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**THE CONSTITUTIONALITY
OF SECTION 97 OF THE BANKS
AND OTHER FINANCIAL
INSTITUTIONS ACT 2020.**

INTRODUCTION

On the 13th of November 2020, the President and Commander-in-Chief of the Federal Republic of Nigeria, President Muhammadu Buhari, signed into law the Banks and other Financial Institutions Act (BOFIA 2020). This new Act replaced the Banks and other Financial Institutions Act (1991 as amended). The BOFIA 2020, inter alia, provides for the regulation of the banking and financial sector with a view to enhancing the soundness and resilience of the financial system for sustainable growth and development of the Nigerian economy. However, as laudable as this new enactment may be, it has been faced with mixed reactions especially from the legal industry. It is perceived that some sections of the BOFIA 2020 might offend some constitutional provisions. In this article, we shall take a cursory look at the provisions of Section 97 of the Act vis a vis its constitutionality with a view to proffering workable legal recommendation.

DOES SECTION 97 OF BOFIA 2020 CONFLICT WITH THE CONSTITUTIONAL PROVISION OF FAIR HEARING?

The Constitution of the Federal Republic of Nigeria (1999) as amended is the highest law of the land. By the provisions of Section 1, the Constitution is supreme and any other law to the extent of its inconsistency shall be null and void.

Interestingly, section 36 of the constitution provides for fair hearing and is reproduced below:

36 (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

36 (2) Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law - (a) provides for an opportunity for the persons whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and (b) contains no provision making the determination of the administering authority final and conclusive.

Section 36 (2) (b) of the 1999 constitution (as amended) is quite instructive. It provides that the only reason any other law may not be invalidated on the grounds of fair hearing is, if it provides an opportunity for the persons whose rights and obligations may be affected, to make representations to the administering authority, before the authority makes the decision that may affect that person. The implication of the above constitutional provision, is to the effect that it has armed the citizens with the right to make representations or be aware of any proceeding or order which may affect their rights.

The concept of fair hearing is hinged on two principles to wit: *audi alterem patem* (let the other side be heard) and *nemo judex in causa sua* (one must not be a judge in his own cause). As stated earlier, these principles are firmly entrenched in section 36 of the 1999 constitution.

Recent media reports indicate that the Central Bank of Nigeria (CBN) has been quite busy seeking court orders for the freezing of bank accounts in commercial banks. As expected, this has been met with lots of criticisms and litigation in court. The backing of the court orders sought by the Central Bank of Nigeria (CBN) is the Bank and other Financial Institution Act (BOFIA) 2020. The relevant section of BOFIA 2020 that comes to mind when such issues bothering on the constitutional provision of fair hearing are raised, is Section 97(1-4) of the Act which is reproduced below:

Section 97(1-4) of the BOFIA ACT provides as follows:

(1) Notwithstanding anything contained in any other enactment, where the Governor has reason to believe that transactions undertaken in any account with any bank, specialised bank or other financial institution are such as may involve the commission of any criminal offence under any law, the Governor may make an ex-parte application for an Order of the Federal High Court verifying on oath the reasons for the Governor's belief, and on obtaining such Court Order direct or cause a direction to be issued to the manager of the bank, specialised bank or other financial institution where the account is situated or believed to be, or in the alternative to the head office of such bank, specialised bank or other financial institution directing the bank, specialised bank or other financial institution to freeze the account.

(2) The manager of a bank, specialised bank or other financial institution in which a direction has been issued on an account under subsection (1) of this section shall, on receipt of such direction, suspend all transactions whatsoever related to such account for such period as may be specified in the direction.

(3) Where an account has been frozen pursuant to this section, the Governor shall refer the matter to the Nigeria Police Force, the National Drug Law Enforcement Agency, the Economic and Financial Crimes Commission or any other law enforcement authority or appropriate regulatory authority. Provided that where the matter relates to an infraction of the provisions of this Bill or other enactment administered by the Bank, the Governor may cause such matter to be investigated by the Bank.

(4) Where it is not possible for the Bank, the Nigeria Police Force, the National Drug Law Enforcement Agency, the Economic and Financial Crimes Commission, or any other appropriate regulatory authority to conclude its investigations within the period stipulated in the Court Order, the Governor shall apply to the Federal High Court for an Order for the continued freezing of the account concerned.

The above provisions in the BOFIA 2020, empowers the Governor of Central Bank of Nigeria (CBN) to apply to the Federal High Court, by an *ex parte* application, for an order freezing the account of a person or entity, upon reasonable suspicion or belief that the transaction undertaken may involve the commission of a criminal offence under the law. The above provisions further empower the Governor of the CBN to, by the same *ex parte* application, seek from the court, a further order for the continued freezing of the account concerned.

The rationale behind this provision is questionable. While it is agreed that the law seeks to curb excesses and flagrant underhand dealings in the financial sector, it is the opinion of the writer that the above provision if applied strictly, offends the constitutional right to fair hearing as enshrined in the constitution of the Federal Republic of Nigeria. The account holder should be given an opportunity to give reasons why the account should not be frozen in the first place or why the freezing order should not be made till investigation is concluded, if there should be any need for such.

From the provisions of Section 97 of the BOFIA 2020, it implies that the account will remain frozen for as long as the investigation by the CBN continues and would continue even after the case is transferred to the Economic and Financial Crimes Commission (EFCC), (National Drug Law Enforcement Agency) NDLEA or Nigerian Police as seen in Section 97(3) of BOFIA 2020. In other words, an account remains under suspension for as long as the CBN investigates, without a formal criminal charge brought against the account holder.

The freezing order and its renewal, without an opportunity to be heard, given to the account holder, contravene the principle of fair hearing. For if the draftsmen had this in contemplation, they would have modelled the statute in line with the mode of commencement of action as well as the rules governing *ex parte* applications in court.

The grant of the *ex parte* order may be in order as it is to prevent the funds from being dissipated or used any further for criminal purpose. However, after the grant of the freezing order, it is the opinion of the writer that the statute ought to have provided for a notification of the account holder of the freezing order to afford the person an opportunity to be heard and not a continuous freezing order with no expiry date.

The freezing of an account and the continuous freezing of same pending investigation, without the opportunity advanced to the account holder to show cause why the order should not subsist, could amount to a final order. Another point to note is the fact that *ex parte* orders do not last till infinity. See the case of *Leedo Presidential Motel Ltd. v. Bank of the North Ltd.* (1998) 10 NWLR (Pt. 696) 364; *Dogban v. Diwhre* (2005) 16 NWLR (Pt. 951) 274.

One may also argue that the provisions of Section 97 of BOFIA 2020 has constitutional backing. In relation to this, Section 44 (2) (k) of the 1999 constitution as amended comes to mind. Also, in the case of **Dangabar v F.R.N** (2014) 12 NWLR (Part 1422), the appellant had challenged the ruling of the lower court granting forfeiture of his assets and the freezing of his account pending the hearing and determination of the criminal charges against him as a violation of his rights of fair hearing. However, the appeal court in dismissing the appeal held as follows:

“By virtue of section 43 and 44 of the constitution of the Federal Republic of Nigeria, 1999 (as amended) all citizens of Nigeria have the right to acquire and own property anywhere in Nigeria and their property should not be compulsorily acquired without payment of compensation. However, by virtue of section 44(2)(k), nothing in this subsection (1) of the section shall be construed as affecting any general law relating to the temporary taking possession of property for the purpose of any examination, investigation or inquiry. Section 44 (2)(k) of the constitution validates any such law as sections 28 and 29 of the Economic and Financial Crimes Commission (Establishment, etc) Act 2004 which allows temporary taking over of assets of accused persons pending the determination of a criminal case pending them. In the instant case, the order of interim attachment and forfeiture of the assets of the appellant pending the hearing and final determination of the criminal case against him was not inconsistent with the constitution.”

There seems to be a sharp contrast upon juxtaposition of the Sections 97 of BOFIA ACT with Sections 17 of the Advance Fee Fraud and other Fraud related offences Act 2006. Reproduced below is section 17 of the Advance Fee Fraud Act 2006:

17 (1) Where any property has come into the possession of any officer of the Commission as unclaimed property or any unclaimed property is found by any officer of the Commission to be in the possession of any other person, body corporate or financial institution or any property in the possession of any person, body corporate or financial institution is reasonably suspected to be proceeds of some unlawful activity under this Act, the Money Laundering Act of 2004, the Economic and Financial Crimes Commission Act of 2004 or any other law enforceable under the Economic and Financial Crime Commission Act of 2004, the High Court shall upon application made by the Commission, its officers, or any other person authorized by it and upon being reasonably satisfied that such property is an unclaimed property or proceeds of unlawful activity under the Acts stated in this subsection make an order that the property or the proceeds from the sale of such property be forfeited to the Federal Government of Nigeria.

17 (2) Notwithstanding the provision of subsection (1) of this section the High Court shall not make an order of forfeiture of the property or the proceeds from the sale of such property to the Federal Government of Nigeria until such notice or publication as the High Court may direct has been given or made for any person, corporate or financial institution in whose possession the property is found or who may have interest in the property or claim ownership of the property to show cause why the property should not be forfeited to the Federal Government of Nigeria.

17 (3) Application under subsection (1) above shall first be made by a motion ex parte for interim forfeiture order of the property concerned and the giving of the requisite notice or publication as required in subsection (2) of this section.

17 (4) At the expiration of 14 days or such other period as the High Court may reasonably stipulate from the date of the giving of the notice or making of the publication stated in subsection (2) and (3) of this section, an application shall be made by a motion on notice for the final forfeiture of the property concerned to the Federal Government of Nigeria.

Section 17(1) of the Advance Fee Fraud Act, just like Section 97 of the BOFIA 2020, predicates the ex parte application on reasonable suspicion of property being proceeds of an unlawful activity. However, a careful look at Section 17(2) of the Advance Fee Fraud Act shows its alignment with the constitutional provision on fair hearing. The order of forfeiture cannot be made until such notice or publication as the high court may direct has been given or made to any party affected. By way of reiteration, one should also question the rationale behind section 97 of the BOFIA ACT which keeps mum about the notification of the account holder and his right to be heard till the investigation is concluded.

RECOMMENDATIONS

From the foregoing, it is quite obvious that Section 97 of the BOFIA ACT contradicts the constitutional provision of fair hearing. With the realization that this section of BOFIA 2020 is not in line with the provisions of the constitution, the court should be weary of granting applications brought under this Section. The court should first, be satisfied that there is real urgency and sufficient facts deposed in the supporting affidavit, warranting the grant of such application. The court should also, after granting such application ex parte, direct the application to be made on notice to the party affected and further indicate that the affected party after the service of such notice, be allowed to show cause why the freezing order should not be renewed. The writer's opinion clearly aligns with Order 26 rule 8 of the Federal High Court (Civil procedure rules) 2019 which states as follows:

"where a motion is made ex parte, the court may:

a. Make or refuse the order sought;

b. Direct the motion to be made on notice to the party to be affected; or

c. Grant an order to show cause why the order sought should not be made. Under the procedural Rules of most courts, including the Federal High Court (Civil Procedure Rules) 2019, an ex parte order should not exceed 14 days with a further renewal."

Under the procedural Rules of most courts, including the Federal High Court (Civil Procedure Rules) 2019, an ex parte order should not exceed 14 days with a further renewal. Unfortunately, according to Section 97 of the BOFIA, the freezing order may last till the investigation is concluded. In line with this, the question that readily comes to mind is: what is the time frame for the investigation? It is no doubt that this particular provision may eventually become a political weapon of oppression as seen by the act of the Federal Government by the freezing of the account of "supposed bankrollers" of the #ENDSARS protest.

While BOFIA 2020 does not specify the time frame for the conduct of investigation by the CBN, it is expected that it will comply with the procedural rules of the courts with regards to the lifespan of an exparte order which should not exceed fourteen (14) days with a further renewal period of 14 days.

WHAT HAPPENS AFTER INVESTIGATION IS CONCLUDED AND THE CBN DISCOVERS IT HAS ACTED UNDER UNREASONABLE SUSPICION?

The answer to this poser lies in the hands of the court. It is one thing for the law to be stated, however, the applicability of that law is all that matters. It is trite that the principal role of the judiciary is the interpretation of the law. Therefore, the application of Section 97 of the BOFIA Act should be done cautiously. Judges should be wary of granting such exparte applications and order that the other party concerned to be put on notice because justice should not be slayed on the altar of speed.

Another perspective to this is that before such application is granted, there must be an extraction of undertaking as to damages, to be made by the Central Bank of Nigeria (CBN). If it is discovered that the supposed reason for the freezing of the account was unfounded, the party affected should be compensated for the period in which transactions could not be made with the frozen account. See *KOTOYE v CBN* (1989) 1 NWLR PART 98 at page 450 where NNAEMEKA-AGU JSC (as he then was) held as follows:

“Above all, this Court ought to take notice of the numerous cases of abuse exparte injunctions that have come up in recent times. The operation of a bank has been halted on an exparte order of injunction granted to a person who had been removed as a director of the bank. Installation ceremonies of chiefs have been halted in the same way even though the dispute had been dragging on for years. The convocation ceremony of a university has been halted on an exparte application by two students who failed their examinations. As the courts cannot prevent such applicants from exercising their constitutional rights by stopping such applications, they can and ought, at least see that justice is done to the victims of such exparte applications and order by ensuring that the applicant fully undertakes to pay any damages that may be occasioned by any such order which may turn out to be frivolous or improper in the end.”

In view of the foregoing, the provisions of Section 97 BOFIA Act should be applied in such a way that brings it in line with the rules of the court. Also, it is sincerely hoped that the draftsmen would comply with fundamental legal principles and observe constitutionality in subsequent legislations.

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