

LITIGATION UPDATE

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ADVOCAT
LAW PRACTICE

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DO ADMINISTRATIVE AGENCIES LACK THE POWERS TO IMPOSE FINES AND PENALTIES WITHOUT RECOURSE TO THE COURTS? MATTERS ARISING

SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED (SHELL) V. NATIONAL OIL SPILL DETECTION AND RESPONSE AGENCY (NOSDRA)

Background

We had last month reviewed the Court of Appeal's decision in ***NATIONAL OIL SPILL DETECTION AND RESPONSE AGENCY (NOSDRA) V. MOBIL PRODUCING NIGERIA UNLIMITED (EXXONMOBIL)***,¹ where it held that the imposition of fines by NOSDRA was contrary to its powers, on the basis that penalties or fines are imposed as punishment for an offence or violation of the law and the power as well as competence to establish that an offence has been committed belongs to the courts and not a regulatory agency.

The Federal High Court (FHC) with the benefit of the above precedent however recently held in the case of ***SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED (SHELL) V. NATIONAL OIL SPILL DETECTION AND RESPONSE AGENCY (NOSDRA)***, that **Sections 5, 6 and 7 of the NOSDRA Act**, which empowers the agency to impose penalties, did not violate the provisions of the 1999 Constitution in terms of appropriating judicial powers vested in the Courts to issue sanctions in the form of fines. The Court further held that NOSDRA had acted in accordance with its powers under the NOSDRA Act by imposing a fine of USD\$3.6 billion on Shell.

Brief Facts

As part of Shell's operational activities within OML 118 situated 120 kilometres off the coast of the Gulf of Guinea, the company's export line linking their Floating Production Storage and Offloading (FPSO) vessel at the Bonga deep offshore the tanker MV Northia ruptured and spilled about 40,000 barrels (6.4 million litres) of crude oil into the sea, according to findings by the National Oil Spill Detection and Response Agency (NOSDRA).

As penalty for the spill, NOSDRA levied Shell the sum of USD\$1.8 billion as compensation for the environmental damage done to natural resources and consequential loss of income by the affected shoreline communities as well as USD\$1.8 billion as punitive damages culminating in a total sum of USD\$3.6 billion. In disputing the fine, Shell instituted a suit before a Lagos Division of the Federal High Court challenging the imposition of the fine. Shell in its argument submitted that the National Oil Spill Detection and Response Agency Act 2006 (NOSDRA Act) empowering the agency to conduct remediation and damage assessment encroaches on the judicial powers exclusively vested in the courts and the legislative powers of the National Assembly. Shell further argued that the imposition of the USD\$3.6 billion fine by NOSDRA was in violation of its right to fair hearing.

¹ Litigation Update May, 2018 <http://www.advocaat-law.com/assets/resources/7aec26c9d3412c22bf4593b13ef1e00e.pdf>

The FHC in its decision held that the NOSDRA Act does not conflict with the Nigerian Constitution and that the agency's assessment and valuation of the damages caused by Shell is not inconsistent with the constitutional duty imposed by the Constitution neither does the imposition of fine on Shell inconsistent with any provisions of the Constitution.

Both cases analysed

The Court of Appeal in the earlier case² had held that NOSDRA has no powers to impose fines without recourse to the Courts whilst considering the powers conferred on NOSDRA by Sections 6(2) and (3) of the NOSDRA Act. Part of the Court's view was that the power to impose fines is a judicial or quasi-judicial power which a regulatory body cannot exercise as doing so would be tantamount to the usurpation of judicial powers vested in the Court by the 1999 Constitution.

The Court noted that the findings of NOSDRA was made without giving Exxonmobil an opportunity to be heard and by so doing, constituted itself into a Court with judicial or quasi-judicial powers, when in fact the law creating it did not donate such jurisdiction to it. The Court also submitted that by the imposition of the fine, NOSDRA acted in a judicial capacity with which it is not imbued under the Constitution. The Court also submitted that NOSDRA acted as both the Complainant as well as the Judge, contrary to the maxim "nemo iudex in causa sua". It is on this premise that the Court held that the imposition of penalties by the NOSDRA was ultra vires its powers, especially where no platform was established to observe the principles of natural justice. The Court further held that penalties or fines are imposed as punishment for an offence or violation of the law and the power to come to this finding whether or not an offence has been committed to warrant a fine and/or penalty lies in the Courts and not an administrative agency.

However, the FHC seems not to have followed the precedence laid down by the Court of Appeal's holding in the case of SHELL v. NOSDRA that NOSDRA had acted in line with its powers under the NOSDRA Act and that it did not violate the 1999 Constitution in the exercise of its powers. In reaching this decision, the FHC did not make any distinction between penalty, levy, damages or compensation but treated them generally as sanctions. What is more is that the FHC held that NOSDRA had not infringed on Shell's right to fair hearing as Shell had the opportunity of recourse to the court when it was served with its notification of sanction.

² NOSDRA v. EXXONMOBIL

Commentary

The precedent created by the Court of Appeal has the tendency in our view to open up the floodgates based on the second arm of its ratio in the NOSDRA v. EXXONMOBIL decision that penalties or fines are imposed as punishment for an offence or violation of the law and the power to come to this finding whether or not an offence has been committed to warrant a fine and/or penalty lies in the Courts and not an administrative agency. In essence any existing fines imposed by regulatory agencies may be challenged based on this ratio and the import of same on various sectors of the economy such as the oil and gas, telecoms and electricity sectors cannot be understated. It is absolutely imperative that as a government regulatory agency, NOSDRA appeals the Court of Appeal's decision to the Supreme Court for a final decision on the issue.

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