

Court Nullifies Provisions in Rules/Practice Directions Prescribing Payment of Deposit Pending Hearing of Appeal

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The Abuja Judicial Division of the Federal High Court (FHC or “the Court”) has ruled, in the case between, *Joseph Bodunrin Daudu SAN (Joseph or “the Appellant” or “the Applicant”)* and the Minister of Finance, Budget and National Planning (“*The 1st Respondent*”), the Honourable Chief Judge of the FHC (“*The 2nd Respondent*”) and the Honourable Attorney General of the Federation of Nigeria (“*the 3rd Respondent*”), that the provisions of Rules and Practice Directions prescribing 50% or full payment of disputed assessments prior to the hearing of the appeal is unconstitutional, null and void. The judgment is anchored on the need to ensure fair hearing and guarantee the constitutional right to appeal.

Facts of the Case

On 7, September 2017, the Applicant, a legal practitioner and principal partner in the law firm of J.B Daudu & Co., received a letter from the Economic and Financial Crimes Commission (EFCC) requesting documents, including tax assessments, evidence of tax remittances, Statement of Financial Position (SOFP), annual reports, etc., dating back to the 2008 financial year (FY). On 4 June 2018, the Appellant also received a letter from the Federal Inland Revenue Service (FIRS) wherein the FIRS assessed the Appellant to tax liabilities of approximately ₦1.2 billion for the period 2010 to 2017 in respect of Personal Income Tax, Withholding Tax and Value Added Tax.

In reaction to the actions taken by the FIRS, the Appellant filed an appeal with the Tax Appeal Tribunal (TAT) on 2, July 2018. Despite the Appellant's efforts, the TAT affirmed the FIRS's stance in a judgment, causing dissatisfaction on the part of the Appellant. Following this, the Appellant referred the case to the FHC.

While the matter was still pending before the FHC, additional issues arose. The 1st Respondent, purportedly acting within her powers, issued the FIRS TAT (Procedures) Rules, 2021.

Furthermore, on 31 May 2021, the 2nd Respondent issued a Practice Direction titled “the FHC of Nigeria (FIRS Practice Directions 2021)” and “the FHC of Nigeria (Tax Appeals) Rules 2022” on January 10, 2022.

Dissatisfied with the Respondents’ actions, the Applicant sought the following reliefs from the FHC:

1. *A Declaration that the Provisions of Order III Rule (6) (a) of the TAT (Procedure) Rules, 2021 issued under the hand of and by authority of the 1st Respondent, which prescribe that an aggrieved person challenging the tax charged by the FIRS or any relevant tax authority shall pay 50% of the disputed amount into any account so designated by the Tax Appeals Tribunal before such appeal can be heard, purportedly as security for prosecuting the appeal are unconstitutional, null and void and contrary to the provisions of Section 36(1) and (2), Section 6(6a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and the doctrine of separation of powers.*
2. *A Declaration that the provisions of Order V Rule 3 of the FHC of Nigeria (FIRS) Practice Directions, 2021 issued under the hand and authority of the 2nd Respondent, which prescribe that where a Respondent intends to challenge an assessment served on him*

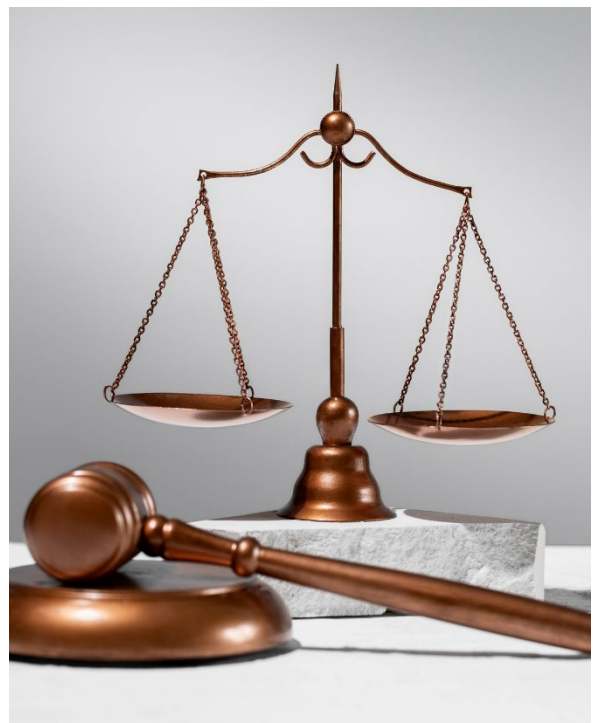
he shall pay half of the assessed amount into an interest yielding account of the FHC, pending the determination of the application/proceedings are unconstitutional, null and void and of no consequence having regard to the provisions of Sections 251(1), 6(6) (a) & (b), 36(1) & (2) of the 1999 Constitution (as amended), Paragraphs 17(1) and 21 of the Fifth Schedule to the FIRS (Establishment) Act, 2007 and contrary to the principles of separation of powers and the Rule of law.

3. A Declaration that the provisions of Order V Rule 1 of the FHC of Nigeria (Tax Appeals) Rules, 2022 issued under the hand and authority of the 2nd Respondent, which prescribe that where an Appellant is appealing against the Decision of the Tax Appeal Tribunal, the sum contained in the Decision shall be deposited in an interest yielding account maintained by the Chief Registrar of the FHC are unconstitutional, null and void and of no consequence having regard to the provisions of Sections 251(1), 6(6) (a) & (b), 36(1) & (2) of the 1999 Constitution (as amended), Paragraphs 17(1) and 21 of the Fifth Schedule to the FIRS (Establishment) Act, 2007, and contrary to the principles of separation of powers and the Rule of law.
4. An Order of this Honourable Court striking down (deleting) the provisions of Paragraph V Rule 3 of the FHC (FIRS) Practice Directions 2021, or any other similar provision therein, for being unconstitutional and in excess of the powers of the 2nd Respondent to issue practice directions.
5. An Order of this Honourable Court striking down (deleting) the provisions of Order V Rule 1 of the FHC of Nigeria (Tax Appeals) Rules 2022, for being unconstitutional and in excess of the powers of the 2nd Respondent to issue practice directions and Rules of Court.
6. An Order of this Honourable Court striking down (deleting) the provisions of Order III Rule 6 (a) of the TAT (Procedure) Rules, 2021 directing the payment of 50 percent by aggrieved persons into designated account by the TAT for being unconstitutional, null

and void and in excess of the powers of the 1st Respondent to make Rules prescribing the procedure and conduct of appeals before the Tribunal.

7. An Order of Perpetual Injunction restraining the 1st Respondent whether acting by herself or through their servants, agents, officers, assigns or any person claiming to act on her behalf from enforcing the provisions of Order III Rule (6) (a) of the TAT (Procedure) Rules, 2021 in respect of appeals pending before all the Tax Appeal Tribunals constituted by the 1st Respondent.
8. An Order of Perpetual Injunction restraining the 2nd Respondent, whether acting by himself or through his servants, agents, officers, assigns or any person claiming to act on his behalf, from enforcing the provisions of Order V rule 1 of the FHC (Tax Appeal) Rules 2022 and Order V Rule 3 of the FHC (FIRS) Practice Directions 2021 against the Applicant.

In addition to the Amended Originating Summons, a supporting affidavit consisting of 40 paragraphs, sworn by the Applicant, was also submitted.



The Applicant's Argument

The Appellant argued that the legislation issued by the Respondents would not only fail to expedite the resolution of tax-related matters but also serve as a mechanism for the FHC to receive monies that are still subject to appeal from litigants. According to the Rules, an Applicant challenging an assessment was mandated to deposit half or 100% of the assessed amount into an interest-yielding federal account pending the hearing and resolution of the appeal.

Contending that the two respondents went beyond their powers, the Appellant claimed that the rules contradicted substantive legislation and infringed upon the right to appeal and fair hearing as enshrined in the constitution. The Applicant, therefore, urged the FHC to strike down the provisions in the Rules and Practice Directions as they were made in excess of the powers of the 1st and 2nd Respondents.

Furthermore, the Appellant asserted that the 2nd Respondent should wield statutory powers granted to his role in adherence to the Constitution. The Appellant contended that the rule requiring a 50% or 100% initial payment favored the FIRS, creating a conflict with Section 36 of the Constitution and the FIRS Establishment Act.

The Respondents' Argument

The 2nd Respondent argued that, as the Chief Judge of the FHC, he possesses statutory authority to oversee the overall administration of the FHC in Nigeria. Based on this authority, he maintained the right to amend, modify, add, or issue directives. Additionally, he contended that the issuance of Practice Directions 2021 was aimed at ensuring that the execution of the FIRS' mandate was subject to judicial power and scrutiny.

Furthermore, the 2nd Respondent proceeded to assert that the Rules, as established, do not diminish the rights of an appellant, emphasizing that payment would be made to an interest-bearing account thereby preserving the funds. Citing the precedent set in *CBN v. Ekunola (2013)*, the Respondent asserted that compliance

with the Rules of an appellate Court was essential for a valid exercise of the right of appeal.

Arguing that the Rules introduced were protective measures aimed at securing the subject matter pending the determination of an appeal, the Respondent asserted that the Appellant failed to demonstrate the alleged injustice suffered from the enforcement of the Tax Appeal Rules. Drawing support from *TGF Real Estate Limited v. Onigbanjo & Anor (2019)*, the Respondent contended that the combined provisions of Section 254 of the Constitution and Order 57 Rule 1-4 of the Civil Procedure of the FHC confer upon the 2nd Respondent the authority to make Practice Directions and subsidiary legislation.

Issues for Determination

Based on the prayers and arguments submitted by the parties, the Court adopted the following issues for determination:

- i. *Whether Paragraphs 19, 20, 21, 22, 23, 24, 27, 28, 30, 31, 32, 3, 34 and 36 of the Supporting Affidavit to the amended originating summons contravenes the evidence act for consisting of arguments, objections and conclusions;*
- ii. *Whether the reliefs related to the FHC (FIRS) Practice Directions 2021 is grantable in the circumstances;*
- iii. *Whether the Applicant is entitled to the reliefs sought.*



FHC's Decision

Following a thorough examination of the arguments presented by both parties, the FHC rendered its verdict by addressing the individual issues of determination as follows:

- i. The Court observed that Paragraphs 19, 22, 23, 24, 27, 28, 31, 32, 33, 34, and 36 of the affidavit contained arguments and conclusions that fall within the exclusive jurisdiction of the Court. Despite recognizing the Appellant's status as a senior lawyer and the fervor in litigating the matter, the Court emphasized that such conclusions should have been presented in the written address rather than the supporting affidavit. Consequently, the Court struck out the identified paragraphs for contravening Section 115 of the Evidence Act 2011.
- ii. Addressing the second issue, the Court initially assessed whether the matter fell within its jurisdiction. Upon determination, the Court relied on *Adigwe v. FRN (2015)* to decide that the right of a person to appeal a decision is a constitutional right which accords with the right to fair hearing. The court also held, based on the cases of *Ekunola v. CBN & Anor (2013)*, *Ezeigwe v. Awudu (2008)*, *Ladoja v. Ajimobi & ORS (2016)*, *Okonkwo v. Ngige & ORS (2007)*, *National Bank of Nigeria Ltd v. Weide & Co. Nig. Ltd. & Ors (1996)*, that the right to appeal is not exercised at large but upon the fulfilment of certain conditions as imposed by law or rules of court. The Court further placed reliance on Section 36 of the Constitution and other cases including as *MFA v. Inongha (2014)*, *INEC v. Musa (2003)*, *Ugba & Ors vs. Suswam & Ors (2012)*, *Akura v. Akpom (2021)*. The Court held that where an administrative body is to make a decision concerning a person, such person must be given the opportunity to represent themselves before a decision is made. The Court submitted that the Provisions of the Practice Directions and Rules of Procedure made by the Respondents seemed to limit the Appellant's right to fair hearing as the said provisions made the exercise of right dependent of the deposit of 50% and 100% as stipulated by the TAT Rules and the FHC Rules and Practice Directions respectively.

The Court further held that, although the provisions appear preservatory at first glance, closer examination reveals that they place a barrier on the path of an Appellant toward expressing his right of appeal against a seemingly unjust tax assessment. The Court asserted that, even though the 1st and 2nd Respondents are empowered to make rules to govern the TAT and regarding appeals from tax assessment, respectively, they have no right to construct an embargo to the enjoyment of the right to appeal of any appellant. Section 1(3) of the Constitution provides that any law or subsidiary legislation which contravenes the provision of the Constitution shall be declared void to the extent of its inconsistency.

- iii. On the final issue, the Court granted Reliefs 1 to 6 as requested by the Appellant. However, Reliefs 7 and 8 were refused.

The FHC analyzed the impact of the Rules and Practice Directions issued by the Respondents on the right to appeal by an Appellant. The court notes that there is no provision in the enabling statutes on tax matters that stipulates any precondition for prosecution of tax appeals before the FHC. It concludes that the right of appeal is unfettered and that the contested provisions are made to favour the FIRS without any attempt to balance the interest of a tax debtor. As far as the court is concerned, any tax debtor that is unable to afford the deposit will automatically be deprived of his right to appeal, which is a constitutional right. The provision will, therefore, constitute an obstruction to an Appellant's right to fair hearing and a violation of the Constitution.

Ultimately, the matter was resolved in the Appellant's favor and the Court struck out the contested Provisions of the Rules of the TAT and the FHC.

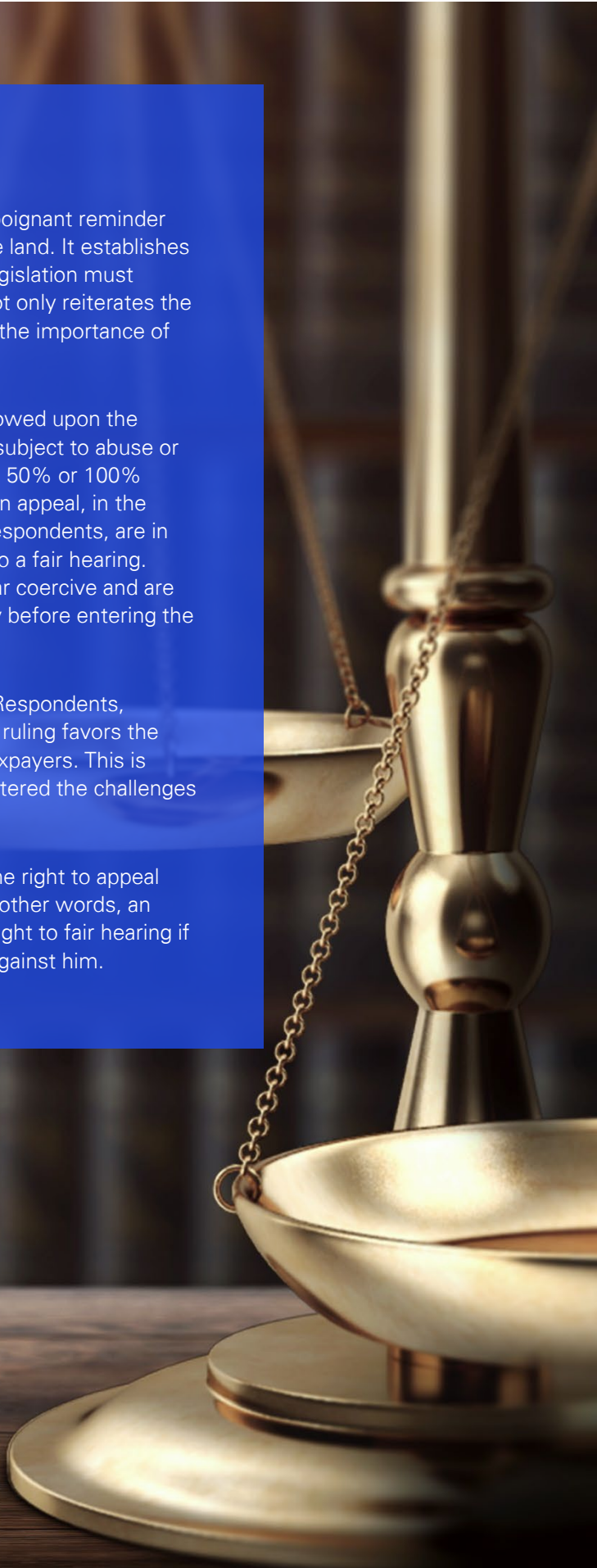
Comments

The position adopted by the FHC serves as a poignant reminder that the Constitution is the supreme law of the land. It establishes standards that other statutes and subsidiary legislation must adhere to. In this context, the FHC's verdict not only reiterates the constitutional foundation but also emphasizes the importance of adhering to established legal procedures.

The judgment highlights that the powers bestowed upon the Respondents by their positions should not be subject to abuse or biased advantage. The provisions prescribing a 50% or 100% deposit of the assessed amount before filing an appeal, in the Rules and Practice Directions issued by the Respondents, are in violation of an Appellant's constitutional right to a fair hearing. Particularly, those specific requirements appear coercive and are akin to compelling the Appellant to plead guilty before entering the courtroom.

Furthermore, the argument presented by the Respondents, suggesting that monies can be refunded if the ruling favors the Appellant, fails to offer adequate comfort to taxpayers. This is especially true for taxpayers who have encountered the challenges associated with securing a tax refund.

The key takeaway from the judgment is that the right to appeal fully complements the right to fair hearing. In other words, an applicant cannot be deemed to have enjoyed right to fair hearing if he is unable to appeal any adverse judgment against him.



For further enquiries, please contact:

Adewale Ajayi

NG-FMTAXEnquiries@ng.kpmg.com

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Ajibola Olomola: Ajibola.Olomola@ng.kpmg.com

Ijeoma Uche: Ijeoma.Uche@ng.kpmg.com

Olatoye Akinboro: Olatoye.Akinboro@ng.kpmg.com



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