

SUPREME COURT OF NIGERIA
16TH MAY, 1997. SC. 100/1994
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, M. E. OGUNDARE,
S. U. ONU, A. I. IGUH, JJSC

LT. F. S. EBOHON (RTD)	AP-
PELLANT		
AND		
ATTORNEY-GENERAL, EDO STATE		
CIVIL SERVICE COMMISSION, EDO STATE	RE-
SPONDENT		
THE COMMISSIONER, MINISTRY OF WORKS		
AND TRANSPORT, EDO STATE		

ACTIONS - *Dismissal - Where jurisdiction is in issue - The lower courts were wrong - To determine that issue - Without resolving the conflicts in the affidavit.*

EVIDENCE - *Affidavits - Conflict on crucial aspect thereof - Cannot be cured by the addresses of counsel.*

EVIDENCE - *Affidavits - Conflicts - On the fundamental issue of jurisdiction - Court is to hear evidence on the conflicts.*

FACTS

The appellant was employed within the Civil Service of the defunct Bendel State as an engineer. By a letter dated the 25-4-84, he was dismissed from service. Appellant filed an action before the High Court challenging the lawfulness of the dismissal. After the exchange of pleadings the Attorney General vide a motion on notice sought to have the action dismissed on the ground that the appellant's dismissal was pursuant to a Decree which prevented the court from trying the matter. There were material conflicts in the affidavits of the parties.

Without hearing evidence on the conflicts, the trial court dismissed the action for want of jurisdiction. Appellant's appeal to the Court of Appeal was dismissed by a majority judgment. He has further appealed to the Supreme Court which had to determine the matter on a main issue.

ISSUE FOR DETERMINATION:

_____ *Whether on the motion on notice the Court's jurisdiction was ousted or not.*

HELD (Unanimously allowing the appeal and ordering retrial per lead judgment of **BELGORE JSC**)

Affidavits - Conflicts on Crucial aspects thereof

1. In my view, both Courts below overlooked a very fundamental aspect of trial by affidavit evidence. Where affidavits of the parties conflict on a very important and crucial aspect of the dispute between them, that conflict cannot be cured by addresses of the parties' counsel. If the Court rules on the affidavits alone, as conflicting as they are, the issue in dispute is being lightly washed away. In such a situation injustice would be the result, for the parties will not thereby be heard on the conflicts in the affidavits. (p. 1031 C)

Conflicts on the Fundamental Issue of Jurisdiction

2. The logical next step for a Court faced with such affidavits with serious conflicts on the main issue, that is to say, as to jurisdiction in this case, is to hear evidence on the conflicts so as to resolve them. In the instant case, the conflicts are as to proper existence and origins of the letters of 13th and 19th April 1984. The deposition in the appellant's counter-affidavit may appear even spurious, it should not be written off as speculative; it was essential to the fundamental issue of whether the Court had jurisdiction to try the case. (p. 1031 D)

Dismissal - Where jurisdiction is in issue

3. Thus, I am not venturing into the lawfulness or wrongfulness of the dismissal; far from it. What I am alluding to is the failure to try the preliminary issue of whether letters of 13th and 19th of April 1984 really never existed when the letter of dismissal dated 24th day of April 1984 was written. This could have been resolved by hearing evidence viva voce whereby the two letters would have been tendered on oath. In such a case, there will be evidence in chief, cross-examination and re-examination on the two documents. The Court would then have moved forward to try the main issue of jurisdiction and thus know whether the dismissal was caught by Decree No. 17 of 1984. By moving forward to determine the issue of jurisdiction without resolving the conflicts in the affidavits of the parties, the lower Courts were definitely in error. (p. 1031 F)

REPRESENTATION

K. E. Mozia with J. D. Eimujenze for the Appellant
Respondents absent. Not represented

CASES REFERRED TO

Nwosu v. Imo State Environmental Authority (1990) 2 NWLR (pt 135) 688, 718

Judicial Service Committee v. Omo (1990) 6 NWLR (pt 157) at 407

Wilson v. Attorney-General of Bendel State (1985) 1 NWLR (pt 3) 572

Olu-Ibukun v. Olu-Ibukun (1974) 2 S.C. 41 at 47

Falobi v. Falobi (1976) 9 & 10 S.C. 1

Okoye v. Lagos State Government (1990) 3 NWLR (Part. 136) 115 at 123

Akinsete v. Akindutere (1966) 1 All N.L.R. 147

LEAD JUDGMENT BY BELGORE JSC

The appellant, Lieutenant Commander Felix S. Ebohon, N.N. (retired) a Deputy Chief Engineer in the defunct Bendel State Civil Service was, by a letter dated 25th April 1984 informed as follows:

"Pruning of the Civil Service of Bendel State

I am directed to refer to the Bendel State of Nigeria Civil Service Commission's letter No. S. 275/vol. III/10 dated 19th April, 1984 on the above - named subject and to convey, with regret, the decision of the Commission to dismiss you and you are hereby dismissed, from the Civil Service, with immediate effect

2. You are advised, in your own interest, to hand over immediately to your Head of Division/Local Head Department all Government property in your possession.

*Sgd. for Permanent Secretary,
Ministry of Works and Transport,
Benin city."*

Thus the appellant was notified of his dismissal from the service of the State. The letter, on its face, purported to intimate the appellant that the dismissal was by Civil Service Commission of Bendel State. In the ordinary course of Civil Service Commission Regulations, there cannot be dismissal without certain steps having been taken e.g. there is evidence that the appellant has been convicted of a criminal offence based on fraud or dishonesty; or the appellant has been found guilty, after a thorough hearing according to the civil service rules, of some offences boarding on dereliction of duty, incompetence, or deliberate act or omission that caused loss to government etc. This is usually stated in the letter dismissing a civil servant. Therefore on its face the letter of 25th April 1984 did not look regular. To any observer, in the absence of any other lawful reason the dismissal would look wrongful and ultra vires.

In his statement of claim the appellant as plaintiff averred that he was in the Nigerian Navy from 1972 to 1980 and that thereafter by transfer

of service he became an employee in the Bendel State Civil Service as an Engineer. By 1983 he was appointed to the Delta Boatyard Limited as a General Manager. It would appear the Bendel State Government had substantial interest in the Delta Boatyard Limited because the appellant averred that he was appointed by the State Governor himself. What is however not in dispute is that the appellant remained in the service of Bendel State. Apparently after he left the Nigerian Navy and while in the service of Bendel State, the former lodged a criminal complaint against him whereby he was tried and convicted by a Lagos High Court but on appeal to the Court of Appeal the conviction was set aside. What followed was the letter quoted earlier in this judgement. After the exchange of pleadings the Attorney-General of Bendel State filed a motion on Notice reading as follows:-

"MOTION ON NOTICE

BROUGHT PURSUANT TO ORDER 24 RULES 2 AND 3

OF THE BENDEL STATE HIGH COURT (CIVIL

PROCEDURE RULES 1988 APPLICABLE

TO EDO STATE OF NIGERIA

TAKE NOTICE that this Honourable Court will be moved of Friday the 24th day of Jan. 1992 at the hour of 9 o'clock in the forenoon or so soon thereafter as counsel may be heard on behalf of the defendants/applicants praying this Honourable Court for the following orders :-

(i) *Setting down for hearing and disposal the point of law raised in paragraphs 9 and 10 of the statement of defence attached hereto as Exhibit 'C'*

(ii) *Dismissing the entire action on the grounds that the plaintiff/respondent was summarily removed (pruned) from the Civil Service of the defunct Bendel State by the Military Governor of the State in Exercise of the powers conferred on him by public Officers (Special provisions) Decree No. 17 of 1984. Accordingly, no civil proceedings relating thereto shall lie or be instituted in any court of law.*

AND for such further Order or other orders as this Honourable Court may deem fit to make in the circumstances.

DATED in Benin City this 18th day of December 1991."

In support of this motion there is an affidavit which, from paragraph 5 thereof, reads up to paragraph 14 as follows:

"5. That I am informed by F.A. Osadiaye, Esq; a Senior Legal officer in the Civil Litigation Division in the Ministry of Justice, Benin City, and I verily believe him that pleadings have been exchanged. Photostat copies each of the statement of claim and the statement of defence are attached herewith as Exhibits 'B' and 'C' respectively.

6. *That I am further informed by the said, Senior Legal officer and I verily believe him that in paragraphs 9 and 10 of Exhibit 'C', a point of law that the action was not maintainable and that this Honourable Court lacks the jurisdiction to hear and determine this matter by virtue of the provisions of public Officers (special Provisions) Decree, 1984 was raised.*

7. *That by a letter reference No. C.S.M. 61/vol.VII286 dated 13th B April, 1984, the 2nd defendant/applicant was informed by the Secretary to the Military Government and Head of Service that the Military Governor had approved the dismissal, retirement or termination of the appointment of a list of Civil Servants and that the 2nd Defendant/Applicant should implement same immediately. A photostat copy of the said letter is attached as Exhibit C 'D'.*

8. *That following the directive in Exhibit 'D' the 2nd Defendant/Applicant, by a letter reference No. S.275/Vol. III/10 of 19th April, 1984, took prompt action and communicated same to the permanent Secretary (now Director-General) of the 3rd Defendant/Applicant. To this letter was attached the list of Civil Servants pruned in the 3rd defendant/applicant's establishment. A copy each of the letter and the attached list is attached herewith as Exhibits 'E' and "EI" respectively and by page 2 of Exhibit E, the action taken by the 2nd defendant/applicant was copied to the Secretary to the Military Government and Head of Service.*

9. *That in Exhibit 'EI', the name of the plaintiff/respondent appeared at No.548.*

10. *That in compliance therewith the 3rd Defendant/applicant communicated to the plaintiff/respondent his dismissal from the Civil Service of the defunct Bendel State.*

11. *That on the 27th of June, 1984, the Federal Military Government promulgated the public officers (special provision) Decree 1984, with commencement date of 31st December, 1983.*

12. *That by section 1 (2) of the said Decree any act or thing done between the commencement date and the date of the promulgation of the Decree is deemed to have been done thereunder.*

13. *That by virtue of section 3 (3) of the said Decree, this honourable court lacks the jurisdiction to hear and determine this action.*

14. *That I am informed by the Senior Legal Officer and I verily believe him that the points of law raised in Exhibit 'C' will substantially, if not wholly dispose of this action in the interest of all concerned. It is therefore necessary to set this point of law down for determination."*

It is in this motion and the supporting affidavit that letters dated 13th April 1984 and 19th April 1984 were alluded to and they are herein quoted

for clearer grasp of the issues in this appeal:

"MILITARY GOVERNOR'S OFFICE

OFFICE OF THE SECRETARY TO THE MILITARY GOVERNMENT

AND HEAD OF SERVICE

BENIN CITY

B *BENDEL STATE OF NIGERIA*

Our Ref: No. CSm. 61/Vol.VI/286

13th April, 1984.

The Permanent Secretary,

Civil service Commission, Benin City.

(For the attention of Mr. V.A. Ayetuoma)

C A. *Pruning of the Civil Service of*
Bendel State

I forward herewith in duplicate, a list of officers in the Civil Service who have been ear-marked for dismissal and retirement or whose appointment are to be terminated in connection with the current pruning of the Bendel State Civil Service being undertaken by the present Military Administration.

D *The list has been considered by the State Executive Council and approved by the Military Governor.*

2. It will therefore be appreciated if you place the matter before the Commission for their immediate implementation.

3. The effective date of the decision in each case is the 1st of May, 1984 and,

E *in the circumstance, appropriate letters should reach the individuals affected without delay.*

Sgd. (P.I.G. Onyeobi)

Secretary to the Military

Government and Head of Service."

F B. *"CIVIL SERVICE COMMISSION*

P.M.B. 1066

BENIN CITY

BENDEL STATE OF NIGERIA

Ref. No. S.275/Vol.111/10

19th April, 1994

The permanent Secretary ,

G *Ministry of Works & Transport,*

BENIN CITY.

(For the attention of Mr. L.O. Umunna)

PRUNING OF THE CIVIL SERVICE OF BENDEL STATE

With reference to the on-going pruning of the Civil Service, I wish to convey the approval of the Civil Service Commission for the retirement/ dismissal or termination of appointment, as the case may be, of the officers in your Ministry/Department listed in the attached schedule. The effective

H

date of retirement/dismissal or termination of appointment is as shown against the names of the officers concerned.

2. *You are kindly requested to convey the Commission's decision to all the officers in your Ministry/department affected by the pruning exercise, as soon as possible but, in any case, not later than 1st May, 1984. It is, perhaps, pertinent to advise that you should ensure that all Government properties in the custody of the affected officers are recovered from such officers before they bow out of the Service.*

3. *Gazette publication of the retirement/dismissal or termination of appointment of the officers affected by this exercise will be handled by this office.*

4. *Copies of this letter and the attached schedule are being forwarded to the Director of Audit and the Accountant-General for their information and necessary action.*

*Sgd. (V.A. Ayetuoma)
Permanent Secretary,
Civil Service Commission.*

S E C R E T

The appellant filed a counter affidavit to the motion on Notice as follows:

"I, Felix Ebohon, Male, Nigerian, Christian resident at No. 21 Adolor Street, Benin City make Oath and state as follows:-

"That I am the plaintiff/Respondent to motion filed by the Defendants on 18th December, 1991.

That I depose to this counter affidavit in opposition to the said motion and prayer sought by the Defendants asking that my action be dismissed.

That I am informed by my Counsel A. I. Uhunmwagho Esq. and I verily believe him that the motion did not disclose any fact whatsoever ousting the jurisdiction of the Court.

That paragraph 7 of the supporting affidavit is misleading and therefore not true. That I was informed of my dismissal by letter Ref. S.502/T/230 dated 25th April, 1984 attached herewith as Exhibit "CA".

That the Applicant's EXHIBIT 'D' i.e. letter CSM.61/Vol./VI/286 of April 1984 is an after -though and a frame-up to deceive this Court.

That I was not dismissed in accordance with the public Officers (special Provision) Decree No. 17 of 1984.

That my letter of dismissal ref. S.502/T/230 of 25th April, 1984 hereby marked Exhibit "CAI" read with the Applicant's Exhibit 'E' clearly show who was dismissing me from the Service of the 1st Defendant.

That I know as a fact that my appointment was never terminated by the Military Governor of Bendel State but by the 3rd Defendant who were

not happy at my progress in the service and collided with 2nd Defendant to frame- up a purported dismissal in 1984.

That I performed my duties so creditably that I was appointed General Manager in February 1984.

That the application was brought in bad faith as the Defendants
B *know that they have no defence to my claim.*

That I was not dismissed in accordance with the provisions of the Civil service Rules which the 2nd Defendant was enjoined to follow in determining the appointment of an Officer.

That this Court has the jurisdiction to determine this suit.

C *Dated this day of January, 1992 at Benin City.*

Sgd. DEPONENT."

From the foregoing what was obvious was that the matter would be first tried by affidavits. The main issue of course is whether, on the motion on notice, the Court's jurisdiction was ousted or not. On the strength of the entire affidavits before the Court the issue raised, and seriously in contention,
D is whether the letters of 13th and 19th of April were an afterthought to cover up the letter of dismissal dated 25th April 1984 (quoted earlier). This serious allegation could not be easily washed away; it must be tried, and the mode of trying it is not simply by annexing the letters to an affidavit and believing they would be presumed to have emanated from the sources they have on
E their headings. This could be so if the letters are not challenged. However, Learned trial judge, after hearing the counsel to the parties on the motion and relying on Section 3 (3) public officers (special provisions) Decree, No. 17 of 1984 and the case of Nwosu v. Imo State Environmental Authority & ors. (1990) 2 NWLR (pt 135) 688, 718 in his ruling came to the conclusion
F that the dismissal of the appellant was caught by the provisions of S. 3(3) of Decree No. 17 of 1984 (supra).

The court of Appeal, in considering the only issue for determination i.e.

"In the opinion of the appellant, only one issue arises for determination in this appeal:-

G *(a) Whether the appellant was proved to have been dismissed under and by virtue of section 3 (3) of the public Officers (Special Provisions) Decree No. 17 of 1984 thereby ousting the jurisdiction of the Court.*

came to the conclusion in majority decision (Akpabio and Ogebe, JJCA, with Ubaezonu JCA dissenting) that the trial High Court was right. In arriving at its majority decision, Court of Appeal held that by virtue of S.4(2) of Decree
H No. 17 of 1984 the two parties having conceded that the Military Governor or any other person authorized by him was the appropriate authority to terminate

or dismiss the appellant, the appellant ought to know that letters of 13th and 19th April 1984 were written on the directive of the Military Governor. The Justices relied on Nwosu v. Imo State Environmental Sanitation Authority (supra) and Judicial Service Committee & 2 ors. v. Micheal Omo (1990) 6 NWLR (pt 157) at 407; and also on Wilson v. Attorney-General of Bendel State & 2 ors. (1985) 1 NWLR (pt 3) 572. The dissenting judgment of B Ubaezeonu JCA held the view that the fact that the Governor was purported to have authorized the dismissal was not enough in the circumstances of this case and those two letters of 13th and 19th of April 1984 were challenged as non-existent as at the time the letter of 24th April 1984 was written and was prepared purely for the motion being heard.

In my view, both Courts below overlooked a very fundamental aspect of trial by affidavit evidence. Where affidavits of the parties conflict on a very important and crucial aspect of the dispute between them, that conflict cannot be cured by addresses of the parties' counsel. If the Court rules on the affidavits alone, as conflicting as they are, the issue in dispute is being lightly washed away. In such a situation injustice would be the result, for the parties will not thereby be heard on the conflicts in the affidavits. The logical next step for a Court faced with such affidavits with serious conflicts on the main issue, that is to say, as to jurisdiction in this case, is to hear evidence on the conflicts so as to resolve them. In the instant case, the conflicts are as to proper existence and origins of the letters of 13th and 19th April 1984. The deposition in the appellant's counter-affidavit may appear even spurious, it should not be written off as speculative; it was essential to the fundamental issue of whether the Court had jurisdiction to try the case. The bigger issue of the appropriateness of the dismissal would naturally follow after resolving the conflicts in the affidavits.

Thus, I am not venturing into the lawfulness or wrongfulness of the dismissal; far from it. What I am alluding to is the failure to try the preliminary issue of whether letters of 13th and 19th of April 1984 really never existed when the letter of dismissal dated 24th day of April 1984 was written. This could have been resolved by hearing evidence viva voce whereby the two letters would have been tendered on oath. In such a case, there will be evidence in chief, cross-examination and re-examination on the two documents. The Court would then have moved forward to try the main issue of jurisdiction and thus know whether the dismissal was caught by Decree No. 17 of 1984. By moving forward to determine the issue of jurisdiction without resolving the conflicts in the affidavits of the parties, the lower Court were definitely in error. All the

cases cited - Nwosu, Wilson, etc. (supra) are on their own facts different from this case in that the authenticity of the letters were not in question as in the case now at hand.

For the foregoing reasons this appeal succeeds only as to the preliminary issue of erroneous decision on affidavits, when those affidavits conflict on material facts, and the Courts below holding that the Court's jurisdiction was ousted. In the light of this, I order that the issue of the two letters be tried by evidence on oath before another High Court of Judge other than Omoluabi J in the High Court of Edo State.

There will be no order as to costs.

C

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Belgore, JSC. I agree with him that where a court of law is faced with affidavits evidence which are irreconcilably in conflict on material facts, the court hearing the case should first hear oral evidence from the parties to resolve the conflict before proceeding with the case (see for example FALOBI v. FALOBI (1976) 1 NWLR 169. This was not done in this case. The appeal therefore succeeds. The decision of the lower courts must therefore be set aside. I endorse the consequential orders made in the said judgment.

E

OGUNDARE JSC

I agree, for the reasons given by my learned brother Belgore, JSC, that this appeal be allowed. Omoluabi J. ought to have taken oral evidence to resolve the conflict in the sets of affidavit evidence before him on the issue whether Exhibit 'D' relied on by Respondents was in fact issued by the purported maker. The court below was equally in error to rely on the document in coming to its conclusion that Appellant's removal from office was ordered by the Military Governor pursuant to Public Officers (Special Provisions) Decree No. 17 of 1984.

I allow the appeal and abide by the consequential orders made by my brother, Belgore JSC.

G

ONU JSC

This is an appeal from the decision of the Court of Appeal, Benin Division (Coram: Akpabio, Ogebe JJ.C.A. with Ubaezonu, J.C.A. dissenting) on the 25th of March, 1995, affirming the judgment of Omoluabi, J. sitting at the High Court of Edo State holden in Benin City which ruled in limine on the 16th of April, 1992 that the plaintiff/appellant's action against the three defendants/respondents herein for wrongful "pruning" be dismissed. The

appeal is sequel to a preliminary point of law raised upon conflicting affidavits that the appellant's removal as Deputy Chief Engineer in Edo Ministry of Works and Transport was done pursuant to the provisions of the Public Officers (Special Provisions) Decree No. 17 of 1984 and that the court of trial had no jurisdiction in the first place to entertain the matter under and by virtue of Section 3(3) of the Public Officers (Special Provisions) Decree, No. 17 of 1984 and further that the Court of Appeal was wrong to affirm same. B

In so far as the appellant had challenged in his counter-affidavit two letters dated 13th and 19th April, 1984 respectively forming part of the respondents' motion which were impeached as non-existent by the appellant, a situation had arisen which called for the resolution of the conflict before the trial of the appellant's action proceeded in the trial court. That the conflict in the affidavit evidence precipitated was not resolved at all and the trial court proceeded to rule on the matter without calling evidence amounted, in my view, to 'jumping the gun.' It is now settled law that where, as in the case in hand, invariably a court is faced with affidavits which are irreconcilably in conflict, the judge hearing the case in order to resolve the conflict properly, should first hear oral evidence from the deponents or such witnesses as the parties may be advised to call. See Ojengbende v. M. O. Esan (Loja-Oke) (1987) 1 NWLR (Part 63) 49 in which the decisions in Olu-Ibukun & anor. v. Olu-Ibukun (1974) 2 S.C. 41 at 47 through Falobi v. Falobi (1976) 10 S.C. 1; (1976) 1 NMLR 169 at 178, were cited with approval in Okoye & anor. v. Lagos State Government & 2 ors. (1990) 3 NWLR (Part. 136) 115 at 123. As in the instant case the learned trial Judge bye-passed the preliminary question posed for resolution by him which, as it were, was a pre-requisite before proceeding with the case, his decision and a fortiori, that of the court below, are rendered incompetent. D F

For the above reasons and the fuller ones contained in the lead judgment of my learned brother Belgore, J.S.C with which I am in complete agreement, I too, allow this appeal and make the same consequential orders as contained therein. G

IGUH JSC

I have had the privilege of reading in draft, the leading judgment just delivered by my learned brother, Belgore, J.S.C., and I agree entirely with his reasoning and conclusion therein. H

The sole issue for determination in this appeal is whether the plaintiff was dismissed under and by virtue of section 3(3) of the Public Officers (Special Provisions) Decree No. 17 of 1984 thereby ousting the jurisdiction of the trial Court to entertain the plaintiff's action. The plaintiff in that suit had

claimed, inter alia, a declaration that his purported dismissal and/or "pruning from public service" as contained in letter No. PC 7950T/57 of the 1st June, 1989 is null and void.

The defendants' application for a determination of the preliminary issue in controversy between the parties was by way of a motion on notice.

B By this motion, the defendants, inter alia, prayed for the dismissal of the suit on the ground that the plaintiff was summarily dismissed from the civil service of the defunct Bendel State Government by the Military Governor of that State in exercise of his powers under the Public Officers (special provisions) Decree No. 17 of 1984. At the conclusion of argument, the learned trial judge C in a considered ruling granted the application and dismissed the plaintiff's action in limine. The appeal lodged against this ruling of the trial Court was in a split decision on the 25th day of March, 1994 dismissed by the Court of Appeal. The plaintiff has further appealed to this, Court.

Section 3 (3) of the Public Officers (Special Provisions) Decree No. 17 of 1984 provides as follow:-

D *"3 (3) No. Civil proceedings shall lie or be instituted in any Court for or on account of or in respect of any act, matter or thing done or purported to be done by any person under this Decree and if any such proceedings have been or are instituted before, on or after the making of this Decree, the proceedings shall abate, be discharged and made void."*

E There can be no doubt that under the Public Officers (special Provisions) Decree No. 17 of 1984, the Military Governor of a State or, any person authorized by him, has power to dismiss or remove a public officer from his office summarily or retire him from public service compulsorily. The question, however, is whether or not from the facts of this case, both Courts F below were right in holding that the plaintiff, hereafter called the appellant, was dismissed by the Military Governor of the then Bendel State by virtue of the powers conferred on him as the "appropriate authority" under the said Decree No. 17 of 1984. Clearly, if it was established that the appellant was dismissed under the Decree, the trial Court would have had no jurisdiction to inquire into the dismissal and the majority decision of the Court below G upholding that trial Court's ruling of want of jurisdiction would be without fault. But if, on the other hand, it was not established that the dismissal was under the Decree, then the ouster of jurisdiction clause could not avail the defendants, hereinafter called the respondents.

H It ought to be emphasized that this case was determined only on the affidavit and documentary evidence of the parties. The documentary evidence relied on by the respondents is fully set out in the leading judgment and no useful purpose will be served by my reproducing them all over again.

It suffices to state that by paragraphs 7, 8, 9 and 10 of the affidavit in support of the respondents' application, it was deposed as follows:-

"7. That by a letter reference No. C.S.M. 16/vol/vi/286 dated 13th April, 1984, the 2nd defendant/applicant was informed by the Secretary to the Military Government and Head of Service that the Military Governor had approved the dismissal, retirement or termination of the appointment of a list of civil servants and that the 2nd Defendant/Applicant should implement same immediately. A photostat copy of the said letter is attached as Exhibit 'D'.

8. That following the directive in Exhibit 'D' the 2nd Defendant/Applicant, by a letter reference No. S, 275/Vol. 111/10 of 19th April, 1984, took prompt action and communicated same to the Permanent Secretary (now C Director-General) of the 3rd Defendant/Applicant. To this letter was attached the list of Civil Servants pruned in the 3rd defendant/applicant's establishment. A copy each of the letter and the attached list are attached herewith as Exhibits 'E' and "E1" respectively and by page 2 of Exhibit E, the action taken by the defendant/applicant was copied to the Secretary to the Military Government and Head of Service.

9. That in Exhibit 'E1' the name of the plaintiff/respondent appeared at No. 548.

10. That in compliance therewith the 3rd Defendant/Applicant communicated to the plaintiff/respondent his dismissal from the civil service of the defunct Bendel state."

The said dismissal of the appellant referred to in paragraph 10 of the respondents' affidavit is by letter dated the 25th April, 1984 written by the 3rd respondent to the appellant and annexed to the respondents' said affidavit as Exhibit CA.

The appellant by paragraphs 4,5,6,7 and 8 of his counter affidavit deposed as followed:-

"4. That paragraph 7 of the supporting affidavit is misleading and therefore not true. That I was informed of my dismissal by letter Ref. S. 502/T230 dated 25th April, 1984 attached herewith as Exhibit "CA"

5. That the Applicant's Exhibit 'D' ie letter CSM.16/vol. vi/286 of April, 1984 is an after - thought and a frame-up to deceive this Court.

6. That I was not dismissed in accordance with the Public Officers (Special Provisions) Decree No. 17 of 1984.

7. That my letter of dismissal ref. S. 502/T/230 of 25th April, 1984 hereby marked Exhibit "CA1" read with the Applicant's Exhibit 'E' clearly show who was dismissing me from the service of the 1st Defendant.

8. That I know as a fact that my appointment was never terminated by the Military Governor of Bendel state but by the 3rd Defendant who was

not happy at my progress in the service and collided with 2nd Defendant to frame-up a purported dismissal in 1984."

The importance of Exhibit D in these proceedings cannot be over emphasized. This is because, unless it is established that the appellant was dismissed by the Military Governor of Bendel State or by the "appropriate B authority" the respondents would be unable to take cover under Decree No. 17 of 1984.

Another vital document in the proceedings is Exhibit C.A. Both Exhibits D and CA were vehemently attacked by the appellant in his counter affidavit. The letter Exhibit D, the appellant described in paragraph 5 of his C counter affidavit as an "after though" and a "frame - up" to "deceive" this Court (meaning the trial court). There is also paragraph 7 of the respondents' affidavit wherein the Military Governor of Bendel State was linked with the appellant's dismissal. This, the appellant stoutly denied in paragraph 4 of his counter affidavit, describing the same as "misleading" and untrue. It is thus clear that the relevant and material depositions for a just determination as to D whether or not the appellant's dismissal was pursuant to Decree No. 17 of 1984 as alleged by the respondents were seriously in issue and in conflict.

It is a well settled principle of law that when a Court, as in the present, is faced with affidavits which are irreconcilably in conflict, the trial Court in order to resolve the conflict properly should first hear oral evidence from the E deponents and any witnesses they may desire to call on the issues. See Joseph Falobi v. Elizabeth falobi (1976) 9 & 10 S.C.1, Akinsete v. Akindutere (1966) 1 All N.L.R. 147, Eboh and others v. Oki and others (1974) 1 S.C. 179 at 189, Olu - Ibukun and Another v. Olu - Ibukun (1974) 2 S.C. 41 at 48 and Uku and others v. Okumagba and others (1974) 3 S.C. 35 at 56 etc. In the face of F the conflicts in the contents of the depositions in the affidavit and the counter affidavit of the parties, it was incumbent on the trial Court to receive viva voce evidence from the parties with a view to settling the question whether or not it was the Military Governor of Bendel State or the appropriate authority who directed the dismissal of the appellant from public service and whether or not this was done pursuant to Decree No. 17 of 1984. This exercise, the G learned trial judge failed to undertake.

I therefore, entertain no doubt that the trial Court was in gross error by resolving the preliminary issue of jurisdiction before it on affidavits which were irreconcilably in conflict with regard to the material issues of fact necessary for a determination of the preliminary issue in question. It is also clear to me that the Court below fell into the same error when it affirmed the H decision of the trial Court.