IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD 2021

CORAM: BAFFOE-BONNIE, JSC (PRESIDING)

LOVELACE-JOHNSON (MS.), JSC

AMADU, JSC

PROF. MENSA-BONSU, (MRS.) JSC

KULENDI, JSC

CIVIL APPEAL

NO. J4/39/2021

14TH APRIL, 2021

THE REPUBLIC

VRS

GHANA INSTITUTE OF MANAGEMENT AND PUBLIC ADMINISTRATION (GIMPA) | **RESPONDENT/RESPONDENT RESPONDENT**

EX PARTE:

1. **EVANS GYAMFI**
2. **FELIX KYEI ADJEI** | **APPLICANTS/APPELLANTS/APPELLANTS**

3. STEPHEN YOMOH

JUDGMENT

DECISION OF THE COURT BY MAJORITY

KULENDI, JSC:-

INTRODUCTION:

This is an appeal against the judgment of the Court of Appeal dated 4th July, 2019 in which the Court of Appeal affirmed the decision of the High Court dated 19th April, 2018, refusing Appellants application for Certiorari.

BACKGROUND

The facts of this case are that the Appellants, who were all level three hundred (300) students of the Respondent institution pursing Bachelor of Science Degree in Accounting were, after a Disciplinary Committee hearing, by letters dated 22nd September, 2017, dismissed for engaging in examination malpractices. According to the Appellants, on the 24th May 2017 at about 5:30 pm, while they were seated to write their marketing examination, the Invigilator of the examination ordered the whole class to walk out of the examination hall to re-arrange the seating positions. This caused some dissatisfaction by the students. At the tail end of this collective expression of dissatisfaction by the class, the 2nd Appellant could be heard saying that the Invigilator's actions would occasion hardship as there were married and pregnant women among the class. Upon hearing this, the Invigilator, charged towards the 2nd Appellant in a confrontational manner but was prevented by the other Appellants in order to avert any altercation. Appellants say that while the examination was ongoing, the Invigilator requested the Appellants to fill the examination malpractice form, which the 1st and 2nd Appellants complied.

The Respondent's narration of the incident differs slightly from that of the Appellants. The conduct of the Appellants, as contained in a formal complaint that was lodged by the Invigilator with the Respondent which can be found at page 215 of the Record of Appeal are as follows:

> *"Felix Adjei Kyei (217016006) and Evans Gyamfi (217003907) kept on telling the whole class I was wrong in what I had said to the class. They equally added that, "if you knew your work, you would have done the arrangement earlier and not come now and waste our time". They kept on telling the class they needed to stand up against my action.*
>
> *Yamoh Stephen (217002927) on the other hand told me, "you have no right to go beyond the stipulated time". He at a point walked up to me and pushed me while rudely talking to me. Stephen also insisted he would not grant me access to his student ID card when I requested for it during the examination. He only gave me the card when Mrs. Esther Ayini who was present, had insisted I had the right to ask him for his ID card. Stephen also refused to fill the misconduct form when it was first given to him. He insisted he would only fill the form after the exam. After the exam, he again refused to fill the form."*

Appellants were by letters dated 8th June, 2017, informed of the allegations of examination malpractice leveled against them and were requested to submit written statements of their version of the incident within two days, which the Appellants complied. Appellants were subsequently, by letters dated 19th June, 2017, invited to attend a disciplinary committee hearing to "give them additional opportunity of hearing", an opportunity the

Appellants availed themselves. Appellants were dismissed from the Respondent upon the recommendation of the Disciplinary Committee by letters dated 22nd September, 2017.

The Appellants contend that the Invigilator who was also the Complainant, acted as the Secretary to the Disciplinary Committee panel that investigated the alleged complaints. Appellants further contend that they were tried and punished under a repealed law hence their trial and subsequent dismissal is unlawful. Appellants say they were not given the opportunity to narrate the events of the said day at the hearing, neither were they given the opportunity to call witnesses or give any evidence to corroborate their story, although the Invigilator had the chance to call the security man who purportedly witnessed the event. Appellants again say the punishment of dismissal is harsh, unfair and unreasonable as the decision of the Disciplinary Committee did not take into account the fact that the Appellants had not been previously cited for any form of misconduct neither did the conduct that was complained of constitute examination malpractice per the regulations and statutes of the Respondent.

Appellants accordingly mounted an application for certiorari before the High Court to quash the decision of the Disciplinary Committee.

On 19th April 2018, the High Court dismissed the application for certiorari holding, among others, that the Respondent acted within its regulations and statutes in coming to the decision to dismiss the Appellants. Appellants Appealed the decision of the High Court to the Court of Appeal and the Court of Appeal on 4th July, 2019, dismissed the appeal and upheld the decision of the trial High Court judge (pages 359·373 of the record of Appeal). Dissatisfied by the judgment of the Court of Appeal, the Appellants have lodged a further appeal to this Court for our consideration.

GROUNDS OF APPEAL

On 29th August, 2019, the Appellants filed a notice of appeal at the registry of the Court below and canvassed the following as the grounds of appeal:

"a. That the judgment is against the weight of the affidavit evidence.

b. The learned Court of Appeal erred when it failed to consider that the basis of the Applicants' dismissal from the Respondent School was a repealed Regulation.

c. The learned Court of Appeal erred when it failed to consider that the Disciplinary Committee of the Respondent's Business School acted without jurisdiction.

d. The Court of Appeal, with respect, erred when it failed to consider the fact that the disciplinary procedures adopted by the Respondent were irregular and in contravention of Respondent's Statute.

e. The Court of Appeal erred when it failed to make a finding of bias against the Respondent.

f. The decision of the Court of Appeal that the Applicants were given a fair hearing is not supported by law.

g. The decision of the Court of Appeal that the Respondent acted fairly, reasonably and in compliance with the requirements imposed by its statutes is erroneous."

(see page 375 of the Record of Appeal)

From the said grounds of appeal, we take the view that the following material issues arise for our determination:

1. Whether or not the Disciplinary Committee had jurisdiction to hear the offence of examination malpractice levelled against the Appellants.
2. Whether or not the procedure adopted by the Disciplinary Committee was regular and in conformity with the Respondent's Statute.
3. Whether or not the Disciplinary Committee acted fairly and reasonably in the discharge of its duty.

THE LAW:

It must be noted that the Appellant herein invoked the supervisory jurisdiction of the High Court. This jurisdiction is conferred on the High Court by article 141 of the Constitution. Article 141 reads as follows:

> "141. SUPERVISORY JURISDICTION OF THE HIGH COURT. The High Court shall have supervisory jurisdiction over all lower courts and any lower adjudicating authority; and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers."

The invocation of the supervisory jurisdiction of the court does not give the High Court the unwarranted discretion to constitute itself into an appellate body of an inferior tribunal and to substitute the decisions of inferior body only because on the given set of facts, the High Court would have come to a different conclusion. The Courts as a matter of common sense and public policy must avoid the temptation to do so under the guise of judicial review. Otherwise the High Court will be assuming appellate jurisdiction over inferior tribunals and become flooded with a torrent of capricious and frivolous applications to "re-hear" matters concluded by statutory adjudicatory bodies. This is not to say that the High Court must shy away from correcting inferior bodies when they err in law or fail in the discharge of the statutory and constitutional duty imposed on them. The High Court, has jurisdiction to supervise inferior tribunals, including statutory adjudicatory bodies and or officials when they commit patent errors of law and/or exceed their powers in the exercise of their adjudicatory function. [see the opinion of Lord Denning in the case of ***Pearlman v Governors of Harrow School*** [1979] QB 56, at p. 70; see also the case of **REPUBLIC VRS CIRCUIT COURT 'B' ACCRA, EX PARTE:**

MADAM REBECCA KOMELEY ADAMS & ORS, (CIVIL APPEAL No.: J/5 / 23/ 2009)(judgment delivered on 16th November, 2011), the dictum of our noble brother Date-Baah JSC (as he then was)].

Lord Bridge, in the case of **Leech v. Deputy Governor of Parkhurst Prison** [1988]AC 533 at 561 stated as follows:

> *" that where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised in accordance with natural justice, the court has jurisdiction to review the exercise*
> *of that power."*

The power of the High Court to exercise supervisory jurisdiction over inferior tribunals is laid down by law and the perimeters of the discretion well demarcated in law.

The Constitution places a duty on all administrative bodies and officials to act fairly and comply with due process of law in the discharge of their functions. The Constitution also enjoins persons affected by the decisions of administrative bodies and officials to seek redress in the court. Article 23 of the Constitution states as follows:

> *"**Administrative bodies and administrative officials** shall **act fairly and reasonably** and **comply with the requirements imposed on them by law** and **persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal**."*

It is worthy of note that article 23 of the Constitution is an entrenched clause that finds itself among the articles on fundamental human rights. This in itself is indicative of the nature and importance of the duty on such bodies, as almost always, the neglect of the

imperatives of article 23 by adjudicatory bodies will occasion a violation of the fundamental human rights of persons whom the decision affects.

Article 296 of the Constitution equally places a duty on all persons exercising constitutional or statutory discretion such as judges, public bodies, public officers, etc to act within the parameters of the enabling law and ensure that the exercise of the discretion is not influenced by caprice, bias, prejudice, arbitrariness, resentment, or dislike. The said article states as follows:

> *"Where in this Constitution or in any other law discretionary power is vested in any person or authority -*
>
> ***(a) that discretionary power shall be deemed to imply a duty to be fair and candid;***
>
> ***(b) the exercise of the discretionary power shall not be arbitrary, capricious or biased wither by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and***
>
> ***(c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."***

Generally speaking, where the inferior adjudicatory body acts in a manner that is ultra vires, or constitutes abuse of discretion, or in breach of the principles of natural justice, or in blatant disregard for the observance of the relevant statutory procedures, the High Court may exercise its supervisory powers to keep such a body or official in check. Our High Courts have never shied away from intervening in instances where inferior

tribunals exercise their discretion in breach of the principles espoused above. [see the cases of THE REPUBLIC v KRACHI TRADITIONAL COUNCIL; EX-PARTE ANANE [1975] 1 GLR 276; REPUBLIC v BUEM TRADITIONAL COUNCIL; EX-PARTE ISUKU II [1991] 1 GLR 455; ABOAGYE V. GHANA COMMERCIAL BANK LTD. [2001-2002] SC GLR 797; AWUNI V. WEST AFRICAN EXAMINATIONS COUNCIL [2003-2004] SC GLR 471,

In the case of L'iar Liquide Ghana Ltd. v. Anin and others [1991] GLR 460 at 461, the Court of Appeal rightly drove home this position of the law thus:

> *"Whenever people were given power by law to consider facts and to arrive at conclusions affecting the fate of human beings, they were performing a quasi-judicial function and if the body violated the rules of natural justice the courts had power to declare the procedure invalid, as well as the conclusions there from"*

The duty that was cast on the High Court was to consider whether or not the Respondent acted within the applicable statute and procedures prescribed therein whilst observing the rules of natural justice in arriving at its decision dismissing the Appellants.

We wish to state without equivocation that in exercising our appellate jurisdiction, this Court, as the second appellate court, will not interfere with the concurrent findings of fact of the High Court and the Court of Appeal unless justice demands such an interference and the concurrent findings are clearly not supported by the evidence on record; or the findings were made on patently wrong principles of law. [See: **OBENG & OTHERS V ASSEMBLIES OF GOD CHURCH, GHANA [2010] SCGLR 300 AT 409; NTIRI V ESSIEN [2001-2002] SCGLR 459; SARKODIE V F K A CO LTD [2009] SCGLR 79; JASS CO LTD V APPAU [20009] SCGLR 266 AND AWUKU-SAO V GHANA SUPPLY CO**

LTD [2009] SCGLR 713; GREGORY V TANDOH IV [2010] SCGLR 971; ACHORO V AKANFELLA. [1996-97] SCGLR 209].

DISCUSSION OF ISSUES 1 & 2

The first issue that arise for our determination is whether or not the Disciplinary Committee had jurisdiction to hear the offence of examination malpractice levelled against the Appellants. The second issue for determination is the issue of whether or not the procedure adopted by the Disciplinary Committee was regular and in conformity with the Respondent's Statute. For purposes of convenience, we shall address the two issues together since they bear similarities on the applicable law.

The Appellants contend under the relevant grounds of appeal (supra) that the Court of Appeal erred when it failed to consider that the basis of the Appellants' dismissal from the Respondent School was a repealed Examination Regulations. The alleged repealed Examination Regulation was exhibited by the Respondent as Exhibit AN4 and can be found at page 230 of the Record of Appeal. The said Regulations were issued by the Academic Registry and is dated 27th April, 2011. According to the Appellants, the Examinations Regulations of the Respondent, published by the Respondent and dated April, 27, 2011 derived its legitimacy from the GIMPA Statute of 2011.

The said regulations reads in part as follows:

> " The following Examination Regulations extracts from GIMPA statutes are published to remind candidates of the existence of these rules and to encourage candidates to comply with them throughout the examination.."

Appellants say that since the Statutes of the Institute, 2015 which came into operation on 16th May 2015 was the statute in force at the time of the Appellants were alleged to have

committed the examination malpractice, and the 2015 Statute expressly repealed the 2011 Statute, all regulations made under the repealed law died with the old law.

Appellants rely on Section 3 of the Statute of the Institute, 2015 (hereinafter referred to as "the 2015 Statute) in urging on us the above view. Section 3 of 2015 Statute states as follows:

> *"The Statutes in force immediately before the commencement of these statutes are repealed."*

It is the contention of the Appellants that since the 2015 Statute repealed the 2011 Statute, all regulations made under the repealed 2011 Statute are also impliedly repealed.

The Respondent contends the contrary and states that section 62(2) of the 2015 Statute saved all existing regulations including the examination regulations with which the Appellants were charged. The said section 62(2) reads as follows:

> "*The academic Board shall not make or ratify a regulation amending or repealing* ***the regulations for the time being in force*** *except at an ordinary meeting of the Academic Board and unless notices of the Amendment or repeal has been placed on the agenda for the meeting."*

We cite with approval, the holding in the case of **REPUBLIC VRS. JUDICIAL COMMITTEE OF THE AHANTA TRADITIONAL COUNCIL; EX PARTE BOSOMKONA II** [1982- 83] GLR 231 at 234 that:

> *"Where a statute is repealed, any bye law made thereunder ceases to be operative unless there is a saving clause in the new statute preserving the old bye-law. There appear to be two reasons for this. First, because there might be two inconsistent codes relating to the same matter… and secondly because the usual practice is to insert in the later statute an article expressly preserving previously made bye-laws if it is intended that they shall remain in force.*

Can it be said that section 62(2) of the 2015 Statute saved the Examination Regulations made in 2011 under the 2011 Statute? Respondent contends that the use of the phrase ***"the regulations for the time being in force"*** in the 2015 Statute contemplates that at the time of the promulgation of the 2015 Statute, there were regulations that were in force. It is these regulations that, Respondent alleges, were not to be amended or repealed unless the notices of the repeal or amendment had been placed on the agenda at an ordinary meeting of the academic board. We are not persuaded that the language of section 62(2) of the 2015 Statute expressly saved regulations made under the repealed 2011 Statutes. This is because, the 2015 Statute itself came with it a set of offences constituting examination malpractices. Schedule F of the 2015 Statute is captioned "abridged version of examination regulations". Under the title of schedule F is the statement: Please refer to Students Handbook for Full Version]. Schedule F, section 9 spells out conducts considered as constituting examination malpractices. Further, Schedule F, section 9 is also captioned as follows: "Examination Malpractices or Offences/Misconduct."

We are of the opinion, that the power vested in the academic board to review the ***"the regulations for the time being in force",*** is referable to the regulations contained in the 2015 Statutes and not regulations made under a completely repealed law. This is because, the 2015 Statute does not come with it any saving provisions, which ordinarily would have clarified the extent of the repeal of the 2011 Statute. Section 62(2) of the 2015 Statute does not also expressly and unambiguously save regulations made pursuant to the 2011 Statute, which section 3 of the 2015 Statute says, is completely repealed.

Granted that the 2011 Examinations Regulations were saved by section 62 (2) of the 2015 Statute, the 2011 regulations does not in itself come with it, any procedure by which the

malpractices may be addressed when a student is alleged to have infringed any of the regulations.

The applicable procedure, would, therefore, have to be the procedure outlined in the 2015 Statute. To appreciate this point, one ought to refer to the Ghana Institute of Management And Public Administration Act, 2004 (ACT 676), which Act establishes the Respondent and spells out its functions. Section 32 of Act 676 states as follows:

> ***"Section 32—Statutes of the Institute***
>
> *(1)* ***The Council may make statutes to carry into effect the objects of the Institute.***
>
> *(2) Without limiting the scope of subsection (1), the Council may make statutes*
>
> *(a) to regulate the appointment, conditions of service, termination of appointment and retirement benefits of the staff of the Institute,*
>
> *(b) to determine the persons who are authorized to enter into transactions, sign documents, negotiable instruments and contracts on behalf of the Institute;*
>
> *(c)* ***for procedures to discipline students*** *and staff of the Institute;*
>
> *(d) for procedures for assessment and the award of degrees, diplomas and certificates of the Institute; and*
>
> *(e) to oversee the award of bursaries and scholarship*

Therefore, the disciplinary procedures that were applicable when the Examination Regulations of 2011 were promulgated was the procedure set out in the 2011 Statute. As has been stated above, the Statute of 2011 was entirely repealed and replaced by the 2015 Statute. Therefore, even, if the Appellants were to be tried on the Examination Regulations enacted in 2011, on the assumption that the said regulations were saved by section 62(2) of the 2015 Statute, the applicable procedure ought to be that stipulated in the new Statute of 2015.

This is because, by section 3 of the new Statute of 2015, the former statute had been completely and totally repealed. Therefore, any disciplinary procedure under the old repealed law was extinct and unlike the phoenix, those disciplinary procedures were never to rise from their ashes and operate again, to borrow the words of Archer JSC in the case of **FATTAL AND ANOTHER v. MINISTER FOR INTERNAL AFFAIRS AND ANOTHER [1981] GLR 104 at 115.**

The eminent jurist, Archer JSC (as he then was) in the Fattal case compares the relationship between repealed law and active law. His Lordship, in his usual flowery but succinct words delivered at page 116 himself as follows:

> *"Active statutory laws are in operation almost every day. Dormant statutory laws are invoked from time to time, but rarely, when the occasion demands.* ***Extinct statutory laws are never invoked because they are inoperative. Like the extinct volcano, extinct statutory laws have exuded all the lava in their interstices"***

Consequently, the effect of section 3 of the Statute of 2015 is that, nothing in the repealed law shall be revived again after the repeal. All Disciplinary procedures in the repealed law died and were buried with the coming into force of the 2015 Statute to give way for the birth and outdooring of the new Disciplinary procedure in the new Statute.

Appellants make a striking argument in this appeal before us. Appellant contends that the procedure adopted by the Respondent is not sanctioned by law and moreover, that the Respondent acted in contravention of its own Statute. Having held that the applicable disciplinary procedure was the one enshrined in the 2015 Statute, the question is, what are the disciplinary procedures that the 2015 Statute prescribes? The answer to this lies in paragraph 9(3) to (10) of Schedule F of the 2015 Statute which provides as follows:

"3. In all instances of examination malpractices or offences formal report shall be made to the Academic Board as soon as Practicable.

4. *The Chief Invigilator or his alternative shall administer the Examination Misconduct Form to the candidate and shall submit to the Director of Academic Affairs. Upon receipt of the report, the Director of Academic Affairs shall inform the candidate in writing that his conduct shall be reported and that a decision as to whether his works shall be accepted rests with the Academic Board. Copy of the letter will be addressed to the Faculty Board/Board of Examiners concerned, through the Dean.*
5. *A candidate, who has been considered to have infringed the rule, shall be required to submit a written report of his side of the case to the Director of Academic Affairs within two working days. Such a report shall be taken to the respective Faculty Board/ Board of Examiners, through the Dean.*

6. *The Faculty Board/Board of Examiners shall review the reports received in connection with an examination malpractice or an offence and on the basis of its review, the Board, acting on behalf of the Academic Board may impose a section involving.*
    a. *Loss of marks in a particular paper*
    b. *Credit denial in respect of any course or examination completed or attempted*
    c. *Withholding of the candidates results for up to one academic year.*

7. *The Board of examiners shall make appropriate recommendations to the Academic Board for its final decision.*
8. *The Academic Board may review all the reported cases and may vary the sanctions as it thinks fit.*
9. *The Academic Board may take any other disciplinary measures deemed appropriate.*
10. *In extreme cases grade "Z" shall be awarded where it is established that a candidate had attempted and had gained an unfair advantage in an examination and may be barred from writing any examinations of the Institute for a stated period, indefinitely or expelled from the Institute"*

From the above, not only did the Statute of Institute, 2015 repeal the 2011 GIMPA Statute, it also provided a comprehensive step-by-step procedure for dealing with alleged instances of examination malpractices.

The compelling question is thus whether the Respondent followed the elaborate procedure laid down by the Statute of Institute, 2015 in its handling of the case of the Appellants? We think not. This is because, from the Respondents own affidavit in opposition as well as the various documents exhibited by the Respondent before the trial Court, the approach adopted by the Respondent in handling the cases of alleged examination malpractice against the Appellants were at variance with the procedure stated in its applicable law, the Statute of 2015. Respondent subjected the Appellants to a Disciplinary Committee which is not sanctioned by the Respondent's applicable Statute. Specifically, paragraph 9 (3) to (10) of Schedule F of the Respondent's 2015 Statute mandates that the Board of Examiners, acting on behalf of the Academic Board reviews the complaint of malpractice and the written response of the student and thereafter impose a sanction. The Board of Examiners then make a recommendation to the Academic Board for a final decision by the Academic Board. In the instant case, the unauthorized Disciplinary Committee, instead of the Board of Examiners, was the body

that heard the Appellants, and made recommendations for the punishment of the Appellants.

In the 2015 Statute, the only place where Disciplinary Committee is mentioned is in section 52. The said section reads as follows:

> "There shall be a disciplinary committee to whom the Rector may refer disciplinary matters involving academic staff and senior administrative staff…

Also, per schedule B Paragraph 11 of the Statute of Institute, 2015, the Terms of reference of the Disciplinary Committee is to:

> *"a. Receive allegations of misconduct made against employees*
>
> *b. Establish whether a misconduct has been committed against an employee*
>
> *c. make recommendations for appropriate sanctions if it is established that an employee has misconducted himself or herself."*

A careful study of the new Statutes of Institute, 2015 reveals that indeed the Disciplinary Committee established under the New Statute did not have the mandate to try students for alleged examinations malpractices. Was it the intendment of the promulgators of the new Statute that the Disciplinary Committee established under the Repealed Statute still continue to exist and try cases of alleged examination malpractices? We do not think so. The New Statute would have expressly stated so.

From the above, we hold that the Disciplinary Committee of the Respondent did not have jurisdiction to hear the case of alleged examination malpractices of the Appellants. Their hearing and findings were therefore made without jurisdiction. Consequently, the Trial High Court and the Court of Appeal ought to have declared the proceedings of the

Disciplinary Committee and all orders or reports emanating therefrom as null and void and of no legal effect.

It is significant to note that if the Respondent had adhered to the Applicable provisions of its 2015 Statute, the severest sanction that could have been recommended by the Board of Examiners to the Academic Board under paragraph 9(7), and not a Disciplinary Committee (the emphasis ours), could have been in terms of Paragraph 9(10). Under Paragraph 9 (10) "*In extreme cases grade "Z" shall be awarded where it is established that a candidate had attempted and had gained an unfair advantage in an examination and may be barred from writing any examinations of the Institute for a stated period, indefinitely or expelled from the Institute.*"

To warrant a grade Z and an expulsion from the institute, it has to be established that the culprit, had attempted and gained an unfair advantage in an examination. From the facts of this case, it cannot be said that the conduct of the Appellants, even if were established, gave them an unfair advantage in an examination. Consequently, it could not have warranted and/or justified the sanction of an expulsion imposed on them.

Having come to the conclusion that the procedure adopted by the Respondent was wrong and in breach of the 2015 Statute, we shall now address the third and final issue of fair hearing. Under this issue, Appellants contend that they were not given a fair hearing and that the Respondents breached the principles of natural justice in its hearing of Appellants matter.

We are of the considered opinion that the right to a fair hearing entails procedural and substantive implications. Consequently, for a hearing to meet the test of procedural fairness, it ought to have been conducted in accordance with law, laid down and accepted

rules for the conduct of the enquiry in issue. Also, substantive fairness entails questions of whether whilst acting in accordance with duly established and permissible procedures, the facts, questions and issues entailed in the enquiry are duly considered, listened to and evaluated in a reasonable, impartial, unbiased and an equitable manner to arrive at findings and or conclusions on the matter. Therefore, a hearing conducted in a manner that does not accord with the procedural rules and principles set out in the relevant legislation is procedurally unfair to begin with and as such fails one of the two pre-requisites of a fair hearing. In such a case, it will be immaterial that a hearing conducted in a manner not sanctioned by law and laid down procedure, was nevertheless undertaken in an impartial, unbiased and an equitable manner.

From our perusal of the Record of this Appeal, particularly, the Memo at page 219 to 222 of the Record of Appeal, as well the Report of the GIMPA Business School's Disciplinary Committee from pages 223 to 229 of the Record of Appeal, it is obvious that the Respondent failed, neglected and/or refused to follow the procedure prescribed in paragraph 9 (3) to 9(10) of Schedule F of the 2015 Statute. The Respondent resorted to a procedure whereby they purported to be giving the Appellants a further right to a hearing before a Disciplinary Committee, an organ which is alien to paragraph 9(3) to (10). Similarly, the letter to the Appellants notifying them of their dismissal which is at page 20 of the Record of Appeal purports to have been issued under the authority of the academic board of the Respondent on the basis of findings of the Business School Disciplinary Committee and not on the basis of recommendation by the Board of Examiners as prescribed under paragraph 9(7). Needless to say, the authority to impose a sanction of expulsion under the paragraph 9(10) aforesaid, can lawfully emanate from the recommendation of a the Board of Examiners to the Academic Board for final decision. Consequently, a decision not founded on the appropriate recommendation is manifestly unlawful and sins against the enabling Statute of the Institute.

Appellants also contend in this Appeal that the Respondent breached the two known principles of natural justice in its hearing and sanctioning of the Appellants. By principles of natural justice, we mean the known maxims of *audi alteram partem* and *nemo judex in causa sua*". We have perused the entire Record of Appeal and have found the assertions of breaches of the principles of natural justice unsubstantiated. Respondent did not breach the principles of natural justice in its determination of the alleged misconduct. It must be borne in mind that the right to be heard does not necessarily impose an obligation on a adjudicatory body to hear oral or *viva voce* evidence from persons who are to answer to charges or allegations of wrong doing. Where a person has been given the opportunity to submit a written response, justification or account, it will be untenable to complain that such a person has not been heard or given an opportunity to be heard. A person who has had the opportunity to be heard formally through a written response or statement by him or her resort to a complaint that he or she has not been given a fair hearing because he or she was not heard orally.

This Court, speaking through His Lordship Date-Bah JSC (as he then was) in the **Awuni case** (supra) at page 563 held as follows:

> *"My interpretation of fairness within the context of article 23 would be that, in general, unless the circumstances make it inappropriate, for instance for reasons of practicality or of public interest or for any other cogently valid reason, it includes a principle that individuals affected by administrative decisions should be afforded an opportunity to "participate" in the decision in the sense of being given a chance to make representations on their own behalf of some kind, oral or written, to the decision-maker. Individuals affected or to be affected by administrative decisions obviously have an interest in influencing the outcome of the decision-making process. In general, it is fair that they*

should be afforded an opportunity to influence the decision. Given the variety, and the width of the continuum, of contexts in which administrative decisions are taken, however, there is need for flexibility in the ways that are to be worked out to enable individuals to influence decisions about themselves. Thus, in relation to a particular decision, the circumstances may indicate that there is no need for a formal hearing, in the sense of an adjudication. A consultation, for instance, may be adequate. This flexibility, regarding how the presentation of the views of those affected by administrative decisions may be made, is expressed thus by Lord Bridge in Lloyd v McMahon [1987] AC 625 at 702:

> *"…the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."*

Accordingly, a fair "hearing" does not necessarily connote an opportunity for the person affected to be heard orally. Written representations on his or her behalf may be sufficient, given the context. Also, the nature of the opportunity to be offered to an affected person to be heard may be influenced by public interest considerations and the requirements of efficient administration".

In the instant case, the Appellants were offered the opportunity to submit their written versions of the incident. The Appellants availed themselves of this opportunity by writing to the Respondent. By letters dated 19th June, 2017, the Appellants were further

invited to appear before the Committee and be afforded the additional opportunity to be heard. (see pages 10 to 17 of the Record of Appeal). To our minds, these series of events gave the Appellants sufficient opportunity to be heard. The plaint by the Appellants that they were not allowed to call witnesses in their defence is not borne out of the evidence on Record. Which witnesses did the Appellants request to call? what are their names? At what point did the Appellants request to call those witnesses? who on the committee denied Appellant's request? What affidavits or declarations were made by the intended witnesses and tendered in court to substantiate the allegations? The Appellants complaint in this regard is thus not supported by the Record before us.

Also, Appellants contend that the complainant served as secretary to the Committee that tried them. The documentary evidence shows otherwise. The Report of the Committee, although narrates the membership of the committee as including the complainant as secretary, the Report also says that the Complainant was excused as secretary to the hearing and was only at the hearing to enable the Appellants be confronted with the story of the Complainant in person. Allegations of bias, must not be fanciful but backed by evidence. Of course, principles of natural justice frowns on a person acting as a judge in his own course. This is captured by the latin maxim of '*nemo judex in causa sua'*. The evidence shows that the complainant was excused from the committee and did not partake in the deliberations of the Committee.

The above findings notwithstanding, in view of the conclusions reached by this Court that the Disciplinary Committee did not have jurisdiction to hear the matter and that the procedure adopted by the Respondent is at variance with that prescribed in its enabling laws, we shall declare the Disciplinary Committee hearings as well as the orders and recommendations arising therefrom as null, void and of no legal effect. We share in the time-honoured reasoning that it is a cardinal principle of law that jurisdiction is a

fundamental matter, which goes to the root of every proceeding and consequently, the lack or want of it renders any proceedings arising from same as null and void. [See the opinion of **Bamford Addo JSC** (as she then was) in ***EDUSEI NO.2 V. ATTORNEY GENERAL [1998-99] SCGLR. 753]***

We shall accordingly reverse the judgment of the Court of Appeal which affirmed the decision of the High Court. Therefore, let the decision of the Respondent's Disciplinary Committee dated 22nd September, 2017 and all orders or decisions, recommendations emanating therefrom be brought up to this Court for the purpose of being quashed and same is hereby quashed.

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

I.O. AMADU TANKO

(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

LOVELACE-JOHNSON (MS.), JSC:-

"Certiorari would lie to quash the decision of a court on the ground of error on the face of the record if such error went to jurisdiction or was so obvious as to make the decision a nullity. Jurisdiction used here simply means the power or authority of the court to give a decision on the issue before it, and in that regard the correctness or otherwise of the decision is irrelevant. The court's duty is to see whether the decision is or is not valid on its face, and was made within its jurisdiction" per Aikins JSC in **Okofoh Estate Ltd v Modern Signs Ltd [1996-97] SCGLR 244@ 247.**

The appellants in this case, to be described hereon as Applicants brought an application before the high court seeking an order for the decision of the Disciplinary committee of the Respondent to be brought before the court and quashed by an order of certiorari, a further order reinstating them as students with the opportunity to write all exams missed so they could graduate with their colleagues, damages for trauma and public ridicule suffered and costs.

The high court in the last two pages of of its thirteen page ruling analysed the documentary evidence before it and stated that it had "*no option than to refuse or dismiss the application for certiorari"*

Being dissatisfied, the Applicants launched an appeal to the court of appeal on six grounds which after resolving six issues it considered to be at the heart of the matter, also refused to grant them the reliefs sought in their application.

In this court, the Applicants' grounds of appeal are as follows

a. That the judgment is against the weight of affidavit evidence
b. The learned justices of the Court of Appeal erred when they failed to consider that the basis of the Applicants dismissal from the Respondent School was a repealed Regulations (*sic*).
c. The Court of Appeal erred when it failed to consider that the Disciplinary Committee of the Respondent's Business School acted without jurisdiction.
d. The Court of Appeal, with respect, erred when it failed to consider the fact that the disciplinary procedures adopted by the Respondent were irregular and in contravention of the Respondent's Statute
e. The Court of Appeal, with respect, erred when it failed to make a finding of bias against the Respondent.
f. The decision of the Court of Appeal that the Applicants were given a fair hearing is not supported by law.
g. The decision of the Court of Appeal that that the Respondent acted fairly, reasonably and in compliance with the requirements imposed by its statutes is erroneous
h. Additional grounds of Appeal may be filed upon receipt of the record of proceedings

No such additional grounds were filed.

They seek from this court a setting aside of that court's Ruling delivered on 14th July 2019 and although not sought, if successful, they would be entitled to the order of certiorari to quash the orders the subject matter of their application before the high court.

The very brief background of this case is that on the evening of 24th May 2017, just before the Applicants and other students were to write a paper, an altercation arose between

them and the invigilator of the said examination. It was as a result of this incident that the Applicants were charged and put before the Disciplinary committee after which they were issued letters of dismissal.

Bearing in mind the grounds on which an application for certiorari will succeed, we set down the following as the relevant issues to be resolved in this appeal in order to determine if the Applicants are entitled to the award of this remedy. It is also to be remembered that it being a discretionary remedy, the court for good reason can refuse to grant it even if the grounds for its grant are established.

i. Were the Applicants investigated under a repealed statute that is the 2011 Statute of the Respondent

ii. Were the Applicants given a fair hearing

At the high court, the Applicants application for certiorari was premised on an allegation that the rules of natural justice were breached in the course of the disciplinary hearing by the respondents because they were not given a hearing and that the disciplinary committee acted unfairly and unreasonably when it imposed the harsh punishment of dismissal on them.

Paragraph 15 of their affidavit in support found at page 5 of the ROA shows that they were of the opinion that they had been dismissed under the provisions of exhibit E, the 2015 statutes of the Respondent. It was the Respondent which raised exhibit AN4 for the first time in its affidavit in opposition in paragraphs 35 and 36 and made it the basis of the Applicants charges and sanctions. See page 216 of the ROA. The said paragraphs state as follows

35. That regulation 2.2 and 2.5 of the Respondent Institute's Examination Regulations dated 27th April 2011 define what constitutes examination malpractice and or misconduct. (Attached is a copy of the Examination Regulations marked as Exhibit "AN4").

36. That regulation 5.0 of Exhibit "AN4" also provides for the appropriate sanctions including dismissal from the Institute.

Counsel for the Applicants submissions relevant to the first issue are as follows; the regulation (Exhibit AN4) under which the Applicants were charged was a repealed one because it was promulgated under a statute which had been repealed at the time the charges were laid. It is contended that the current statute, exhibit E, did this repeal at paragraph 3 of page 3. Counsel contends that any reference to regulations by the current statute can only be a reference to those promulgated under the current statute (exhibit E) so any regulation made under any previous statute such as exhibit AN4 had been repealed. Further it is contended that exhibit E did not have any saving clause which saved any portion of its predecessor ie the 2011 statute. In other words, the 2011 statute 'died' with all its regulations.

In response to these submissions counsel for the Respondent contends that while it is true that exhibit E per its paragraph 3 repealed all statutes in force before the commencement of those therein, the said paragraph did not repeal all regulations impliedly including exhibit AN4. The 'life' or 'efficacy' (as counsel puts it) of these regulations is derived from Article 62(2) of exhibit E which states as follows

"The Academic Board shall not make or ratify a regulation amending or repealing the regulations for the time being in force except at an ordinary meeting of the Academic Board and unless notice of the amendment or repeal has been placed on the agenda paper for the meeting"

The high court's finding on these competing submissions is one line at page 308 of the ROA when it states as follows

"Exhibits AN4 and E provide the basis of the Respondent's claim that it acted within its regulations"

No reason was given for this finding. It is no wonder that that the second ground of appeal filed by the Applicants to the Court of Appeal was that the learned high court judge erred when it failed to consider that their dismissal was based on a repealed regulation. See page 311 of the ROA.

The Court of Appeal discussed the issue at some length and took the position that if indeed exhibit AN4 had been repealed as contended then it ought to have been properly done in accordance with article 62(2) and that it was the Applicants who bore the burden of proving such repeal since they are making the allegation. Having failed to do this, the court stated thus in part

"…this Court cannot but conclude that the Regulations therein have not been repealed and that the Disciplinary Committee did not hear the complaint against the Applicants under a repealed regulation."

It is agreed by all that exhibit AN4, the examination regulations were issued under the 2011 Act. See pages 230 and 231. The date of their issue ie April 27th 2011 confirms this. It is also not in dispute that exhibit E, the 2015 statutes made on May 16 2015 per its paragraph 3 repealed the Statutes immediately in force which Statutes are those of 2011.

What has to be decided is the import of Article 62(2), if any, on exhibit AN4 and contrary to the position taken by the Court of Appeal, it was the Respondents who were alleging that it gave efficacy to regulations enacted under repealed statutes who had a duty to prove the said allegation.

A reading of the whole of Article 62 headed REGULATIONS puts 62 (2) in the proper context.

62(1) provides as follows

The Council, the Academic Board, and the standing committees respectively may make regulations for their own procedures and for the exercise of their respective powers and the performance of their functions under these Statutes

62(2) The Academic Board shall not make or ratify a regulation amending or repealing the regulations for the time being in force except at an ordinary meeting of the Academic Board and unless notice of the Amendment or repeal has been placed on the agenda paper for the meeting.

3. Regulations made by a standing committee or any other subordinate body of the Institute pursuant to subsection (1) above are subject to the approval of the Academic Board and shall not come into effect unless approved by the Academic Board.

4. The Council and the Academic Board respectively shall in approving, ratifying, making, amending or repealing Regulations, observe the conditions specified in subsections (5) to (8) below.

5. The Regulations shall not be inconsistent with, or repugnant to, a provision of the Constitution of the Republic of Ghana, the GIMPA Act, 2004 (Act 676) or the Statutes of the Institute.

6. A regulation shall not be held invalid by reason only of the fact that it confers on female members, physically challenged individuals or others duly identified by the Institute benefits which are not extended to any other persons

7. Where a question arises as to the validity under these Statutes or a Regulation made by the Academic Board or standing committee or any other body authorized to make regulations within the Institute, the decision of the Council on that question is subject to the operation of clause (3) of Article 125 of the Constitution of the Republic of Ghana.

8. For the purposes of this section, "Regulations" include By-Laws.

Article 62(1) spells out the powers of certain bodies to make regulations. The rest of the article appears to put checks and balances in place in the exercise of these powers. For example by 62(2) the Academic Board cannot in effect change the regulations without an

ordinary meeting and the sought change should be on the agenda for the meeting. Regulations made by standing committees had to be approved by a higher body ie the academic Board. The Council and Academic board had to observe certain conditions in the process of approving regulations. Clearly, the whole article is one whose purpose is to make sure that the process of making regulations for the Respondent is properly done.

Counsel for the Respondent contends that since there were no new regulations it will be absurd to interpret Article 61(2) to be referring to new regulations passed under the 2015 statute. Counsel argues that the repeal of all statutes in force before that of 2015 did not mean a repeal of all regulations.

As stated earlier, the regulations in exhibit AN4 were made under the repealed statute.

Section 34 of the Interpretation Act 2009, Act 792 headed **Effect of repeal** states in subsection (2) as follows

Subsection (1) ***does not*** *authorize the continuance in force after the repeal or revocation of an enactment or of an instrument made under the enactment*

Instrument is defined under section 1 to include *"a notice, Rules,* ***Regulations,*** *By-Laws…."*

Clearly then, with the repeal of the 2011 statutes came the demise of the regulations made thereunder. A further pointer that the purpose of Article 16(2) was NOT to give efficacy to any existing regulations under the 2011 statute is the fact that the word REGULATIONS used in the 2015 statute is defined as ***rules and by-laws made by the appropriate authority under these statutes***, that is the 2015 statutes.

It is also worthy of note that the 2015 statute has by schedule F provided an abridged version of examination regulations and in Article 9 defined what examination malpractices or offences and misconducts are, the process to be followed when these arise and sanctions to be imposed. Some of the sanctions in exhibit AN4 such as loss of marks,

withholding of results, award of Z, being barred from writing an exam for a stated period or indefinitely and expulsion are also stated in schedule F. Why the need for a repetition of such sanctions if the regulations in the 2011 statute (supposedly still efficacious) contain same?

We make a finding that exhibit AN4, regulations promulgated under the 2011 statutes had been repealed at the time the Applicants were put before the disciplinary committee.

A careful reading of the letters (exhibit B series) sent to the Applicant levelling charges against them does not specifically mention under which regulations the charges were being laid. The invitations to the disciplinary hearings (exhibit C series) and the letters dismissing them (exhibit D series) also do not make any such reference. As stated earlier, the Applicants assumed, and rightly in our opinion, that they were being charged under the regulations made under the prevailing 2015 statutes.

In conclusion, I find that exhibit AN4, birthed by the 2011 statute, having "died" with the repeal of the said statute, could not have clothed the disciplinary committee which went into the matter with jurisdiction to investigate the charges against the Applicants herein. The mere statement by the Respondent's counsel in this court that their jurisdiction was derived from this source, that is the repealed regulation, did not make it so. This court in the exercise of its powers of rehearing is duty bound to go through the evidence on record and make its own finding on the matter.

Indeed the disciplinary committee never stated that it was acting under exhibit AN4 and the Applicants, from their affidavit in support of their application assumed, rightly in my opinion, that they had been investigated under exhibit E hence their not basing their application at the high court on want of jurisdiction. See paragraph 28 of the affidavit in support at page 8 of the Record of Appeal (ROA). I am satisfied that the applicants were investigated under exhibit E, the 2015 statute.

As stated earlier, the trial court found that the Applicants were dismissed under the regulations in Exhibit AN4 and Exhibit E. Clearly exhibit E is the operating statute of the Respondent and per schedule F, paragraphs 9 and 10, a definition of what examination malpractice or misconduct is, is provided and the procedure to be used in investigating such.

Certiorari being a discretionary remedy can be refused even when grounds supporting an application for it have been established. In **Republic v High Court, Denu; Ex parte Agbesi Awusu II (No 2) (Nyonyo Agboada (Sri III) Interested Party) [2003-2004] 2 SCGLR 907** Atuguba JSC stated as follows

"It is well known that certiorari is a discretionary remedy and therefore it does not necessarily follow that when the technical grounds upon which certiorari lies are established, it will be pro tanto granted"

See also the case of **Republic v High Court, Accra, Ex parte Attorney-General (Ohene Agyepong Interested Party). [2012] 2 SGGLR 1204**

Schedule F of exhibit E, as stated earlier makes provision for the procedure to be followed in re examination malpractices. It is not in dispute that it is a so called disciplinary committee of the Respondent which went into the allegations levelled against the Applicants instead of the Academic Board. In my opinion the question to be answered is that having found that the applicants were investigated under the prevailing 2015 statute and not the repealed 2011 statute, but the wrong procedure was followed for the said investigation, was the wrongful procedure employed such as to make the Applicants worthy of the grant of an order of certiorari? I think not.

As stated earlier the grant of the discretionary remedy of certiorari is not automatic. The availability of other remedies at the time of making the application is good reason for

refusing such an application. See **Republic v High Court, Accra, Ex parte Attorney-General (Ohene Agyepong, Interested** Party) supra.

Of more relevance to the present case is the statement of Atuguba JSC in the case of **In re Appenteng (Decd); Appenteng (Appentengs Interested Parties) [2010] SCGLR 327** quoted in the earlier mentioned case that

"It is well established that this remedy being discretionary, a suitor for it, even on the ground of want or excess of jurisdiction, will not obtain it ex debito justitiae unless he can show that he had raised an objection to the want of jurisdiction if he was aware of it"

Date Bah JSC stated thus in part

"The applicant, by his conduct, has clearly acquiesced in whatever want of jurisdiction attended the High Court's conduct of this case. Whilst such acquiescence may not cure any want of jurisdiction, it can found the basis for a negative exercise of discretion in relation to the grant of an order of certiorari"

As stated earlier the issue of whether or not the disciplinary committee was the proper body to investigate the matter was never raised by the Applicants either at the committee's hearing or at the High Court. See the affidavit in support of the application at paragraph 3 of the ROA and their supplementary affidavit at page 264 of the ROA upon leave granted on 15th March 2018.

In an application such as the present, our jurisdiction is only exercisable in relation to matters that occurred at the court or body from which the order sought to be quashed arises. In other words we are bound by the record of the investigative body. Looking at the record of that body, its jurisdiction to act was not raised. How then could that be an error patent on the face of the record? To quote Gbadegbe JSC in the case of The Republic vs High Court, Accra, ex parte Mirielli Hitti [George Jamil Mougaine & ors Interested Parties] ,this Court's jurisdiction

"…is exercisable only in relation to matters which transpired in the court whose judgment or order is the subject matter of the application and does not extend to matters which were not part of the proceedings leading to the judgment or order on which the application is grounded…."

It is to be borne in mind that the core matter for consideration before us is whether or not the trial court exercised its discretion within the parameters laid down by law for such exercise and not how this court would have exercised that discretion in the said circumstances.

Bearing in mind that the grant of the remedy is not automatic, even where the conditions for its grant are met, I am satisfied that it was within the province of the High Court to refuse its grant in the circumstances of this case even if for different reasons than proffered in this judgment.

On the second issue set down, the Applicants contend that, the Invigilator who made a complaint was present at the hearing as the panel's secretary, that they were not allowed to narrate their side of the story, call witnesses or tender any evidence to 'corroborate' their story.

The Respondents per paragraphs 25, 27, 28, 31 34, 37, 38, 39, 40 and 41 of their affidavit in opposition however take the position that due process was followed, that the Applicants were given a hearing and that the Invigilator was present as a complainant. They attached a copy of the proceedings of the committee as exhibit AN3.

It is difficult from just the affidavit evidence on record to determine whether or not the plaintiffs were given a fair hearing or if the complainant took part in the proceedings in such a way as to infringe the rules of natural justice that persons such as the Applicants are entitled to be heard in their defence (audi alterem partem rule) and persons such as the complainant are not allowed to so participate in proceedings resulting from their own

complaint that they become judges in their own cause and thus bias ensues.(nemo judex in causa sua). Evidence will need to be taken before findings on these issues can be made.

The inability to make such a determination means that if indeed there was a breach of the rules of natural justice, it is not apparent on the face of the record, as it is required to be for an order for certiorari to issue on that ground. To put it in the words of the opening quotation by the Supreme Court at the opening of this judgment, I am unable to *"determine if the decision is or is not valid on its face"* on the affidavit evidence before us regarding the issue under discussion.

With the resolution of the issues set down in the manner in which they have, I conclude that the Applicants herein did not merit the exercise of the discretion of the courts below in their favour by the grant of an order of certiorari. Their remedy lies elsewhere.

The decision of the court of appeal dated 14th July 2019 refusing the Applicants' relief for a setting aside of the High court decision, except for costs, is hereby affirmed but for the reasons above stated.

A. LOVELACE–JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

COUNSEL