommendation of the Board of the Cross River state newspaper Corporation, the Governor-in-Council has approved your appointment as General Manager of the newspaper corporation with effect from 1st July 1983, on salary grade level 16 (N13,506) per annum. Other conditions of service are as specified in the relevant advertisement for the vacancy and the law establishing the corporation as may be amended from time to time."

The Nigeria Chronicle of February 1983 exhibit 2 contains on page 11 thereof the advertisement for the vacancy. Paragraph 4 of the advertisement deals with the conditions of service and states that:-

"the post is pensionable and in the case of new entrant into the service, appointment would be on probation for two years..."

The appellant pleaded in paragraph 14 of the statement of claim section 2(1) of the Statutory Corporation (Miscellaneous Provisions) Edict No. 2 of 1977 the provisions of which he quoted on page 34 of his brief thus:-

"Section 2(1) The power of appointment, confirmation of appointment, appointment on promotion, posting, transfer, dismissal or any other disciplinary control over the person who is by whatever known (sic) or howsoever described the chief executive of a corporation to which this edict applies shall be exercised by the Military-Governor-in Council on the recommendation of the board."

In addition to all the above and contrary to the respondent’s contention, the appellant in paragraph 14 of his statement of claim pleaded the Cross River State Newspaper Corporation Staff Conditions of Service 1983, a booklet which was tendered and admitted in evidence as exh. 12. It shows that it was made pursuant to section 9 of the Cross River State Newspaper Law No. 17 of 1976. Chapter 6 thereof makes provisions for disciplinary procedures. In the light of the foregoing, I do not think it can seriously be contended that the appellant’s employment has no statutory backing. It is an employment statutorily flavoured that invested him with tenure and legal status. Both parties essayed on the legality or otherwise of the dismissal of the appellant in the context of section 2(1) of Edict No. 2 of 1977 with particular reference to whether the dismissal was recommended by the board of the corporation. That issue it appears was not canvassed in the court below nor was it ruled upon by that court and as such it is a fresh point of law that cannot be entertained on appeal without the fulfilment of certain conditions. These conditions include the point of law raised must be substantial, no further evidence could be adduced which will affect the fresh issue, the refusal of leave to argue the fresh issue will occasion a miscarriage of justice – See Plateau Publishing Co. Ltd.AND 2 Ors v. Chief Chuks Adolphy (1986) 4 NWLR (Pt. 34) 205 at 223; Samuel Fadiroa AND Anor v. Festus Gbadebo AND Anor. (1978) SC 219 at 248; Abinabina v. Enyimadu (1953) 12 WACA 171; Ejiojodomi v. Okonkwo (1982) 3 SCNLR 135 at 138. A fresh issue not raised in the court below will not be raised in the Court of Appeal except with the leave of the Court of Appeal and such issue will not necessitate the calling of fresh evidence. See Apena v. Barclays Bank Nigeria Ltd. (1977)1 SC 47. Since no leave was sought and obtained to canvass the point under consideration, it cannot be entertained.

The appellant having successfully brought his employment within the exception to the general rule that prohibits specific performance for a contract of service and since I have held that the findings and recommendations of the panel of inquiry as well as the appellant’s dismissal based on them are null and void, I am of the strong view that the appellant is entitled to the declaratory reliefs as well as arrears of salaries and allowances for the period he was purportedly dismissed. To this end, the appellant who was 43 years old in 1984 when he was dismissed claimed arrears of salaries and other entitlement up to the time he was due to retire at 60 which incidentally coincide with this year 2001. He also claimed gratuity. In considering the period for which arrears of salary and leave grants are payable, I bear in mind the passage of the judgment at p231 of the record which reads:

"From 1984 to 1987 when Akwa Ibom State was created out of the Cross River State, the Cross River State Government would normally be responsible to the plaintiff all things being equal. With the creation of the State, all Akwa Ibom State indigenes in all departments including the newspaper corporation were disengaged. It therefore seems to me that even if the plaintiff were to continue to be the General Manager of the corporation, he would have ceased to do so on the creation of Akwa Ibom State."

Against that findings, there is no appeal. If a finding or decision of a trial court whether on an issue of fact or law is not challenged in an appeal to the Court of Appeal, such a finding or decision rightly or wrongly stands and must not be disturbed: See Nwabueze v. Okoye (1988) 4 NWLR (Pt. 91) 664; Oshodi v. Eyifuemi (2000) 13 NWLR (Pt. 684) 332; Timitimi v. Amabebe (1953) 14 WACA 374, 377, Aladagbemi v. Fasanmade (1988) 3 NWLR (Pt. 81) 129. Guided by these authorities, I am persuaded to hold that the appellant’s entitlements should be reckoned from the date of his purported dismissal to 1987 when Akwa Ibom State was created. That amount was not computed by the court below. But where an appellate court is in as good a position as the trial court to assess an item of special or general damages, the appellate court will be entitled to assess such damages and avoid remitting the case unnecessarily to the trial court for determination of the issue where the trial court failed to assess such damages. Se Ubani Ukoma v. Nicol (1962) 1 SCNLR 176; (1961-62) Vol. 2 NSCC 73; Broadline Ent. Ltd. v. Monterey Maritime Corporation (1995) 9 NWLR (Pt. 41) 31. In Overseas Construction Co. Ltd.v. Creek Enterprises Ltd.(1987) 3 NWLR (Pt. (Pt. 13) 407, the Supreme Court held that where the trial court made no assessment, an appellate court can make the assessment itself if there exists on the record enough evidence on which assessment can be made. See also Dumbo v. Idugboe (1983) 1 S.C.N.L.R. 29. In paragraph 10(5) of his statement of claim, the appellant pleaded and this was supported by his evidence on oath at p.176 of the record that his salaries and leave grants were:-

"July to December 1984 salary and leave pay -N6,465.50

In 1985 salary and leave pay was N14,631.50

In 1986 salary and leave pay was 14,631.50

In 1987 salary and leave pay was 14,631.50."

The total amount for the period is N50,360.

The evidence was not controverted and this must be accepted as true for as the law stands where evidence given by a party to any proceedings is not challenged by the opposite side who had the opportunity to do so, it is always open to the court seized of the matter to act upon such unchallenged evidence before it. See Isaac Omorogbe v. Daniel Lawani (1980) 3-4 SC 108 at 117; Odulaja v. Haddad (1973) 11 SC 357; Nigerian Maritime Service Ltd. v. Alhaji Bello Afolabi (1978) 2 S.C 79 at 81 and Adel Boshali v. Allied Commercial Exporters Ltd. (1961) 2 SCNLR 322; (1961) All N.L.R. 917. By chapter 11 page 58 of exhibit 12 the staff conditions of service, the appellant who as at 1987 had put in 10 years service is entitled to gratuity at the rate of 100% of his final salary which stood at N13,506 and this sum added to N50,360 amounts to N63,866.

Consistent with the foregoing, I make the following orders. The appeal is allowed. The judgment of the court below is set aside. In its place, judgment is entered in favour of the appellant for a declaration that the findings and recommendations of the panel of inquiry are null and void and that the dismissal of the appellant and the imposition of a surcharge on him based on the said findings and recommendations are null and void. The appellant is entitled to damages assessed and fixed at N63,866 (Sixty-three thousand, eight hundred and sixty six naira). The sum of N5000 cost is also awarded to the appellant against the respondents.

***CHUWUCHUKWU OPENE, JCA:***

I have read in draft the judgment just delivered by my learned brother Edozie JCA. I agree with him that the appeal is meritorious and that it ought to be allowed. I will only like to comment briefly on the issue of bias. At the trial, exhibit 4 which is a front page publication of Sunday Chronicle of 1st July, 1984 captioned.

"Probe Panel Advises Sunday Chronicle Staff was tendered in evidence and it reads:-"

"Workers of the Cross River State Newspaper Corporation have been advised to learn from the revelations of the probe panel currently investigating alleged cases of administrative and financial mismanagement in the corporation. The chairman of the panel, Chief E.B. Udoh gave the advice last Wednesday in an address which signaled the end of the public hearing of the panel…

Chief Udoh pointed out that the startling revelations made during their investigation were examples of indiscipline and abuse of office prevalent in the society. The panel chairman remarked that the administration of the General Manager now on leave Mr. A.U. Udoh was a typical situation of where a man wields power to the detriment of his fellow man..."

The publication is the statement by the Chairman of the administrative enquiry into the allegation of administrative and financial mismanagement in the Cross River State newspaper corporation, Chief E.B. Udoh and this is in respect of the appellant while the enquiry was still going on, because the report of the enquiry in which the appellant had appeared before the panel had not been submitted to Cross River State Government by then.

I must say that in the determination of a likelihood or bias that the test is not subjective but objective. In other words, it is from the point of view of a reasonable man who happened to be present in the enquiry and watched the proceedings. It must be observed that the moment right minded or right thinking people are of the view that the chairman or the tribunal was biased so much violence is done to the fair hearing principle as entrenched in section 36(1) of the 1999 Constitution of Federal Republic of Nigeria. It cannot be said that from the pronouncement of the chairman that he is not biased. This is because the chairman in his biased mind had closed the frontiers of fair hearing against the appellant that he hates. This is injustice and a chairman of a panel of enquiry should control his mouth and in this case, he did not hide his bias against the appellant. Justice must be rooted in confidence and the confidence is destroyed when right minded people go away thinking.

"The Chairman of the panel or Judge is biased"

See:- Abiola v. Federal Republic of Nigeria (1995) 7 NWLR (Pt. 405); Deduwa v. Okorodudu (1976) 1 SCNLR 135. It is my view that the panel of enquiry was biased and that the appellant was not given a fair hearing and this is a proper case that this court ought to intervene. For these and the fuller reasons given in the leading judgment. I will allow the appeal. I abide by the consequential order made in the leading judgment including the order as to costs.

***SIMEON OSUJI EKPE, J.C.A*:**

I had the privilege to read in advance the lead judgment of my learned brother, Edozie, J.C.A, just delivered and I entirely agree with his reasoning and conclusions. There is no doubt that he has exhaustively dealt with the issues arising in the appeal. However, as a matter of emphasis, I want to add these views of mine on the vital issue of bias. Whenever bias is alleged against a Judge or an inferior tribunal, it is always taken very seriously by the courts because bias destroys confidence on which justice is rooted. In Metropolitan Properties C (FGC) Ltd v. Lannon AND Ors (1968) 3 A.E.R. 304 at page 310 Lord Denning MR had this to say:

"Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking the Judge is biased."

See also Abiola v. Federal Republic of Nigeria (1995) 7 NWLR (Pt. 405) 1 at pages 23 – 24. In the instant case the appellant in his pleadings made allegations of bias against the chairman and some of the members of the panel of inquiry set up by the Cross River State Government to investigate certain allegations against him as the General Manager in particular and the management in general of the Cross River State Newspaper Corporation. In support of his pleadings the appellant gave evidence about the utterances of the chairman at the sessions of the inquiry against the appellant which were in bad taste and tendered exh. 4 which is a publication in the front page of Sunday Chronicle of 1st July 1984 of and concerning the appellant in an address he (the chairman) gave at the end of the public hearing of the panel. There was no evidence by the defence in rebuttal of the damaging statements credited to the chairman of the panel of inquiry. Despite this shortcoming by the defence and in the face of the appellant’s uncontradicted evidence, the learned trial chief Judge (Ecoma C.J) held in his judgment at page 223 of the record thus:

"His (appellant’s) contention in respect of bias did not fill me with confidence to enable me come to the conclusion that there was bias…."

The law is that bias or the likelihood of bias whenever it exists in the proceedings by a court or an inferior tribunal is enough for the proceedings to be set aside as null and void. The question is, what in the eyes of the law amount to such bias or interest that would erode public confidence in the administration of justice by the courts or by an inferior tribunal such as the one in the present case. It is the general principle of law that Magistrates or persons in judicial authority ought to be quite clear of any interest or bias in a case brought before them, but the interest or bias which an applicant can complain of is such interest which amounts to something reasonably likely to influence their minds. There must be not merely a vague and general allegation of bias but the possibility of real bias. See R. v. Sunderland Justices (1901) 2 K.B. 357 at pages 367 – 368.

Where the interest alleged is of pecuniary nature, the law raises a conclusive presumption of bias. There is no doubt that the utterances and the press conference by the chairman of the panel of inquiry published in the Chronicle Newspaper, exhibit 4 were reasonably likely to influence not only the chairman but also other members of the panel of inquiry, and in fact did influence them in the outcome of their investigation. There is also no doubt that with the biased frame of mind of the chairman and members of the panel of inquiry, the appellant was not given a fair hearing. The test of fair hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done in the case. See Isiyaku Mohammed v. Kano N.A. (1968) 1 All N.L.R. 424; Deduwa v. Okorodudu (1976) 9-10 S.C. 329. My conclusion in the instant case is that the panel of inquiry was really biased and its proceedings, findings and recommendations are vitiated by the fundamental vice namely bias.

For the above reasons and the detailed reasons in the leading judgment, I allow the appeal. I also abide by the orders made in the leading judgment.

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