SHELL EXPLORATION AND PRODUCTION COMPANY LIMITEDVs NATIONAL OIL DETECTION AND RESPONSE AGENCY (NOSDRA)[1]: CASE COMMENT

Abstract
The International Oil Companies (1OCs) had over the years not only questioned but challenged the authority and powers of National Oil Spill Detection and Response Agency (NOSDRA) to monitor, supervise and regulate operations relating to the oil and gas industry. As a result, the IOCs have consistently flouted or ignored directives by NOSDRA in oil spill situations especially when it has to do with imposition of penalty/fine or compensation payable. They always had their way. The objectives of this case review were to determine whether NOSDRA has the authority to assess damage in oil spill situation and impose fine on the oil spiller; and, whether NOSDRA acting in such a manner amounted to ultra vires its statutory powers and therefore, an encroachment on the powers of the Federal High Court. Doctrinal research methodology was used and judgment on the case obtained by visiting law chambers. Findings show that NOSDRA has the authority to direct clean-up operation in oil spill cases, assess damage to ecology and impose fine or compensation payable on the oil spiller. It recommended a synergy between NOSDRA and the IOCs towards oil spill incidents to enable conscientious handling of the situation for the benefit of all.

Keywords: SNEPCO Ltd, NOSDRA, BONGA, Oil Spill, Compensation, Judgment.

1. Facts of the Case

The plaintiff is the Contractor Party under the Oil Mining License 118 Production Sharing Contract (OML 118 PSC), and in the course of its oil and gas exploration activities approximately 120 kilometers off the Coast in the Gulf of Guinea, the plaintiff's export line linking their Float Production Storage and Offloading (FPSO) vessel at its Bonga field deep offshore, which was supplying crude oil to a tanker (MV NORTHIA), ruptured and thereby spewed out about 40,000 barrels of crude oil into the sea.

The plaintiff in compliance with the enabling statute[1] of the defendant reported the incident to the defendant promptly on the same day of December 20th, 2011. Consequent upon this notification by the plaintiff, the defendant in carrying out its statutory duties, notified other relevant governmental agencies and also appointed some of its officers to investigate it. In the course of investigations conducted with other relevant government agencies, the plaintiff and the officers of the defendant as alleged by the latter but denied by the former, the spills were found to be caused by equipment failure that resulted from a snapped loading hose under water in the plaintiff's export terminal operated by the plaintiff at the material time. The consequences of the 40,000 barrels of crude spill into the sea were a devastation and degradation of the aquatic life and marine environment including the Exclusive Economic Zone. There were also severe disruptions to communities, persons, properties and lives of people in the shoreline area as a result of the spill. The investigation showed that about 350 communities and satellite villages were affected by the plaintiff's spillage and harmful chemical pollutions utilized by the plaintiff in the clean-up operations. In furtherance to the defendant's statutory functions, the defendant commissioned consultants and experts to carry out the mapping of all the shoreline communities and satellite villages which are susceptible to imminent staggered and lagged effects of the spill which suffered economic losses as well as result of reversible and irreversible damage arising from the Bonga spill.

Consequent upon this joint visit and further to its Constitutional and statutory role in ensuring that adequate compensation are paid to the affected communities and satellite villages and to ensure punitive

***By Christian Chukwuma OBEAGU, Ph.D.,** Senior Lecturer and Acting Head, Department of Public Law, Faculty of Law, Enugu State University of Science and Technology, ESUT Email: christian.obeagu@esut.edu.ng. Phone Number: +2348039332542; and
*__Ikenga K.E. ORAEGBUNAM__, **PhD (Law), PhD (Phil.), PhD (Rel. & Soc.), MEd, BTh, BL**, Associate Professor, Department of International Law & Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, P.M.B. 5025, Awka, Anambra State, Nigeria. Email: ikengaken@gmail.com; ik.oraegbunam@unizik.edu.ng. Phone Number: +2348034711211.
***SUIT NO: FHC/L/CS/576/2016 Judgment delivered by the Honourable Justice C.M.A Olatoregun of the Federal High Court, Lagos, on Thursday, 24th May, 2018.
[1]National Oil Spill Detection and Response Agency (Establishment) Act, No.15 of 2006.

damages/sanctions/fine was meted out to the plaintiff to deter future occurrence, the defendant commissioned a firm of chartered valuers, Messrs Dan Ekotogbo& Co to make an assessment and valuation of the damage and impacted ecological resources and services impacted by Bonga Oil spill disaster. This was done in collaboration with other stakeholders that included the Nigerian Maritime Administration and Safety Agency (NIMASA), the defendant, and the consultants from Nigerian National Assembly Senate Committee on Environment and Ecology, the defendant reviewed and established the scope and terms of reference for the Post Impact Assessment (PIA) of the spill around Bonga field up to shoreline, in line with the statutory provisions establishing the defendant. The defendant gave approval since April, 2012 for the commencement of the PIA which included the plaintiff, which would give a detailed assessment and analysis of the impact of the Bonga Spill on the marine environment and aquatic life around Bonga and between Bonga and the shoreline, even though the plaintiff claimed that it was neither invited nor involved in the PIA by the independent consultant appointed by the defendant.

Upon being served with this sanction by the defendant, the plaintiff objected to it and challenged the constitutionality and authority of the defendant to act as such. The plaintiff contended that the defendant lacked the powers to sanction her, the plaintiff. The plaintiff further contended that the duty to sanction her is that of the court, *to wit* the Federal High Court, pursuant to its mandate under Section 251(1) (n) of the 1999 Constitution as amended. The plaintiff argued further that within the provisions of sections 1 (3), 4, 6, 36 (1) (2) (12), 43, 44 and 318 (4) of the 1999 Constitution, the court or tribunal is the only body that can adjudge the plaintiff liable and award compensation or fine or damages. It was further submitted on behalf of the plaintiff that sections 5,6,7,19 (1), b, c, d,q, 3d,26 of the NOSDRA Act are *ultra vires* the Constitution while regulations 25, 26 and 27 are inconsistent with the power given to the agency under the NOSDRA Act.

2. Court Analysis and Judgment on the Matter

The above represented the *lis inter partes* in this suit which the court was called upon to adjudicate. The court first dealt with the subsidiary rule-making powers of the defendant as coming from section 26 of the NOSDRA Act[2], which states: 'The Agency may with the approval of the Governing Board make such regulations as in its opinion are necessary or expedient for giving full effect to the Provisions of this Act and for the due administration of its provision'The court consequently held that the above provision gave the defendant power to give full effect to the provisions of the NOSDRA Act. This means that all regulations 25, 26 and 27 were drawn up from these enabling powers.

On whether these regulations constituted ultra *vires* the subsidiary rule-making powers of the defendant or inconsistent with the doctrine of separation of powers as enshrined in the constitution or amounted to taking over the duties of the court, in particular the Federal High Court within the contemplation of Section 251 (1) (n) of the 1999 Constitution as amended, the court answered in the negative. The court specifically said at pp.30-32:

> I accept the submission that the effect of the Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations 2011, Regulations 25, 26 and 27 are to give efficacy to section 19 (1)(d) and (g) of the NOSDRA Act to calculate compensation and enforce it.
> '25(1) on completion of clean-up, the Agency shall undertake damage assessment in collaboration with relevant stakeholders.
> (2) The assessment shall include data on extent of damage to the environment including the biodiversity, water resources, fishery and other fishery resources, properties (NOAA, 2000) social-economic losses and damage assessment is a responsibility that shall be undertaken by the Agency in collaboration with the relevant stakeholders.
> (3) The assessment shall form the basis of the compensation to be paid for the losses.
> 26(1) An owner or operator of an oil spill facility shall pay compensation to an oil spill victim for damage caused to the victim's person, business or property.
> "(a) in the event of a major disastrous oil spill, in collaboration with other Agencies co-opt, undertake and supervise, all those provisions as set out in the Second Schedule to this Act;
> (b) assess the extent of damage to the ecology by matching conditions following the spill against what existed before (reference baseline data and ESI maps);
> (c) undertake a post-spill impact assessment to determine the extent and intensity of damage and long term effects;

[2]*Supra.*

(d) advise the Federal and State Governments on possible effects on health of the people and ensure that appropriate remedial action is taken for the restoration and compensation of the environment;
(e) assist in mediating between affected communities and the oil spillers;
(f) monitor the response effort during an emergency, with a view to ensuring full compliance with existing legislation on such matters; and
(g) assess any damage caused by an oil spillage.

The court specifically found that the assessment and valuation of damages by the defendant was not inconsistent with the Constitutional duty imposed by the Constitution on the Federal High Court vide section 251 (1) (n). It held that these assessments could only provide a guide to the court in coming to a just conclusion in the determination of causes before it. In this regard, the court concluded thus: 'I have no doubt at all that the duties imposed on the defendant are statutory. When a statutory body act in excess of the powers given to it, recourse can always be had to the court with powers to interpret the laws setting the body up'.[3]

Finally, on the allegation of lack of fair hearing by the plaintiff by virtue of the two letters dated 19th December, 2014 and 25th March, 2015; the court did not agree with the plaintiff's argument. The court held that from the affidavit attached to the originating summons as well as the counter affidavit in response thereto, the plaintiff had notice in line with section 6 of the NOSDRA Act. This is more so when the letter dated 19th December, 2014 is a notification of sanction for which the plaintiff could have had recourse to the court if it so desired when served with the letter. The court unmistakably stated:

> When the notifications were received the plaintiff could have appealed to the Agency or approach [sic] the court. These letters cannot be taken to be in conflict with section 44 of the 1999 Constitution or a violation of section 36 of the 1999 Constitution. The Plaintiff had notice and opportunity to fair hearing. The plaintiff ought to have had recourse to the court for the determination of its civil rights and a proper adjudication on the issues, if it felt its rights were infringed or about to be infringed, inconsistent with sections 36 and 44 of the 1999 constitution. I do not find the two letters *ultra vires* the duties and functions of the defendant.[4]

The Honourable Judge eventually dismissed the suit as unmeritorious in the following words:

> I have no reason to set both letter aside as well as the sums ordered as parties did not make evaluation of the assessed damage an issue for consideration in the questions raised for determination. No evidence upon which an evaluation could be made was also proffered. In the final analysis all the questions raised by the plaintiff are resolved in favour of the defendant the only thing left to do is make an order dismissing the suit. Same is dismissed.[5]

3. Comments

Looking at the facts of this case, findings and the resulting decision, one cannot fault the judgment of the court. The plaintiff was misguided or misconceived the authority and power of the defendant to determine and assess liability for purposes of imposing penalty/fine or compensation in oil spill cases; when, it sought a declaration that by the express provision of sections 6, 36 (1) and 251 (1) (n) of the Constitution, the jurisdiction to determine liability and to assess, impose and direct the payment of any sum as such, in connection with the Bonga oil spill of 20th December, 2011, is vested exclusively in the Federal High Court. The court rightly rejected this view.

The above issue, that is, the authority and power of the defendant to impose fine or compensation on the plaintiff was the major plank upon which the plaintiff's case rested; and that determination having been effectively and judiciously made, it emptied the plaintiff's case of its steam and force.

The second issue, being the case of lack of fair hearing was an afterthought, meant to defeat the object of justice but which the court could not be hoodwinked; as the court rightly held that the plaintiff had the opportunity to contest these issues either administratively or in court of law. It is good that this case went to court as it provided the opportunity for judicial determination of the authority and powers of the defendant (NOSDRA) to implement and

[3]at p. 41.
[4]at p. 46.
[5]at p.47.

supervise clean-up operations in oil spill situations; determine and assess damages to the environment/ecology, and impose the appropriate penalty /fine or compensation.

4. Conclusion and Recommendation

This judgment has put to rest any doubt or misconception by the International Oil Companies' (IOCs) habitual challenge of and refusal to carry out directives by the defendant in the event of oil spill cases on the basis that the defendant lacked such authority and powers to act in such manner. This posture naturally leads to worsening of the situation whenever there is oil spill occurrence, especially of significant magnitude. The IOCs should always collaborate with NOSDRA whenever there is oil spill so as to properly and effectively manage the situation holistically for the interest of both the environment and mankind.