

## CASE REVIEW:

### NIMASA v. NLNG & 2 ORS. (2019 COURT OF APPEAL DECISION)

- 1 Appeal No. CA/L/1241/2017 (Suit No. FHC/L/CS/847/2013).
- 2 *The Attorney-General of the Federation and Global West Vessel Specialist Nigeria Limited*.
- 3 *Cap. N87, Laws of the Federation of Nigeria ("LFN") 2004*.
- 4 *Cap. C51 LFN 2004*.

#### Introduction

On March 29, 2019, the Court of Appeal, Lagos Judicial Division, delivered a judgment in [NIGERIAN MARITIME ADMINISTRATION AND SAFETY AGENCY v. NIGERIA LNG LIMITED & 2 ORS.](#)<sup>1</sup>, an appeal involving the apex body/agency for the development, regulation and administration of the maritime sector in Nigeria and a key stakeholder in the Nigerian oil and gas industry (the "CA Decision"). The CA decision set aside the judgement of the Federal High Court ("FHC") which exempted the Nigeria LNG Limited ("NLNG") from levies imposed on it by the Nigerian Maritime Administration and Safety Agency ("NIMASA"), among other things, solely on the grounds of lack of fair hearing. The CA Decision emphasizes the importance and effect of fair hearing in any proceedings conducted by a court of law and/or tribunal. It is for this reason that we shall be considering the relevant facts in succeeding sub-heads and providing our analysis of the case, based on the facts and the holding of the Court of Appeal.

#### Suit at the FHC

NLNG, who is the 1st Respondent on record at the Court of Appeal (but was the Plaintiff at the FHC) commenced the action by way of Originating Summons at the FHC, Lagos Division, seeking declaratory, injunctive and other orders against the Appellant (NIMASA) and the other two (2) Respondents on record.<sup>2</sup> The Originating Summons was supported by a 94-paragraph Affidavit, while the Appellant filed a 64-paragraph Counter-Affidavit, deposed to by an Assistant Director in the employment of the Appellant, in opposition and raised a counter-claim. The 1st Respondent filed a Reply Affidavit and the Appellant later filed an Additional Affidavit along with an Additional Written Address.

#### Key Issue for Determination

One of the key issues formulated for determination by the Lower Court is whether the 1st Respondent, by virtue of Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act ("NLNG Act")<sup>3</sup> is exempted from the payment of levies and surcharges prescribed in the Nigerian Maritime Administration and Safety Agency Act 2007 ("NIMASA Act"), Coastal and Inland Shipping (Cabotage) Act ("Cabotage Act");<sup>4</sup> the Marine Environment (Sea Protection Levy) Regulations 2012 ("Marine Environment Regulations") and the Marine Shipping (Ship Generated Marine Waste Reception Facilities) Regulation 2012 ("Marine Waste Regulations").

#### Reliefs sought

The reliefs sought by the Plaintiff at the FHC included:

- 1 A DECLARATION that the NIMASA Act, including the payment levy, charge or imposition under Section 15(a) thereof is inapplicable to the Plaintiff, its agents, subsidiaries, contractors and sub-contractors pursuant to Section 6(8), (9), (10), 7(7) and Paragraph 3 of Schedule II of the NLNG Act.
- 2 A DECLARATION that the tax and other exemptions/incentives granted to the Plaintiff, its agents, subsidiaries, contractors and sub-contractors in Schedule II to the NLNG Act havenot been abrogated, repealed, suspended, circumscribed or limited by Section 15(a) or any other provision of the NIMASA Act.
- 3 A DECLARATION that the Cabotage Act, including the surcharge payable under Section 43(a) thereof, is not applicable to the Plaintiff and its subsidiaries and Schedule II and other provisions of the NLNG Act.



- 4 AN ORDER compelling the Defendants to refund to the Plaintiff forthwith, the sum of US\$20,000,000 and all other monies paid on protest by the Plaintiff to the 3rd Defendant through its agent(s) further to the directives of the Federal Government of Nigeria ("FGN") acting through the National Security Adviser or otherwise howsoever as contribution to the statutory funds of the 3rd Defendant under the provisions of NIMASA Act, the Cabotage Act, or any other law, together with the interests on the said accrued sums at the prevailing Central Bank of Nigeria Monetary Policy Rate from the respective dates of payment until the date of liquidation of same.

#### Decision of the FHC and the Appeal

Summarily, the trial Judge resolved the issues formulated against the Appellant and granted the reliefs sought by the 1st Respondent. It is important to note, however, that the FHC did not consider the opposing processes (including affidavit evidence) and counter-claim of the Appellant, on the basis that the issues formulated for determination by the Appellants were different from and/or did not arise from the issues submitted for determination by the 1st Respondent. Dissatisfied with the FHC decision, the Appellant appealed to the Court of Appeal.

#### Issues Formulated for Determination at the Court of Appeal

Issues formulated for determination on appeal included, but not limited to the following:

- Whether the 1st Respondent's case initiated via an Originating Summons can be properly adjudicated without oral evidence, when the facts of the case as presented on affidavit evidence are hostile and whether the resolution of the 1st Respondent's case without oral evidence has not vitiated the decision of the trial Judge.
- Whether the Appellant's right to fair hearing was not breached when the learned trial Judge held that the Appellant raised fresh issues in its Counter-claim, discountenanced and struck out the Appellant's Counter-claim thereby denying the Appellant any hearing on the Counter-claim which is a complete answer to the 1st Respondent's claims.
- Whether the Appellant's right to fair hearing was not breached when the learned trial Judge failed to give any consideration to the Counter-Affidavit and Written Address of the Appellant and issues therein before and in granting the claims of the 1st Respondent and the breach has not rendered as a nullity, the proceedings and the judgment of the trial Court.
- Whether the provisions of paragraphs 1, 2, 3 and 6 of the Schedule II of the NLNG Act are not unconstitutional and liable to be so declared, due to their inconsistency with the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended), particularly Section 4 thereof.
- Whether having regard to the purport and intentment of Section 2 of the NLNG Act, the construction given to Section 6(8), (9), (10), Section 7(7) Paragraph 3 of Schedule II of the NLNG Act and its application can stand to justify the grant of the 1st Respondent's claim.
- Whether on a proper construction of Section 6(8), (9), (10), Section 7(7) Paragraph 3 of the Schedule II of the NLNG Act, Section 15(1) of the NIMASA Act and

Section 43(a) of the Cabotage Act and other available materials, the 1st Respondent through its chartered ships are not engaged in Cabotage trade and together with its ships operating internationally and within the Cabotage zone, is exempted from the operation and application of Section 15(1) of the NIMASA Act and Section 43(a) of the Cabotage Act.

- 7 Whether having regard to the facts and evidence in this case, the learned trial Judge rightly granted the claims of the 1st Respondent and rightly ordered the Appellant to pay the sum of US\$20,000,000 and US\$37,809,395.29 to the 1st Respondent.

#### Decision of the Court of Appeal

In a unanimous decision, the Court of Appeal solely considered and resolved the issue on fair hearing in favour of the Appellant and consequently set aside the judgment of the FHC. The Court of Appeal, [Garba JCA](#) (who read the lead judgment), held instructively at Page 35 of the judgment thus:

*"...the Lower Court wrongly, both in fact and in law, deliberately disregarded, refused and ignored the Appellant's relevant and material side of the case before it as represented in the Counter Affidavit, Additional Counter Affidavit and Written Address in defence of the summons filed by the 1st Respondent... All the Appellant did in the Counter-Affidavit, Additional Counter-Affidavit and Written Address in support of the Counter-Affidavit, was to respond to the questions raised in the summons...which the Lower Court recognizes it has the right to file in the suit. To turn around to ignore the said processes merely because the Appellant formulated issues in the Address in support of the Counter Affidavit and Additional Counter Affidavit filed in defence of the summon, was to unwittingly, deny the Appellant the right which the Lower Court earlier acknowledged it was entitled to." [Emphasis supplied]*

The Court of Appeal held that the FHC judgment constituted and amounted to a clear denial and breach of the Appellant's right to fair hearing in the determination of the Originating Summons. Consequently, the proceedings conducted by the Lower Court which culminated in the judgment delivered at the FHC, were rendered a nullity. Specifically, the Court of Appeal, Per [Garba JCA](#), emphasized at Page 36 of the Judgment as follows:

*"What the Lower Court did, in practical and legal effect, with the respect due to it, was to shut out the Appellant in the determination of the action, by ignoring its own side of the evidence and Address properly placed before it, thereby denying and breaching its fundamental right to fair hearing in the proceedings and the judgment delivered in the action. Again, with deference to the Lower Court, its judgment was...completely based on the 1st Respondent's side of the case alone to the exclusion of the Appellant's side which was properly placed before it."*

In providing its reasoning for the decision, the Court of Appeal emphasized that where a Court fails to give full consideration and determination of the case of a party, it is a situation touching on the violation of the party's right to fair hearing and when there is a breach of a party's constitutional right to fair hearing, the entire proceedings will be vitiated upon the intervention of an appellate Court, once there is a complaint by the affected party.



- 5 (2017) 14 NWLR (Pt. 1586) 522 at 547
- 6 *ASUQUO v. ESHIET (2008) ALL FWLR (Pt. 401) 970 at 983, para. B (CA), Per. Oimage JCA; see also OTAPE v. SUNMONU (1987) 5 SCNJ 57*
- 7 See Section 6 (6) (b) Constitution of the Federal Republic of Nigeria 1999, as amended.
- 8 *The right to fair hearing is a fundamental constitutional right guaranteed by Section 36 of the Constitution of the Federal Republic of Nigeria 1999, as amended. Fair hearing is a hearing which is fair to all parties to the suit, giving each one an opportunity to be heard, whether the party be the plaintiff, the defendant, the prosecution or the defence.' See OGBESHE v. IDAM (2013) LPELR-20330(CA) (P. 28, paras. A-B) Per Otisi, JCA*
- 9 *MILITARY GOVERNOR OF IMO STATE & ANOR v. NWAUWA (1997) LPELR-1876(SC) (P. 48, paras. A-B) Per Iguh, JSC; ANYAKORA & ORS. v. OBIAKOR & ORS. (2004) LPELR-7367(CA) (P. 26, Paras B-D) Per Adekeye, JCA; See further BAMGBOYE v. UNIVERSITY OF ILORIN (1999) 10 NWLR (Pt.622) 270; SALEH v. MONGUNO (2003) 1 NWLR (Pt. 801) 221.*
- 10 (2015) LPELR-25205(CA)
- 11 See *EZEIGWE v. NWAUWULU [2010] 4 NWLR (PT. 1183) 159 SC; OBI v. INEC [2007] 1 NWLR (PT. 1046) 465; AMAECHI v. INEC [2008] 5 NWLR (PT. 1080) 227; INAKOJU v. ADELEKE [2007] 4 NWLR (PT. 1025) 423; AGBAKOBA v. INEC [2008] 18 NWLR (PT. 1119) 489*

Having found there was no valid proceedings and judgment by the Lower Court, the Court of Appeal proceeded to hold that there were no valid issues left in the appeal and cross appeal that could competently be considered on the merit. Relying on the decision of the Supreme Court in *KALU v. STATE*,<sup>5</sup> the Court of Appeal held that once there is a denial of the right to fair hearing in the proceedings adopted at the court of first instance, the only and proper order to be made by an appellate Court is one for retrial or re-hearing.

Given the circumstances, the Court of Appeal declined the invitation to invoke the provisions of Section 15 of the Court of Appeal Act, in the absence of a valid proceedings conducted by the Lower Court. Accordingly, the Learned Justices of the Court of Appeal ordered that the casefile be sent back to the Administrative Judge of the Lagos Division of the FHC for assignment and expeditious determination of the issues formulated in the originating summons on the merit.

### Commentary on the CA Decision

As a preliminary point, it is important to note that the breach of a right to fair hearing occurs when the opportunity a party has to state his case or position in relation to a matter is denied or foreclosed<sup>6</sup>. A Court has a sacred constitutional duty to dispassionately consider all cases submitted for adjudication by fairly hearing all sides.<sup>7</sup> This is because the absence of fair hearing exposes the entire proceedings (no matter the time and industry devoted to the case) to nullity. The position is further buttressed by the trite principle that a breach of the right to fair hearing, being a fundamental right constitutionally guaranteed,<sup>8</sup> renders any proceeding(s) null and void.<sup>9</sup>

Given the foregoing background, it can be correctly asserted that the failure or refusal of the FHC to take into consideration the Appellant's counter-claim, and other opposing processes in defence of the originating summons at the lower court, amounts to a breach of the Appellant's right to fair hearing. Additionally, it could equally be rightly opined that there were no valid proceedings before the FHC. Consequently, any decision arising from such invalid proceedings amounts to a nullity and should be set aside. The proper order to make in the circumstances is a retrial or re-hearing, in order to allow the appellant to be properly heard.

Interestingly, however, under the provisions of section 15 of the Court of Appeal Act 2010, the Court of Appeal is empowered to re-hear a case in whole or part and can so sit as if the matter had been instituted in the Court of Appeal as a court of first instance.

We are of the considered view that since the original action was, in particular, commenced through Originating Summons, the Appellate Court had a golden opportunity to proceed to re-hear the entire proceedings and afford the parties (particularly the Appellant) the chance to be heard on the legal issues arising from this matter. In the case of *ECOTRADE LIMITED v. ALHAJI (CHIEF) SIKIRU ALABI MACFOY & ORS*<sup>10</sup>, the Court of Appeal took the opportunity to outline the relevant considerations for the invocation of the provisions of Section 15 of the Court of Appeal as follows:

*"..the following conditions which had already been settled in legion of authorities must exist, to wit (a) the Lower Court must have the legal power to adjudicate over the matter before the appellate court can entertain it; (b) the issue sought to be determined must be capable of being distilled from the grounds of appeal before the appellate court; (c) all relevant materials must be available before the Court for consideration; (d) the need for expeditious disposal of the case to meet the ends of justice must be apparent on the face of the materials presented; and (e) the injustice or hardship that will follow if the case is remitted to the Lower Court must be clearly manifest."*<sup>11</sup>

Taking the above requirements under the context of the instant case, we believe that: (i) there is no contention as to the jurisdiction of the FHC over the subject for determination at the lower court; (ii) from the grounds distilled for determination by the Appellant, the crux of the issues were carefully submitted before the Court of Appeal beyond the issue of fair hearing; (iii) it was not in contest that all relevant materials were put before the Court of Appeal through the Records of Appeal; and (iv) considering the nature of the legal issues, including issues touching on revenue of the FGN and given that the original action had been commenced at the FHC almost six (6) years before the judgment of the Court of Appeal, it was a good case for the invocation of the provision of section 15 of the Court of Appeal Act. This, in our opinion, would have better served the interest of justice, not only to the parties and the stakeholders in the maritime and oil and gas sectors, but also save scarce judicial time and resources that would be deployed for a re-hearing at the lower court.

Conclusively and our position in the foregoing paragraph notwithstanding, the judgment of the Court of Appeal further strengthens the legal framework on the constitutional requirement of fair hearing and clearly underlines the very heavy implications of the absence of fair hearing in any judicial proceedings.

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