

CASE REVIEW

Savannah Bank Plc v. Central Bank of Nigeria & 2 Ors. [2009] 6 NWLR (Pt. 1137) 237 – A review of the Court of Appeal’s decision on the proper exercise of power to revoke a Bank’s license by the CBN by Ayokunle Ogundipe*

With recent developments in the Nigerian banking industry, the Central Bank of Nigeria (CBN) has once again beamed its searchlight on Nigerian banks (and deservedly so) in a bid to secure the nation’s financial integrity as well as the interests of the collective banking public. The result has been deeply unsettling, with more than a handful of bank Managing Directors losing their jobs and well respected private businessmen facing prosecution by the Economic and Financial Crimes Commission (EFCC) on account of alleged financial impropriety.

In certain cases, the CBN has found it necessary to exercise its powers to revoke a bank’s operational license, not surprisingly however, the recourse to such powers have usually been challenged. To be sure, the settled role of the CBN as a regulator must be balanced by the need to ensure that its discretionary powers, which usually have far-reaching impact are exercised *bona fide*. This and other related issues were part of the issues for determination in the matter under review before the Court of Appeal, Lagos. The case has proven to be a watershed in that it was the first time an appellate court was opportuned to espouse on the ambit of the CBN’s revocatory powers.

The Facts

On February 15, 2002, the then CBN Governor, Chief (Dr.) Joseph Oladele Sanusi, issued a notice of revocation of the banking license of Savannah Bank Plc, listing as factors directly responsible for the revocation: insolvency/insufficient assets to meet liabilities, non-compliance with obligations imposed by the CBN and failure of all efforts by the regulatory authorities to reverse the worsening conditions in the Bank. The Nigeria Deposit Insurance Corporation (NDIC) subsequently moved in as liquidator and sealed the various branches of the Bank with the assistance of the Nigeria Police Force.

Aggrieved by the action of the 1st Respondent and alleging bad faith in the revocation of its license, the Appellant instituted an action at the Federal High Court, Abuja, for a declaration that the Respondents were not entitled to interfere in any way whatsoever with the control, management or running of the Appellant. The Appellant also prayed the Court for a declaration that the Respondents had acted in contravention of the **Banks and Other Financial Institutions Act, 1991** (BOFIA, as amended) in revoking its license and same should accordingly be restored or re-issued. The Appellant claimed ₦100 billion (One hundred billion Naira) as special, exemplary and general damages.

The trial court was persuaded upon the evidence led before it by the Respondents and after a consideration of the provisions of the **BOFIA**, especially its **Section 53(1)**, that there was a clear absence of *mala fide* to warrant invoking the jurisdiction of the Court

over the matter. Accordingly, it held that the 1st Respondent had acted in accordance with the law when it revoked the Appellant's license.

Aggrieved by this decision, the Appellant proceeded to the Court of Appeal.

Issues for determination and judgment

Amongst the issues for determination, the Appellate Court was primarily concerned with; whether there was any conflict between **Section 4 (8)** of the **Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999)** and **Section 53 (1)** of the **BOFIA**, such as to render the latter unconstitutional; and whether bad faith was established in the conduct of CBN in revoking Savannah bank's license.

Section 4 (8) of the CFRN 1999 effectively prevents the National Assembly from enacting any law ousting or purporting to oust the jurisdiction of a court of law or judicial tribunal established by law. The Court found that though this appears to conflict with Section 53 (1) of the BOFIA, this was not the case. Section 53(1) of the BOFIA exempts the CBN and its officers from being subject to any action, claim, demand or liability in respect of things done or omitted to be done, in good faith, pursuant to or in the execution of any power conferred by the Act.

The Appellate Court relied upon the decision of the Supreme Court in the cases of ***NDIC v. CBN & Anor. (2002) 7 NWLR (Pt. 766) 272*** and ***CBN v. Industrial Bank Limited (1997) 9 NWLR (Pt. 522) 712***. Both cases held conclusively that the section of the BOFIA in question, does not impede access to the Courts, nor does it oust the jurisdiction of the court, rather it creates a condition precedent to be satisfied before the court can assume jurisdiction. That condition precedent is the establishment of bad faith.

The court opined that the section in question merely serves as a restatement of the presumption of regularity found in Section 150 of the Evidence Act. This is in line with the long established principle of Administrative Law that an administrative act is presumed to have been reasonably and honestly done, until the contrary is proven.

The onus lies on he who alleges bad faith, to establish same as a means of invoking judicial action. Bad faith was indeed found to be present in the instant case. The Court of Appeal was able to discern from a chain of factual events leading to the conclusion that the 1st Respondent, did in fact, act in bad faith when it revoked the license of the Appellant.

These signposts included the fact that the 1st Respondent had a short while before the revocation, permitted the Appellant to raise funds in the capital market. The license was revoked only one month to the Appellant's recapitalization exercise which, unimpeded, would have resulted in significant increase in capital for the Appellant. This revocation was done less than 24 hours after the CBN issued a circular to all banks, including the Appellant, to comply with a new recapitalisation contingency plan which was designed to help out ailing banks in the long run.

The Court of Appeal in its judgment delivered on February 5, 2009 unanimously allowed the appeal and awarded general damages to the Appellant in the sum of ₦100 million (One hundred million Naira).

Comment

Mala fides (bad faith) is defined as ‘the conscious doing of a wrong’ and as ‘a state of mind affirmatively operating with furtive or ill will’. The propriety of any exercise of the CBN Governor’s power of revocation may ultimately hinge upon the presence of this singular element. The **BOFIA** in Sections 12 & 39, vests in the Governor of the CBN, the power to revoke a bank’s license. This power under the former section is a blanket one and may be exercised without consultation or recommendation, but upon the existence of certain conditions, including: insufficient assets to meet liabilities and non compliance with the CBN’s capital adequacy ratio requirement.

Whilst the power of the CBN Governor to revoke under appropriate circumstances is not now in issue, it is clear that there is no precise formula or easily discernible method for determining bad faith in every instance. This may largely depend upon the interpretation of the particular judge. In the case under reference, in addition to the presence of bad faith, the appeal court found that relevant documentary evidence led by Savannah Bank Plc, was not taken into account by the trial Judge. The position of the law is that when a court overlooks vital evidence, occasioning a miscarriage of justice, the judgment will be set aside.

Savannah Bank Plc has since commenced the process of its “re-launch” into the unsettled waters of commercial banking in Nigeria. Needless to say, the restoration of the bank’s license does not at least as of right, guarantee automatic re-entry into banking business. The bank’s victory in court, though hard won is now threatened by the simple realities of modern day business.

In reality, this is the clear and present danger that faces any bank which suffers the fate of having its license revoked. It stands the risk of having its relevance and hard earned customer loyalty ‘overtaken by events’ in today’s ever undulating economic environment. Suffice it to say, that all eyes are firmly fixed on the CBN and its Governor and of course in response to whatever fate today’s troubled banks may be afflicted with, all roads lead to the last bastion of the aggrieved citizen – the judiciary.

Published in BusinessDay Newspaper of Thursday, November 5, 2009