



IS THE IMPOSITION OF FINES BY REGULATORY AGENCIES WITHOUT RECOURSE TO THE COURT UNCONSTITUTIONAL?

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Introduction

One of the enforcement techniques utilised by regulatory agencies to ensure compliance by individuals and entities within the purview of their enabling laws, is the imposition of fines. These fines which are imposed in instances of non-compliance, omission, or failure to undertake an act within a stipulated period are often backed by law and have long become an effective deterrence tool deployed by regulatory agencies to induce adherence. In recent times however, there have been debates surrounding the powers of certain Regulators to impose fines.

The recent decision of the Court of Appeal, Calabar Judicial Division, in the case of *National Oil Spill Detection and Response Agency (NOSDRA) v. Mobil Producing Nigeria Unlimited (Mobil) - Unreported- Appeal no. CA/C/244/2017 (NOSDRA's Case)* delivered on Thursday, March 22, 2018 has yet again, resuscitated this debate.

Case synopsis and decision

Following an oil spill at Qua Iboe Terminal, a facility owned by Mobil, NOSDRA instituted an action at the Federal High Court, Uyo Division, against Mobil claiming the sum of ₦10,000,000 (Ten Million Naira) as penalty for failure to comply with the clean-up and remediation exercise in accordance with the

National Oil Spill Detection and Response Agency Act, 2006 (NOSDRA Act). The fine was imposed pursuant to section 6 (2) & (3) of NOSDRA Act which provides as follows:

6 (2) An oil spiller is by this Act to report an oil spill to the Agency in writing not later than 24 hours after the occurrence of an oil spill, in default of which the failure to report shall attract a penalty in the sum of five Hundred Thousand Naira (₦500,000.00) for each day of failure to report the occurrence.

(3) The failure to clean up the impacted site, to all practical extent including remediation, shall attract a further fine of one million Naira.

In response, Mobil filed a statement of defence and a preliminary objection to the jurisdiction of the Court to hear the case. One of the grounds on which Mobil challenged the Court's jurisdiction, was that NOSDRA did not have the inherent powers to declare/impose fines on Mobil as it is not a Court of law. Upon hearing the motion on notice, the Federal High Court *per* Ijeoma L. Ojukwu agreed with the arguments of Mobil and struck out the suit.

Dissatisfied with the decision of the Federal High Court, NOSDRA appealed to the Court of Appeal and one of the issues for determination

was ‘whether having regard to section 6 (2) & (3) of the Plaintiff/Appellant’s (NOSDRA) Establishment Act (NOSDRA Act), the Learned Judge was right in holding that the imposition of penalties by the Plaintiff/Appellant was ultra vires its powers.

NOSDRA’s argument was that it is empowered to levy fines on Mobil pursuant to section 6 (2) and (3) of its enabling law, the NOSDRA Act. In response, Mobil argued that only a Court of law has the powers to impose fines and a departure from this principle will amount to usurping the powers of the Courts under section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). In addition, Mobil contended that NOSDRA being an administrative agency, has no inherent powers in itself or from the provision of its enabling Act, to hold a person guilty of an offence or impose fines without proper adjudication by a Court of law.

The Court of Appeal decided in favour of Mobil. The Court reasoned that judicial powers are vested in the Courts by virtue of section 6 of the Constitution, and since the imposition of fines is a judicial function, only a Court has the power to impose fines after conviction. The Court of Appeal noted that by virtue of section 36 of the Constitution, Mobil was entitled to fair hearing and that by the imposition of the fine, NOSDRA acted in a judicial capacity contrary to the Constitution and by so doing, it became, the complainant, as well as the judge in its own case contrary to the maxim ‘nemo iudex

in causa sua’ (the maxim simply translates to ‘a person should not be a judge in his own cause’)

Is this an emerging trend?

There has been a plethora of decided cases/Court decisions on the capacity of regulatory agencies to impose fines. Some Courts have held that a law which grants a regulator the power to impose fines on an alleged offender is contrary to the Constitution and a Regulator discharging such functions without granting the alleged offender a right to be heard would have acted against the principles of fair hearing enshrined in the Constitution. On the other hand, some Courts have held that a Regulator imposing fines under its enabling law, in the discharge of its functions, could not be said to have acted unconstitutionally.

One of such pro-regulator stance was made by the Court in the recent decision of the Court of Appeal in the case of **Moses Ediru v. Federal Road Safety Commission (FRSC) and 2 Ors (2016) 4 NWLR Part 1502 pg. 209** which was delivered on February 27, 2015. In this case, the Court held that the fines which the Federal Road Safety Commission (Establishment) (FRSC) Act 2007 gives the FRSC the right to impose and enforce do not derogate from the judicial powers of the Court as enshrined in the Constitution, as there is no confluence point where the powers of FRSC and that of the Court meet. The Court observed that FRSC and the Court are mutually exclusive, such that the FRSC powers of

enforcement is not an usurpation of the judicial powers of the Court.

The **Moses v. FRSC** case above is a clear departure from the decision of the Court in the NOSDRA's Case. One may want to argue that in view of the fact that both decisions emanated from the same Court of Appeal (albeit different Judicial divisions), then the decision in NOSDRA's Case should prevail as law when similar issues arise for determination, being the decision that was delivered later in time. However, it is pertinent to note that the Court of Appeal when faced with conflicting decisions of its Court, is entitled to elect which of the conflicting decisions to follow. This introduces some unpredictability and uncertainty into our laws because whilst the High Courts may be bound to follow the later decision in the NOSDRA's Case, the Court of Appeal may elect which to follow between - **Moses v. FRSC** and the NOSDRA's Case.

Analysing the context of the decision of the NOSDRA's Case

The Court of Appeal's decision in the NOSDRA's Case was chiefly predicated on the provisions of sections 6 and 36 of the Constitution. The crux of section 6 of the Constitution is that the judicial powers are exclusively vested in the Courts, to the exclusion of other arms of government. Section 36 of the Constitution on the other hands posits that in the determination of civil rights and obligations, or when a person is charged with a criminal offence, fair hearing must be

guaranteed subject to the exceptions prescribed by the Constitution.

From an administrative and criminal law perspective, there appears to be two types of fines, namely, civil fines and criminal fines.

Civil fines, also known as Administrative Monetary Penalties (AMP), statutory penalties or civil penalties in some jurisdictions, are monetary penalties which are imposed by Government Agencies for contravention of legislative requirements, obligations or directives of a civil nature. The amount payable as civil fines are often certain because they are clearly specified in the legislation imposing them.

The underlining feature of civil fines is that they are not imposed consequent upon conviction for a criminal offence rather, they are regulatory tools intended to be used to ensure compliance and are based on purely civil matters. Accordingly, any legislation imposing a civil fine would typically not make conviction a condition precedent for the imposition of such fine. This is because the intention of the draftsman is not that the fine should be directed to the Court before it is imposed as, only the Courts can convict.

Criminal fines (also known as criminal sanctions) are the reverse of civil fines. A criminal fine is a monetary criminal punishment that is imposed on a person found guilty of committing a criminal offence.

Criminal fines are sometimes available as an alternative to imprisonment or in addition to imprisonment. In the Nigerian context, before an offence can amount to a crime, it must fulfil the conditions as set out in section 36(12) of the Constitution which provides as follows:

“Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law”.
(emphasis are ours)

From a careful perusal of section 6 (2) & (3) the NOSDRA Act, the fine imposed by NOSDRA fits perfectly as a civil fine as same was not predicated upon conviction by a Court of law. In addition, the section did not create a criminal offence within the contemplation of section 36(12) of the Constitution reproduced above.

Based on the definition of civil fines proffered above, one may without more, conclude that there is no need for a recourse to a Court of law before the imposition of a civil fine. However, from an examination of the provisions of section 36 of the Constitution it can be inferred that even civil fines

which involves the imposition of a civil obligation cannot be levied by a Regulator without recourse to the Court. Section 36(1) of the Constitution provides as follows:

36. (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. (emphasis are ours)

The implication of the above provision is that since imposition of civil fines constitute a determination of a person’s civil obligations, any Regulator intending to impose same must have recourse to the Court, so that the alleged violator is granted fair hearing. However, section 36(2) of the Constitution provides an exception to section 36(1) of the Constitution and suggests that a Regulator in the administration of a law it is empowered to administer, may make a decision affecting a person’s civil obligation provided that such law provides that the persons whose obligation is being determined, is allowed to present his case, before a decision affecting that person is made, and the law does not preclude the person from appealing the said decision. For ease of reference, section 36(2) is reproduced below:

“Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law -

(a) provides for an opportunity for the persons whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and

(b) contains no provision making the determination of the administering authority final and conclusive”.
(emphasis are ours)

Applying the above section to the poser in this write up, a Regulator may impose a civil fine pursuant to a law that it administers without recourse to Court if such law follows section 36 (2) (a) & (b) of the Constitution. Unfortunately, most laws authorising the imposition of fines by Regulators seldom contain provisions in line with Section 36(2) of the Constitution.

It may be argued that the absence of any provision in the NODSRA Act creating a platform for alleged violators to be heard before the imposition of fines, as well as a

procedure for challenging any decision of NOSDRA made pursuant to the NOSDRA Act, may have influenced the decisions of both the Federal High Court and the Court of Appeal in the NOSDRA case.

The learned Justice of the Federal High Court, Ijeoma L. Ojukwu had this to say in this regard:

“It bears repeating to say that the law establishing the plaintiff (NODSRA) ought to have created a platform to hear parties who are in any alleged breach of their regulations and also make provisions for judicial review to allow aggrieved persons to seek a review of their decisions before a Court of law”.

The Court of Appeal *per* Chioma Nwosu-Iheme also expressed similar sentiments when it stated as follows:

‘On the facts and circumstances of this case, I am of the firm but humble view that the imposition of penalties by the Appellant was ultra vires, especially where no platform was established to observe the principles of natural justice’.

Be that as it may and with due respect to the hallowed decision of the Court of Appeal in NOSDRA’s Case, our opinion is that insisting that all fines, irrespective of their nature (whether civil or criminal),

cannot be imposed without recourse to Courts will swamp the judiciary with eternal cortege of litigation. Our Courts are well congested as it is. Indeed, one of the most important aspects of public administration is that it must be efficient and encourage economical use of resources as well as being development oriented.

The imposition of fines drives compliance in a society like ours, and to insist on a Court action before the imposition of fines by Regulators, is not only impracticable but also a recipe for chaos.

Our thoughts are that in the alternative, what should be advocated (as the Court of Appeal and also the Federal High Court recommended in NOSDRA's Case,) is that Regulators should ensure that alleged violators are afforded an opportunity to make representations before a decision imposing civil fines on them is made.

Conclusion

In view of the well-established principle of law that once a judgment of Court is given, it remains valid, subsisting and binding on all parties until it is set aside by a Court of competent jurisdiction, the decision in the NOSDRA's Case remains the law, until it is set aside by the Supreme Court (in the event that there is an appeal to the apex Court).

It is instructive to highlight that the decision of the Court of Appeal in the NOSDRA's Case may have little or no impact on the imposition of fines by other Regulators. This is because the relevant statute which the Court delivered a decision on is the NOSDRA Act and not generally to all laws in Nigeria which enable other Regulators to impose fines. Therefore, individuals and entities within the regulatory radar should ensure compliance with all laws and regulations, especially those that attract fines - whether civil or criminal.

In the light of section 36 of the Constitution, Regulators on their part may have less challenges to their powers to impose civil fines, if enabling laws establish a platform where alleged violators are given an opportunity to make representations before decisions imposing fines on them are made.

In summation, it is proposed that to have a consummate system for the enforcement of civil fines by Regulators, the legislative houses should ensure that laws establishing a regulatory agency, and which authorises the imposition of fines by the agency, should correspondingly have specific provisions in line with of section 36(2) of the Constitution.

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