

REGULATION OF PRIVATE COMPANIES: EKO HOTELS LTD VS FINANCIAL REPORTING COUNCIL OF NIGERIA

The decision of the Federal High Court sitting in Lagos in the suit instituted by the Management of Eko Hotels Limited against the Financial Reporting Council of Nigeria (FRCN) emphasizes the alleged over-regulation of companies in Nigeria as a disincentive to investment. In the suit, the Hotel formulated the following issues for determination by the FHC:

- Whether the Hotel is statutorily mandated to register with the FRCN under the FRCN Act 2011;
- Whether the Hotel is liable to pay the statutory fees as assessed to the FRCN for 2011 and 2012;
- Whether the Hotel is obliged to furnish the FRCN with evidence of its statutory filings with the Corporate Affairs Commission (CAC) and the Federal Inland Revenue Service; and
- Whether the Council could penalize the Hotel for failure to submit the Annual Returns and Financial Statements.

The Hotel sought a declaration by the Federal High Court that the FRCN's demand for registration was unlawful, null and void on the basis that Eko Hotels not being a public company or a public interest entity, the FRCN lacked the statutory power to demand for its Annual Returns and Financial Statements.

The Hotel further contended that the FRCN could not unilaterally extend its jurisdiction beyond the express provisions of the enabling Act, and particularly that the FRCN's regulatory power does not extend to private companies registered in Nigeria. The Hotel contended that the Act only requires 'Public Companies' and 'Public Interest Entities' to register with the Council and that as defined in the Act, does not include private limited liability companies.

On its part, the FRCN contended that the Hotel was expected to file returns not only with the CAC or the FIRS but also with the Tourism Development

Corporation charged with the responsibility of regulating the hospitality industry. It noted that 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 contended that one of the requirements for the Hotel to file its routine returns with the CAC was evidence of payment of its annual dues to FRCN. It therefore concluded that the Hotel was statutory within its jurisdiction and was therefore required to register with the Council and make yearly payments accordingly.

In upholding the Plaintiff's arguments, Justice Okon Abang considered the legal interpretation of **Sections 7(1), 18 (f), 41 (1) and 77 of the FRCN Act**. The Court held that the combined effect of the sections is to the effect that the Council lacks the statutory powers to exercise control over a private company and that the Hotel was not liable to register with the FRCN.

The Court further held that there is no legal authority empowering the FRCN to exercise any form of regulatory power over Eko Hotels being a private company and that the FRCN Act only allows for the registration of accountants and other professionals engaged in the financial reporting process as well as publicly quoted companies or public interest companies.

The Court arrived at its decision relying on the principle of statutory interpretation *expressio unius est exclusio alterius* - the express mention of one thing excludes the others. The Court further held that the FRCN cannot rely on any implied powers to bring the Hotel under the Council's jurisdiction as there is no express power from which the implied powers could be derived.

The decision of the Federal High Court reiterates the admonition to regulators to stick to their mandates as

contained in the enabling laws and not seek an extension thereof except through legislative means. This indeed is the essence of the rule of law. It has been argued that over-regulation of private companies is a disincentive to investment and erodes the benefits of privately owned enterprise. Regulators should concern themselves with creating an enabling environment for businesses to thrive towards efforts at improving Nigeria's rating on the Global Competitiveness Index rather than placing additional hurdles in the path of attaining economic prosperity.

We await the decision of the Court of Appeal.

Who We Are

DCSL Corporate Services Limited (DCSL) provides corporate, company secretarial, immigration, training and governance services to corporate bodies, individuals, government agencies and business organizations. We operate from our Head

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