

FHC dismisses a suit on the NCDMB's authority to collect NCD levy

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The Federal High Court ("FHC" or "the Court"), sitting in Yenagoa, recently delivered its judgment in a case between The Incorporated Trustees of the International Association of Drilling Contractors, Nigeria ("IADC" or "the Plaintiff/Applicant") and the Nigerian Content Development and Monitoring Board (NCDMB or "the Defendant/Respondent").

The FHC held that the NCDMB is empowered by its enabling statute - the Nigerian Oil and Gas Industry Content Development Act (NOGICDA or "the Act") - to collect one percent of every contract awarded to any operator, contractor, sub-contractor in the upstream sector of the oil and gas industry, and the members of the IADC are required to comply with the statutory obligation. Interestingly, the court did not dwell on the merits of the case but struck it out largely on technical basis that the IADC lacked the locus standi to institute the case. Consequently, the court lacked the jurisdiction to commence the suit.

Facts of the Case

The NOGICDA established and empowered the NCDMB to monitor, coordinate, and implement the provisions of the Act, including the management of the Nigerian Content Development (NCD) Fund ("the Fund"). Section 104 of the Act provides that:

"the sum of one per cent of every contract awarded to any operator, contractor, subcontractor, alliance partner or any other entity involved in any project, operation, activity or transaction in the upstream sector of the Nigeria oil and gas industry shall be deducted at source and paid into the Fund."

The NCDMB, in its Guidelines for Remittance of 1% of Contract Sum to NCD Fund ("the Guidelines") issued pursuant to Section 70 of NOGICDA, clarified the mandatory contributors to the Fund to include *all operators, contractors, subcontractors, alliance partners and other companies including but not limited to exploration and producing companies, gas*

producing, compressing and processing companies, EPC and EPCI companies, original equipment manufacturers, all other service companies involved in the upstream sector of the Nigerian oil and gas industry. Consequently, the NCDMB has relied on the contents of its Guidelines in the implementation of the above provision of the law, during its forensic investigation of companies operating in the Nigerian oil and gas industry, including investigation carried out on members of the IADC.

The IADC was of the view that the NCDMB's position contradicts their interpretation of Section 104 of the NOGICDA regarding the application of the NCD levy; which, in its view, does not apply to all players in the oil and gas industry. Rather, it applies to entities operating in the upstream sector of the industry such as exploration and production (E&P) companies and other companies that provide services in the upstream sector. On this basis, members of the IADC were not consistent in the deduction of the levy from transactions with their vendors.

Due to non-compliance with the NCDMB's position as set out in the Guidelines, some members of IADC were summoned by the House of Representative Committee on NCD for an investigative hearing. Their names were also published in various national newspapers as defaulting companies, and they were requested to defray the alleged liabilities within two weeks of publication.

Aggrieved by these, the Plaintiff (IADC) commenced an action by way of an originating summons on 14 July 2022. The issues raised for determination by the Defendant and adopted by the Plaintiff were:

- a) Whether the suit was competent and initiated by due process of law such as to vest the FHC with requisite jurisdiction to hear and determine the case;
- b) Whether the Plaintiff's suit disclosed any cause of action against the Defendant;
- c) Whether the Plaintiff had the requisite standing (or *locus standi*) to initiate and prosecute the suit; and
- d) Whether the suit was an abuse of court process.

Plaintiff's Arguments

The Plaintiff argued that:

- the oil and gas industry is categorized into upstream, midstream, and downstream sectors, and according to the Black's Law Dictionary, "*upstream*" relates to or involves exploration and production activities of oil companies and their direct contractors. Therefore, the specific reference to "*upstream*" in Section 104(2) of the Act implies that the NCD levy should only apply to contracts, projects, operations, activities, or transactions carried out in the upstream sector of the oil and gas industry;
- following from the above, its members were compliant with the provisions of the Act when the E&P companies that contracted them deduct the NCD levy at source and remit same to the NCDMB;

- the contracts of its members with third parties for the supply of goods and services for their businesses was outside the scope of Section 104(2) and any attempt to impose the levy amounts to multiple taxation of the same income;
- the Defendant's Guidelines - a subsidiary legislation - could not validly alter the Act on the category of companies, contracts and activities that are liable to the NCD levy; and
- the imposition of the NCD levy on any contract, project, transaction, activity, or operation that is not directly connected to the upstream sector of the oil and gas industry is unlawful.

Defendant's Arguments

The Defendant argued that the Court should dismiss the suit on the following bases:

- the Plaintiff had failed to demonstrate the harm it suffered to enable it to commence the suit and lacked the *locus standi* (requisite standing to sue) to commence the suit or seek any relief/redress thereon. This was hinged on the fact that IADC was not an entity subject to the provision of the Act or the Guidelines as it is not an operator, contractor, sub-contractor, alliance partner involved in any project, operation, activity, or transaction in the upstream sector of the oil and gas industry. The Defendant had never imposed NCD levy on the Plaintiff nor described it as non-compliant, and none of the members of the Plaintiff was named as a party to the suit. This stripped the FHC of jurisdiction to hear and determine the suit;
- the affidavit submitted by the IADC was deposed to by its legal counsel in contravention of the ethical restriction that lawyers should not act as witnesses for their clients. Hence, the faulty Affidavit invalidated the suit;
- the suit was an abuse of the court process because it was instituted to prevent the National Assembly from investigating some of the Plaintiff's defaulting members.

Decision

After considering the arguments of both parties, the FHC upheld the Preliminary Objection ('PO') of the Defendant and dismissed the case on technical grounds that it lacked jurisdiction. The specific reasons the FHC gave are as follows:

- The suit was commenced without following the prescribed conditions, and it robbed the Court of its jurisdiction - a Court must be clothed with jurisdiction before it can properly and competently adjudicate.
- There was no valid, effective and effectual affidavit in support of the Plaintiff's originating summons as it was deposed by its legal counsel in clear contravention of the Rules of Professional Conduct for Legal Practitioners.
- The Plaintiff lacked the *locus standi* to institute the action.
- The suit was an abuse of Court process as the Plaintiff failed to initiate the suit by due process.

However, the FHC expressed its opinion on the merits of the case to the effect that IADC was not entitled to the reliefs that it sought because it did not proffer sufficient evidence for the FHC to decide on the issue sought to be clarified under the originating summons.

Commentary

The roots of the suit date back to the passage of the NOGICDA. There has been a dispute about the range of application of the NCD levy between players in the Nigerian oil and gas industry and the NCDMB. Section 104(2) of the Act is clear that the NCD levy is payable on "...any project, operation, activity or transaction in the **upstream sector of the Nigeria oil and gas industry...**" (emphasis ours). The bone of contention has remained the definition and breadth of the term "upstream sector".



Specifically, there have been arguments on whether the term is synonymous with 'upstream companies' or 'upstream activities'. If the term refers to *upstream companies*, any contract with an E&P company irrespective of the nature of the service would be liable to the NCD levy such that even entities providing cleaning, accounting or catering services to an E&P company would be liable to NCD levy. Conversely, if the term refers to *upstream activities*, the levy should apply only to exclusive upstream activities such as exploration, drilling, production and related activities in the upstream sector of the oil and gas industry.

The suit presented a rare and golden opportunity to obtain a resolution of the irreconcilable divergent views on the range of application of the NCD levy. Sadly, the FHC did not evaluate the different views/merits of the case and give judicial guidance. The suit was dismissed based on legal technicalities. We hope that this would be corrected if the Plaintiff decides to appeal the judgment, or any other player in the oil and gas industry institutes a court action regarding this.

Another issue which was not thoroughly evaluated was the Plaintiff's assertion that the NCDMB's publication altered the meanings of Section 104(1) and (2) of the NOGICDA through the Guidelines, which specified certain categories of companies that were not contemplated nor mentioned by the Act. The Plaintiff did not contest the general power of the NCDMB to issue regulations or guidelines pursuant to its powers under the NOGICDA. The argument was narrowed to the issue of a subsidiary legislation seeking to fundamentally alter the principal Act. Unfortunately, the Court failed to address this fundamental concern of the Plaintiff and by extension, concerns of other players in the oil and gas sector. It has been established by a long line of decided cases that subsidiary legislation such as circulars, regulations and guidelines cannot alter, amend, vary, or expand an enacted statute. For example, in *FBIR VS HALLIBURTON*, the court held that the information circular issued by the tax authority is merely informative and cannot override or supersede the provision of an Act. This was another missed opportunity to provide some certainty to the place of subsidiary legislation.

Pending a legislative amendment or judicial interpretation of section 104(2) of the NOGICDA, the expectation is that the rules of interpretation of statute will be employed by stakeholders in applying the provisions of the Act. One of the cardinal rules of interpretation of taxing legislation is the strict or literal rule. According to the Court of Appeal in *AHMADU VS GOVERNOR, KOGI STATE*, "*In a taxing legislation, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption about a tax. Nothing to be read in and nothing to be implied. One can only look fairly at the language used...*". Given this position which has been upheld by the Supreme Court, the NCD levy should apply to only contracts, transactions, projects and operations that relate to the upstream sector i.e., *the exploration and production activities* in the upstream sector of the oil industry. The NCD levy should only apply to all service providers of the upstream companies whose activities directly relate to the upstream sector and should not apply to contracts or contractual arrangements **not** related to upstream activities.

Ultimately, legislative action will be required to define the intendment of Section 104(2) in terms of the breadth and whether it should cascade throughout the value chain. This would bring much-needed certainty to all stakeholders in the oil and gas industry.

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