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TEMPLARS ThoughtLab

Nigeria's Judiciary Restricts Imposition of Administrative Fines and Sanctions

Introduction

The application of fines, penalties, or sanctions by regulatory agencies to enforce compliance is commonplace. While this practice is widely acknowledged, the procedure deployed by regulatory authorities for applying these fines or sanctions has often raised legitimacy and fair hearing concerns giving rise to judicial interventions.

In this piece, we examine the fair hearing and legitimacy concerns arising from the exercise of administrative power to impose fines, penalties, or sanctions in Nigeria.

Imposition of Fines as an Enforcement Mechanism; Matters Arising

The concept of imposition of administrative fines or sanctions is widely recognized as an effective tool for securing and promoting compliance with legal/regulatory requirements. However, most times, the administrative bodies who impose these fines and sanctions are, usually, the complainants, the prosecutor, and the judge, notwithstanding that they are not imbued with judicial powers. This practice raises legitimacy and fair hearing concerns.

The legitimacy issue bears on *the notion that the imposition of fines/penalties is a judicial act reserved solely and exclusively for the courts and as such, should not be exercised by a regulatory body not conferred with judicial or quasi-judicial powers.*

In keeping with the separation of powers principle recognised under our Constitution, judicial powers are conferred exclusively on the courts¹, whilst executive and legislative powers are vested in the executive² and the legislature³ respectively. Thus, to allow administrative/regulatory bodies who are part of the executive arm of government to

¹ Section 6 of the Constitution.

² Section 5 of the Constitution.

³ Section 4 of the Constitution.

exercise powers vested exclusively in the courts, provides an opportunity for such administrative bodies to wrestle power with the courts which may be inconsistent with the principle of separation of powers.

The fair hearing issue is no less a big concern. Typically, what happens when a person is accused of breaching a regulatory requirement, is for the relevant administrative agency or regulator to constitute itself into the complainant, the investigator, the prosecutor, and apply the relevant fines as the judge. In most cases, the alleged violator is not afforded the opportunity to explain his own side of the story, i.e., the reason the alleged infraction or violation occurred in the first place.

Clearly, this practice undermines the age-long principles of fair hearing encapsulated in the twin Latin maxims of “*nemo judex in causua*”, which means that no person should be a Judge in a case in which he has a personal interest or involvement; and “*audi alteram partem*”, which means that one must be given the opportunity to present his side of the story. Thus, where an administrative agency imposes a fine or penalty as a consequence of an alleged breach or infraction of its own rules, it creates an impression that the agency acted as a judge in determining the guilt and/or application of the fines payable in its own case. This is in addition to the impression that the agency, who accused the alleged offender, was also the investigator, the prosecutor, and the judge who determined what should be paid as a fine, and the alleged offender was not allowed to explain the reasons why he acted in the manner that he did.

Initially, the courts did not appear to see anything wrong with the above procedure employed by regulatory bodies for applying fines and sanctions to enforce regulatory compliance. For example, in **MOSES EDIRU V FEDERAL ROAD SAFETY COMMISSION⁴ (FRSC) [Moses Ediru's Case]**, where the appellant challenged the fines imposed on him by FRSC for allegedly failing to use his seat belt and for the use of his phone whilst driving, both of which amounted to infractions of road traffic law and regulations, the Court of Appeal rejected the appellant's argument that the imposition of fines, when he had not first been tried and found liable by a court, was an infringement of his right to fair hearing. The Court further took the view that the provisions in section 10 (7) – (9) of the FRSC Act and paragraph 113 of the National Road Traffic Regulations, which empower the FRSC to impose fines to enforce compliance with traffic rules, do not derogate from the juridical powers of the courts.

However, after the Moses Ediru's Case, Nigerian courts changed their approach in determining the legitimacy of the imposition of fines and sanctions by administrative bodies.

First, in **National Oil Spill Detection and Response Agency (NOSDRA) v. Mobil Producing Nigeria Unlimited** (NOSDRA's case), NOSDRA imposed a penalty of N10,000,000 (Ten Million Naira) on ExxonMobil for an alleged contravention of a provision in the National Oil Spill Detection and Response Agency Act 2006 (NOSDRA Act) and the Court of Appeal was faced with the determination of the legality of the statutory power of NOSDRA to impose penalty fees for contravention of the NOSDRA Act. In resolving the issue, the noble Lords of the Court of Appeal, held that “*by the imposition of the fine, the appellant (NOSDRA) acted in a judicial capacity, which they are not imbued with under the Constitution. By so doing, the appellant became a judge in its own cause, the complainant as well as the judge, contrary to the maxim nemo judex in causa sua.*”

⁴ & Others (2016) 4 NWLR (pt.1502) 209.

Similar sentiments were expressed by the same Court of Appeal in the more recent case of **Shell (Nig) Exploration and Production Co Ltd v. NOSDRA (Shell's Case)** against the same regulatory authority. Interestingly, the views of the Court of Appeal in the NOSDRA and Shell's Case was re-echoed in the case of **The Incorporated Trustees of Media Rights Agenda v. National Broadcasting Commission**⁵ (the "NBC's Case"). In this case, which was against the NBC, the Court held that:

- A. the fines and the procedure adopted by the NBC in imposing same violated the rules of natural justice and the right to fair hearing because the NBC was the accuser, prosecutor, and the judge in the case.
- B. the NBC is not a court of law and has no power or competence to impose sanctions as punishment and the NBC Code, being a subsidiary legislation cannot confer judicial powers on the NBC to impose criminal sanctions or penalties such as fines.
- C. By virtue of Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) only the courts can impose fines on anybody accused of breaching the law.

The Implications of the latest judicial approach to fines and sanctions

The latest judicial approach to the application of regulatory fines and sanctions highlighted above has a far-reaching impact on the powers of regulatory agencies and other departments of government to impose fines and penalties for allegations of infraction or noncompliance with the relevant provisions of the laws creating them. This is because, **the law as it stands today, is that regulatory authorities and departments of government, will no longer be able to validly impose fines/penalties or sanctions generally to enforce regulatory compliance even if the enabling laws conferred such powers on them.** Shorn of any pretences, this new judicial thinking in the application of regulatory fines and sanctions aims not only to prevent the arbitrary exercise of regulatory power to impose penalties or sanctions and ensure that the fundamental rights of citizens and the players in the various sectors of the Nigerian economy are respected, it also helps to inspire transparency and accountability in the regulatory space. And this, in turn, creates a conducive environment for the smooth and seamless conduct of businesses.

The Need for Legislative Action

It is instructive to note that our courts have not, by this new approach, invalidated or outlawed the regime of regulatory fines/penalties or sanctions as necessary tools for enforcing compliance with extant laws and regulations. Rather, what the Courts have done is to signal that the administration of fines/penalties ought to follow the due process of law and international best practices. This is to prevent arbitrariness and disregard for the rights of citizens and residents (be in natural or juristic persons) which may, inevitably, be the norm if the regulator is allowed to combine the role of an arbiter with that of a complainant and/or prosecutor.

Perhaps, our law makers need to take a cue from the provisions of the Federal Competition and Consumer Protection Act, 2018 (the "FCCPA" or the "Act") which recognize the imperatives of applying fines or penalties⁶ only upon a judicial process resulting in a conviction⁷, the only exception being where there is prior admission of liability. Thus, when

⁵ *FHC/ABJ/CS/1386/2021: The Incorporated Trustees of Media Rights Agenda v National Broadcasting Commission*

⁶ Section 18 of the Federal Competition and Consumer Protection Act, 2018.

⁷ Sections 33 (3) and (4), and 35 (3) of the Federal Competition and Consumer Protection Act, 2018.

the FCCPC alleges a violation of the provisions of the Act and such violation attracts fines (and/or imprisonment), FCCPC is required to file criminal charges against the violator before a court of competent jurisdiction, and it is only where the violator is found guilty, that fines (and/ or terms of imprisonment) will be imposed by the Court.

Conclusion

Accordingly, it is recommended that the enabling laws of the various regulatory authorities be reviewed following the model of the FCCPC Act, to allow for fair hearing by ensuring that alleged violators of regulatory requirements are brought before courts of competent jurisdiction where the complaints against them will be considered against the backdrop of their defences before a determination of their guilt pursuant to which fines will be imposed.

Thus, any imposition of administrative fines and sanctions must be contingent upon a process, such as a court or tribunal hearing, that guarantees fair hearing and respect for the rights of potential or real violators. If this is not done, the regime of administration of regulatory sanctions will remain open to legal challenge.

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