

## *The Financial Reporting Council of Nigeria is restricted from regulating private companies*

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### ***In brief***

The Federal High Court (“FHC”) on 21 March 2014 ruled in a case between Eko Hotels Limited and the Financial Reporting Council of Nigeria (“FRCN”).

The FHC decided that under the FRCN Act, the FRCN cannot enlarge its regulatory powers to regulate private companies.

### ***In detail***

#### ***Background***

In 2012, Eko Hotels Limited received a notice from the FRCN requesting for its registration with FRCN and to pay annual dues accordingly for 2011 and 2012.

Eko Hotels responded to the FRCN stating that it is neither a public company nor a public interest entity and does not require registration with the FRCN as provided by the FRCN Act. The FRCN challenged the authority of the legal counsel of Eko Hotel to make representations on the matter on the basis that the law firm involved was also not registered with FRCN.

Eko Hotels then approached the Federal High Court (“FHC”) to rule on the issue.

#### ***Overview of the Federal High Court Judgment***

##### ***Position of Eko Hotels Limited***

The main issues raised by Eko Hotels for determination by the FHC were:

- Whether Eko Hotels is required to register with the FRCN under the FRCN Act 2011
- Whether Eko Hotels is liable to pay the statutory and renewable annual dues to the FRCN for 2011 and 2012.
- Whether Eko Hotels is required to furnish the FRCN with evidence of its statutory filing with the Corporate Affairs Commission and the Federal Inland Revenue Service.
- Whether the FRCN could penalise it for failure to submit the annual returns and statements.

Eko Hotels sought a declaration from the court that the FRCN’s demand for registration was unlawful on the basis that Eko Hotels is not a public company or a public interest entity. It further sought the FHC to declare that the FRCN lacked the statutory power to demand for annual returns and financial statements of a private limited liability company among others.

##### ***Position of the FRCN***

FRCN’s position was that Eko Hotels was expected to routinely file returns not only with the CAC or the FIRS but also with the Tourism Development Corporation (being the regulatory body responsible for the registration, classification and grading of all hospitality and tourism enterprises in Nigeria). 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 stated that one of the requirements for Eko Hotels to file its routine returns with the CAC was evidence of payment of its annual dues to FRCN.

### **The Judgment**

On every issue raised by Eko Hotels, the FHC ruled in favour of Eko Hotels. The FHC held that Eko Hotels was not liable to register with FRCN and was not liable to pay any statutory dues to it. The court held that there is no legal authority empowering the FRCN to exercise any form of regulatory power over Eko Hotels, a private company.

The FHC based its decision on the following points –

- Sections 7(1), 18 (f) and 41(1) of the FRCN Act which only allows for the registration of professional accountants and professionals engaged in the financial reporting process and not for private companies like Eko Hotels. The express mention of the parties to be covered by the Act implies

that those not mentioned should be excluded.

- Section 77 of the Act, which is the definition Section of the Act, under which Eko Hotels cannot be classified as a publicly quoted company or a public interest entity.

The court further ruled that the FRCN cannot claim implied, incidental or consequential powers to register Eko Hotels where there is no express provision empowering it to do so and any attempt to do so by the FRCN is null and void. The court also ruled that the FRCN acted ultra vires in calling for annual returns and statements from Eko Hotels as it lacked the power and authority to do so.

### **The takeaway**

This decision reiterates the scope of the FRCN's authority in regulating companies in general in line with the provision of the enabling statute being the FRCN Act 2011. Based on the judgment, the FRCN does not

have oversight functions over private companies. Attempts by the FRCN to bring a wider range of companies under its scrutiny and guidance are therefore open to challenge by any affected company on the basis of this decision.

The judgment suggests that the rules imposed in some industries requiring players in the industry to submit certain documentation or to pay certain registration fees does not translate to "filing of returns" as contemplated by the Act. Furthermore the mere fact that a company is popularly known to the public due to the nature of its services does not automatically make it a public interest entity.

On the basis of this judgment, private companies who only file returns routinely with the CAC and FIRS can carry on their business activities without the additional administrative burden of registration or payment of fees to the FRCN.

***Let's talk***

For a deeper discussion, please contact:

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