



# ÁELEX

**CASE REVIEW: NOSDRA v. EXXONMOBIL**

**EXAMINING THE POWERS OF REGULATORY AGENCIES TO  
IMPOSE PENALTIES**

## **INTRODUCTION**

In March 2018, the Court of Appeal upheld the ruling of the Federal High Court (the trial Court) and decided that the National Oil Spill Detection and Response Agency (NOSDRA) acted beyond its statutory powers when it imposed a fine on Mobil Producing Nigeria Unlimited (ExxonMobil).

NOSDRA (the Appellant) had instituted the action against ExxonMobil (the Respondent) claiming the sum of ₦10,000,000 (ten million Naira) as penalty for the alleged infringement of the National Oil Spill Detection and Response Agency Act 2006 (NOSDRA Act), and the regulations made thereunder.

## **THE DISPUTE**

The dispute between the parties arose as a result of oil spillage from ExxonMobil's facility. ExxonMobil alleged at the trial Court that the spillage was accidental and upon becoming aware of the spillage, it immediately shut down the affected tanks, activated its Emergency Response Procedure and carried out a clean-up, remediation and assessment exercise on the impacted site in accordance with the stipulated standards of the NOSDRA Act and its regulations. ExxonMobil further alleged that NOSDRA rated the Emergency Response Procedure it implemented as satisfactory. NOSDRA however, subsequently instituted the action against ExxonMobil claiming the sum of ₦10,000,000 (ten million Naira) as penalty for an alleged infringement of the NOSDRA Act and its regulations.

In its judgment, the trial Court held that NOSDRA's imposition of the penalty was *ultra vires* (outside) its powers. NOSDRA was dissatisfied with the decision and appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal considered whether, having regard to Section 6(2) and (3) of the NOSDRA Act, the judge was right in holding that the imposition of a penalty on ExxonMobil by NOSDRA was *ultra vires* its powers.

NOSDRA argued that levying a fine on the ExxonMobil was done under *Section 6(2) and (3) of the NOSDRA Act*<sup>1</sup> which provides as follows:

*(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 (N500,000.00) for each day of the 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.*

ExxonMobil on its part argued that the judicial arm of government has the exclusive powers of imposing fines and penalties, and queried if NOSDRA, being a non-judicial entity, could impose a fine or penalty on ExxonMobil.

After considering the parties' submissions, the Court of Appeal dismissed the appeal and affirmed the ruling of the trial Court. Relevant portions of the decision are set out below:

1. *"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 its powers, especially where no platform was established to observe the principles of natural justice.*
2. *Penalties or fines are imposed as punishment for an offence or violation of the law. The power as well as competence to come to that finding belong to the courts, and the Appellant is not clothed with the power to properly exercise that function in view of the law creating the Appellant (NOSDRA). There is, therefore, a lacuna in that law establishing the Appellant."*

## **OUR THOUGHTS**

It could be distilled from this decision that the imposition of a fine on ExxonMobil by NOSDRA was invalidated on the following grounds:

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<sup>1</sup> Cap N157, LFN 2004.

- a. Under the 1999 Constitution, only judicial bodies can impose fines or penalties and NOSDRA, not being a judicial body, cannot impose fines or penalties;
- b. The law establishing NOSDRA does not clothe it with the powers to impose fines; and
- c. NOSDRA did not observe the principles of fair hearing in its fact-finding; thus the fine imposed as a result of that flawed process cannot stand.

In examining ground (a) above, it appears the Court of Appeal took the view that before a fine or penalty is imposed on any person or entity, such person or entity must have been found guilty of a contravention of a law, and only judicial bodies have the powers to conduct this fact-finding, which must be done through criminal prosecution.

We concur that the Court of Appeal was right when it held that only judicial bodies can conduct criminal trials. *Section 36(4) of the 1999 Constitution* provides that whenever a person is charged with a criminal offence, such person shall be entitled to a fair hearing in public within a reasonable time by a court or a tribunal. Thus, the courts and other criminal tribunals created under different statutes in Nigeria are the proper fora for the conduct of criminal trials in Nigeria.

However, we opine that it is not correct that *every* imposition of a fine or penalty must be preceded by a criminal trial which must be prosecuted before judicial bodies. In Nigeria, administrative bodies can make findings of fact that can lead to the imposition of sanctions on subjects within their regulatory purview *provided* that such powers are specifically granted to the bodies and there is no requirement for an establishment of criminal culpability before imposition of the sanction.

For example, in 2015, a US\$5.2 billion fine was handed down to MTN Nigeria Communications Limited, a mobile network operator by the Nigerian Communications Commission (NCC) due to MTN's failure to disconnect the Subscribers Identification Modules (SIM) that were improperly registered. The issuance of the fine was not preceded by a criminal trial but was made by the NCC in its capacity as the regulator. The amount imposed was based on a regulation that prescribed the penalty for every improperly registered SIM, which amounted to \$5.2 billion in MTN's case.

In the above case, it is clear that the NCC is not a criminal tribunal and lacks capacity to conduct a criminal trial. The facts of the case show that no crime was committed so as to require the conduct of a criminal trial. However, the NCC regulations did not intend that there will be a prosecution and determination of guilt by a court. It can be argued that the aim of the legislature in enacting the regulation is to disincentivise or penalise certain conducts but without the necessity of a criminal conviction.

In contrast, in October 2018, the Central Bank of Nigeria imposed various fines on MTN and four commercial banks in Nigeria as punishment for a breach of the provisions of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995 and the Foreign Exchange Manual. While it has been reported that this matter has now been settled, we believe that the CBN was acting in excess of its powers since the Central Bank of Nigeria Act 2007 does not specifically confer the CBN with the power to impose penalties for the commission of offences under the CBN Act or any other law, in the manner in which these penalties were imposed on MTN and the banks.

It is our view that the powers the CBN exercised in penalising MTN is similar to NOSDRA's powers under the Act. The implication of the ruling of the Court of Appeal in the NOSDRA case would be that the CBN did not have the powers to impose the fine on MTN and the banks, since making the findings of fact that led to the imposition of the fine is the exclusive preserve of the courts.

A literal application of the NOSDRA decision could weaken the regulatory powers of various statutory bodies, and will subject matters that can be speedily settled administratively to lengthy criminal prosecution. It will also require the criminalisation of acts or omissions that would best be described as administrative or operational lapses or inaction.

This seeming uncertainty on when a body, in the exercise of its regulatory powers, can impose financial penalties could be settled if there is a provision in the establishing law that expressly designates such bodies as the authority to impose or collect any fine stipulated in the law or subsidiary legislation. Nonetheless, where no such provision exists, the implication, as decided in the NOSDRA case, will be for criminal proceedings

to be brought against defaulter with the expectation that the fine or penalty will be imposed once guilt is established.

It will be incongruous to conclude that a literal application of the NOSDRA case would mean that even though the NOSDRA Act prescribes a fine for a failure to report an oil spill, a person who fails to report an oil spill can escape this liability simply because the Act did not expressly designate a particular authority to collect the fine or to ensure the payment of the fine.

## **CONCLUSION**

Administrative agencies are vital for the smooth operation of the modern state. Thus a ruling that restricts the powers of these agencies without a solid basis could have far-reaching consequences, and will impact negatively on even decisions of other bodies such as the Federal Inland Revenue Service, the Corporate Affairs Commission and even court registries who, as a matter of course, impose penalties for failure or lateness in taking certain actions.

While resort to the courts as a prerequisite for imposition of penalties may prevent capricious imposition of fines by administrative bodies, a requirement for all infractions to be determined in court by way of criminal proceedings will simply create additional burden for a legal system that is already bursting at its seams, and will lead to significant delays in the enforcement of laws.

It is expected that the Supreme Court would, in entertaining an appeal, provide more clarity on the NOSDRA decision. Nonetheless, it might be more expedient to retain the powers of regulatory bodies to impose penalties and fines for civil infractions, while leaving the burden of penalising actions or omissions that have already been criminalised to the courts.



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