

**EFFECTIVE MECHANISM FOR ENFORCING
DECISIONS OF THE ICAN DISCIPLINARY
TRIBUNAL**

By Professor Itse Sagay, SAN.

**LECTURE DELIVERED AT THE RETREAT OF
THE ICAN DISCIPLINARY TRIBUNAL AND
INVESTIGATING PANEL**

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AT:

**DOVER HOTEL
LEKKI PHASE 1
LAGOS.**

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1. Offensive Conduct Under the Institute's Act

- 1.1 I feel highly honoured to be invited to participate in the deliberations of such an esteemed institution and professional body like the Institute of Chartered Accountants. It is my hope that my little contribution this afternoon will be of assistance in the smooth operations of the practice of accountancy.
- 1.2 By Section 11, of the Institute of Chartered Accountants of Nigeria Act, CAP 111, 2004 Laws of the Federation of Nigeria, provision is made for the establishment of a Disciplinary Tribunal and an Investigation Panel for the enforcement of Professional Discipline in ICAN. We shall examine these bodies in greater detail later in this paper.
- 1.3 The offences which can give a rise to a charge before the Tribunal basically involve conduct in contravention of a very detailed Code of Conduct containing the Fundamental Principles of the Profession and ethical standards drawn from them. The Fundamental Principles which must guide the conduct of a Chartered or Registered Account are Integrity, Objectivity, Professional Competence and due Care, Confidentiality and Professional Behaviour.
- 1.4 Within this very broad frame work guiding the conduct of recognized practitioners of accountancy, are acts or conduct too numerous to list,

which could constitute an offence, leading to an appearance before the Investigating Panel and charges before the Disciplinary Tribunal.

Such conduct is given various descriptions under Section 11 of the Institute's Act.

These include:

- i. Situations in which a member has misbehaved in his capacity as an accountant.
 - Section 11 (3) (a).
- ii. Professional misconduct.
 - Section 12
- iii. Infamous conduct in a professional respect.
 - Section 12(1) (a)

More specifically, an Accountant can be disciplined in the following circumstances:

- i. Conviction by any Court in Nigeria or elsewhere having power to award imprisonment for an offence (whether or not punishable by imprisonment) which in the opinion of the Tribunal is incompatible with the status of an accountant – section 12(1) (b)
- ii. Fraudulent registration as a member of the Institute – Section 12(1) (c)

- 1.5 Section 18 of the Act establishes criminal offences which are outside the jurisdiction of the Tribunal and are subject to trial by regular Courts. These apply to a person who for the purpose of procuring registration of any name, qualification or other matter;

- i. knowingly makes a false statement or statements in a material particular; Section 18(1)(a)
- ii. recklessly makes such a statements, - Section 18(1) (b)
- iii. By Section 18(2) if a non-member of the profession practices as an accountant for reward or takes on a name or title or description suggesting that, he is a member, when infact he is not being considered for enrollment or registration, he shall also be guilty of an offence.

2. Comments on the Offences

- 2.1 Some comments on the listed offences are apt at this stage. In the first place, anything which in the opinion of the Investigating Panel is considered unprofessional, a misconduct, misbehaviour "in his capacity as an accountant" or where for any other reason the Panel thinks a member of the Institute should appear before the Panel, the latter has the power to invite that member to appear before it. There is clearly here, a large measure of discretion conferred on the Panel.
- 2.2 Also where a member of the profession has been convicted by any Court in Nigeria or elsewhere having the power to impose the sanction of imprisonment, the Tribunal, without waiting for the Panel to consider the case, can impose a sanction on that member, even though as a matter of fact, the member was not sent to prison but was only sentenced to pay a fine or was simply warned and ordered to be of good behaviour, or given any other punishment other than imprisonment.

- 2.3 Once the Tribunal is of the opinion that the conviction is incompatible with the status of an accountant, it can punish the member on its own initiative.
- 2.4 It should be noted that the making of a reckless statement which turns out to be false under section 18(1)(b) means that such a statement was made recklessly and carelessly, without regard as to its accuracy or correctness. This is different from willfully making a statement which you know to be false. (see Derry v, Peek , 14 App. Cas. 337 at 374). However, the punishment in each case is the same.

3. Disciplinary Procedure

- 3.1 The procedure for enforcing discipline amongst ICAN members involves a two-stage procedure. In the first place the person is invited to appear before the Accountants Investigating Panel which is 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: and
 - b) deciding whether the case should be referred to the Tribunal.
- 3.2 After conducting its preliminary enquiry into allegations made against the member, which must obviously include writing the person to give his testimony, the Panel then decides whether or not a prima facie case has been made against the member. If for example the Panel feels that the case against him is too tenuous or that he has proffered

an acceptable explanation or account of his conduct, the matter ends there at that level.

- 3.3 If however, the Panel is of the view that inspite of all the member's explanations, he has a case to answer, the case is referred to the Tribunal where a deeper and more thorough process of inquiry is carried out. The Tribunal stage is more like a Court proceeding, where detailed evidence is taken from human and documentary evidence. A legally qualified Assessor is also on hand to assist the Panel with his opinion and advice on legal issues (see Section 11(3) and paragraph 4 of the 3rd schedule of the Act).

4. Fair Hearing

- 4.1 It is absolutely important that the whole disciplinary process is subject to fair hearing as prescribed by Section 36 of the Constitution. The proceedings of numerous administrative Tribunals Panels and Committees have been nullified by the Courts for the basic reason that they flouted the mandatory fair hearing Rule.

The Rule has two arms:

- i. Hear the other side
- ii. Do not be a judge in your own cause.

- 4.2 The Universities, which seem unduly fond of disciplinary proceedings against students and staff, have been constantly hammered by the Courts for violations of the right of fair hearing. The latest of these is the case of Dr. Taiwo Olarunoba-Oju & Ors v. Professor Shuaib O. Abdul-Raheem and Ors [2009] 26 WRN 1, in which the Vice-Chancellor of the University of Ilorin, dismissed 49 Professors and Lecturers in

one fell-swoop, simply for participating in an ASUU strike. There was no attempt to query them or change them before the Senior Staff Disciplinary Committee. The affected Lecturers were afforded no opportunity whatsoever to defend themselves.

4.3 Nullifying the termination of the Lecturer's appointments, the Supreme Court (per Adekeye JSC) held as follows:

"The nature of fair hearing to be observed in this context is as entrenched in section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999, as it encompasses the twin pillars of justice namely:

- (a) *Audi alteram partem* (hear the other party)
- (b) *Nemo iudex in causa sua* (no one should be a Judge in his own cause)

It is equally a common law doctrine that in the determination of his civil rights and obligations a person is entitled to a fair hearing within reasonable time by a court or tribunal established by law.

Section 15(1) of the University of Ilorin Act guarantees administrative, academic and professional staff fair hearing before their appointment is terminated thus giving the exercise of such disciplinary powers a statutory flavour. The learned senior counsel for the respondents distinguished the case of *Olaniyan* from this instant case. There is similarity in that case with the case in hand as to the *cassus belli* reasoning and

decision particularly on the issue of fair hearing in the termination of appointment of employees whose contract of employment enjoys statutory flavour. There is no iota of evidence that the procedure for termination of employment of the appellants as to fair hearing was observed in this case. Issue three is resolved in favour of the appellants.”

4.4 This has been a re-occurring decimal in the co-called citadels of learning. Some of such other cases include Olaniyan v. University of Lagos [2004] 15 WRN 44; Eperokun v. University of Lagos [2004] 16 WRN, 90; Bamigboye v. University of Ilorin [1999] 10 NWLR (Pt. 922) 290, and Garba v. University of Maiduguri [1986] 1 NWLR (Pt. 18) p. 550.

4.5 Even the Nigerian Bar Association fell into the same error when it attempted to discipline the late great Chief Gani Gawehinmi, for what it referred to as advertising. The then Attorney-General, not only queried Gani for advertising, but attempted to preside over the Disciplinary Tribunal set up to try him. What is more Gani was given 14 days to respond to the charges, but was then charged before the 14 days elapsed, thus denying him the opportunity to respond to the charges.

Nullifying the whole process, the Supreme Court declared, (per Eso JSC)

“It is patent from the action of the Attorney-General in this case, that he is not only a Judge in his own cause – in effect he is complainant, prosecutor and Judge – but also heavily biased

against the respondent whom, though he allowed fourteen days to state his case, he also prevented him from so doing with so much swiftness that it would leave no one in doubt of his bias. Not less are the three members of the Bar Association who having condemned the respondent at their earlier Bar Executive would now sit in judgment over him. It is a case of "come here quickly for your assured condemnation."

4.6 This explains why adequate provisions are made for fair hearing in the third Schedule of the Act of the Institute as follows:

"2. (1) The Chief Justice of Nigeria shall make rules as to the selection of members of the Tribunal for the purposes of any proceedings and as to the procedure to be followed and the rules of evidence to be observed in proceedings before the Tribunal.

(2) The rules shall in particular provide –

- (a) for securing that notice of the proceedings shall be given, at such time and in such manner as may be specified by the rules, to the person who is the subject of the proceedings;
- (b) for determining who in addition too the person aforesaid, shall be a party to the proceedings;
- (c) for securing that any party to the proceedings shall, if he so requires, be entitled to be heard by the Tribunal;
- (d) for enabling any party to the proceedings to be represented by a legal practitioner;"

4.7 That is why the same Schedule also provides at paragraph 4(2) that:

“(2) The Chief Justice of Nigeria shall make rules as to the functions of assessors appointed under this paragraph, and in particular such rules shall contain provisions for securing –

- (a) that where an assessor advises the Tribunal on any question of law as to evidence, procedure or any other matters specified by the rules, he shall do so in the presence of every party or person representing a party to the proceedings who appears thereat or, if the advice is tendered while the Tribunal is deliberating in private, that every such party or person as aforesaid shall be informed what advice the assessor has tendered;
- (b) that every such party or person as aforesaid shall be informed if in any case the Tribunal does not accept the advice of the assessor on such a question as aforesaid.”

5. Sanctions

5.1 When the Tribunal finds a member guilty of the charge against him, it is given 3 options:

- i) To reprimand the member
 - ii) To Order that the person’s name be struck off the Register
 - iii) To defer a decision
- (see Section 12(2) and (3))

5.2 Where the member commits an offence under the Act, which is not within the jurisdiction of the Tribunal, e.g, knowingly making a false statement, or recklessly making same regardless of its falsity, the punishment is either a fine of one hundred naira, on summary conviction, or one thousand solely or coupled with imprisonment for a

maximum period of two years if conviction is an indictment. A summary trial usually involves a relatively minor offence and is heard by a Magistrate's Court, whilst an indictable offence usually involves a more serious offence, heard by a High Court Judge.

- 5.3 Other offences outside the jurisdiction of the Tribunal include illegal operation as an accountant or the making of a false entry or information into Institute's register by the Registrar or any member of staff under him. (See Section 18 paragraphs 3 and 4).
- 5.4 It is worth stating that the Supreme Court held in Garba v. University of Maiduguri [1986] 1 NWLR (Pt. 18) p. 550 that no non-judicial body has jurisdiction to try anyone for an offence under the Penal Code (Northern States) and the Criminal Code (Southern States). Only the regular courts had jurisdiction in such matters.
- 5.5 Luckily, the very wide scope of what constitutes unprofessional conduct or breach of the code of conduct of the Institute ensures that the Tribunal can operate without infringing on the jurisdiction of regular Courts.

6. Appeals

- 6.1 Any one found guilty of an offence by the Tribunal is entitled to appeal against the decision of the Tribunal to the Court of Appeal within 28 days of receiving notice of the Tribunal's decision. (Section 12(5)) A decision of the Tribunal shall not take effect as long as the appeal against its decision has been lodged at the Court of Appeal within the prescribed 28 days and has not been concluded.

6.2 On the other hand, the Tribunal's decision takes effect,

- (i) where no appeal has been lodged against it within the stipulated 28 days;
- (ii) where the appeal has been heard and dismissed and
- (iii) where the appeal is either withdrawn or struck out for want of prosecution.

(Section 12(6))

Note should be taken of the fact that the Court of Appeal is the final Court Appeal for such matters. There is no right of further appeal to the Supreme Court.

7. Conclusion

7.1 In the light of the above review of the mechanism for the enforcement of the ICAN Disciplinary Tribunal, one can say that in principle an effective mechanism already exists. However, some further steps can be taken to improve it.

1. The Punishment for the offences in Section 18 are far too lenient. One hundred naira fine in 2010 is nothing to an Okada man much less an Accountant.
2. In the third Schedule, the Chief Justice of Nigeria is empowered not only to make rules for the proceedings of the disciplinary process, but in addition he is authorized to make rules for the selection of members of the Tribunal for the purposes of the proceedings.

7.2 Frankly, I fail to see why this second leg is necessary. What stops the Institute or even the Council from selecting members of the Tribunal? The Council knows its members far more than the Chief Justice. What is more there is a clear conflict between Section 11(2) and paragraph 2 of Schedule three of the Act. Already Section 11(2) clearly provides that the Tribunal shall consist of a Chairman and six other members of the Council **appointed by the Council**. This provision is in conflict with the third Schedule which purports to give the Chief Justice power to do the same thing. In the light of the above, the provision in the substantive part of the Act, Section 11(2) prevails over the conflicting provision in the Schedule, and the latter is thus emptied of any content to the extent of the conflict.

7.3 Also Section 11(3) of the Act provides for an Accountants Investigation Panel of 3. Yet paragraph 5 of Schedule three decrees a quorum of 3. Should the composition of the Panel not be increased to say 6 or 7 before fixing the quorum at 3? For the Tribunal itself, no provision is made for quorum out of its membership of 7.

It is my candid view that once these conflicting provisions and omissions are attended to, the enforcement provisions of the ICAN Disciplinary Tribunal can be regarded to be as good any other organization's disciplinary process, including that of the NBA.