The Rule of Law in the Nigerian oil and gas industry: NNPC v. Famfa Oil Limited

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Most Nigerians and indeed Africans have, by now, heard the story of "Africa's richest woman". What however may be less clear to many is the legal jurisprudence that accompanies the story of Mrs. Alakija, owner of Famfa Oil. That legal aspect of the story is relevant to the Nigerian business community and to lawyers generally, as it adjudicates on, and further judicially entrenches the concept of the rule of law in business, the idea that all market participants (including government) must play by set rules and more so where a venture includes private business participants on the one hand and the regulator on the other. Consistent judicial support for the rule of law in business will give investors certainty and thereby increase investment inflows and its attendant benefits.

The concept of the rule of law is not new to business and is, in fact, intimately linked with it. In the 17th and 18th centuries, European merchants were increasingly agitated over the unbridled power of monarchs and they demanded equality before the law and that monarchs also be bound by the law and legal norms. The 1773 American Boston Tea Party was a consequence of arbitrary powers that the English colonists gave to the East India Company to sell its tea to America without paying export duty. In Nigeria, while civil society has fought arduously for enthronement of the rule of law in the area of civil rights, the idea of big government is pervasive in the economic sphere and there appears to be a certain reluctance to challenge government regulatory action especially in closely regulated sectors like the petroleum industry.

NNPC v. Famfa Oil Limited [(2012) 17 NWLR p. 148] stands as a notable exception. On 5 May 1993 Famfa applied for and was granted an Oil Prospecting License (OPL 216) by the Federal Government of Nigeria. Famfa then entered into Joint Venture agreements with Star Deep Water Petroleum Limited and Petrobras. The Joint Venture expended considerable costs to prospect for oil. However, on 23 March 2000 the Nigerian National Petroleum Corporation sought to compulsorily acquire 40% of Famfa's interest in OPL 216, Famfa challenged this at the Federal High Court at that time and obtained an order of the Court declaring the purported acquisition to be illegal, null and void. The Court held that while the government may have a right to participate in an oil lease grant, it could do so only upon the grant of an Oil Mining Lease. Famfa subsequently discovered oil in commercial quantities and applied to convert its OPL to an OML. Its application was granted on 13 December 2004.

In July 2003, before the grant of the OML to Famfa, the Federal Government promulgated the Deep Water Block Allocations To Companies (Back-In-Rights) Regulations. The Regulations applied to all deep water blocks issued before the regulations came into force and also to others as may be issued from time to time. It also gave the Federal Government a right to participate in such OMLs by acquiring five-sixths of the allottee's interest in the relevant oil prospecting licence and oil mining lease under such terms and conditions as may be determined, from time to time, by the Federal Government. The Federal Government's right to do this was subject to it reserving such a right in the deep water block allocation.

Barely one month after the grant of the OML to Famfa, the government showed up again. Apparently relying on the earlier Federal High Court judgment and the Back In Rights Regulation (2003) it wrote to Famfa on 27 January 2005 and again on 18 April 2005 seeking to compulsorily acquire five-sixths of Famfa's equity interest and a 50% participating interest on the block. Famfa instituted action in the Federal High Court seeking declarations that the actions of the government in respect of the OML did not follow the law and were illegal null and void. The Federal High Court disagreed with Famfa and dismissed its case. They appealed to the Court of Appeal which allowed the appeal. The Federal Government then appealed to the Supreme Court contending that the government had a right to participate in the OML.

The Supreme Court formulated one issue for determination: whether the acquisition of 50% interest in OML 127 by the Federal Government of Nigeria was done in compliance with the provisions of the law and the constitution. The Court then answered a number of questions that illuminate the rules of the road for government and foreign and local investors in the Nigerian Oil and gas industry. ratio in this case firmly establishes rule of law principles of equality before the law and supremacy of the law in petroleum business that involve government and government regulators. It further peels off a layer of the government's regulatory discretion in the conversion of an OPL to an OML.

Nature of Government Right to Participate in OMLs

The Supreme Court held that where the government reserves a right to participate in an oil and gas venture, it is like any other right and is by no means absolute but subject to limitations imposed by law. Specifically the government's right is burdened by its duty to follow the relevant law and the constitution. Paragraph 35 of the First Schedule to the Petroleum Act provides that the Minister may impose terms on a license, including terms and conditions as to participation in a license by the Federal Government on terms and conditions to be negotiated between the Minister and the applicant for the lease. The government therefore has a duty to negotiate with an applicant for a license or a lease at the time of consideration of the application of the license or lease. The failure of the government to negotiate and its unilateral attempt to participate were therefore procedurally flawed and contrary to the provisions of the law.

Constitutional Proprietary Rights

The Court further held that by virtue of section 44 of the 1999 Nigerian Constitution, no movable property or interest in movable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired except in a manner prescribed by law. The Court held that the attempt by the Minister to participate in OML 127 without complying with the provisions of the Paragraph 35 of the First Schedule to the Petroleum Act offended the provisions of section 44 of the Constitution.

These cases are a victory for property rights advocates and procedural due process. Particularly where the Court held that The Petroleum Act is a principal law, a statute. Where it prescribes a particular method of exercising statutory power the procedure so laid down must be followed without any deviation whatsoever … further entrenches a line of judicial authority that strictly limits the powers of the government in petroleum dealings to its granted powers and all such powers must be exercised in line with procedural due process of law.