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ARTICLE SERIES

GOVERNOR, CENTRAL BANK OF NIGERIA V. 20 OTHERS: AN EXAMINATION OF THE ISSUES ARISING

INTRODUCTION

In an earlier article series[1] (https://www.aelex.com/post-no-debit-orders-on-the-accounts-of-customers/), we examined the extent and limitation of the powers of regulatory agencies and financial institutions to issue a directive freezing accounts of individuals that are subject to their regulatory oversight or individuals under their investigation.

To this end, we stated that the power of regulators of financial institutions, as well as other regulatory/law enforcement agencies, to direct the freezing of accounts of bank users is exercisable subject to the directives of a court of law. In other words, in addition to any law that may empower a regulator to issue a directive freezing an account, such regulator must also obtain an order of a competent court before issuing a freeze directive to commercial banks.

Recognising this limitation, the Central Bank of Nigeria (the "CBN" or "apex bank") recently obtained an order, of the Federal High Court (the "FHC"), sitting in Abuja, to freeze 20 bank accounts linked to individuals and a Company that allegedly sponsored the #EndSARS protest[2] in Nigeria.

Despite what appears to be compliance with the procedure for directing the freezing of bank accounts by the CBN, controversy trailed CBN's application as well as the order made by the court pursuant to the Motion Ex-parte filed by the CBN.

However, it is imperative to point out that these controversies have nothing to do with the procedure adopted by the apex bank in directing that the 20 bank accounts be frozen. Rather, it relates to the propriety of the court order directing the freezing of the accounts of the individuals involved.[3]

To efficiently examine the propriety or otherwise of the ex-parte order, it is important to consider all the background facts surrounding the grant of the order vis-à-vis the facts placed before the court by the CBN in obtaining the said order.

[1] Abdulmajeed Abolaji: "Post-No-Debit Alerts on the Accounts of Customers: Limitation to the Powers of Regulatory Agencies and financial institutions" https://www.aelex.com/post-no-debit-orders-on-the-accounts-of-customers/
[2] A movement which called for disbandment of the Special Anti-Robbery Squad (SARS), a notorious unit of the Nigeria Police Force with long records of abuses including torture, extortion and extrajudicial judicial killings of citizens all over Nigeria.
[3] Alfred Olubunmi: "#EndSARS: Lawyers, activists condemn Nigerian govt. for freezing accounts of protesters" https://www.premiumtimesng.com/news/headlines/424971-endsars-lawyers-activists-condemn-nigerian-govt-for-freezing-accounts-of-protesters.html; Fikayo Olowolagba: "End SARS: Nigerians threaten protest as court grants CBN request to freeze Rinu, others' accounts" https://dailypost.ng/2020/11/07/end-sars-nigerians-threaten-protest-as-court-grants-cbn-request-to-freeze-rinu-others-accounts/

GOVERNOR, CENTRAL BANK OF NIGERIA V. BOLATITO RACHAEL ODUALA & 19 OTHERS[4]

FACTS

By a Motion Ex-parte dated 20 October 2020 (the "Application"), the CBN requested an order of the Federal High Court, Abuja Division freezing the accounts of 19 individuals and 1 Company on the ground that the funds in the accounts might have been linked to terrorist activities in contravention of Section 13(1)(a) and (b) of the Terrorism (Prevention)(Amendment) Act (the TPA), 2013 and Regulation 31(2)(a) and (3)(b) of the Central Bank of Nigeria Anti-Money Laundering/Combating the Financing of Terrorism Regulations, 2013 ("the Regulation").

In the affidavit in support of the application deposed to by one Aondowase Jacob on behalf of the CBN, it was averred, among other things, as follows:

"There is a grave allegation that the defendants are involved in suspected terrorism financing via their bank accounts in contravention of the provisions of extant laws and regulations. The aforesaid transactions undertaken by the defendants, using their bank accounts, can cause significant economic and security harm to the public and the Federal Republic of Nigeria if left unchecked.

"The applicant (CBN Governor) is thus desirous to have the court empower him to direct the freezing of the 20 accounts listed on the annexure to this application and all other bank accounts held by the defendants.

"A freezing order of this Honorable court in respect of the defendants' accounts would also enable the investigation of the activities of the defendants to a logical conclusion, with a view to reporting same to the Nigerian Financial Intelligence Unit."

[4] Suit No: FHC/ABJ/CS/1384/2020

Furthermore, the written address in support of the application partly reads as follows:

"My lord, the nature of the transactions undertaken through the defendants' accounts are of suspected terrorism financing in contravention of Section 13(1)(a) and(b) of the Terrorism (Prevention)(Amendment) Act, 2013 and Regulation 31(2)(a) and (3)(b) of the Central Bank of Nigeria Anti-Money Laundering/Combating the Financing of Terrorism Regulations, 2013."

ORDER

In his decision, Hon. Justice Ahmed Mohammed ordered that the accounts of the 20 Respondents be frozen for an initial period of 90 days, subject to renewal upon an application by the CBN. The order was to allow CBN conclude its investigations.

For ease of reference, the court order partly reads as follows:

"A mandatory order is made empowering the plaintiff/applicant to direct the head office of the banks involved to freeze forthwith all transactions on the 20 bank accounts listed for a period of 90 days pending the outcome of investigation and inquiry currently being conducted by the Central Bank of Nigeria."

"It is, however, directed that the 90-day freezing order, when it lapses, may be renewed upon good cause shown by the applicant. "It is also directed that any person, whether artificial or natural, that is affected by this order may apply to the court to have his grievance or complaint heard by the court. The suit is adjourned till February 4, 2021."

OTHER RELEVANT FACTS

Notably, the CBN did not disclose in the application that the 20 bank accounts were owned by individuals and a Company that were involved in the #EndSARS protests. Rather, the apex bank informed the court that the funds in the accounts are of suspected terrorism financing in contravention of the Terrorism Prevention Act and the CBN AML/CFT Regulations.

By the affidavit in support of the Application, CBN informed the court that "There is a grave allegation that the defendants are involved in suspected terrorism financing via their bank accounts in contravention of the provisions of extant laws and regulations. The aforesaid transactions undertaken by the defendants, using their bank accounts, can cause significant economic and security harm to the public and the Federal Republic of Nigeria if left unchecked."

However, the media reported that the CBN sought the freezing order against the 20 accounts after flagging them for receiving money with the narration "#EndSARS".[5] Other reports also alleged that contrary to the narrative of the CBN, the apex bank had, prior to its application for the court's order, directed the freezing of the bank accounts of persons suspected to have been involved in the #EndSARS protest.[6]

ANALYSIS OF THE ISSUES ARISING FROM THE ABOVE

From the foregoing, there are several issues that need to be examined in order to ascertain the propriety or otherwise of the order freezing the accounts of the protesters. These include:

- Whether a Protest amounts to Terrorism under Nigerian Law
- The power of the Central Bank of Nigeria to Apply for the Freezing Order
- Propriety of the Ex-Parte Order Made by the Court
- Legality of Central Bank of Nigeria Freezing the Accounts Before Obtaining a Court Order
- Options Available to the Owners of the 20 Bank Accounts Frozen by the Ex-parte Order

WHETHER A PROTEST AMOUNTS TO TERRORISM UNDER NIGERIAN LAW

In its Ex-parte Application, the CBN premised its prayers on the "allegation that the defendants are involved in suspected terrorism financing via their bank accounts in contravention of the provisions of extant laws and regulations."

[5] Chike Olisa: "#EndSARS: CBN says funds in frozen accounts may be linked to terrorist activities" https://nairametrics.com/2020/11/11/endsars-cbn-says-funds-in-frozen-accounts-may-be-linked-to-terrorist-activities/
[6] Alao Abiodun: "#EndSARS: Fresh protest threat over freezing of accounts" https://thenationonlineng.net/endsars-fresh-protest-threat-over-freezing-of-accounts/'; See also William Ukpe: "#EndSARS: Activists petition courts to unfreeze accounts of supporters" https://nairametrics.com/2020/11/14/endsars-activists-petition-courts-to-unfreeze-accounts-of-supporters/

In support of the reliefs sough in the application, the apex bank relied on the provision of Section 13(1)(a) and (b) of the TPA and Regulation 31(2)(a) and (3)(b) of the "Regulation. For ease of reference, Section 13(1)(a) and (b) of TPA provides as follows:

"3(1) Any person or body corporate,
who, in or outside Nigeria:
(a) solicits, acquires, provides, collects, receives, possesses or makes available funds, property or other services by any means, whether legitimate or otherwise, to:

(i) terrorist organisation, or
(ii) individual terrorist, directly or indirectly, willingly with the unlawful intention or knowledge or having reasonable grounds to believe that such funds or property will be used in full or in part in order to commit or facilitate an offence under this Act or in breach of the provisions of this Act,

(b) attempts to do any of the acts specified in paragraph (a) of this subsection

commits an offence under this Act and is liable on conviction to imprisonment for a term of not less than ten years and not more
than life imprisonment."

Before examining whether the above provision empowers the CBN to file an Ex-parte Application, it is pertinent to first examine whether the involvement of the 20 Respondents in the #EndSARS protest amounts to an act of terrorism.

a) What is terrorism?

Section 40 of the TPA defined a "terrorist" as "any person involved in the offences under Sections 1 to 14 of this Act and includes his sponsor". Specifically, Section 1(3) of the TPA defined acts of terrorism to include "an act which disrupts a service but is committed in pursuance of a protest.". [7]

From the above provision, we can say that a protest which disrupts "services" qualifies as an act of terrorism under the TPA. However, the TPA does not make a distinction between a peaceful protest or violent protest; and it does not state the extent of "service disruption" that may make a protest an act of terrorism.

To resolve this unanswered part of the definition, recourse is to the definition of terrorism provided by Nigerian courts.

[7]See Section 1 to 14 of TPA for all acts that constitutes act of terrorism under the Act.

In the case of Adamu Ali Karumi v. Federal Republic of Nigeria[8], the Court of Appeal describes terrorism as follows:

"**The gravity of the offence of terrorism which involves the use of violence or force to achieve something**, be it political or religious, is a grave affront to the peace of society with attendant unsalutary psychological effect on innocent and peaceful members of the society who may be forced to live in perpetual fear. It is an offence that may even threaten the stability of the state. **The sophisticated planning and execution of the acts of terrorism show it is an offence that requires premeditated cold-blooded organisation.** The circumstances under which such a crime is organised calls for appropriate sentencing to deter its recurrence by potential or prospective offenders."

From the above, we can then surmise that for an act of protest to amount to terrorism, such act must involve the use of violence, force, or an act which requires premeditated cold-blooded organisation.

a) Was the #EndSARS Protest a Violent Protest?

Information available to the public reported that the #EndSARS protest was a decentralised social movement against police brutality in Nigeria. The core demand of the movement was the disbandment of the Special Anti-Robbery Squad (SARS), a unit of the Nigeria Police Force with long records of abuses, including torture; extortion; and extrajudicial judicial killings of citizens all over Nigeria.[9]

In the same vein, various accounts of the protest available to the public revealed that the protesters were peaceful in their demonstration; and all their activities were conducted in a well-coordinated, orderly, and nonviolent manner.[10]

In other words, from media reports, the #EndSARS protest was a peaceful and nonviolent protest which does not appear to qualify as an act of terrorism under TPA.

9]END SARS https://en.wikipedia.org/wiki/End_SARS'; Stephanie Busari (CNN): "Nigeria's Youth find Its voice with the EndSARS Protest Movement" https://edition.cnn.com/2020/10/25/africa/nigeria-end-sars-protests-analysis-intl/index.html

[10] Some report also revealed that the protest was later hijacked by hoodlums. See Tobias Sylvester: "Police Beating and Harrasing Peaceful #EndSARS Protesters in Nyanya, Abuja" https://www.kanyidaily.com/2020/10/police-beating-and-harassing-peaceful-protesters-in-nyanya-abuja-video.html; Steve Dede: "#EndSARS protest were peaceful, until Nigerian Government Weaponised Violence to Crush them [Pulse Features]" https://www.pulse.ng/news/local/endsars-protests-were-peaceful-until-government-crushed-them/96xnrbk

Moreover, the Constitution of the Federal Republic of Nigeria 1999 (As Amended) [The "Constitution"], which is the grundnorm [11] for all other laws in the country clothes every citizen with the right to peaceful assembly for the protection of their interests. To this end, Section 40 of the Constitution provides as follows:

"Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests"

Therefore, it appears, from the foregoing that the ground upon which the CBN's Application to freeze the 20 bank accounts was premised is unfounded in law. This is because a peaceful protest (like the #EndSARS protest) done pursuant to a right derived from the Constitution does not qualify as an act of terrorism as envisaged under the TPA upon which the apex bank premised it Ex-Parte Application.

[12] Nigerian Financial Intelligent Unit

THE POWER OF THE CENTRAL BANK OF NIGERIA TO APPLY FOR THE FREEZING ORDER

The CBN also relied on Regulation 31(2)(a) and (3)(b) of the Regulation to justify its power to file the Ex-Parte Application seeking the freeze order.

Meanwhile, Regulation 31(2)(a) and (3)(b) of the Regulations provides as follows:

"31(2) where a financial institution suspects that the funds mentioned under sub-regulation (1) of this regulation—
(a) Are derived from legal or illegal sources but are intended to be used for act of terrorism

It shall immediately and without delay report the matter to NFIU[12] and shall not be liable for violation of the confidentiality rules and banking secrecy obligation for any lawful action taken in furtherance of this obligation.

(3) A financial institution shall immediately and without delay; but not later than within 24 hours

(b)Take appropriate action to prevent the laundering of the proceed of a crime, an illegal act or financing of terrorism"

The above provision of the Regulation, particularly Sub-Regulation (3)(b), empowers the CBN, as a financial institution[13], *to "take appropriate action to prevent the laundering of the proceed of a crime, an illegal act or financing of terrorism".*

However, Sub-Regulation (2)(a) circumscribes the nature of "appropriate action" that is expected from a financial institution. Thus, the Sub-Regulation stated that where a financial institution suspects that funds derived from legal or illegal sources are intended to be used for act of terrorism, such institution should immediately report the matter to the Nigerian Financial Intelligence Unit (NFIU), without more.

Further giving credence to the limited obligation of the CBN as a financial institution with respect to funds suspected to be used for financing acts of terrorism, Section 14(1) of the TPA provides as follows:

"14(l) A financial institution or designated non-financial institution shall, within a period not more than 72 hours, ***forward reports of suspicious transactions relating to terrorism to the Financial Intelligence Unit which shall process such information and forward it to the relevant law enforcement agency where they have sufficient reasons to suspect that the funds –***

(a) are derived from legal or illegal sources but are intended to be used for any act of terrorism;

(b) are proceeds of a crime related to terrorist financing; or

(c) belong to a person. entity or organisation considered as terrorist."

It can be gleaned from the above that the CBN's duty, as a financial institution, with respect to any funds suspected to be used for financing act terrorism, is to report issues relating to such funds to the NFIU.

[13] CBN appears to qualify as a financial institution under the CBN AML/CFT Regulation and the T by virtue of Regulation 132 of "the Regulation" which defined financial institution to include any person or entity who conducts trading in—foreign exchange, etc. Also, by Section 40 of the TPA which defines Financial institution as any institution or persons regulated by any of the enactments specified in the schedule to the Act, including the Central Bank of Nigeria Act (the "CBN Act")—the Act regulating the CBN.

There is nothing in the relevant laws that empowered the apex bank to apply for and obtain an order of court to freeze the accounts holding the funds "intended to be used to finance act of terrorism", as it has done in this case.

Therefore, even when it is established that the funds in the accounts of the 19 individuals and 1 corporate entity were funds intended to finance terrorism activities, it is not the CBN's place to apply for an order freezing the accounts. Its duty herein is limited to reporting such suspicion to the appropriate authority, which may then act according to its statutory mandate.

PROPRIETY OF THE EX-PARTE ORDER MADE BY THE COURT

The Federal High Court (Civil Procedure) Rules 2019 ("FHC Rules") provides that where an order is made pursuant to a Motion Ex-Parte, such order shall remain valid for only 14 days after any person affected has applied to the court to vary or discharge the order, unless the court, considering the interest of justice directs otherwise.

For ease of reference, Order 26 Rule 10 (1)(2) and (3) of the FHC Rules provide as follows:

"10(1) An Order made on motion ex parte may not, ***unless the Court otherwise directs in the interest of justice****, last for – (a) More than 14 days after the party or person affected by the Order has applied for the Order to be varied or discharged; or*
(b)Another 14 days after application to vary or discharge it has been argued.

(2)An application to vary or discharge an order made ex-parte may be made by the party or person affected within 14 days after service and shall not last for more than 14 days after the application has been argued unless the Court otherwise directs.

(3) Where a motion to vary or discharge an ex parte order is not taken within 14 days of its being filed, the ex parte order shall lapse unless the court otherwise directs in the interest of justice."

It appears that in delivering the ruling, the court did not consider the above provision of the FHC Rules. The court ordered that the accounts of the 20 Respondents be frozen for an initial period of 90 days, subject to renewal upon an application by the CBN.

It may be argued in favour of the court's order that the decision of the court to make the ex-parte order freezing the 20 accounts last for "90 days", contrary to the 14 days allowed under the FHC Rules, is in exercise of the court's discretion to "otherwise direct in the interest of justice".

However, the exercise of discretion by the court appears to run contrary to the plethora of judicial authorities on this point as the appellate courts have consistently held that "ex-parte orders are made for a short duration".[14]

This was exemplified by the Supreme Court's decision in Group Danone & Anor v. Voltic (Nigeria) Limited[15]where it held as follows:

''An ex-parte Injunction, is expected to last for a very short time moreso, as the procedure, is likely to be abused by litigants. This is why, the order, must be very sparingly made and only when the circumstances, are urgent and compelling such as to leave the court with no other alternative in preventing an anticipated injury of a grave nature.''

In the same vein, the Supreme Court has also emphasised the importance of adherence to the provisions of the Rules of Courts, when it held as follows in **Abia State Transport Corporation & Ors. v. Quorum Consortium Ltd[16]:**

*"**The** settled law is that rules of court of each court are not made for fun, but to be obeyed. Once such rules are in place they must be adhered to and not contravened or ignored. This is most especially in matters or procedures of fundamental importance like in the instant case".*

Therefore, it can be surmised that the ex-parte order freezing the accounts of the 20 Respondents for 90 days was not granted in consonance with the FHC Rules and, by far, exceeds the short limit recognised by the courts. Thus, the freezing order cannot be said to be appropriate in the light of relevant laws, as the order made was not intended to last for "short duration" as established by judicial precedent.

[15]Supra.
[16] (2009) LPELR-33(SC) Per Mukhtar, J.S.C. (P.26,Paras.B-C); See also Okorocha v. PDP & Ors (2014) LPELR-22058(SC) Per OGUNBIYI, J.S.C

LEGALITY OF CENTRAL BANK OF NIGERIA FREEZING THE ACCOUNTS BEFORE OBTAINING A COURT ORDER

Some of the persons affected by the ex-parte application filed by the CBN alleged that the apex bank, had frozen their accounts before the order was made.[17]

The position of the courts in recent decisions is that a regulatory or law enforcement agency desirous of issuing a directive freezing any bank accounts must first obtain an order of a competent court.[18] Where it fails to obtain such order, any directive issued in this regard is a nullity and liable to be set aside by the court.[19]

Therefore, assuming the prior inability of the Respondents to access their accounts before the court order was as a result of a directive issued by the CBN before obtaining the court's order, such act by the CBN is illegal and amounts to an abuse of its regulatory power. Such act may constitute a cause of action against the CBN and any commercial bank which complied with such directive by the CBN in the absence of a court order.[20]

OPTIONS AVAILABLE TO THE OWNERS OF THE 20 BANK ACCOUNTS FROZEN BY THE EX-PARTE ORDER

The options available to the owners of the 20 bank accounts frozen by the ex-parte orders made pursuant to CBN's Application includes the following:

a) Apply to vary or discharge the order

The affected persons may apply to the court that granted the order to vary or discharge it. This is in accordance with Order 26 Rule 9(1) of the FHC Rules which provides that:

"Where an order is made on a motion ex-parte, any person affected by it may, within 7 days after service of it or within such further time as the Court may allow, apply to the Court by motion to vary of discharge it"[21]

b) **File an appeal where the application to vary or discharge is refused**

In the event that the court refused to discharge the order, the Respondents may file an appeal against the refusal to vary or discharge the ex-parte orders before the Court of Appeal.[22]

[18] Abdulmajeed Abolaji: "Post-No-Debit Alerts on the Accounts of Customers: Limitation to the Powers of Regulatory Agencies and financial institutions" https://www.aelex.com/post-no-debit-orders-on-the-accounts-of-customers/
[19] Blaid Construction Limited & Mrs. Ochuko Momoh v. Federal Republic of Nige ria FHC/ABJ/CS/132/2019
[20] See Blaid Construction Limited & Anor. v. Access Bank Plc.
[21] See also Order 26 Rule 10(2) of the FHC Rules; Abary v. Talle & Anor (2016) LPELR-40805(CA)
[22] See Section 240 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended).

c) Institute an action for damages against the CBN and their respective commercial banks for breach of banker- customer relationship

The Respondents may institute an action against the CBN for exceeding its statutory mandate and against their respective commercial banks claiming damages for breach of their banker- customer relationship. However, this may only be possible where the Respondents are able to establish that their accounts had been frozen by the commercial banks before the ex-parte order was made.[23]

CONCLUSION

Although, the CBN appeared to have complied with the procedure for freezing bank accounts, the grounds upon which the apex bank obtained the order freezing the 20 accounts appears to be faulty as it is arguable that not only does the #EndSARS protest not qualify as an act of terrorism under the Terrorism (Prevention) (Amendment) Act, 2013; but the apex bank also lacks the power to bring the ex-parte application that was granted by the court.

The foregoing notwithstanding, there are remedial actions that may be explored by the persons affected by the order in a bid to mitigate or rectify hardship that may result. This includes filing an application to vary or discharge the ex-parte order; filing an appeal in the event that their application to vary/discharge is refused; or bringing an action for damages against individual commercial banks of breach of banker-customer relationship.

Nonetheless, individual persons are advised to seek legal counsel to address the peculiarity of their case.

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