OLUFEMI ADEBAYO JAIYESIMI v. INSTITUTE OF CHARTERED ACCOUNTANTS OF NIGERIA

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/878M/06
THURSDAY 8TH NOVEMBER, 2012

(AUGIE; BAGE; PEMU, JJ.CA)

CIVIL PROCEDURE – Evaluation of Evidence – Where a tribunal fails to properly evaluate evidence leading to improper findings, an appellate court can interfere with the improper findings.

CIVIL PROCEDURE – Burden of Proof – The primary onus of proof in civil cases rests on the plaintiff, but the onus can be discharged where the facts have been admitted in pleadings.

CIVIL PROCEDURE – Disciplinary Panels – Where the statute creating a disciplinary panel empowers it to do so the panel can go outside the compliant before it and recommend other issues for determination for a tribunal.

INTERPRETATION OF STATUTES – Judicial interpretation – In construing statutes the court will read every word or clause in the statute together with reference to the context and other clauses in the statute to reach a consistent meaning of the whole statute.

INTERPRETATION OF STATUTES – Judicial Interpretation - Once the language of the law is clear and unambiguous the court must give them their ordinary literal meaning.

Facts:

The appellant and one Mr. Oluoluwa Akinadewo were accused by Mrs. Esther Babatunde, the managing partner of Olufunmi Niniowo Esq and Co, of practicing under the name of Olufunmi Niniowo Esq Co (Chartered Accountants) without her authority and posing as partners in the firm.

Mrs Babatunde reported the matter to the Institute of Chartered Accountants of Nigeria (ICAN). The appellant was invited to an investigative panel, after the three parties stated their cases, the panel recommended that the matter be tried before a Disciplinary Tribunal on the grounds that the appellant and Oluoluwa Akinadewo prepared the audits of four companies as accountants while they were in full employment with the firm of Ayorinde Thomas Esq. Co.

After the trial the tribunal found the appellant guilty on two counts of professional misconduct and suspended him from membership of the institute for six months.

The appellant dissatisfied with the findings of the tribunal, appealed to the Court of Appeal Lagos Division.

Held ***(Unanimously allowing the appeal in part):***

[1] ***Civil Procedure – Evaluation of Evidence – Where a tribunal fails to properly evaluate evidence leading to improper findings, an appellate court can interfere with the improper findings.***

Let me mention here that although this court had resolved the issue No. 1 in favour of the respondent that was more of a declaratory decision on the action of the panel that did the preliminary investigations before sending same to the Tribunal. The Tribunal entered the verdict of guilt against the appellant in its judgment. It is this judgment that this court must set aside as proof of finding of fact has been established against the appellant in this Appeal On the whole therefore this appeal is meritorious, and it is hereby allowed.

PER AUGIE, JCA:

Findings of facts are within the province of the Tribunal, and there is a rebuttable presumption that its findings and conclusions are correct. However, where a Tribunal fails to properly examine and evaluate the evidence it, the duty of an appellate court to interfere with any improper findings would come into play - see *Sanni v. State* (1993) 4 NWLR (Pt. 285) 99 & *Nwankwoala v. State* (2005) 12 NWLR (Pt. 940) 637.

Obviously, the decision of the Tribunal in this case cannot stand, and I also allow the appeal, and order that it be set aside in its entirety.

PER PEMU, JCA:

The fact that the so called third party did not appear before the Tribunal, nor testify before it, is fatal to the case of the appellant.

Every fact constituting a cause of action in a cause or matter, has to be crystallized before a cause of action is said to arise against a person.

It is no gainsaying that a Tribunal or court is presumed to have in its hallowed bosom the facts of a case, but there is a rebuttable presumption that its findings and conclusions, are correct. Therefore it is pertinent for a Tribunal to evaluate evidence before her properly, and where this is

lacking, as in the present case, the appellate court is duty bound to interfere with same.

The decision of the learned trial judge is hereby set aside, while I allow the appeal. **(P. 149 lines 42 - 45; P. 150 lines 1 - 5; P. 150 lines 11 - 23)**

[2] ***Civil Procedure – Burden of Proof – The primary onus of proof in civil cases rests on the plaintiff, but the onus can be discharged where the facts have been admitted in pleadings.***

The submissions of counsel is carefully examined Black's Law Dictionary Eight Edition at page 1544 defines a Tribunal as:

"Tribunal (tri byoo-nal)

(1) A court or other adjudicatory body

(2) The seat, bench or place where a judge sits.

By the above definition, a tribunal can function as court, or as an adjudicatory body. The burden or standard of proof remains, if functioning in either capacity in civil cases the primary onus of proving his case lies on the plaintiff. But that onus may even be discharged in the pleadings as by the Rules of pleading there is no onus to prove that which had been admitted See *Lawrence Onyekaonwu v. Ekwubiri & Ors.* (1966) 1 All NLR 34; *Alhaji Aliyu Balogun v. Alhaji Shittu Labiran* (1988) SCNJ 71 at 85.

In criminal cases, the burden of proofing (sic) the accused guilty rests throughout on the prosecution. It is not for the accused to prove honest dealing with the property in respect of which he is charged with an offence, but for the prosecution to prove the reverse. See: *Dr. Olu Onagoruwa v. The State* (1993) 7 NWLR (Pt. 303) 49 at 91; *Kenneth Clark & Anor. v. The State* (1986) 4 NWLR (Pt.35) 381; *Patrick Okoroji v. The State* (2005) 1 N.C.C. 279 at 297. **(P. 145 lines 38 - 45; P. 146 lines 1 - 14)**

[3] ***Civil Procedure – Disciplinary Panels – Where the statute creating a disciplinary panel empowers it to do so the panel can go outside the compliant before it and recommend other issues for determination for a tribunal.***

In the instant appeal it is beyond doubt that there was a complaint, a panel was constituted, the duty charge upon the panel by the Law stated above was to conduct a preliminary investigation which the record before the court showed that it did and is not denied by the appellant. To this extent are required of the law under the Act is met. The Act went further to

give power to the Panel, because the word "Or" is used to recommend to the tribunal "should for any other reason the subject of proceedings before the tribunal". This is also very clear that the panel can where it deems it necessary to recommend to the tribunal for any other reason, no doubt outside the complaint laid in the first instance, any subject of proceeding before the tribunal. It therefore cannot be correct as suggested by the learned counsel to the appellant, that, the panel is only restricted to the complaint laid before it. The law permits it to go outside the complaint laid and recommend any other subject for determination of the tribunal. The word "Or" used in this instance, makes it disjunctive. See: *Fayemi v. Oni* (2010) 17 NWLR (Pt.1222) 362 at 399 paras B - E where Salami JCA, stated:

> ***"Whenever the word "or" is used in a statute, it bears a disjunctive meaning. The use of the word "or" is therefore a separating factor of preceding provisions from the one coming under, and thus giving a sense of complete and an independent identity...."***

It See also: *Obase v. National Judicial Council* (2008) All FWLR (Pt. 434) 1637; *Kim v. Emefo* (2001) 4 NWLR (Pt. 702) 147.

Again of great significance is the Supreme Court decision in *Alalade v. ICAN* (1975) 4 SC 43, (referred to by respondent's counsel), when all the charges/complaints were neither brought under the ICAN Act nor under the rules of professional conduct and yet the Supreme Court uphold all the recommendations/convictions of the Institute of Chartered Accountants of Nigeria. The trial was also conducted under the present Act.

Let's mention here that the appellant did not show beyond the mere mention that the charges recommended by the panel to the Tribunal did not emanate from the complaint laid before it. In the absence of such proof, issue No. 1 is resolved in favour of the respondent and against the appellant.
(P. 143 lines 39 - 45; P. 144 lines 1 - 28)

[4] ***Interpretation of Statutes – Judicial interpretation – In construing statutes the court will read every word or clause in the statute together with reference to the context and other clauses in the statute to reach a consistent meaning of the whole statute.***

The submission to issue No. 1 by both sides is carefully examined. The law is already trite on construction of statute or instruments i.e. the provisions of the Institute of Chartered Accountants of Nigeria Act Cap 111 Laws of Federation of Nigeria 2004. In constructing a statute or instrument, every word or clause in an enactment must be read and construed together, not in isolation, but with reference to the context and

other clauses in the statute, in order, as much as possible not only to reach a proper legislative intention, but also to make a consistent meaning of the whole statute. See: *Oyeyemi v. Commissioner for Local Government Kwara State* (1992) 2 SCNJ 266 at 280; *Artra Ind. Nig. Ltd v. NBCA* (1998) 3 SCNJ 97 at 115; *Bakare v. NRC* (2007) 17 NWLR (Pt. 1064) 606 at 639 paragraphs C - D page 640 paragraphs G, 641 paragraphs G - H; *Odutola Holdings Ltd v. Ladejobi* (2006) 12 NWLR (Pt. 994) 321 at 358 paragraphs C - D; *Unipetrol v. E.S.B.I.R.* (2006) 8 NWLR (Pt. 983) 624 at 641 paragraphs F - H; *Rivers State Government v. Specialist Konsult* (2005) 7 NWLR (Pt. 923) 145 at 179 paragraphs E - F.
(P. 140 lines 38 - 45; P. 141 lines 1 - 6)

[5] ***Interpretation of Statutes – Judicial Interpretation - Once the language of the law is clear and unambiguous the court must give them their ordinary literal meaning.***

This court remains consistent where the words of a statute are clear and unambiguous, they should be construed so as to give effect to their natural and lateral meaning. See: *Mkpa v. Mkpa* (2010) 14 NWLR (Pt. 1214) 612, at 645 paras F - H; *Orhiunu v. F.R.N.* (2005) 1 NWLR (Pt. 906) 39; *Ndoma-Egba v. Chukwuagor* (2004) 6 NWLR (Pt.869) 382; *Awuse v. Odili* (2004) 8 NWLR (Pt. 876) 481. **(P. 143 lines 33 - 37)**

BAGE, JCA (Delivering the lead Judgment): This is an appeal against the decision of the Accountants Disciplinary Tribunal delivered on the 1st December, 2006, which found the appellant guilty of two counts of professional Misconduct and infamous conduct and subsequently suspended him from membership of the institute for six month (the decision of the tribunal is at pages 127 to 133 of the Record of Appeal).

Dissatisfied with the decision of the tribunal, the appellant filed a Notice of Appeal on 29th December, 2006, containing 3 Grounds of Appeal. (The Notice of Appeal is at pages 134 to 136 of the Record of Appeal).

The charge against the appellant arose out of a complaint against the appellant and a 3rd party by one Mrs. Esther Babatunde Managing - partner of Olufunmi Niniowo Esq. Co. (Chartered Accountants) - alleging that the appellant of was practicing in the name of Olufunmi Niniowo Esq Co. without her authority. (The charge is at pages 134 to 136 of the Record of Appeal.)

The appellant was invited and attended an investigative panel, of the Institute of Chartered Accountants. The investigative panel after hearing the complainant and the appellant recommended them as well as the 3rd party for trial before the Disciplinary Tribunal at the institute (The proceedings of the Investigative Panel is at pages 1 to 28 of the Record of Appeal).

The Disciplinary Tribunal, with its changing composition started sitting on 5th January, 2001 from date to date and finally entered judgment on the 1st December, 2006 suspending the appellant for six months, on counts 3 and 4. Dissatisfied with this decision, the appellant has appealed to this court.

From the 3 Grounds contained in the Notice of Appeal, the appellant distilled the following two (2) issues for the determination of this appeal as follows:

(1) Whether counts 3 and 4 upon which the appellant was convicted were properly before the tribunal and valid in law? (Ground 1 of the Notice of Appeal).

(2) Whether the facts before the Tribunal justified a finding of guilt against the appellant on counts 3 and 4? (Grounds 2 and 3 of the Notice of Appeal).

On the other hand the respondent adopts the issues as framed by the appellants above.

ISSUE ONE

In arguing his issue No. 1, Badejo SAN, Learned Counsel to the appellant submitted that, the complainant in this case, Mrs. E.O. Babatunde lodged a complaint, vide Exhibit "JA1", against the appellant alleging specifically that the appellant and a 3rd party had been "posing as partners of her firm, obtaining audit and tax consulting service jobs and performing such jobs by using photocopies of the firm's letter head without authority to carry out their assignments and submitting same to the Federal Board of Inland Revenue Department and possibly to the Corporate Affairs Commission."

Learned counsel submitted further that the investigative panel found clearly that there allegations were baseless and that, the appellant had indeed not only obtained the consent of the complainant, but had infact, shared the remuneration accruing - there from with the complainant. However, the panel proceeded to recommend the appellant, the complainant and the third party for trial before the Tribunal on the grounds that they prepared the audit as accountants while they (The appellant and the third party) were in full employment with the firm of Ayorinde Thomas Esq. Co. which was clearly beyond the complaint before the panel.

Learned counsel submitted further that, these counts in the charge were clearly beyond the mandate of the panel and contravenes the provisions of Section 11(3) (a) of the Institute of Chartered Accountants of Nigeria Act.

Learned counsel further submitted that, the panel which is an integral part or "body' of the Institute cannot be, the complainant, prosecutor and judge in its own

cause. This offends the principles of fair hearing enshrined in section 36(2) of the 1999 Constitution and captured in the maxim *nemo judex* in Causa Sua. See: *L. PIDC v. Fawehinmi* (1985) 2 NWLR (Pt 7) 3000.

Learned counsel further submitted that, the firm of Ayorinde Thomas & Co. did not lay a complaint before the panel, there was no evidence that any of its staff, or partners could not take briefs outside. The terms of employment of the appellant or the third party was not placed before the panel or the tribunal and neither was Ayorinde Thomas & Co. called as a witness before the panel and the tribunal. This was in fact the reason why the tribunal found the appellant not guilty of counts 1 and 2. Also the charges against the appellant in counts 3 and 4 were also not in accordance with the provisions of Section 12(1)(a) of the ICAN Act as well as paragraph 2.1 of the Code of Professional Conduct of members of the Institute of Chartered Accountants.

In reply, the learned counsel to the respondent Ifediora Esq. submitted that by the combine (sic) provisions of Section 11 and 12 of the ICAN Act, neither the investigation panel nor the Disciplinary committee is bound to investigate or try the appellant on the complaint as laid but on the misconduct revealed by the investigation.

Learned counsel further submitted that there is no provision for drafting of formal charges and this is so because the law presumes that members of all professional bodies should be able to decide the rules of conduct that will guide good practice of their professional calling and also that they should be able to discipline erring members. That is why the law provides that when a with (sic) offences is committed, it should be tried in a formal court of law and not by any professional bodies. See: *Alalade v. ICAN* (1975) 4 SC 43.

Learned counsel furthered his submission that it is the Law that Appeals from Native Tribunals, the courts do not lay emphasis on the form in so long as the issues involved are clear. See: *Opare v. Sampson*, 3 WACA 169, *Kwaa v. Kwakwa* 3, WACA 176; *Okuma v. Tsutu* 10 WACA 89, *Efi v. Eyinful* 14 WACA 434; The proceedings before the ICAN Disciplinary Tribunal is analogous to that before Native Tribunal since both are constituted by persons who do not have any formal legal training.

The submission to issue No. 1 by both sides is carefully examined. The law is already trite on construction of statute or instruments i.e. the provisions of the Institute of Chartered Accountants of Nigeria Act Cap 111 Laws of Federation of Nigeria 2004. In constructing a statute or instrument, every word or clause in an enactment must be read and construed together, not in isolation, but with reference to the context and other clauses in the statute, in order, as much as possible not only to reach a proper legislative intention, but also to make a consistent meaning of the whole statute. See: *Oyeyemi v. Commissioner for Local Government Kwara*

State (1992) 2 SCNJ 266 at 280; *Artra Ind. Nig. Ltd v. NBCA* (1998) 3 SCNJ 97 at 115; *Bakare v. NRC* (2007) 17 NWLR (Pt. 1064) 606 at 639 paragraphs C - D page 640 paragraphs G, 641 paragraphs G - H; *Odutola Holdings Ltd v. Ladejobi* (2006) 12 NWLR (Pt. 994) 321 at 358 paragraphs C - D; *Unipetrol v. E.S.B.I.R.* (2006) 8 NWLR (Pt. 983) 624 at 641 paragraphs F - H; *Rivers State Government v. Specialist Konsult* (2005) 7 NWLR (Pt. 923) 145 at 179 paragraphs E - F.

The main crux of this appeal oscillates around the complaint made by one Mrs. E.O. Babatunde vide Exhibit "JA1," against the appellant and a 3rd party, to the respondents (ICAN). The respondent vides its enabling law constituted an investigative panel. According to the facts at trial, the investigative panel found the allegations contained in exhibit "JA1" to be baseless. However it proceeded to recommend the appellant and the 3rd party for trial before the Tribunal on other grounds which was clearly beyond the complaint before the panel and thus contravenes the provisions of Section 11 (3) (a) of the ICAN Act.

It is quite apposite at this juncture to reproduce the provisions of section 11(3)(a) of the Act.

Section 11(3):

> ***"There shall be a body to be known as the Accountants investigating panel (in this Act referred to as "the Panel") which shall be charged with the duty of***
>
> ***(a) Conducting a preliminary investigation into a case where it is alleged that a member has misbehaved in his capacity as an accountant, or should for any other reason be the subject of proceedings before the Tribunal".***

It is again clear that Section 11 (3)(a) of the Act, cannot be read in isolation of Section 11 (3)(b) of the Act, which provides thus:

> "Deciding whether the case should be referred to the tribunal".

The main grouse of the appellant is that the panel went beyond the complaint made before it to recommend the appellant, complaint, and the 3rd party for trial before the Tribunal on the grounds that they prepared the audited accounts while they (The appellant and the third party) were in full employment with the firm of Ayorinde Thomas & Co; and thus contravenes section 11(3)(a) of the Act. The appellant did not challenge the constitution of the panel neither did he challenged (sic) its powers to make a recommendation to the Tribunal. It thus becomes necessary at this point to examine the complaint contained in exhibit "JA1" and the panel's recommendation to the tribunal, to determine whether or not it acted beyond its mandate.

Exhibit "JA1" which was the complaint brought by Mrs. Esther Olufunlola Babatunde who practices under the name of Olufunmi Niniowo & Co. dated 29th of September, 1999, is stated at page 14 of the Records of Appeal and its states:

> ***"My bone of contention is that Mr. Jaiyesimi got copies of my binding instrument and my letter headed paper. I don't know how and he used it later for jobs I did not know of and even extended it to a third party and they were doing jobs getting of appointment on my firms name. They were doing all sorts of things that they would have done as part of my firm whereas I did not know about it".***

The Panel after conducting its investigation - referred the case to the Tribunal. In so doing, it prepared charges for the determination of the Tribunal.

The one's of interest are, counts 3 and 4, contained on page 34 of the Record of Appeal as follows:

COUNTS 3

STATEMENT OF OFFENCE

PROFESSIONAL MISACONDUCT (sic): Contrary to paragraphs 2.1 of the code of professional conduct of members of the institute and punishable under the said code and section 12(1)(a) of the ICAN Act Cap. 185, Laws of the Federation 1990.

PARTICULARS OF OFFENCE

That you OLUFEMI ADEBAYO JAIYESIMI (M) on or about 1997 and 1998 at Lagos wrongfully gave permission to one Mr. Israel Oluoluwa Akinadewo to prepare (4) companies namely Independent Communications Network Limited, Corporate Ventures Limited, and Twenty four Hours Limited using the name of Olufunmi Niniowo & Co. without the firms permission, when at the material time, the said Israel Oluoluwa Akinadewo had no practicing licence and was in full time employment with the firm of Ayorinde Thomas & Co. (Chartered Accountants) thereby committing an offence contrary to paragraph 2.1 of the code of professional conduct of members of the institute and punishable under the said code and Section 12 (1)(a) of the ICAN Act Cap.185 Laws of the Federation 1990.

COUNT 4

STATEMENT OF OFFENCE

INFAMOUS CONDUCT: Contrary and punishable under Section 12 (1)(a) of the ICAN Act, Cap 185, Laws of the Federation 1990.

PARTICULARS OF OFFENCE

That you, OLUFEMI ADEBAYO JAIYESIMI (M) on or about 1997 and 1998 at Lagos wrongfully gave permission to one Mr. Israel Oluoluwa Akinadewo to prepare audited accounts for four (4) Companies namely Independent Communications Network Limited, Book mate Educational Limited, Corporate Ventures Limited and Twenty Four Hour Limited using the name of Olufunmi Niniowo & co. without the firms permission, when at the material time, the said Israel Oluoluwa Akinadewo had no practicing licence and was in full time employment with the firm of Ayorinde Thomas & Co. (chartered Accountants) thereby committing an offence contrary to and punishable under section 12 (1) (a) of the ICAN Act Cap. 185, Laws of the Federation 1990."

The faring set out both the complaint and the charges count 3, 4, this court had expected the appellant to go beyond the mere mention as he did, that, the panel which investigated him, went beyond its mandate of the complaint made before it against him in the recommendation to the tribunal. Appellants claim is that by so doing there was a contravention of the provision of section 11 (3) (a) of the ICAN Act. The wording of that provision was set out earlier on by this court but it shall be repeated here again for clarity.

Section 11(3) of the Act provides:

> ***"There shall be a body, to be known as the Accountants Investigating panel (in this Act referred to as "the panel") which shall be charged with the duty of -***
>
> ***(a) Conducting a preliminary investigation into any case where it is alleged that a member has misbehaved in his capacity as an accountant, or should for any other reason be the subject of proceedings before the tribunal."***

This court remains consistent where the words of a statute are clear and unambiguous, they should be construed so as to give effect to their natural and lateral meaning. See: *Mkpa v. Mkpa* (2010) 14 NWLR (Pt.1214) 612, at 645 paras F - H; *Orhiunu v. F.R.N.* (2005) 1 NWLR (Pt. 906) 39; *Ndoma-Egba v. Chukwuagor* (2004) 6 NWLR (Pt. 869) 382; *Awuse v. Odili* (2004) 8 NWLR (Pt. 876) 481.

In the instant appeal it is beyond doubt that there was a complaint, a panel was constituted, the duty charge upon the panel by the Law stated above was to conduct a preliminary investigation which the record before the court showed that it did and is not denied by the appellant. To this extent are required of the law under the Act is met. The Act went further to give power to the Panel, because the word "Or" is used to recommend to the tribunal "should for any other reason the subject of proceedings before the tribunal". This is also very clear that the panel

can where it deems it necessary to recommend to the tribunal for any other reason, no doubt outside the complaint laid in the first instance, any subject of proceeding before the tribunal. It therefore cannot be correct as suggested by the learned counsel to the appellant, that, the panel is only restricted to the complaint laid before it. The law permits it to go outside the complaint laid and recommend any other subject for determination of the tribunal. The word "Or" used in this instance, makes it disjunctive. See: *Fayemi v. Oni* (2010) 17 NWLR (Pt.1222) 362 at 399 paras B - E where Salami JCA, stated:

> ***"Whenever the word "or" is used in a statute, it bears a disjunctive meaning. The use of the word "or" is therefore a separating factor of preceding provisions from the one coming under, and thus giving a sense of complete and an independent identity...."***

See also: *Obase v. National Judicial Council* (2008) All FWLR (Pt. 434) 1637; *Kim v. Emefo* (2001) 4 NWLR (Pt. 702) 147.

Again of great significance is the Supreme Court decision in *Alalade v. ICAN* (1975) 4 SC 43, (referred to by respondent's counsel), when all the charges/ complaints were neither brought under the ICAN Act nor under the rules of professional conduct and yet the Supreme Court uphold all the recommendations/ convictions of the Institute of Chartered Accountants of Nigeria. The trial was also conducted under the present Act.

Let's mention here that the appellant did not show beyond the mere mention that the charges recommended by the panel to the Tribunal did not emanate from the complaint laid before it. In the absence of such proof, issue No. 1 is resolved in favour of the respondent and against the appellant.

ISSUE TWO

Whether the facts before the Tribunal justified a finding of guilt against the appellants on counts 3 and 4.

Learned counsel to the appellant adopts all arguments on issue one anon, and submit that the facts before the Tribunal did not justify a finding of guilt on counts 3 and 4 against the appellant. There was nothing before the Tribunal or the panel to justify a finding that the appellant "gave active encouragement and connive with him to carry out the audits.

Learned counsel submitted further that there was no evidence before the Tribunal that the terms of employment or engagement of the appellant and Mr. Akinadewo with Ayorinde Thomas & Co. was loose. The firm of Ayorinde Thomas was not called to give evidence before the tribunal and this fact was a ground for discharging the appellant on counts 1 and 2. And having discharged the appellant on counts 1

and 2 it was practically and logically impossible to find the appellant guilty on counts 3 and 4 which equally required the evidence of Ayorinde Thomas & Co. to sustain the charge.

Learned counsel furthered his submission that, it is trite that the burden of proof is always on the prosecution.

In the absence of clear evidence that this was disallowed by the terms of engagement, there is nothing unethical about introducing Mr. Akinadewo to Mrs. Esther Babatunde. See: Section 138 of the Evidence Act. There is absolutely no evidence to substantiate the finding that the appellant connived with Mr. Akinadewo to carry out the audits in the name of Olufunmi Niniowo & Co. Mr. Akinadewo did not give such evidence. See: *Kinnani v. Bauchi Native Authority* (1957) NRNLR 42; *Oladele v. Nigerian Army* (2004) 6 NWLR (Pt. 868) 166 at 182; *CCB (Nig) Ltd v. Onwuchekwa* (2000) 3 NWLR (Pt. 647) 65 at 68; *Sagay v. Safere* (2000) 6 NWLR (Pt. 661) 360.

Learned counsel finally submitted that, from the foregoing, the Tribunal was not justified in returning a verdict of guilt against the appellant on count's 3 and 4.

Learned counsel to the respondent in reply to the submissions of the learned counsel to appellant, submitted that, when findings of facts are challenged on Appeal, the principle which the appellate courts adopt is whether there is evidence upon which the trial court could reached the finding it made and this is irrespective of the fact that there is evidence from which the Trial Judge could have taken the opposite view. See: *Hammond v. Randolph* 5 WACA 42; *Loeb v. Nassar* 3 WACA 226. In this matter, the ICAN Tribunal behaved the evidence given by Mr. Israel O. Akinadewo and property found the appellant guilty of the complaint.

Learned counsel further submitted that, where the appellant complained that the firm of Ayorinde Thomas & Co. was not called as a witness, the complete answer to this is that it is trite that a party, be it in Criminal or Civil matter is not bound to call all witnesses. A party is only required to call enough witness to prove its case and no more. See: *Olabode v. State* (2009) 5 - 6 SC (Pt. 11) 29; *Iyare v. Bendel Feed and Flour Mill Ltd* (2008) 7 - 12 SC 151; *State v. Azeez & Ors* (2008) 4 SC 188.

The submissions of counsel is carefully examined Black's Law Dictionary Eight Edition at page 1544 defines a Tribunal as:

"Tribunal (tri byoo-nal)

(1) A court or other adjudicatory body

(2) The seat, bench or place where a judge sits.

By the above definition, a tribunal can function as court, or as an adjudicatory body. The burden or standard of proof remains, if functioning in either capacity in civil cases the primary onus of proving his case lies on the plaintiff. But that onus may even be discharged in the pleadings as by the Rules of pleading there is no onus to prove that which had been admitted See *Lawrence Onyekaonwu v. Ekwubiri & Ors.* (1966) 1 All NLR 34; *Alhaji Aliyu Balogun v. Alhaji Shittu Labiran* (1988) SCNJ 71 at 85.

In criminal cases, the burden of proofing (sic) the accused guilty rests throughout on the prosecution. It is not for the accused to prove honest dealing with the property in respect of which he is charged with an offence, but for the prosecution to prove the reverse. See: *Dr. Olu Onagoruwa v. The State* (1993) 7 NWLR (Pt. 303) 49 at 91; *Kenneth Clark & Anor. v. The State* (1986) 4 NWLR (Pt. 35) 381; *Patrick Okoroji v. The State* (2005) 1 N.C.C. 279 at 297.

This court had earlier on, in this judgment, set forth both counts 3 and 4 with their particulars, sent from the panel to the Tribunal against the appellant. The Tribunal in its finding of guilt on counts 3 and 4 against the appellant at pages 131(a) to 132 of the Record of Appeal found as follows:

> ***"On the issue of wrong fully giving permission for Mr. Akinadewo; the facts as presented before the Tribunal are that the respondent had a very good relationship with Mrs. Esther Babatunde in Mr. Akinadewo's reply to the investigating panel (Exhibit JA7) he stated categorically that the respondent gave him permission before this Tribunal Mr. Akinadewo did not give evidence.***
>
> ***How did he got hold of the stationary of Olufunmi Niniowo & Co. Mr. Akinadewo testified that the respondent was to take him to see Mrs. Esther Babatunde the principal partner but somehow he did not see her. It was later when a dispute arose that he went to see her. He even went to the extent of agreeing to profit sharing (Exhibit JA9).***
>
> ***The respondent testified that he did not give permission to Mr. Akintunde but he admitted Mr. Akinadewo was practicing without a license while he was in full time employment with the firm of Ayorinde Thomas & Co. Mr. Akinadewo testified before the panel that was an auditor with the firm of Ayorinde Thomas & Co. and Mr. Jaiyesimi was his colleague before he left to set up on his own. He also admitted that this case had cost him his job.***
>
> ***The Tribunal holds that this act is an act of professional misconduct since the respondent knew that Mr. Akinadewo was in full time employment with the firm of Ayorinde Thomas & Co. and did not have a practicing licence yet he gave him active encouragement and***

connived with him to carry out the audits in the name of Olufunmi Niniowo & Co. The Tribunal therefore holds that this ingredient has been proved.

This is a finding of fact by the Tribunal. Again the Black's Law Dictionary, Eight Edition, at page 664, defines the finding of fact as follows:

"A determination by a judge, jury or administrative agency of a fact supported the evidence in the record usually presented at the trial or hearing ..."

The Tribunal adjuged (sic) the appellant guilty of active encouragement and connivance with Mr. Akinadewo which amounted to a professional misconduct. The only evidence relied upon by the Tribunal to arrive at this verdict according to it was the evidence of Mr. Akinadewo at the panel. The said Mr. Akinadewo did not appear at the Tribunal, and therefore did not give evidence. However from the Record of Appeal before this court, at pages 16 and 17, these are a few Excepts of Mr. Akinadewo before the panel. At page 16:

"What happened was that I was looking for a firm to use for the job I got I now got the consent of Mr. Jaiyesimi, even ever before then we had gone to Mrs. Babatunde's office because is like we were very good friends and I believe we still good friends I got his own permission to use the name"

"I went to Mrs. Babatunde with him and I was there for once. Mr. Jaiyesimi told me that look you have to go and see this woman because she gave him the permission"

"She gave him permission but for him to give me the permission we need to go and see Mrs. Bababtunde."

"That was it and I have apologized to her on that."

At page 17 of the Records Mr. Akinadewo stated:

"I was on contract because I was not doing anything but due to communication gap for not going to her which I apologized and I actually accepted it that I ought to have gotten in touch with her which I never did I apologized, I accepted the whole thing to which she agreed, that was why she asked me to write an undertaking that I was not going to use her name again. I said fine to the extent of prostrating because I know the implication of this and she agreed with me but unfortunately which I never knew, one day when I saw her in my office I was curious and I now say excuse ma hope there is

no problem, she said no she just came for a personal thing. I still went back to her office and asked her, she said am I afraid because she came to my office, I said I have to be afraid because I know the implication of this thing, she told me not to worry, until when I now saw a letter from ICAN and meanwhile she has gone to report to my boss which has cost me my job, now I am jobless."

This is the Record before this court from above, can it be determined beyond doubt, as the Tribunal did, that the appellant, gave his consent to Mr. Akinadewo to go and practice, having knowledge that the latter had no professional licence to do so, and to use the firm name of Olufunmi Niniowo & Co. The facts before the Courts as admitted by Mr. Akinadewo suggests otherwise. The appellant clearly, and which was admitted categorically by Mr. Akinadewo that the latter could not proceed to do so what he wanted to do even with the appellant's consent, unless and until the two of them see Mrs. Babatunde. It therefore means for the consent of the appellant to be of any value to Mr. Akinadewo the meeting of two, with Mrs. Babatunde was *sinequanon*. Mr. Akinadewo said he had accepted the whole thing to himself, and that was why he apologized to Mrs. Babatunde and wrote an undertaking not to use her name again.

The question remains, where is the evidence of active encouragement and connivance that the appellant was found guilty of the knowledge that the latter had no professional licence to do so, and to use the firm's name of Olufunmi Niniowo & Co. The facts before the court as admitted by Mr. Akinadewo suggests otherwise. The Appellant clearly, and which was admitted categorically by Mr. Akinadewo that, the latter could not proceed to do so what he wanted to do, even with the appellant's consent, unless and until the two of them see Mrs. Babatunde. It therefore means for the consent of the appellant to be of any value to Mr. Akinadewo the meeting of two, with Mrs. Babatunde was Sinequanon. Mr. Akinadewo said he had accepted the whole thing to himself, and that was why he apologized to Mrs. Babatunde and wrote and undertaking not to use her name again.

Again the evidence of the appellant at page 93 of the Record of Appeal is more consistent with the evidence by Mr. Akinadewo. The appellant said:

"There is no way somebody can give permission for what you don't have what I did was to introduce Mr. Akinadewo to Mrs. Funmi Babatunde and whatever arrangement they had was between them. That was what I did".

The Tribunal in his verdict found that the appellant was guilty of professional misconduct. The word "misconduct is defined by the Black's Law Dictionary Eight Edition at page 1019 as:

"A dereliction of duty; unlawful or improper behavior."

By the definition above, any act associated with dereliction of duty, done unlawfully or which improper behavior, the stand (sic) of proof must be one beyond reasonable doubt. No such proof from the facts before this court that has been established against the appellant.

Let me mention here that although this court had resolved the issue No. 1 in favour of the respondent that was more of a declaratory decision on the action of the panel that did the preliminary investigations before sending same to the Tribunal. The Tribunal entered the verdict of guilt against the appellant in its judgment. It is this judgment that this court must set aside as proof of finding of fact has been established against the appellant in this Appeal On the whole therefore this appeal is meritorious, and it is hereby allowed.

The judgment of the Accountants Disciplinary Tribunal in charges No: ICAN/LEG/DISC. 1/6168/05/2000, dated the 1st day of December, 2006 is hereby set aside by this court.

Parties to bear their own costs.

AUGIE, JCA: I have read the lead Judgment just delivered by my learned brother, Bage, JCA, and I agree with him that the appeal will have to be allowed.

The Tribunal found the appellant guilty of professional misconduct because he gave a third party, who did not have a practicing licence, and who was in full time employment with an accounting firm, "active encouragement and connived with him to carry out the audits".

"Encourage" means "to give courage, hope or confidence to; embolden, to give support to; foster; help - see Webster's New World Dictionary.

The word "connive" is defined in the same Webster's Dictionary thus –

> "1. To pretend not to see or look (at something wrong or evil), thus giving tacit consent or cooperation; feign ignorance of another's wrongdoing; 2a). To cooperate secretly (with someone), esp. in wrongdoing; conspire b) to scheme in an underhanded way".

The said third party did not appear before the Tribunal, not to mention testify before it, and there is nothing he said to the investigation panel that proves that the appellant knew the alleged facts used against him.

Findings of facts are within the province of the Tribunal, and there is a rebuttable presumption that its findings and conclusions are correct. However, where a Tribunal fails to properly examine and evaluate the evidence it, the duty of an appellate court to interfere with any improper findings would come into play - see *Sanni v.*

State (1993) 4 NWLR (Pt. 285) 99 & *Nwankwoala v. State* (2005) 12 NWLR (Pt. 940) 637.

Obviously, the decision of the Tribunal in this case cannot stand, and I also allow the appeal, and order that it be set aside in its entirety.

PEMU, JCA: I have read in draft the judgment just delivered by my brother S.D. Bage J.C.A and I agree with his opinion and indeed conclusion that the appeal be allowed.

The fact that the so called third party did not appear before the Tribunal, nor testify before it, is fatal to the case of the appellant.

Every fact constituting a cause of action in a cause or matter, has to be crystallized before a cause of action is said to arise against a person.

It is no gainsaying that a Tribunal or court is presumed to have in its hallowed bosom the facts of a case, but there is a rebuttable presumption that its findings and conclusions, are correct. Therefore it is pertinent for a Tribunal to evaluate evidence before her properly, and where this is lacking, as in the present case, the appellate court is duty bound to interfere with same.

The decision of the learned trial judge is hereby set aside, while I allow the appeal.

I also abide by the consequential order made as to costs.

Cases cited in the judgment

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Awuse v. Odili (2004) 8 NWLR (Pt. 876) 481
Bakare v. NRC (2007) 17 NWLR (Pt. 1064) 606
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Section 138 of the Evidence Act
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History:

TRIBUNAL
Accountants Disciplinary Tribunal

COURT OF APPEAL (Lagos Division)
Aminat Adamu Augie, JCA *(Presided)*
Sidi Dauda Bage, JCA *(Read the lead judgment)*
Rita Nosakhare Pemu, JCA

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