

THE COURT SAYS THAT FINANCIAL REPORTING COUNCIL OF NIGERIA (FRCN) IS NOT EMPOWERED TO REGULATE PRIVATE COMPANIES

The Federal High Court (“FHC”) in Lagos on Friday, 21 March 2014 ruled in a case between Eko Hotels Limited and the Financial Reporting Council of Nigeria (“FRCN”) and held that the Financial Reporting Council of Nigeria (FRCN) lacked the statutory powers to regulate the activities of private firms in Nigeria. The FHC decided that under the FRCN Act, the FRCN cannot enlarge its regulatory powers to regulate private companies.

The main issues raised by Eko Hotels for determination by the FHC were:

1. Whether Eko Hotels is required to register with the FRCN under the FRCN Act 2011
2. Whether Eko Hotels is liable to pay the statutory and renewable annual dues to the FRCN for 2011 and 2012.
3. Whether Eko Hotels is required to furnish the FRCN with evidence of its statutory filing with the Corporate Affairs Commission and the Federal Inland Revenue Service.
4. Whether the FRCN could penalise it for failure to submit the annual returns and statements.

Eko Hotels sought a declaration from the court that the FRCN’s demand for registration was unlawful on the basis that Eko Hotels is not a public company or a public interest entity. It further sought the FHC to declare that the FRCN lacked the statutory power to demand for annual returns and financial statements of a private limited liability company among others.

Position of the FRCN:

FRCN’s position was that Eko Hotels was expected to routinely file returns not only with the CAC or the FIRS but also with the Tourism Development Corporation (being the regulatory body responsible for the registration, classification and grading of all hospitality and tourism enterprises in Nigeria). The FRCN Act defines a public interest entity to include ‘unquoted’ entities which file returns with regulators other than the FIRS and the CAC. The FRCN also stated that one of the requirements for Eko Hotels to file its routine returns with the CAC was evidence of payment of its annual dues to FRCN.

Decision of the court:

Justice Okon Abang, who handed down the verdict, equally ruled as follows:

1. That under the FRCN Act, the FRCN cannot enlarge its regulatory powers to regulate private companies.

2 *That the FRCN lacked the legal backing to impose statutory renewal dues on private companies in Nigeria.*

Justice Abang arrived at the conclusions while delivering judgment in a suit filed by Eko Hotels Limited, challenging the legality of an attempt by the FRCN to regulate its financial activities.

FRCN had written a letter to Eko Hotels Limited requesting registration and payment of statutory renewal dues. The FRCN had also requested the plaintiff (Eko Hotels Limited) to furnish it with evidence of statutory filings of annual report, financial report and statements at the Corporate Affairs Commission (CAC) and the Federal Inland Revenue Service (FIRS).

But in his judgment, Justice Abang held that from the careful interpretation of the Financial Reporting Council of Nigeria Act, there was no provision that empowers the agency to exercise disciplinary control over a private company.

“The section relied upon by the defendant (FRCN) relates only to an employee of the plaintiff and not the plaintiff as a corporate entity.

“The plaintiff is a private company and the shares are not quoted on the floor of the Nigerian Stock Exchange. By the clear provision of the FRCN Act, the plaintiff is exempted.

“The defendant (FRCN) can only regulate publicly-quoted companies and public interest entity. “Where a statute does not empower a statutory body to do certain things, such body cannot so act,” Justice Abang ruled.

The court thereafter nullified the letter written by FRCN to the plaintiff, and also awarded N40,000 as cost in favour of the plaintiff (EKO Hotel) against the defendant.

CONCLUSION THAT COULD BE DRAWN FROM THIS COURT JUDGEMENT

The decision of FHC reiterates the scope of the FRCN’s authority in regulating companies in general in line with the provision of the enabling statute being the FRCN Act 2011. Based on the judgment, the FRCN does not have oversight functions over private companies. Attempts by the FRCN to bring a wider range of companies under its scrutiny and guidance are therefore open to challenge by any affected company on the basis of this decision.

The judgment suggests that the rules imposed in some industries requiring players in the industry to submit certain documentation or to pay certain registration fees does not translate to “filing of returns” as contemplated by the Act. Furthermore the mere fact that a company is popularly known to the public due to the nature of its services does not automatically make it a public interest entity.

On the basis of this judgment, private companies who only file returns routinely with the CAC and FIRS can carry on their business activities without the additional administrative burden of registration or payment of fees to the FRCN.

However, the Financial Reporting Council of Nigeria (FRC) has appealed the verdict of the Lagos Federal High Court which restrained its powers to register and regulate companies in the country. The FRC also contended that the judgment did not take cognisance of the provisions of Section 77 of the FRC Act which defines a public interest entity as Governments, government organisations, quoted and unquoted companies and all other organisations which are required by law to file returns with regulatory authorities and this excludes private companies that routinely file returns only with the Corporate Affairs Commission and the Federal Inland Revenue Service.”

*Until the Appeal Court rules otherwise, the law as it is today is that **FINANCIAL REPORTING COUNCIL OF NIGERIA (FRCN) IS NOT EMPOWERED TO REGULATE PRIVATE COMPANIES.***

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