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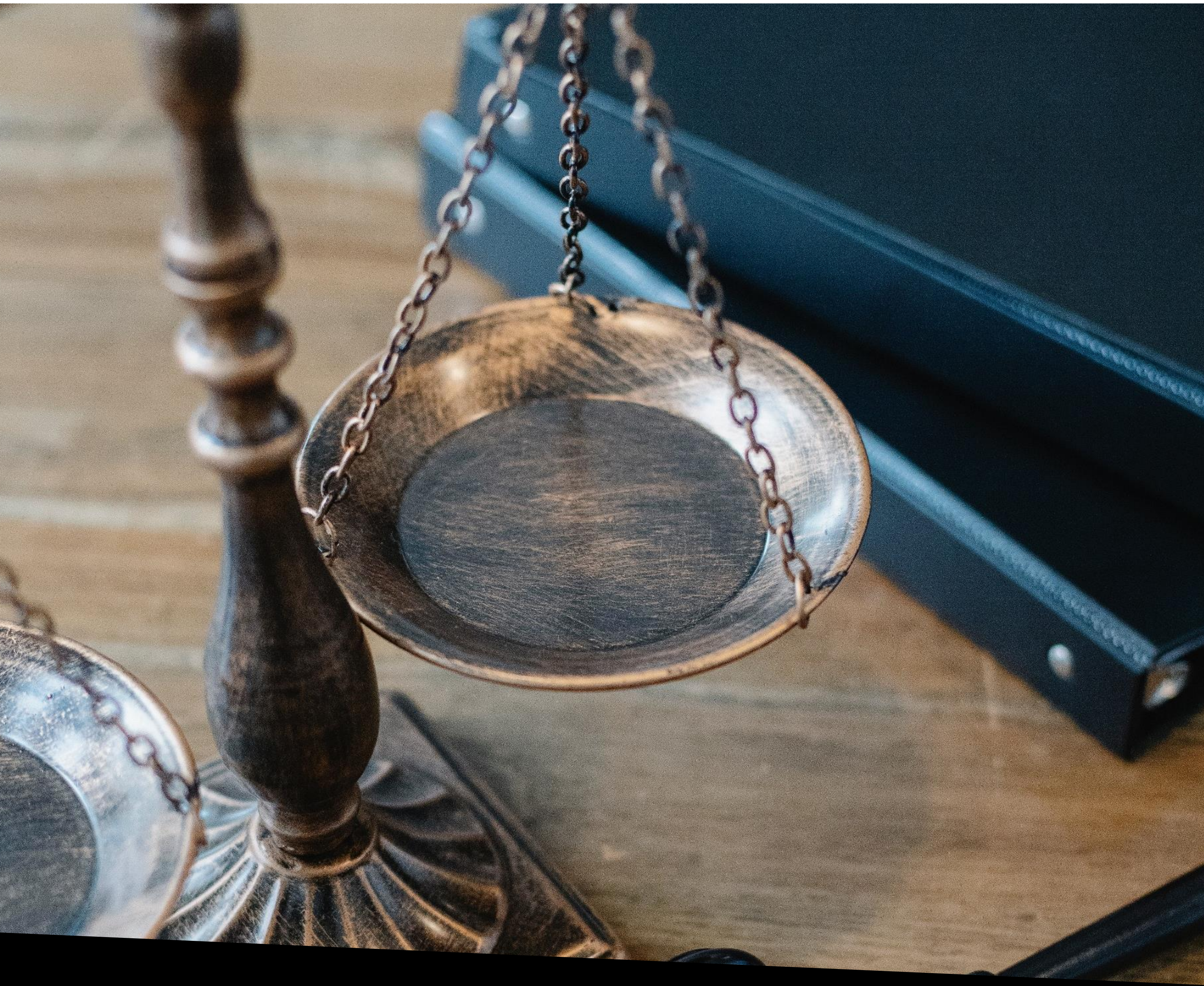

Mufutau Ajayi v Securities and Exchange Commission –

Implication for the Jurisdiction of The Investments and Securities Tribunal

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1. Introduction

In the recently decided case, *Mufutau Ajayi v Securities and Exchange Commission* (2023)[1] ("**Mufutau**"), the Supreme Court handed down a decision on the long-debated question as to whether exclusive jurisdiction over matters relating to capital and securities market operations vest in the Federal High Court (the "**FHC**") or the Investments and Securities Tribunal (the "**IST**").

This flash note examines the Mufutau decision, among other things, and its implication on the Nigerian capital markets for the future.

2. Background as to Question of Jurisdiction

In Nigerian capital markets law, as with other areas of law, the question as to where jurisdiction lies is critical, as "jurisdiction is always a threshold issue, for when the Court has no jurisdiction to entertain a matter, the proceedings are a nullity, no matter how well conducted and brilliantly decided they may have been."[2] Accordingly, the IST was established pursuant to section 274 of the *Investments and Securities Act 2007* (the "**ISA**"), with jurisdiction over "disputes" or "questions of law" emanating from the capital market,[3] and appeals going to the Court of Appeal.[4] On its face, this conflicts with section 251 of the 1999 Constitution of the Federal Republic of Nigeria (the "**Nigerian Constitution**"), which vests exclusive jurisdiction over matters relating to the operation of companies under the *Companies and Allied Matters Act 2020* (the "**CAMA**") in the FHC. Additionally, exclusive jurisdiction is vested in the FHC in respect of "civil causes and matters arising from the operation of CAMA", which invariably relates to companies. This conflict of laws has hampered the effectiveness of the IST because questions arise as to the validity of its creation in face of section 251 of the Nigerian Constitution.

This implication of this conflict was captured in *Wealthzone Limited v Securities and Exchange Commission* (2016)[5] (the "**Wealthzone Case**"), where the court stated:

> "The mere fact that the Federal High Court and the Nigerian Investments and Securities Tribunal have their origins rooted firmly in the constitution does not however suggest that there are no jurisdictional conflicts between the duo. Indeed, both institutions have been clearly demonstrated in this judgment and in the briefs of learned counsel to the parties to be greatly enmeshed in jurisdictional conflicts. The two institutions are generally clothed with exclusive jurisdictions in determined borderline areas which clearly overlap and have presented difficulties to the parties in this appeal as well as to the Capital and Securities Investments Community."

3. The Development of Case Law

In *Securities and Exchange Commission v Kasunmu & Anor* (2008),[6] the Court of Appeal, in deciding where jurisdiction lay, took a straightforward approach. It relied on the pronouncement of the Supreme Court in *Attorney-General of Abia State v Attorney-General of the Federation* (2006),[7] which stated:

> "The Constitution of a nation is the *fons et origo*, not only of the jurisprudence, but also of the legal system of the nation. It is the beginning and the end of the legal system… In line with this kingly position of the Constitution, all the three arms of Government are slaves of the Constitution, not in the sense of undergoing servitude or bondage, but in the sense of

[1] LPELR-59729 (SC).
[2] *Nigerian Stock Exchange v Abiodun* (2022) LPELR-56896 (CA).
[3] Section 284 of the ISA.
[4] Section 295 of the ISA.
[5] LPELR-41808 (CA).
[6] LPELR-4936 (CA).
[7] 16 NWLR (Pt 1005) 265 at 381.

total obeisance and loyalty to it. This is in recognition of the supremacy of the Constitution over and above every statute, be it of the National Assembly or a law of the House of Assembly of a State."

The Court of Appeal noted that the jurisdiction of the FHC was founded on the Nigerian Constitution, while jurisdiction of the IST was founded on an Act of the National Assembly. As such, the exclusive jurisdiction of the FHC, which was rooted in superior law, took precedence.

In the *Wealthzone Case*, the Court of Appeal took a different position, holding that the IST too was also rooted in the Constitution, as the National Assembly was empowered by section 6(4)(a) of the Nigerian Constitution to establish courts in Nigeria other than those already established and listed in the Constitution. The Court of Appeal critically examined the interpretative intention of the National Assembly in creating the IST as a specialist court for handling capital and securities market matters. It was noted that the National Assembly, upon establishing the IST, made amendments to other legislations which revealed its clear intention. For example, the National Assembly repealed Part XVII of the erstwhile *Companies and Allied Matters Act 1990*, which, at the time, regulated dealings in companies' securities, and, by implication, vested exclusive jurisdiction to handle disputes arising therefrom in the FHC. Given this, the Court of Appeal held that, in repealing the aforementioned provisions, the National Assembly intended to divest the FHC of exclusive jurisdiction over the capital and securities market and explicitly vested same in the IST.

The Supreme Court has finally made its pronouncement on the issue. In *Mufutau*, the Appellant, while in active service as the Finance and Accounts Manager of African Petroleum PLC, had authorised the issuance of a prospectus containing an untrue statement on the total indebtedness of the company. The Appellant was penalised by the Administrative Proceedings Committee ("**APC**") and appealed to the FHC. The FHC dismissed the appeal on the grounds that the IST possessed jurisdiction in the matter and was, thus, the appropriate forum for the appeal. Dissatisfied, the Appellant appealed to the Court of Appeal; this appeal was dismissed for the same reason. Thereafter, the Appellant appealed to the Supreme Court which held that the position of law is that disputes bordering on capital market operations and investments are within the exclusive jurisdiction of the IST.

4. Effect of the Judgment of the Supreme Court

The judgment of the Supreme Court of Nigeria is final and binding on all other courts of law in Nigeria. As such, unless the Supreme Court upturns or reverses its decision in a subsequent matter, the IST, for all intents and purposes, has exclusive jurisdiction over capital and securities market matters, except matters which are more appropriately initiated in the APC, over which the IST has appellate jurisdiction.

5. Proposed Amendments to the ISA

On 29 March 2023, the Senate of Nigeria passed the Investments and Securities Bill 2023 (the "**Bill**"), which seeks to, *inter alia*, repeal and replace the ISA. The Bill sets out provisions pertaining to the jurisdiction of the IST. Specifically, section 320(1) of the Bill provides that the IST shall have exclusive jurisdiction to adjudicate on disputes arising from investments and securities transactions in Nigeria.

Under the Bill, the IST will have original jurisdiction where:

(a) the complaint is against a direct action of the Securities and Exchange Commission (the "**Commission**"); or

(b) a matter had been referred to the Commission and the Commission fails to act within sixty days.[8]

The IST will have appellate jurisdiction on matters from the APC:

(a) between the Commission and any person (individual or corporate) in respect of any capital market matter;
(b) between capital market operators and securities exchanges or financial market infrastructure;
(c) between capital market operators *inter se*;
(d) between capital market operators and their clients;
(e) between public companies and the Commission or the securities exchanges or investors;
(f) between an investor and a securities exchange or financial market infrastructure;
(g) between capital market operators and self-regulatory organisations;
(h) between a capital market operator and the Commission;
(i) between an investor and the Commission;
(j) between an issuer of securities and the Commission;
(k) arising from the administration, management and operation of collective investment schemes; and
(l) relating to the review, approval and regulation of mergers, takeovers and restructuring of public companies or the shares, assets, business, or subsidiaries of public companies.

We note that the language of the Bill appears to be more explicit than the ISA 2007, indicating, perhaps, a conscious effort by the National Assembly to ensure that there is absolute clarity in the relevant provisions. The Bill currently has yet to be signed into law. It is hoped that, once enacted, the issue will be brought to a definitive close.

6. Conclusion

The judgment of the Supreme Court is important and is expected to eliminate instances of actions being initiated in the wrong forum, and, perhaps, reduce instances of counterparties delaying proceedings by filing preliminary objections for lack of jurisdiction when matters concerning the capital markets are appropriately brought to the IST, or the APC at first instance. The clarification afforded by the judgment of the apex court also seems to comport with the intention of the National Assembly, as can be gleaned from the Bill, which seems to unambiguously confer the IST with exclusive jurisdiction over capital and securities market matters. As such, we envisage the clarity provided will result in a more efficient dispute resolution framework, which will be of significant benefit to all participants in the Nigerian capital markets.

[8] This is, perhaps, in response to cases such as *Union Capital Markets LTDC v BJ Export LTD & Anor* (2019) LPELR-47316 (CA), where the Court of Appeal held that where a participant in the capital market has been a victim of misconduct perpetuated by another capital market participant which results in loss, and SEC fails in its obligations to provide redress, the appropriate forum to institute an action for redress is the IST.

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