

ANALYSING THE POWERS OF ADMINISTRATIVE AGENCIES TO IMPOSE FINES: A REVIEW OF THE COURT OF APPEAL'S DECISION IN NOSDRA V. EXXON MOBIL*

Abstract

The power of administrative agencies to impose fines as a regulatory measure has received much attention in recent times. The court has been viewed as the only constitutional institution that can impose fines as a form of punishment. However, an agency such as the National Oil Spill Detection and Response Agency (NOSDRA) is empowered to impose fines in accordance with its enabling Act. This means that its activities and decisions are firmly backed by law. This paper is a bold attempt to resolve the debate as to the constitutionality or legality of fines imposed by an administrative agency without recourse to courts in Nigeria. The paper reviewed the Court of Appeal's decision in NOSDRA V. Exxon Mobil where the Court of Appeal upheld the decision of the trial court stating that the power as well as competence to impose fines belong to the courts, and the Appellant is not clothed with the power to properly exercise that function. It was necessary to review the instant case to point out the challenges of limiting the powers administrative agencies to impose civil fines. It further discusses the importance of administrative agencies, their powers to impose sanctions, the need for administrative agencies to have established Tribunals for internal dispute resolution, and the sacrosanct doctrine of fair hearing which the Trial and Appellate court built their decision on in the case under review. This paper finds that the decision of the Court of Appeal is not at par with the practice in other jurisdictions where summary action procedures are employed to facilitate the process of justice without congesting the courts. The paper recommends that a distinction must be made between civil fines imposed by administrative agencies and criminal monetary sanctions imposed by the courts. The paper concludes by highlighting the advantages prevalent in allowing these agencies to perform their functions as stipulated by their enabling laws without it being viewed as derogation to the powers of the court.

Keywords: Administrative Agencies, Imposition of Fines, Regulatory Measure, NOSDRA v EXXON MOBIL Nigeria

1. Introduction

According to the view of the Sociological school, as eminently posited by Roscoe Pound amongst others, the purpose of the law is to protect the interests of society.¹ The instant case under review, NOSDRA v. Exxon Mobil² bothers on the powers of administrative agencies to impose fines on offenders, without recourse to the court. The Court of Appeal in the earlier case of *Ediru v. FRSC* involving an individual and a regulator had held that the powers of regulatory agencies to enforce penalties and the judicial powers of the court were not in conflict. Therefore, the imposition of fines by FRSC in this case in no way detracts from the powers of the court. Instead, the imposition of such fines on violators of traffic regulation was regarded as a deterrent to reckless road usage. This is in tandem with the Roscoe Pound's view of law being a tool of protection for the society. The clear departure of the Court of Appeal in the case under review, from the earlier case of *Ediru v. FRSC* seems to have tilted the table and is the focus of this paper. The judge in deciding that the imposition of fine by NOSDRA on ExxonMobil was a usurpation of judicial powers seems not to have accurately interpreted the powers of NOSDRA as highlighted in the enabling Act. Bearing in mind that the primary aim of law aligns with the reason for which the people have delegated power to the state; which is to ensure the safety of lives and property, to promote orderliness and to advance both individual and corporate development. In reaching this end, the courts must recognize the need for administrative agencies to perform *quasi-judicial* functions.

2. Roles and Powers of Administrative Agencies

Administrative Law governs the relations between an administrative agency and the individuals over whose activities the purpose of the agency oversees. It therefore controls their administrative powers by making it possible for the individuals to seek redress if the agency acts illegally or the individual is adversely affected by the state acting beyond its powers³. According to Sir Ivor Jennings' in his book, *The Law and the Constitution*, Administrative Law is defined as a law relating to the administration that determines the organization, powers and duties of administrative authorities.⁴ However, Okany's definition of the subject, he defined Administrative Law as the law relating to the administration of the executive, and which sets out the power of the executive branch of the government including various agencies through which powers are exercised. It is that body of rules which aims at reducing the areas of conflict between the administrative agencies of the state and the individuals.⁵

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¹Yakubu J. A. *Who gives the Law? Determining the Jurisprudential Question* (Ibadan: Humanities Research Centre, 2002) 2-3.

² [2018] LPELR – 42210(CA).

³ O'Donnell G.A., 'Why the Rule of Law matters' *Journal of Democracy*, 2004 33

⁴ Ivor Jennings W. *The Law and the Constitution*, (University of London Press 1938) 322.

⁵ Okany M.C., *Nigerian Administrative Law* (Ibadan: Africana First Publishers Limited 2007) 4.

Under a constitutional system like ours and the United States, agencies are creations of the legislature. They do not spring up on their own and they cannot be created by courts. They function only in so far as the legislature has given them the authority to function. The legislature must enact a statute creating the agency usually referred to as 'the enabling statute or Act.' Powers of administrative agencies which includes their functions and duties are primarily, specifically or expressly granted by statutes. Therefore, a public body or administrative authority invested with statutory powers must act within the law. In other words, where a person or authority claims to have acted in consonance with the power granted by statutes, such authority if challenged needs only to show that it was empowered to act under the enabling statute.

The people, through the Constitution, have delegated power to the three arms of Government and to other organs, public institutions, and authorities at the three tiers of government. Regardless of the foregoing, the operation and delegation of the legislative, executive and judicial powers of Government through its administrative agencies and public authorities require a degree of discretion. The Nigerian people are presumed to have delegated their powers to the Constitution. Though, the Nigerian Constitution cannot be said to have been made by the Nigerian People because it was imposed on the people by the military through a decree.⁶ Notwithstanding this deficiency, it is the supreme law in Nigeria.

3. The Case of *NOSDRA V EXXON MOBIL*

The Facts

The National Oil Spill Detection and Response Agency (NOSDRA) as the Plaintiff instituted an action at the Federal High Court, Uyo Judicial Division action against Mobil Producing Nigeria Unlimited (EXXON MOBIL) as Defendant claiming the sum of N10,000,000.00 (Ten Million Naira) as penalty fees for the alleged contravention of NOSDRA Act and its regulations. In its defence, EXXON MOBIL argued that upon observing the small amount of oil and water released from its facilities, it immediately shut down the affected tanks' operations and activated its emergency response procedure in order to contain the spread of the spilled oil and water which were immediately contained and cleaned up. It was also argued that the clean-up, remediation and assessment exercise of the impacted site was indeed in line with the stipulated standards of the NOSDRA Act, 2006 and its regulations. EXXON MOBIL pleaded NOSDRA's report which rated the clean-up exercise as satisfactory. Consequent upon the above, EXXON MOBIL stated that there was no basis or justification for the penalty levied against them as the clean-up exercise that was done on its Qua Iboe facility was in line with the NOSDRA Act and Regulations.

Decision of the Court

In its judgment, the trial Court held that NOSDRA's imposition of the penalty was *ultra vires* (outside) its powers. Dissatisfied by the ruling, NOSDRA filed an appeal in the Calabar Judicial Division of 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 its act of levying a fine on the ExxonMobil was done under *Section 6(2) and (3) of the NOSDRA Act*⁷ 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.

Exxon Mobil on its part, argued that only 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 Exxon Mobil. 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.

⁶ The 1999 Constitution was made as a schedule to the CFRN (Promulgation Decree No. 24 of 1999). It is as a result of this that it has been remarked that the Nigerian Constitution is not more than Decree No. 24 of 1999.

⁷ Cap N157, LFN 2004.

Analysis of the Decision

It could be distilled from the above decision that the imposition of a fine on ExxonMobil by NOSDRA was invalidated. Under the 1999 Constitution, only judicial bodies can impose fines or penalties, and NOSDRA not being a judicial body, cannot impose fines or penalties. The law establishing NOSDRA does not clothe it with the powers to impose fines; and, 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 one above, the Court of Appeal was of 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 process which is achievable via a proper court procedure. 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 are of the view that not 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 have the legal backing to make findings of fact that can lead to the imposition of sanctions on subjects within their regulatory purview provided that no finding of fact regarding the criminal guilt of such subjects is made. It is true that NOSDRA in this case is not a criminal tribunal and therefore lacks capacity to conduct a criminal trial. However, the facts of this case do not require the conduct of a criminal trial as held by the Court of Appeal. No crime was committed, and the NOSDRA Act 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 NOSDRA Act, is to de-incentivize or penalize certain conducts but without the necessity of a criminal conviction.

Furthermore, the example of the Nigerian Communications Commission (NCC) and MTN in 2015 brings some things to light. In that case, US\$5.2 billion fine was handed down to MTN, a mobile network operator by the NCC. We would agree that the issuance of the fine was not preceded by a criminal trial but was made by the NCC in its capacity as a communication regulator. The NCC arrived at a factual determination that MTN had failed to meet the deadline for disconnecting the Subscribers Identification Modules (SIM) that were improperly registered. MTN was then fined \$1000 for every improperly registered SIM, and the total fine amounted to \$5.2 billion. It posits that the powers NCC exercised in fining MTN is similar to NOSDRA's powers under the Act. The implication of the ruling of the Court of Appeal in this case would be that the NCC did not have the powers to impose the fine on MTN since making the findings of fact that led to the imposition of the fine is the exclusive preserve of the courts. If this position is erected, it would no doubt weaken the regulatory powers of various bodies, and will subject matters that can be speedily dispensed with administratively to lengthy criminal prosecution which certainly is not a plus to our judicial system.

On ground two, the Court of Appeal's decision that the law establishing NOSDRA does not clothe it with the powers to impose fines is not accurate. This assertion by the court seems to be a deliberate oversight to the clear provisions of the NOSDRA Act. Section 6(2) and (3) of the *NOSDRA Act*⁸ provides that:

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.

This shows clearly that NOSDRA has the legal backing to impose fines.

On the third ground, the doctrine of fair hearing is fundamental to the dispensation of justice. The court is an institution clothed with the capacity to establish whether or not this right has been violated and most importantly, the court is charged with the responsibility to uphold this doctrine. However, I think that no protocol of this doctrine was violated by NOSDRA as posited by the Court of Appeal. The matter being before a court of competent jurisdiction clearly affords this doctrine to be upheld and justice served. Interestingly, the Court of Appeal in the earlier case of *Ediru v. FRSC*⁹ held that the enforcement powers of the Regulatory agencies and the judicial powers of the courts were mutually exclusive. As a result, the imposition of fines by FRSC in the instant case in no way derogates from the powers of the court. Instead, the imposition of such fines on violators of traffic regulation will act as a deterrent to reckless road usage and help ensure the safety of lives and property on Nigerian roads. But, the judgment in NOSDRA's case has again, tilted the table to restrict the Regulators from imposing the fines that have been prescribed under their enabling laws on violators in the exercise of their administrative roles. Could the court be overruling itself? This is a clear departure from its initial decision.

⁸ Cap N157, LFN 2004.

⁹ [2016] 4 NWLR (pt. 1502) pg.209.

4. The Doctrine of Fair Hearing and Administrative Tribunals

One obvious reason why the case was not decided in NOSDRA's favour both at the trial court and the Court of Appeal is hinged on the indispensable doctrine of fair hearing. At the trial court, the learned Justice of the Federal High Court, Ojukwu J stated that:

It bears repeating to say that the law establishing the plaintiff (NODSRA) ought to have created a platform to hear parties who are in any alleged breach of their regulations and also make provisions for judicial review to allow aggrieved persons to seek a review of their decisions before a Court of law.

The Court of Appeal per Chioma Nwosu-Iheme also expressed similar sentiments when it stated as follows: '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, especially where no platform was established to observe the principles of natural justice'. The doctrine of fair hearing, being a key principle of natural justice is sacrosanct to the dispensation of justice in Courts and Tribunals. The apex court held in the case of *Access Bank Plc v. Edo State Board of Internal Revenue*¹⁰ that:

The Constitutional provision for fair hearing mainly stems or germinates from two common law principles of natural justice. They are audi alteram partem and nemo iudex in causa sua. The meaning of Latinism is, hear the other party; hear both sides. No man should be condemned unheard. What the rule or doctrine of fair hearing means is that the parties must be given equal opportunity to present their case to the Court and no party should be given more opportunity or advantage in the presentation of his case.' See also *Inakoju v. Adeleke* (2007) 4 NWLR (PT. 1025) 423.

In *Kotoye v. Central Bank of Nigeria and 7 Ors*¹¹ the Supreme Court held that: 'Fair hearing anticipated by the Constitution implies that every reasonable and fair-minded observer who watches the proceedings should be able to come to the conclusion that the court or other tribunal has been fair to all the parties concerned'. In *Mohammed v. Kano N. A.*¹² the apex court gave the following basic *criteria* and attributes of fair hearing which should include the following:¹³

That the court or tribunal shall hear both sides not only in the case but also in all material issues in the case before reaching a decision which may be prejudicial to any party in the case; the court or tribunal shall give equal treatment, opportunity and consideration to all concerned. See *Adigun v. A.G. of Oyo State*,¹⁴ the proceedings shall be heard in public and all concerned shall have access to and be informed of such a place of public hearing; and; having regard to all the circumstances in every material decision in the case, justice must not only be done but must be manifestly and undoubtedly seen to have been done. See *Deduwa v. Okorodudu*¹⁵ Going through the Act establishing NOSDRA, it is interesting to discover that no provision is made for the establishment of a tribunal to attend internally to grievances regarding its operations. If such existed, it would have probably been the first resort in the instant case. The absence of a tribunal in any administrative agency results in an indirect breach of fair hearing as seen in this case. Thus, it can be safely concluded that the absence of any provision in the NODSRA Act that creates a platform for alleged violators to be heard before the imposition of fines, as well as a procedure for challenging any decision of NOSDRA made pursuant to the NOSDRA Act greatly influenced the decisions of both the Federal High Court and the Court of Appeal as earlier stated.

Civil Fines and Criminal Monetary Sanctions

Criminal fines are criminal sanctions in form of monetary punishment. They are usually available as an alternative to imprisonment and are imposed in relation to criminal offences. On the other hand, civil fines are not imposed consequent upon conviction for an offence. They are merely regulatory weapons to ensure compliance and it is purely in civil matters.¹⁶ Fines imposed by administrative agencies in Nigeria are to be considered civil fines and not criminal punishment like the courts have adjudged. Though fines are the most used criminal penalties in the United States, they are rarely used as sole sanctions for serious cases or repeat offenders.¹⁷ This demonstrates the fact that fines are seldom regarded as punitive enough in most cases of serious offences. In Western Europe, on the other hand, administrative proceedings being less formal than criminal proceedings has made imposition of administrative sanctions a cheaper and more welcome alternative.¹⁸ Invariably, there are two kinds of fines. One from the criminal law perspective and the other

¹⁰ (2018) LPELR-44156(CA)

¹¹ (1989) 1 NWLR (Pt.98) 419

¹² (1968) 1 ALL NLR p 424

¹³ Constitutional Law II Law 244 Noun pp 56-57

¹⁴ (1987) 1 NWLR (pt.53) 678

¹⁵ (1976) 4 SC. 329

¹⁶ Jackson Etti & Edu, *Is the Imposition of Fines by Regulatory Agencies Without Recourse to The Court Unconstitutional?* (2019) <www.jacksonettiededu.com/wp-content/uploads/2018/08/is-the-imposition-of-fines-by-regulatory-agencies-without-recourse-to-the-courts-unconstitutional?> accessed 29 October, 2022.

¹⁷ Hillsman Sally T., *Fines and Day fines*. Crime and Justice (Oxford University Press 1990), Vol. 12, pp 49. <<http://www.jstor.org/stable/11/47438>> Last accessed 6 January, 2019.

¹⁸ Faure M. & Svahkova, K., *Criminal or Administrative Law to protect the environment?* supra

from the administrative law perspective. There are criminal fines and civil fines respectively. Based on the interpretation of the court in the case under review, there appears to be a need to be specific as to what kind of fine is in question here and that civil fines can be imposed without necessary recourse to the courts. One may thus safely conclude that there is no need for recourse to courts by a regulator such as NOSDRA before imposing a civil fine. This has been earlier established with reference to *NCC v MTN*. Furthermore, the NOSDRA Act empowered the Agency to impose fines so the Agency has not acted ultra vires. If the NOSDRA Act has provided for the establishment of a tribunal, such tribunal is empowered by the Constitution to conduct proceedings in line with the principles of natural justice. Nonetheless, upon closer scrutiny of the provisions of Section 36 of the Constitution,¹⁹ we infer the duty of the Regulator (NOSDRA) to protect an alleged violator's right to fair hearing before a court or tribunal in the determination of even his civil rights and obligations. Section 36(2) (a) (b) of the Constitution however provides an exception to Section 36(1) stating that a regulator may impose a civil fine pursuant to a law that it administers without recourse to court if such a law provides an opportunity for the persons whose rights and obligations may be affected to make representations to the administering authority before such authority makes the decision that will affect them. Such law must also contain no provision making the determination of the administering authority final and conclusive.

5. Conclusion and Recommendations

It goes without saying from the foregoing that there is an urgent need for the courts to be decisive in pronouncing once and for all that regulatory agencies do not need to resort to the courts before they can impose fines. It is required however that they create a platform that provides the opportunity for an alleged violator to make a representation before such a decision is taken. It therefore behoves a regulator such as NOSDRA to have recourse to a form of tribunal (at least) so long as it is established by law and constituted in a way so as to secure its impartiality and independence, before imposing such a fine, even though civil. We humbly disagree with the decision of the Court of Appeal in the case being reviewed²⁰ which insisted that regulators cannot impose fines without recourse to the courts (irrespective of whether they are civil or criminal) in spite of the laudable arguments canvassed in *Ediru v FRSC*.²¹ This position taken by the Court of Appeal will only further swamp our already congested judicial system. It is worthy of mention that in the United States, Summary Action procedures are employed as far back as the 70's and it has ensured that more than 90% of the work of administrative agencies is done informally without adjudicatory hearing.²² Moreso, in a country like Nigeria, the average citizen would less assaulted and more fairly if they are tried summarily and fined than if they are arraigned before a court for trial. We must therefore focus on the potential abilities of administrative bodies to catalyze national development, if and only if they are allowed some lee-way in their operations. Fines which are imposed in cases of non-compliance, unruliness, and failure to obey basic regulations are meant to promote order in our society and they remain till today, effective tools to induce adherence to law.

Stemming from the foregoing, it is important for there to be a proper understanding and distinguishing of the powers and roles of the court and administrative agencies to avoid clashes and miscarriage of justice. Based on the findings in this paper we make the following recommendations. First, the Legislature should as a matter of necessity provide for the establishment of internal Tribunals for trying certain offences particularly civil offences. For instance, the NOSDRA establishment Act makes no clear provision for such Tribunal where grievances can be heard and decided without court intervention. However, there can be appeals made to the courts from the decision of the Tribunals. Second, the adoption of summary actions would be effective. As earlier mentioned in this paper, some developed countries have effectively deployed summary actions in punishing civil wrongs. With this, justice will be swift and effective. This will also ensure that the court is not unnecessarily over flogged with cases it may never be able to attend to in time. Third, Administrative Agencies should be seen as catalysts in national development in their quasi-judicial capacity and not as competitors. Fourth, it important for the court to distinguish in the future between criminal money sanctions and civil fines. This will help to check the powers of administrative agencies once the enabling law provides for this. Also, the Court needs to uphold the doctrine of '*stare decisis*' to strengthen judicial precedence. That is, the court needs to be consistent in its rulings and judgement on cases with similar facts and circumstances. This will reduce confusion on what position to take on similar matters in the future.

¹⁹ Section 36(1) of the 1999 CFRN

²⁰ *National Oil Spill Detection and Response Agency v Exxon Mobil* [2018] LPELR – 42210(CA)

²¹ *Moses Ediru v FRSC* supra

²² Freedman J., *Summary Action by Administrative Agencies* (The University of Chicago Law 1972), 1