**FEDERAL UNIVERSITY OF TECHNOLOGY MINNA, NIGER STATE AND OTHERS**

**V.**

**BUKOLA OLUWASEUN OLUTAYO**

SUPREME COURT OF NIGERIA

15TH DAY OF DECEMBER 2017

SC. 344/2009

**LEX (2017) - SC.344/2009**

OTHER CITATIONS

2PLR/2017/128 (SC)

**BEFORE THEIR LORDSHIP**

MUSA DATTIJO MUHAMMAD, JSC (Presided)

K. MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC

JOHN INYANG OKORO, JSC

CHIMA CENTUS NWEZE, JSC

EJEMBI EKO, JSC (Read the Lead Judgment)

**BETWEEN**

1. FEDERAL UNIVERSITY OF TECHNOLOGY MINNA – Appellant

2. PROF. TURKUR SA’AD (VICE CHANCELLOR) FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA, NIGER STATE.

3. MALLAM MOHAMMED DATI USMAN (ACTING REGISTRAR) FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA, NIGER STATE

4. A. N. KOLO (THE ACTING SECRETARY) FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA, NIGER STATE UNIVERSITY OF TECHNOLOGY, MINNA, NIGER STATE

AND

BUKOLA OLUWASEUN OLUTAYO – Respondent

**ORIGINATING COURT**

1. COURT OF APPEAL

2. HIGH COURT OF NIGER STATE SITTING AT MINNA (M.S. Zukogi, J., Presiding)

**REPRESENTATION/LAWYERS**

JOSEPH OLUWAROTIMI OJO, Esq with C. A. AKINWALE, Esq, ITE THOMAS AGANTEMI, Esq., TEMITOPE AYODELE-OSUNJIDE, Esq and OLUWOME KOLAWOLE, Esq., - for the Appellants.

BOLA OLOTU, Esq., with CHINENYE ANEKE, Esq., KARINA - for the Respondent.

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

EDUCATION AND LAW:– Suits against educational institutions – Defence based on the limitation imposed under the Public Officers’ Protection Act, POPA – When would be deemed inapplicable – Burden of proof on defendant invoking same – Attitude of court to invitation to liberally interpret the provisions of POPA and other limitations laws

EDUCATION AND LAW – SENATE OF A STATUTORILY ESTABLISHED UNIVERSITY:- Functions of – How determined – Duty of the University authority to follow the prescription of its establishment law - Section 17(1) of the Federal Universities of Technology Act (FUTA), 2004 – Where statute provides a procedure for the discipline students including a right of appeal – Effect of failure to afford the student of same

EDUCATION AND LAW - EXPULSION OF UNIVERSITY STUDENT:- Action on – Defence that action statute barred - How court determines same - Section 2(a) of the Public Officers Protection Act, Laws of the Federation of Nigeria, 2004 construed

EDUCATION AND LAW – EXPULSION OF STUDENT:- Date when cause of action relating thereto is deemed to arise – How determined – Date on letter of expulsion – Whether relevant – Onus of proving date when letter of expulsion brought to the notice of the student – On whom lies – Effect of failure to plead and prove notice to student of the letter

EDUCATION AND LAW – EXAMINATION MALPRACTICE:- Duty of university authorities in the investigation and disciplining of students accused of examination malpractice – Where student cleared by investigating panel SET UP BY THE University – Reversal of by Senate of University without affording the student a right of hearing – Rule against double jeopardy - Validity of reversal of such clearance and subsequent expulsion by the Senate of the University – Attitude of court thereto

EDUCATION AND LAW – DISCIPLINING OF STUDENT:- Right to fair hearing of student thereto – Constitutional basis of – Primacy of the Constitution and the enforcement framework under the Fundamental Rights (Enforcement Procedure) Rules over other ordinary laws, including section 2(a) of POPA

EDUCATION AND HUMAN RIGHTS LAW - FUNDAMENTAL RIGHTS OF UNIVERSITY STUDENTS:- Enforcement of where a Federal Government agent or agency is party to the suit - Court seized with jurisdiction to adjudicate on - Section 46(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) construed

CONSTITUTIONAL LAW AND HUMAN RIGHTS:- Fundamental Rights of University student - Enforcement of where a Federal Government agent or agency is a party to the suit - Court seised with jurisdiction to adjudicate on

CONSTITUTIONAL LAW - CONSTITUTION 1999, SECTION 240:- Jurisdiction of the Court of Appeal as vested by section 240 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) – Whether determined by cause of action

CONSTITUTIONAL AND HUMAN RIGHTS - FUNDAMENTAL RIGHTS - FAIR HEARING - Fundamental right to vis-a-vis other laws - Rights to enforce – Basis and status of

ADMINISTRATIVE AND GOVERNMENT LAW - FAIR HEARING – RULES OF NATURAL JUSTICE:- Essence and purport of - Duty of Administrative Panel of enquiry thereto - Guiding principles to ensure observance thereof when dealing with alleged misconduct and expulsion of University student

ADMINISTRATIVE AND GOVERNMENT LAW - ADMINISTRATIVE ENQUIRY SET UP TO DETERMINE MISCONDUCT AND EXPULSION OF UNIVERSITY STUDENT:- Natural Justice - Guiding principles to ensure fair hearing

**PRACTICE AND PROCEDURE ISSUES**

ACTION - DEFENDANT IN AN ACTION:- Duty on to raise its defence.

ACTION - LIMITATION OF ACTION - EXPULSION OF UNIVERSITY STUDENT:- Action on - How court determines whether statute-barred - Section 2(a) of the Public Officers Protection Act, Laws of the Federation of Nigeria, 2004 construed

ACTION – PARTIES:- Defendant in an action - Duty on to raise its defence.

ACTION LIMITATION LAW - LIMITATION PROVISIONS:- How construed.

COURT - COURT OF APPEAL:- Jurisdiction of as vested by section 240 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) - Operation of – Whether cause of action determines.

EVIDENCE - BURDEN OF PROOF IN A PROCEEDING:- On whom lies - section 132 of the Evidence Act, 2011 considered.

EVIDENCE - EVIDENCE ACT, 2011, SECTION 132:- Burden of proof in proceedings - On whom lies.

EVIDENCE – FACTS:- Where undisputed – Legal effect – Duty of Court thereto

JURISDICTION - FUNDAMENTAL RIGHTS OF UNIVERSITY STUDENTS:- Enforcement of where a Federal Government agent or agency is party to the suit - Court seised with jurisdiction to adjudicate on - Section 46(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) construed.

JURISDICTION - JURISDICTION OF COURT OF APPEAL AS VESTED BY SECTION 240 OF THE 1999 CONSTITUTION:- Operation of - Whether cause of action determines.

JURISDICTION:- Jurisdiction of the Court of Appeal as vested by section 240 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) – How determined

INTERPRETATION OF STATUTE - PUBLIC OFFICERS PROTECTION ACT, LAWS OF THE FEDERATION, 2004, SECTION 2(A):- Construction of

INTERPRETATION OF STATUTES - LIMITATION PROVISIONS:- How construed.

WORD AND PHRASES – LATIN MAXIM – “NEMO JUDEX IN CAUSA SUA”: - Meaning of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The respondent a student of Federal University of Technology, Minna, on allegation of examination malpractice in Chem III, was ordered to appear before the Student Disciplinary Committee (SDC). She was placed on suspension until the final determination of her case. After the SDC sitting, the report of the SDC showed that allegations against her were unfounded. Instead of reinstating the respondent, who had lost a session due to the misunderstanding, the senate of the appellants expelled the respondent from the university without affording her the right to be heard or allowing her the right to exercise her right of appeal as provided by sections 17(1), 17(2) and 7(6) of the Federal University of Technology Act, (FUTA), 2004.

The respondent instituted an action at the High Court of Niger State to enforce her fundamental right to a fair hearing as guaranteed by section 36(1) of the 1999 Constitution and enforceable under section 46(1) of the same Constitution, and Fundamental Rights (Enforcement Procedure) Rules. The trial court dismissed the case after trial. Dissatisfied, the respondent appealed to the Court of Appeal, which court allowed the appeal and declared the respondent’s suspension, null and void.

Dissatisfied, the appellants appealed at the Supreme Court where they challenged the decision of the Court of Appeal on grounds that the trial court lacked requisite jurisdiction to adjudicate on an action instituted against a Federal Government Agency and that the action was statute-barred vide provisions of the Public Officers Protection Act, section 2(a) thereof.

**DECISION(S) APPEALED AGAINST**

The Court of Appeal entered judgment, setting aside the decision of the trial court that dismissed the Respondent’s claims and consequently declared null and void the suspension and expulsion of the respondent from the Appellant University, vide exhibits D and E.. Dissatisfied, the Appellant appealed to the Supreme Court.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

1. Whether the lower court had jurisdiction to entertain an appeal from a case that was instituted against a Federal Government agency in a State High Court; and

2. Whether the lower court had jurisdiction to entertain an appeal from a case that was instituted against Public Officers well outside the 3 months statutory period.

*BY RESPONDENT:*

[The Respondent adopted the issues formulated by the Appellant].

DECISION OF THE SUPREME COURT

1. Section 46(1) of the 1999 Constitution (ipssma verba with section 42(1) of the 1979 Constitution) clearly, vests concurrent jurisdiction in both the Federal High Court and the State High Court in the matters for the enforcement of a citizen’s fundamental right. A High Court in section 46(1) of the Constitution and FREP (Fundamental Rights Enforcement Procedure) means and includes the Federal High Court and or a State High Court.

2. Both the Federal High Court and the High Court of a State have concurrent - jurisdiction. An application may therefore be made either to the judicial division of the Federal High Court in the State or the High Court of the State in which the breach occurred, is occurring or about to occur. That is without prejudice to whether any of the parties is either the Federal Government or an agent or agency of the Federal Government.

3. The principles of natural justice, demand that a student accused of examination misconduct and expelled for that misconduct must be afforded an opportunity by the body statutorily empowered to take such decision, either judicially or quasi-judicially, to:

a. know the allegation against him;

b. be present when the case against him is heard, and

c. not only to state his side of the allegation but also to contradict the case against him by the cross-examination of the witnesses called by his accusers.

4. The undisputed facts clearly, established that the Senate of the University, in their decision to expel the respondent for examination misconduct acted capriciously and arbitrarily and thereby violated the respondent’s right to fair hearing, not only in the context of audi alteram partem (i.e. denying her an opportunity to be heard) under section 36(1) of the Constitution, but also in terms of the right against double jeopardy, on the basis of her plea of autrefois acquit (the exoneration or acquittal) by the SDC, guaranteed by section 36(9) of the Constitution.

5. The student showed by evidence that she was administratively tried her and acquitted her on the same allegation of examination misconduct which the Senate of the same University “convicted and sentenced” her for.

6. It is erroneous to believe that the cause of action at the trial court determines the substantive jurisdiction of the appellate court. The cause of action does not determine the substantive jurisdiction of the Court of Appeal vested by section 240 of the Constitution. The Court of Appeal is not a court of first instance. It is an appellate court. What was before it was the complaint that the decision of the trial court was either wrong or right. What the appellants sought for at the lower court, was a remedy, upon review, to correct the error(s) committed by the trial court and give the correct decision as regards the issues at the trial. An appeal is not a new action, but a continuation of the matter which is a subject of the appeal; and that it is a complaint against the decision of the court below. It amounts to a complete review of the proceedings and the decision appealed against.

9. In the proceedings at the court of first instance, culminating in the appeal at the lower court, the appellants filed no defence or counter-affidavit. The facts constituting the cause of action were deemed taken as admitted and therefore established against the appellants. The basic principle of our adversarial jurisprudence is that it is the duty of the defendant to raise his defence. The trial court owes the defendant no duty to raise a defence to the claims against him. Doing that offends section 36(1) of the Constitution and the principles of natural justice, particularly, the rule that the court or tribunal established by law shall be “constituted in such a manner as to secure its independence and impartiality”. This injunction is what, in common law, is expressed as nemo judex in causa sua. The rule prohibits or restrains the judge or court of law from being a judge in his own cause in order to actualise his or its impartiality.

10. The appellants contended that section 2(a) of the Public Officers Protection Act Cap P41 Laws of the Federation of Nigeria, 2004 (POPA) has rendered the respondent’s cause of action statute-barred. In the first place, the appellants did not raise this special defence at the trial. They did not file any defence or counter affidavit to challenge the facts which the respondent’s cause of action was predicated. The averments in the supporting affidavit of the respondent remain unchallenged, and are consequently taken or deemed to have been admitted. The appellants have not pointed at or shown on what legal evidence have they situated their invocation of section 2(a) of POPA.

11. The appellants may have obtained leave to raise and argue this fresh issue about the suit or claim of the respondent at the trial court being statute-barred by the operation of section 2(a) of POPA. They, however, did not obtain any leave to adduce fresh or additional evidence. The operational facts in this case are those facts in the claim of the respondent as contained in her supporting affidavit.

12. The appellants cannot insist on the cause of action accruing from the date the letter of expulsion to the student was written without showing when the letter was in fact delivered to her, or when the fact of her expulsion was brought to her knowledge. The computation of the 3 months, for purposes of the limitation imposed by section 2(a) of POPA starts from the date the cause of action accrued. In this case, it should start from when the expulsion or the letter of expulsion, exhibit E, was either brought to the knowledge of the respondent or from the date the letter exhibit E was delivered. It is, therefore, not enough that the letter was written.

13. For the appellants to successfully plead the three month limitation, on the basis of their letter of expulsion, they must also prove the date the said letter was delivered to the respondent and that she became seised of the fact and knowledge of her expulsion from thence. The burden of proving their defence or objection founded on section 2(a) of POPA is on the appellants to discharge. This evidential burden they have failed to discharge. They failed to prove the date the cause of action accrued to the respondent. This, of course, is fatal to the appellants’ case.

14. Limitation provisions, like penal provisions, take away or derogate from vested rights. They have to be construed strictly. The right of the respondent vested by law cannot just be set aside by the mere ipsi dixit of the appellants.

15. The respondent’s right to enforce her fundamental right to fair hearing is one specially vested by section 46(1) of the 1999 Constitution and the Fundamental Rights (Enforcement Procedure) Rules.The right to enforce fundamental rights stands above the ordinary laws, including section 2(a) of POPA; which in my firm view is inapplicable in the circumstance.

16. The expulsion resulting in this litigation culminating in this appeal, was itself an unwarranted and capricious violation of the respondent’s right to fair hearing. The appellants had all the opportunity to make amends to alleviate costs. They chose not to. Upon proper counselling, which they never had unfortunately, this expensive litigation was avoidable. The appellants, however, chose the path of this ignoble and invidious litigation, hoping, probably, in wishful thinking that their outrageous decision to expel the respondent would by some devious judicial accident or default be ratified.

**MAIN JUDGMENT**

**EKO JSC:** (DELIVERING THE LEAD JUDGMENT):

The respondent was, at all times material to this appeal, a student of the Federal University of Technology, Minna, particularly in the Department of Agric Engineering within the School of Science and Engineering Technology. In May 2004, she sat, as she claims, for the 2003/2004 First Semester Examination in Chem.III. She claims also that before the examination, she signed in, and later signed-out after the examination. The custom is that no student must leave the examination hall, after the examination, until he had duly submitted his answer sheets, and had mandatorily signed-out.

The results of the said first semester examination were later released and pasted at the notice board. The result posted showed clearly, that the respondent got 37 marks for Chem.III. That result was later withdrawn from the notice board, and replaced with another result which showed and suggested that she was absent and did not write Chem.11I examination. The respondent protested.

Her complaints at the Department fell on deaf ears. She persisted.

The next thing she got was a letter inviting her to appear before the Students Disciplinary Committee (SDC) for alleged examination misconduct in respect of the same Chem.111. The letter is dated 20 October 2005. Before then, a letter dated 6 October 2005 had placed her on suspension and informed her, that her case had “been referred to the Students Disciplinary Committee for further investigation” and that she would “remain on suspension until the final determination” of her case. She was thereby “advised to keep-off the campus”.

The respondent appeared at the SDC hearing. She was duly informed and given the particulars of the allegation against her. That is: that she did not submit her answer booklet after Chem.III examination, and that the answer booklet was found in the School Examinations Officer’s office after 6.00p.m. on the day of the examination, that is: 5 May 2004. The SDC, in their report, dismissed the allegation and recommended that the respondent be recalled to continue her studies, having already lost one session.

Notwithstanding the finding and report of the SDC that the allegation of examination malpractice against the respondent was not established, the University, the 1st appellant, went ahead to issue, on 22 December 2005, a letter expelling the respondent from the University. The letter, Exhibit E, states inter alia: “Senate, at its 28th meeting held on 30 November 2005, considered and upheld the recommendation of the Students Disciplinary Committee that you be expelled from the University after you were found guilty of examination misconduct during the first semester of 2003/2004 Session”.

The Senate of the University, as it appears, may have purportedly acted under section 7(2)(b) of the Federal Universities of Technology Act, Cap F23, Laws of the Federation of Nigeria, 2004, in the matter of the expulsion of the respondent. The function of the Senate of the University, under section 7(2)(b) of the Act, includes “the organisation and control of examinations held in conjunction with “the student’s course of study at the University. Function and duty are usually co-related. The duty to act fairly in the discharge of this -statutory function of the Senate cannot be denied. I think it is for this reason that section 7(b) of the Act provides a right of appeal to the Council of the University against the decision of the Senate.

A student expelled, pursuant to the directive of the Vice Chancellor of the University for examination misconduct under section 17(1) of the Federal Universities of Technology Act (FUTA), 2004, also has a right of appeal to the Council of the University by virtue of section 17(2) of the same FUTA. It appears to me that the respondent was exercising the rights of appeal she had, by dint of sections 7(6) and 17(2) of the FUTA, when she addressed her appeal to the Vice-Chancellor vide her letter dated 14th February, 2006, exhibit F. In this letter of appeal, the respondent asked, for the reconsideration of her expulsion and reiterated the fact that she was called upon to face the panel (that is the SDC), on the allegation of examination misconduct and that at the time she left the SDC and upon the SDC findings and report there was no evidence, and no evidence established, that she committed the alleged examination misconduct.

Accordingly, the expulsion, conveyed by exhibit E, was an embarrassment to her. Protesting her innocence of the allegation of examination misconduct she pleaded, in exhibit F, that her expulsion be reconsidered to save her the “countless loss” caused by the expulsion.

The respondent heard nothing in response to her appeal, contained in Exhibit F. On the 14 April 2006, she approached the High Court of Niger State for enforcement of her right to fair hearing, a fundamental right guaranteed by section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999, and enforceable under section 46(1) of the said Constitution, and the Fundamental Rights (Enforcement Procedure) Rules (FREP). The originating motion was supported by an affidavit and 6 exhibits. The appellants did not file any counter-affidavit joining issues with the respondent on all the facts constituting the cause of action of the respondent, against them. The law is trite: Facts not disputed are taken as admitted and/or established. They accordingly require no further proof. Admitted facts are, usually regarded as the best evidence: Din v. African Newspapers of Nig. Ltd (1990) 2 NSCC (Pt. 2) 313, (1990) 3 NWLR (Pt. 139) 392.

The most fundamental of these undisputed or admitted facts are that the respondent appeared before the SDC on allegation of examination misconduct; the SDC finding the allegation not established or proved against her, recommended that she should be recalled to continue her studies. The other germane facts not disputed, or taken as admitted, as averred in paragraphs 15 and 16 of the respondent’s affidavit, are:

15. That at no time after the SDC’s report was I served any charge or allegation, nor was I present to hear anyone testify against me and given the opportunity to cross-examine such witness(es);

16. That after the SDC submitted its report, I was not invited before any panel or body whether quasi-judicial or judicial, or even the Senate or other organ(s) of the appellants or the sub-committee of any one of them. [emphasis supplied]

In other words, the Senate of the University, when “at its 291st Meeting held on 30 November 2005, considered and upheld the recommendation of the Students Disciplinary Committee that the respondent be expelled from the University after finding her guilty of examination misconduct during the First Semester of 2003/2004 Session”, did not give the respondent an opportunity to be heard.

Now, if as admitted or as it is deemed admitted by the appellants, that the SDC, upon hearing the respondent on the allegation of examination misconduct, had exonerated or acquitted her on that allegation, on what basis did the Senate of the University act to find the respondent guilty of the same examination misconduct? No facts are available on this fundamental question.

The trial court (coram: M.S. Zukogi, J.) dismissed the respondent’s case. The Court of Appeal (the lower court), on the appeal of the respondent, allowed the appeal and in consequence declared null and void the suspension and expulsion of the respondent from the University, vide exhibits D and E. This further appeal has been brought on two grounds. They are (shorn of their particulars):

1. The learned Justices of the Court of Appeal erred in law in entertaining an appeal that was brought from the lower court that has no jurisdiction to entertain the matter.

2. The learned Justices of the Court of Appeal erred in law by entertaining an appeal from a lower court that assumed jurisdiction in a case where the defendants are protected by the provisions of the Public Officers Protection Act Cap P41 Laws of the Federation of Nigeria, 2004.

Counsel on both sides are ad idem on the issues for the determination of this appeal. That is:

1. Whether the lower court had jurisdiction to entertain an appeal from a case that was instituted against a Federal Government agency in a State High Court; and

2. Whether the lower court had jurisdiction to entertain an appeal from a case that was instituted against Public Officers well outside the 3 months statutory period.

Appellants’ counsel, on issue 1, had strenuously argued that this case, specifically for the enforcement of the respondent’s fundamental right to fair hearing, comes under section 251(1)(q), (r) & (s) of the 1999 Constitution of the Federal Republic of Nigeria and therefore, distinguishable from the case of Garba v. University of Maiduguri (1986) 1 NWLR (Pt. 18) 550, (1986) 2 SC 128, (1986) All NLR 149, (1986) 1 NSCC 245, where this court had held that the High Court of Borno State had jurisdiction, by virtue of section 42(1) of the Constitution of the Federal Republic of Nigeria, 1979 (in pari materia with section 46(l) of the extant 1999 Constitution), to entertain the case filed by students of University of Maiduguri for the enforcement of their right to fair hearing in disciplinary proceedings for misconduct.

The Garba case was also for enforcement of the fundamental rights of some students.

The contention of the appellants’ counsel is that the named appellants herein are all agents or agencies of the Federal Government and that in the expulsion of the respondent from the University, the appellants were undertaking or had taken executive or administrative action or decision in their official capacities and also within their statutory powers. He therefore called in aid N.E.P.A. v. Edegbero (2002) 18 NWLR (Pt. 798) 79, (2003) FWLR (Pt. 139) 1556, and invoked section 251(1) (q), (r) & (s) of the 1999 Constitution, in the submission that only the Federal High Court, to the exclusion of the Niger State High Court, has jurisdiction in the matter since the appellants, as the defendants, were agents or agencies of the Federal Government. In the process, the appellant’s counsel had disingenuously cited in support of his fallible position the Court of Appeal decision in University of Agriculture v. Jack (2000) FWLR (Pt. 20) 720, (2000) II NWLR (Pt. 679) per Mangaji JCA, that was set aside by this court in Jack v. University of Agriculture, Makurdi (2004) All FWLR (Pt. 200) 1506, (2004) 5 NWLR (Pt. 865) 208, (2004) 1 SCNJ 335, (2004) 14 WRN 91.

The core issues in Garba v. University of Maiduguri (supra); Jack v. University of Agriculture, Makurdi (supra) and the instant case are not dissimilar. They are; whether the State High Court has jurisdiction to entertain the complaints of students of higher institutions of learning that the University authorities, in purporting to discipline them for misconduct, had infringed on their fundamental rights guaranteed in Chapter 4 of the Constitution. I find no substantial distinction between this case and the cases of Garba v. University of Maiduguri (supra); Jack v. University of Agriculture, Makurdi (supra). This case, brought under section 36(l) of the Constitution of the Federal Republic of Nigeria, 1999 is for the enforcement of the respondent’s right to fair hearing, a fundamental right guaranteed under Chapter 4 of the Constitution.

Section 42(1) of the Constitution of the Federal Republic of Nigeria, 1979, under which Garba v. University of Maiduguri (supra); Jack v. University of Agriculture, Makurdi (supra) were brought for the enforcement of the fundamental rights of students of the Universities, is in pari materia with section 46(1) of the 1999 Constitution.

Section 46(1) of the 1999 Constitution provides:

“46. (1) Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.”

Section 46(1) of the 1999 Constitution (ipssma verba with section 42(1) of the 1979 Constitution) clearly, vests concurrent jurisdiction in both the Federal High Court and the State High Court in the matters for the enforcement of a citizen’s fundamental right. A High Court in section 46(1) of the Constitution and FREP, means and includes the Federal High Court and or a State High Court. Katsina-Alu JSC (as he then was) had put it succinctly thus in Jack v. University of Agriculture, Makurdi (supra) at 1518.

In the resolution of this issue, I would like to point out that section 42(1) of the Constitution of the Federal Republic of Nigeria, which I reproduced above, has provided the court for the enforcement of the fundamental rights as enshrined in Chapter IV. A person whose fundamental right is breached, being breached or about to be breached may therefore apply to a High Court in that State for redress.

Order 1 Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules, 1979 - defines “a court” as meaning “the Federal High Court” or “the High Court of a State”. What this means is this; both the Federal High Court and the High Court of a State have concurrent - jurisdiction. An application may therefore be made either to the judicial division of the Federal High Court in the State or the High Court of the State in which the breach occurred, is occurring or about to occur.See also Gafar v. Government, Kwara State (2007) All FWLR (Pt. 360) 1415, (2007) 4 NWLR (Pt. 1024) 375, (2007) LPELR-8073, (2007) 20 WRN 170.

On this issue, I have no hesitation agreeing with the respondent’s counsel that the settled position of the law that the jurisdiction to entertain actions for the enforcement of any of the fundamental rights guaranteed by the Constitution in Chapter IV thereof, is concurrently vested in the Federal High Court and the State High Court. This is without prejudice to whether any of the parties is either the Federal Government or an agent or agency of the Federal Government. N.E.P.A. v. Edegbero (supra) is accordingly inapplicable as it does not deal with enforcement of fundamental rights. On the other hand, Garba v. University of Maiduguri (supra); Jack v. University of Agriculture, Makurdi (supra) as well as Gafar v. Government Of Kwara State (supra) are very apposite.

Issue l, accordingly is resolved in favour of the respondent, and against the appellants.

The basis of the decision of the lower court, the subject of this appeal, are that the appellants by not joining issues with the averments of the respondent, contained in paragraphs 12, 13 and 15 of the supporting affidavit, that she signed-in to write Chem.111 examination, wrote the examination and that she submitted her answer booklet after writing Chem.11I and thereafter signed-out of the examination hall, and further that the SDC, after hearing her on the allegation of examination misconduct, absolved her as there was no evidence establishing the allegation. The lower court further found, as a fact, that the Senate of the University did not give the respondent an opportunity to be heard before purporting to find her guilty of examination misconduct, and expelling her on the same allegation she had, previously on the facts, been exonerated and acquitted of. The lower court, relying on Garba v. University of Maiduguri (supra) and Adigun v. A.G. Oyo State (1987) 3 SC. 250 at 375, (1987) 1 NWLR (Pt. 53) 678, had correctly, in my view, found that the respondent was not given fair hearing. The principles of natural justice, as held by the lower court, demand that a student accused of examination misconduct and expelled for that misconduct must be afforded an opportunity by the body statutorily empowered to take such decision, either judicially or quasi-judicially, to:

a. know the allegation against him;

b. be present when the case against him is heard, and

c. not only to state his side of the allegation but also to contradict the case against him by the cross-examination of the witnesses called by his accusers.

The undisputed facts clearly, established that the Senate of the University, in their decision to expel the respondent for examination misconduct acted capriciously and arbitrarily and thereby violated the respondent’s right to fair hearing, not only in the context of audi alteram partem (i.e. denying her an opportunity to be heard) under section 36(l) of the Constitution, but also in terms of the right against double jeopardy, on the basis of her plea of autrefois acquit (the exoneration or acquittal) by the SDC, guaranteed by section 36(9) of the Constitution.

She had been able to show, satisfactorily, that the SDC tried her and acquitted her on the same allegation of examination misconduct the Senate of the same University “convicted and sentenced” her for in exhibit E. The appellants, having no answer to the factual situations made out by the respondent against them, which facts justify and warrant the decision of the lower court, have now under issue 2 raised the question or point: whether the lower court had jurisdiction to entertain the appeal from the High Court of Niger State? Straight away, this poses no problem. The answer is in section 240 of the 1999 Constitution that provides: subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the “High Courts”, including the High Court of Niger State.

However, it appears from the submissions of the appellants’ counsel under the said issue 2, raised from their ground 2 of the grounds of appeal, that his complaint under this issue is: whether, in the first place, the trial court was bereft of any jurisdiction over the cause of action, by operation of the limitation clause in section 2(a) of the Public Officers Protection Act, and accordingly, the lower court also lacks jurisdiction to entertain the appeal arising therefrom. The appellants appear here to misconceive or confuse the substantive jurisdiction of the Court of Appeal, vested by section 240 of the Constitution, with the “cause of action” jurisdiction of the trial court. This latter jurisdiction is rather a procedural jurisdiction and it is about whether the trial court had or did not have jurisdiction over the cause of action of the claimant, like the instant respondent. This “cause of action” jurisdiction depends on the peculiar facts of the case that vary from case to case. They are not always constant, nor are they always identical.

The misconception of the appellants in this regard stems from their erroneous belief that the cause of action at the trial court determines the substantive jurisdiction of the appellate court. The cause of action does not determine the substantive jurisdiction of the Court of Appeal vested by section 240 of the Constitution.

The lower court is not a court of first instance. It is an appellate court. What was before it was the complaint that the decision of the trial court was either wrong or right. What the appellants sought for at the lower court, was a remedy, upon review, to correct the error(s) committed by the trial court and give the correct decision as regards the issues at the trial. Thus, as it is stated by this court in Effiom & Ors. v. Cross River Independent National Electoral Commission & Anor. (2010) All FWLR (Pt. 552) 1610, (2010) 14 NWLR (Pt. 1213) 106 and First Bank of Nigeria Plc v. T. S. A. Industries Ltd (2010) All FWLR (Pt. 537) 633, (2010) 15 NWLR (Pt. 1216) 247, (2010) LPELR -1283 (SC) 49, (2010) 4 - 7 SC (Pt. 1) 242; an appeal is not a new action, but a continuation of the matter which is a subject of the appeal; and that it is a complaint against the decision of the court below. In effect, as Onnoghen JSC (as he then was) puts it in Effiom v. INEC (supra), it amounts to a complete review of the proceedings and the decision appealed against.

In the proceedings at the court of first instance, culminating in the appeal at the lower court, the appellants filed no defence or counter-affidavit. The facts constituting the cause of action were deemed taken as admitted and therefore established against the appellants. The basic principle of our adversarial jurisprudence is that it is the duty of the defendant to raise his defence. The trial court owes the defendant no duty to raise a defence to the claims against him. Doing that offends section 36(1) of the Constitution and the principles of natural justice, particularly, the rule that the court or tribunal established by law shall be “constituted in such a manner as to secure its independence and impartiality”. See also, section 17(2)(e) of the Constitution. This injunction is what, in common law, is expressed as nemo judex in causa sua. The rule prohibits or restrains the judge or court of law from being a judge in his own cause in order to actualise his or its impartiality.

The appellants contended that section 2(a) of the Public Officers Protection Act Cap P41 Laws of the Federation of Nigeria, 2004 (POPA) has rendered the respondent’s cause of action statute-barred. They rely on Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546, (1990) 3 SC (Pt. III) 63; Ibrahim v. Judicial Service Commission, Kaduna State (1998) 12 SCNJ 255, (1998) 14 NWLR (Pt. 584) 1; Osun State Government v. Dalami (Nig.) Ltd (2007) All FWLR (Pt. 365) 438, (2007) LPELR - 2817 (SC) 13, (2007) 6 MJSC 187, (2007) 9 NWLR (Pt. 1038) 66, (2007) 17 WRN 1 and Forestry Research Institute of Nigeria v. Gold (2007) All FWLR (Pt. 380) 1444, (2007) 11 NWLR (Pt. 1044) 1, for the contention that the respondent’s cause of action having elapsed by affluxion of time, had become extinguished by section 2(a) of POPA at the time the suit was taken out on 14 April 2006. The issue of jurisdiction raised from these facts is that the respondent’s cause of action having become statute-barred, the trial court lacked jurisdiction to entertain it.

In the first place, the appellants did not raise this special defence at the trial. They did not file any defence or counter affidavit to challenge the facts which the respondent’s cause of action was predicated. The averments in the supporting affidavit of the respondent remain unchallenged, and are consequently taken or deemed to have been admitted. Paragraph 17 of the said supporting affidavit avers “that on receiving the letter of expulsion, exhibit E, the respondent wrote exhibit F to appeal the decision and ask for the review of the expulsion. She got no reply or response thereto”. The question that follows is; when did the cause of action accrue to warrant the appellant’s invocation of section 2(a) of POPA? This is a question of facts. I agree, as submitted for the appellants’ relying on Bronik Motors Ltd v. Wema Bank (Nig.) Ltd (1983) 1 SCNLR 296, (1983) 6 SC 158, (1983) NSCC 226, that it is the claim of the plaintiff that determines the jurisdiction of the court of first instance that entertains the claim. In the appellate jurisprudence, the burden is on the appellant to show how and in what way the trial court or the court below erred in its decision. To corroborate this, section 131(1) of the Evidence Act, 2011 [formerly section 134(l)], firmly places on whoever desires any court to give him judgment as to any civil right or obligation dependent on the existence of facts which he asserts must prove that those facts exist. The appellants have not pointed at or shown on what legal evidence have they situated their invocation of section 2(a) of POPA.

The appellants may have obtained leave to raise and argue this fresh issue about the suit or claim of the respondent at the trial court being statute-barred by the operation of section 2(a) of POPA. They, however, did not obtain any leave to adduce fresh or additional evidence. The operational facts in this case are those facts in the claim of the respondent as contained in her supporting affidavit.

The appellants cannot insist on the cause of action accruing from the date the letter of expulsion in exhibit E was written, that is 3 months from 22December 2005, without showing when the letter was in fact delivered to her, or when the fact of her expulsion was brought to her knowledge. The computation of the 3 months, for purposes of the limitation imposed by section 2(a) of POPA starts from the date the cause of action accrued. In this case, it should start from when the expulsion or the letter of expulsion, exhibit E, was either brought to the knowledge of the respondent or from the date the letter exhibit E was delivered. It is, therefore, not enough that the letter was written. This court, in Ejegi v. C. O. P (1977) 10 SC 1, has held that a driving licence prepared, but not delivered to the driver or his agent, is not a certificate issued until it was delivered. On this analogy, I hold firmly the view that for the appellants to successfully plead the three month limitation, on the basis of their letter of expulsion, exhibit E; they must also prove the date the said letter was delivered to the respondent and that she became seised of the fact and knowledge of her expulsion from thence. I, therefore, agree with the counsel for the respondent that the actual date the letter of expulsion was brought to the respondent is material for the computation of the period of limitation. The learned counsel, relying on U.B.A. Plc v. BTL Industries Ltd (2006) 12 SC 63, (2006) 19 NWLR (Pt. 1013) 61, (2007) All FWLR (Pt. 352) 1615 at pages 1650 - 1651; Jallco Limited v. Owoniboys Technical Services Ltd (1995) 4 NWLR (Pt. 391) 534, (1995) 4 SCNJ 256; Attorney-General, Bayelsa State v. Attorney-General, Rivers State (2007) All FWLR (Pt. 349) 1012, (2007) 8 WRN 50, submits and I agree that the respondent’s right to the cause of action accrued to her from the date she became aware of the cause of action. Section 135 of the Evidence Act, 2004 (now section 132 of the Evidence Act, 2011) places the burden of proof, in a suit or proceeding, on that party who would fail if no evidence at all were given on either side. In this case, the burden of proving their defence or objection founded on section 2(a) of POPA is on the appellants to discharge. This evidential burden they have failed to discharge. They failed to prove the date the cause of action accrued to the respondent. This, of course, is fatal to the appellants’ case.

Limitation provisions, like penal provisions, take away or derogate from vested rights. They have to be construed strictly. See Wilson v. Attorney-General, Bendel State (1985) 1 NWLR (Pt. 4) 572, (1985) LPELR 3496; Ojo v. Governor of Oyo State (1989) 1 NWLR (Pt. 95) 1. The right of the respondent vested by law cannot just be set aside by the mere ipsi dixit of the appellants.

In any case, the respondent’s right to enforce her fundamental right to fair hearing is one specially vested by section 46(1) of the 1999 Constitution and the Fundamental Rights (Enforcement Procedure) Rules. Accordingly, reasoning as this court did in Uzoukwu v. Ezeonu II & Ors. (1991) 6 NWLR (Pt. 200) 708 at 61, I hold that the right to enforce fundamental rights stands above the ordinary laws, including section 2(a) of POPA; which in my firm view is inapplicable in the circumstance.

Issue 2 canvassed and argued does not avail the appellants.

It was not made out. It is accordingly resolved against the appellants.

The appeal, lacking substance, is hereby dismissed in its entirety. The decision of the lower court in the appeal No. CA A 136/06 setting aside both exhibits D and E at the trial court, respectively, the letters of suspension and expulsion of the respondent from Federal University of Technology, Minna, is hereby affirmed.

The respondent has been made to throw away costs in defending this unmeritorious appeal. She deserves to be indemnified in costs at the trial court and this court. The lower court specifically stated that it would not make any order as to costs. She is entitled to the costs wasted. I hereby order the appellants, jointly and or severally, to pay a total of N1,000,000.00 as costs to the respondent made up of N300,000.00 as costs at the trial court and N700,000.00 costs in this court.

The expulsion resulting in this litigation culminating in this appeal, was itself an unwarranted and capricious violation of the respondent’s right to fair hearing. The appellants had all the opportunity to make amends to alleviate costs. They chose not to.

Upon proper counselling, which they never had unfortunately, this expensive litigation was avoidable. The appellants, however, chose the path of this ignoble and invidious litigation, hoping, probably, in wishful thinking that their outrageous decision to expel the respondent would by some devious judicial accident or default be ratified.

**MUHAMMAD JSC:**

The lead judgment of my learned brother, Ejembi Eko JSC, completely reflects the unanimous decisions we reached at the conference in respect of the appeal. I imbibe the reasoning and conclusion in the lead judgment as mine in dismissing the unmeritorious appeal. I abide by the consequential orders contained in the lead judgment including the order as to costs.

**KEKERE-EKUN JSC:**

I have read in draft the judgment of my learned brother, Ejembi Eko JSC, just delivered. The resolution of the issues and conclusion reached are in accord with mine. I agree that the appeal lacks merit and deserves to be dismissed. In a nutshell, the genesis of this appeal was an application by the respondent for the enforcement of her fundamental right to fair hearing guaranteed by Section 36(6) of the 1999 Constitution before the High Court of Niger State sitting at Minna, arising from her expulsion from the University of Technology, Minna, Niger State on alleged grounds of examination misconduct. It was her contention that she was not given a fair hearing before being expelled from the institution. The trial court, in a ruling delivered on 19 June 2007, held that there was no violation of her right to fair hearing and dismissed the application. On appeal to the court below, the ruling of the trial court was set aside and her reliefs granted on 3 July 2007. The appellants are dissatisfied and have appealed against the decision.

The appellants have raised 2 issues for the determination of the appeal:

1. Whether the lower court had jurisdiction to entertain an appeal from a case that was instituted against a Federal Government Agency in a State High Court?

2. Whether the lower court had jurisdiction to entertain an appeal from a case that was instituted against public officers well outside the 3 months statutory period?

My first observation is that there is no appeal against any of the findings of the court below on the merits of the case. The two issues raised are of a technical but fundamental nature.

Both issues are jurisdictional. In effect, if answered in the negative neither the lower court nor the trial court would have been clothed with jurisdiction to entertain the matters before them. The proceedings before both courts would amount to a nullity and the decision taken by the appellants to expel the respondent would stand. On the other hand, if the questions posed are answered in the affirmative, there would be no need to delve into the merits of the decision of the lower court, as there is no complaint against it.

A careful perusal of the submissions of learned counsel in respect of the first issue reveals that the complaint is not against the jurisdiction of the Court of Appeal to entertain an appeal from a State High Court, but it is a challenge to the jurisdiction of the Niger State High Court to have entertained the respondent’s application for the enforcement of her fundamental rights ab initio, having regard to the fact that one of the parties is an agency of the Federal Government and that having regard to section 251 (1) (q), (r) & (s) of the 1999 Constitution, in such circumstance, exclusive jurisdiction is conferred on the Federal High Court. Reliance was placed on the celebrated case of NEPA v. Edegbero (2002) 18 NWLR (Pt. 798) 79, in support of this contention.

I think learned counsel for the respondent got it right and I agree with him that firstly, the jurisdiction of the Court of Appeal to entertain an appeal is conferred by section 240 of the 1999 Constitution, which does not restrict the court’s jurisdiction on the basis of the nature of the parties before it. Section 240 provides: “240. Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the National Industrial Court, the High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of the Federal Capital Territory, Abuja, Customary Court of Appeal of a State and from decisions of a court martial or other tribunals as may be prescribed by an Act of the National Assembly.”

Thus, the Court of Appeal has exclusive jurisdiction to entertain appeals from the courts set out above, irrespective of the peculiarities of the parties or subject matter.

It also appears that learned counsel for the appellants lost sight of the fact that the suit before the trial court was sui generic, in the sense it was an application for the enforcement of the plaintiff’s/respondent’s fundamental rights guaranteed under Chapter IV of the 1999 Constitution.

Specifically, section 46(1) & (2) of the Constitution provides:

“46 (1). Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing securing the enforcement within that State of any right to which the person who makes the application may be entitled under this Chapter)” It is quite evident that section 46(1) above refers to “a High Court in that State” without any restriction. The violation of a citizen’s fundamental rights is viewed so seriously that the framers of the Constitution sought to ensure that no fetters are placed in the path of a citizen seeking to enforce his rights. In other words, the provision ensures that he has access to any High Court as long as it is within the State in which the alleged infraction has occurred. Indeed, it would negate the principle behind the guarantee of fundamental rights if a citizen were to have any obstacle placed in the path of enforcing those rights.

The Fundamental Rights (Enforcement Procedure) Rules 1979 (applicable at the time the suit was filed at the trial court) were made pursuant to section 42(3) of the 1979 Constitution (now section 46(3) of the 1999 Constitution) and therefore, have constitutional flavour. Order 1 Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules defines “court” as the Federal High Court or the State High Court.

There is no ambiguity in the provisions of the Constitution or of the Fundamental Rights (Enforcement Procedure) Rules referred to above regarding which court has jurisdiction to entertain an application for the enforcement of fundamental rights. The decision of this court in the case of Jack v. University of Agriculture, Makurdi (2004) All FWLR (Pt. 200) 1506 at 1518, paragraphs B-D, (2004) 5 NWLR (Pt. 865) 208, (2004) 1 SCNJ 335, (2004) 14 WRN 91, has put the matter to rest in the following dictum of Katsina-Alu JSC (as he then was) to wit:

“In the resolution of this issue, I would like to point out that section 42(1) of the Constitution of the Federal Republic of Nigeria which I have reproduced above has provided the court for the enforcement of the fundamental rights as enshrined in Chapter IV. A person whose fundamental right is breached, being breached or about to be breached may therefore apply to a High Court in that State for redress Order 1 Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules, 1979, which came into force on 1 January 1980, defines “court” as meaning “the Federal High Court or the High Court of a State’: What this means is this, both the Federal High Court and the High Court of a State have concurrent Jurisdiction. An application may therefore be made either to the Judicial division of the Federal High Court in the State or the High Court of the State in which the breach occurred, is occurring or about to occur.” (Underlining mine for emphasis)

It is noted that the above decision overruled the Court of Appeal decision in University of Agriculture v. Jack (2000) FWLR (Pt. 20) 720, (2000) II NWLR (Pt. 679) 658, relied upon by learned counsel for the appellants, where it was held that the Federal High Court has exclusive jurisdiction to determine fundamental rights matters. Under the doctrine of stare decisis, the extant position of the law on the issue is as stated in Jack v. University of Agriculture Makurdi (supra). With due respect to learned counsel for the appellants, had diligent research been done, this issue would not have been raised at all. With regard to the second issue, I agree with my learned brother, Ejembi Eko JSC, that in the absence of any evidence led at the trial court to prove the date on which the respondent was served with the letter of expulsion, there were no facts before the court upon which it could have made a determination as to when the cause of action accrued and whether there was non-compliance with the provisions of Section 2 of the Public Officers Protection Act Cap. P41 Laws of the Federation of Nigeria, 2004. In any event, learned counsel for the appellants failed to take into consideration the fact that by section 17(2) of the Federal Universities of Technology Act Cap. F23, Laws of the Federation of Nigeria 2004, the respondent had a right of appeal against her expulsion, which she duly exercised. In other words, time would not begin to run until after she had exhausted all remedies available to her.

For these and the more detailed reasons set out in the lead judgment, I find this appeal to be devoid of merit. It is hereby dismissed. I abide by the order on costs made.

**OKORO JSC:**

I read in advance the judgment of my learned brother, Ejembi Eko JSC, just delivered which I agree that this appeal lacks merit and deserves a dismissal order. Based on the decisions of this court in Garba v. University of Maiduguri (1986) 1 NWLR (Pt. 18) 550, (1986) 2 SC 128, (1986) All NLR 149, (1986) 1 NSCC 245 and Jack v. University of Agriculture, Makurdi (2004) All FWLR (Pt. 200) 1506, (2004) 5 NWLR (Pt. 865) 208, (2004) 1 SCNJ 335, (2004) 14 WRN 91, the High Court of a State and the Federal High Court both have jurisdiction to entertain fundamental right enforcement proceedings. In fact, they have concurrent jurisdiction. I agree entirely with my learned brother that the court below was right to hold that the High Court of Niger State had jurisdiction to have entertained the suit.

Secondly, the respondent had averred in paragraphs 12, 13 and 15 of her supporting affidavit that she signed-out of the examination hall after submitting her answer booklet of Chemistry III paper. According to her, submission of the examination paper is a precondition for signing-out. The appellants failed to controvert these averments. Based on this, she averred in paragraph 16 thereof that the Students Disciplinary Committee absolved her of any misconduct. Again, the appellants failed to controvert this averment. The committee even recommended that she be recalled to the school to complete her studies. I am at sea as to where the University Council had further evidence which it used to expel the respondent from the University.

There is absolutely no such evidence and I do not intend to speculate here. If any, the respondent was not afforded any opportunity to defend herself and this violently violates section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) on the respondent’s right to fair hearing.

For all I have endeavoured to say above and the fuller and comprehensive reasons in the lead judgment, I agree that this appeal is devoid of merit and deserves to be dismissed. Appeal is accordingly dismissed by me. I abide by all consequential orders made in the lead judgment, that relating to costs, inclusive.

**NWEZE JSC:**

My Lord, Eko JSC, obliged me with the draft of the leading judgement just delivered now. I agree with His Lordship that this appeal, being unmeritorious, should be dismissed.

Appeal dismissed.