

April, 2019

LEGAL ALERT**COURT OF APPEAL SETS ASIDE THE DECISION OF THE FHC THAT NIGERIA LNG LIMITED IS EXEMPTED FROM CHARGES, FEES/TAXES IMPOSED PURSUANT TO THE NIMASA ACT, CABOTAGE ACT, AND SEA PROTECTION LEVY****Introduction**

On 29th March 2019, the Court of Appeal, Lagos (in Appeal Number: CA/L/1241/2017 between NIMASA v. NLNG & 2 Others) set aside the judgment of the Federal High Court where it was held that NLNG is exempted from charges fees/taxes imposed pursuant to the NIMASA Act, Cabotage Act, and the Sea Protection Levy. Read our alert on the Federal High Court judgment at: <https://adebiyitaxandlegal.com/court-nullifies-sea-protection-levy/>

By an originating summons, NLNG sought the interpretation of the Federal High Court on whether NLNG is subject to charges imposed under the NIMASA Act. NLNG challenged the decision of the National Security Adviser (NSA) to subject NLNG to charges, fees/taxes imposed by the Nigeria Maritime Administration and Safety Agency (NIMASA).

The Federal High Court in its judgment discountenanced the counter affidavit and written address filed by NIMASA on grounds that the written address formulated issues which were different from the issues contained in the originating summons. The Federal High Court also discountenanced the counter claim filed by NIMASA and held that while a respondent to an originating summons may competently file a counter claim, such a counter claim cannot formulate a new set of issues different from those contained in the originating summons.

Issues for determination

Dissatisfied with the judgment, NIMASA filed an appeal to challenge the decision at the Court of Appeal and among other things, raised the following issues for determination:

- (i) Whether the originating summons at the Federal High Court ought to have been converted to a writ of summons in view of the contentious facts relied upon by parties;
- (ii) Whether NLNG can be heard to challenge the decision of the NSA having voluntarily submitted itself to the jurisdiction of the NSA;
- (iii) Whether the Federal High Court judgment did not breach NIMASA's right to fair hearing when it discountenanced the counter affidavit and written address of NIMASA on grounds that NIMASA's written address formulated new issues different from those contained in the originating summons filed by NLNG;
- (iv) Whether the Federal High Court breached NIMASA's right to fair hearing when it discountenanced NIMASA's Counter Claim on grounds that a counter claim to an

originating summons cannot raise new issues different from those contained in the originating summons;

- (v) Whether sections of the NLNG Act are unconstitutional and against public policy for fettering the legislative power of the National Assembly of Nigeria.

Decision

The Court of Appeal set aside the entire judgment of the Federal High Court on the ground that NIMASA was not afforded the right to fair hearing.

Competence of Issues Which Are Different from Issues Contained in Originating Summons

The Court of Appeal held that the Federal High Court ought to have considered the arguments advanced by NIMASA even if the issues formulated by NIMASA in its written address were not the exact reproduction of the issues set out in the originating summons. The Court of Appeal compared the issues formulated in NIMASA's written address with the issues set out in the originating summons and held that in substance, the issues were similar. Therefore, there was no basis for discountenancing same.

The Court of Appeal also held that even if the written address was incompetent based on dissimilarity in the issues formulated by parties, the Federal High Court ought not to have also discountenanced the counter affidavit filed by NIMASA which could have served as both evidence and written argument. The Court of Appeal held as follows:

Because actions initiated or commenced by way of originating summons are decided on the basis of the Affidavit evidence filed and relied upon by the parties, no oral evidence would be required or necessary to be adduced the parties, as is required or necessary in actions commenced by way of a writ of summons.

In that context, Affidavit evidence in actions commenced by way of originating summons plays the dual role of pleadings and evidence in support of the reliefs claimed and defence of the action.

On propriety of filing Counter Affidavit in Suit Commenced by Originating Summons

The Court of Appeal held that since it is established that a respondent in an originating summons can file a counter claim as an independent action, it would be incongruous to hold that such a counter claimant cannot formulate his own set of issues different from those contained in the originating summons. Thus the Court of Appeal held that the decision of the Federal High Court to discountenance the counter claim filed by NIMASA was a denial of fair hearing.

Based on the above findings, the Court of Appeal set aside the entire judgment and held that there was no requirement to rule on other issues in the appeal.

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