

AN APPRAISAL OF THE LEGAL STATUS OF THE ECONOMIC AND FINANCIAL CRIME COMMISSION AS AN ANTI-GRAFT AGENCY IN CRIMINAL PROSECUTION IN NIGERIA

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Abstract

Undoubtedly, the EFCC is one of the dominant anti-corruption agencies in Nigeria statutorily established to combat the monstrous corruption in recent times. However, the powers and functions of the EFCC are restricted by its enabling legislation, EFCC Act, to economic and financial crimes and other related offences committed with the sole aim of earning wealth illicitly. There is no gain saying of the fact that the EFCC, in the exercise of its powers and authority, has sometimes exceeded its limits as statutorily provided by its enabling Act. Its apparent excesses have been epitomized in diverse scenarios such as the freezing of the accounts of State governments, and incessant intrusion with those of other anti-graft agencies. This has, invariably, ignited the clamour by some legal luminaries and scholars for a judicial interpretation of the exact scope of powers of the EFCC. Consequently, this paper reviews the functions and powers of the EFCC as provided in section 6 and 7 relating to 'economic and financial crimes' and defined in section 46 of the EFCC Act, and recommends that the EFCC should operate within its statutory trajectory by ensuring strict compliance with the said provisions in the exercise of its investigation and prosecution powers. Additionally, the paper recommends that the clause '...and any form of corrupt malpractices...' as contained in section 46 of the EFCC Act should be amended by re-phrasing or exciting it completely. The section appears to have imbued the EFCC with enormous powers at the expense of other anti-graft agencies.

1.0 Introduction

The Economic and Financial Crime Commission (EFCC) was established by its enabling Statute¹ as a body corporate with perpetual succession and a common seal. Thus, the EFCC is imbued with the power to sue and be sued in its corporate name, and for the purpose of its functions may acquire, hold or dispose of movable and immovable properties.² The EFCC is the designated Financial Intelligence Unit (FIU) in Nigeria, which is charged with the responsibility of coordinating the various institutions involved in the fight against money laundering and enforcement of all laws dealing with economic and financial crimes in Nigeria³. Undoubtedly, the provision accords the EFCC with status that distinguishes it from other anti-corruption agencies in Nigeria.⁴ It is noteworthy that the members of the Commission, other than the Chairman and the Secretary, shall be part time members⁵ and shall hold office for four years, but could be reappointed. In addition, the chairman and members of the Commission, other than

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¹ Economic and Financial Crime Commission (Establishment) Act, 2004 (as amended).

² EFCC Act (n1) s.1 (2) (a) and (b).

³ *Ibid*, s.1 (2) (c).

⁴ O. Samuel, 'An Appraisal of the Roles of EFCC and ICPC in Combating Corruption and Financial crimes in Nigeria' (3) (2) (2010)-(2014) *University of Jos Law Journal*, 85.

⁵ EFCC Act (n1) s. 2(2) (c).

ex-officio members, shall be appointed by the President, and the appointment shall be subject to the confirmation of the Senate.⁶

2.0 The Functions of the EFCC under the Act

The functions of the EFCC as provided by the EFCC Act⁷ revolve around economic and financial crimes and other related offences. However, it is imperative to note that, unlike the other anti-graft agencies, its functions appear to be very enormous and wider in scope.

The function the Commission as provided in section 6 of the EFCC Act include:

- a) The enforcement and due administration of EFCC Act;
- b) The investigation of all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam, etc;
- c) The coordination and enforcement of all economic and financial crimes laws and enforcement functions conferred on any other person or authority;
- d) The adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crime offences, or the properties the value of which corresponds to such proceeds;
- e) The adoption of measures to eradicate the commission of economic and financial crimes;
- f) The adoption of measures which include coordinated, preventive and regulatory actions, introduction and maintenance of investigative and control techniques on the prevention of economic and financial related crimes;
- g) The facilitation of rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic and financial related crimes;
- h) The examination and investigation of all reported cases of economic and financial crimes with a view to identifying individual corporate bodies or groups involved;
- i) The determination of the extent of financial loss and such other losses by government, private individuals or organisations;
- j) Collaborating with government bodies both within and outside Nigeria carrying on functions wholly or in part analogous with those of the Commission concerning:
 - i) the identification, determination, of the whereabouts and activities of persons suspected of being involved in economic and financial crimes;
 - ii) the movement of proceeds or properties derived from the commission of economic and financial crimes, and other related crimes;
 - iii) the exchange of personnel or other experts;
 - iv) the establishment and maintenance of a system for monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved,

⁶ *Ibid*, s. 2 (3).

⁷ *Ibid*, s. 6 and 7

- v) Maintaining data, statistics, records and reports on persons, organisations, proceeds, properties, documents or other items or assets involved in economic and financial crimes;
 - vi) Undertaking research and similar works with a view to determining the manifestation, extent, magnitude and effect of economic and financial crimes and advising government on appropriate intervention measures for combating same;
 - k) Dealing with matters connected with extradition, deport and mutual legal or other assistance between Nigeria and any other country involving economic and financial crimes;
 - l) The collection of all reports relating to suspicious financial transactions, analysis and dissemination to all relevant government agencies;
 - m) Taking charge of, supervising, controlling, coordinating all the responsibilities, functions and activities relating to the current investigation and prosecution of all offences connected with or relating to economic and financial crimes;
 - n) The coordination of all existing, economic and financial crimes investigating units in Nigeria;
 - o) Maintaining a liaison with the office of the Attorney-General of the Federation, the Nigeria Customs Services, the Immigration and Prison Service Board, the Central Bank of Nigeria, the Nigeria Deposit Insurance Corporation, the National Drug Law Enforcement Agency, all government Security and law enforcement agencies, and such other financial supervisory institutions involved in the eradication of economic and financial crimes;
 - p) Carrying out and sustaining rigorous public enlightenment campaign against economic and financial crimes within and outside Nigeria; and
 - q) Carrying out such other activities as are necessary or expedient for the full discharge of all or any of the functions conferred on it under this Act.
- 7(1) It is imperative to note that the function of the EFCC are not limited to the foregoing, but the Commission has power to:
- i) cause investigations to be conducted as to whether any person, corporate body or organization under this Act or law relating to economic and financial crimes,
 - ii) cause investigations to be conducted into the properties of any person it appears to the Commission that the person's lifestyle and extent of the properties are not justified by his source of income.
- (2) In addition to the powers conferred on the Commission by this Act, the Commission shall be the coordinating agency for the enforcement of the provisions of-
- a) The Money Laundering Act, 2004, 2003, No.7, 1985 No. 13;
 - b) The Advance Fee Fraud and Other Related Offences Act, 1995;
 - c) The Failed Banks (Recovery of Debt) and Financial Malpractices in Banks Act, (as amended);
 - d) The Banks and Other Financial Institutions Act, 1999 (as amended);

- e) The Miscellaneous Offences Act, and
- f) any other law or regulation relating to economic and financial crimes, including the Criminal Code and Penal Code.

In order to ensure the effective conduct of the foregoing functions, the Commission is empowered to established special units for the performance of special duties⁸. These include:

- a) the General and Assets Investigation Unit;
- b) the Legal and Prosecution Unit;
- c) the Research Unit;
- d) the Administration Unit; and the
- e) the Training Unit.

It also noteworthy that the Commission, in addition to establishment of the above special units, can also set any unit or committee as may be necessary to assist in the performance of its duties and functions under the Act;⁹ and can also appoint for each of the Units a principal officer whose designation is to be determined by the Commission.¹⁰

The General and Assets Investigation Unit shall be charged with the responsibility for the prevention and detection of offences in violation of the provisions of this Act; the arrest and apprehension of economic and financial crimes perpetrators; the investigation of assets and properties of persons arrested for committing any offence under this Act; the identification and tracing of proceeds and properties involved in any offence under this Act and the forfeiture of such proceeds and properties to the Federal Government; and dealing with matters connected with extradition and mutual assistance in criminal matters involving economic and financial crimes.¹¹

The Legal and Prosecution Unit shall be charged with the responsibility for prosecuting offenders under the Act; supporting the General and Assets Investigation Unit by providing the unit with legal advice and assistance whenever is required; concluding such proceedings as may be necessary towards the recovery of any assets or property forfeited under this Act; performing such legal duties as may be referred to from time to time.¹²

2.1 Offences and Penalties under the EFCC Act

Offences under the EFCC Act are contained in section 14 to 26 under Part IV. The offences and penalties created under the Act include the following:

Offences relating to financial Malpractices: As regards financial malpractices, the Act provides that a person who, being an officer of a bank or other financial institutions or designated non- financial institution, fails or neglect to secure compliance with the provisions of this Act; or fails or neglects to secure the authenticity of any statement submitted pursuant to the provisions of this Act, commits an offence and is liable on conviction to imprisonment for a term not exceeding five years or to a fine of

⁸ EFCC Act (n.1) s.12 (1).

⁹ EFCC Act (n1) s.12 (2).

¹⁰ *Ibid*, s.13 (3).

¹¹ *Ibid*, s.13 (1).

¹² *Ibid*, s. 13 (2).

five hundred thousand naira (N500,000) or to both such imprisonment and fine¹³. In addition, the Commission is empowered to compound any offence punishable under this Act by accepting such sum of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence¹⁴. Interestingly, the Act also provides expressly that the money received by the EFCC is not to be retained by the Commission in its account¹⁵. But all moneys received by the Commission shall be paid to the Consolidated Revenue Fund of the Federation.¹⁶

Offences relating to terrorism: under this heading, the Act provides that any person who willfully provides or collects by any means, directly or indirectly, any money from any other person with the intent that the money shall be used or it in the knowledge that the money shall be used for an act of terrorism, commits an offence under the Act and is liable on conviction to imprisonment for life¹⁷. It also provides that any person who commits or attempts to commit a terrorist act or participates in or facilitates the commission of a terrorist act, commits an offence under this Act and is liable on conviction to imprisonment for life¹⁸. Similarly, any person who makes funds, financial assets or economic resources or other related services available for use of any other person to commit or attempt to commit, facilitate or participate in the commission of a terrorist act is liable on conviction to imprisonment for life¹⁹.

Offences relating to false information: in this case, any person who in the discharge of his duty under this Act gives information which is false in material particular to a public officer or any person who is to take decision or to do any other act in relation thereto commits an offence under this Act, and the onus shall be on him to prove that he exercised due diligence to prevent the commission of the offence having regards to the nature of his functions and circumstance²⁰. The penalty of the above offence is an imprisonment for a term not less than 2 years and not more than 3 years; if the offender is a public officer the penalty shall be imprisonment for a term not less than 3 years and not less than 5 years²¹. Without prejudice to the provisions of any other enactment, any regulatory agency or body in the financial sector shall in the exercise of its functions, liaise with the Commission to investigate and monitor the commission of economic and financial crimes²².

Retention of Proceeds of a criminal conduct : Under this heading, the Act provides that any person who whether by concealment, removal from jurisdiction, transfer to nominees or otherwise retains the control of the proceeds of an economic or financial crimes on behalf of another person knowing that the proceeds are as a result of criminal conduct by the principal; or knowing that any property in whole or part, directly or indirectly representing another person's proceeds of economic or financial crime, acquires or uses that property or has possession of it, commits an offence and is liable on conviction to

¹³ *Ibid*, s.14 (1) (a) (b).

¹⁴ EFCC Act (n 1) s.14 (2).

¹⁵ Samuel (n 4) 89.

¹⁶ EFCC (n 1) s. 14 (3).

¹⁷ *Ibid*, s. 15(1).

¹⁸ *Ibid*, s.15 (2).

¹⁹ *Ibid*, s. 15 (3).

²⁰ *Ibid* s.16 (1)

²¹ *Ibid*, s.16 (2)

²² *Ibid*, s. 16 (3).

imprisonment for a term not less than 3 years or to a fine equivalent to 100 percent of the value of the proceeds of the economic or financial crime or to both such imprisonment and fine²³.

Offences in relation to economic and financial crimes and penalties. Under this heading, a person who engages in the acquisition, possession, and use of property knowing at the time of its possession, acquisition or use that such property was derived from any offence under this Act; engages in the management, organization or financing of any of the offences under this Act; engages in the conversion or transfer of property knowing that such property is derived from any offence under this Act; or engages in the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property knowing that such property is derived from any offence under this Act, is liable on conviction to the penalties provided.²⁴ The penalties for offences under this section shall be imprisonment for a term not less than two years and not exceeding three years.²⁵

3.0 The Investigating and Prosecuting Powers of the EFCC

Undoubtedly, the EFCC has recorded some laudable achievements since its inception as an anti-graft agency, especially, in the investigation and prosecution of economic and financial crimes and other related crimes. This, to a large extent, has laundered the battered image of the country through corrupt practices in and outside the country by fraudsters and corrupt public office holders. However, there has been a groundswell of opinion among legal luminaries and judicial officers with respect to the scope of powers and operations of the Commission in recent times. It has been posited that the EFCC often, but not all the times, exceeds its powers in what it considered to be its public duty in relation to the war against corruption in Nigeria.²⁶ According to Olisa Agbakoba, a Senior Advocate of Nigeria and a former NBA President, there is no doubt as to the commitment of the EFCC in the fight against corruption and the required support needed on the part of the citizenry to achieve its objectives, but it is also incumbent on the Commission, as an anti-graft agency, in its statutory powers to stamp out corruption in Nigeria to strictly conform to the prescriptions of the law.²⁷ Thus, the legal luminary posited that EFCC should exercise its powers within the purview of the statutory provisions, but not to undermine the rule of law in a bid to performing its functions, and thus, advocated for a judicial declaration of the powers of the Commission as an anti-graft agency by the court.

Two scenarios involving the freezing of the bank accounts of Benue State and Akwa Ibom States by the EFCC are apt in illustrating the position of the legal luminary in relation to the excesses of the Commission in the exercise of its powers. The freezing of the two States was at the instant of the Governor of Benue State of Nigeria who defected from the All-Progressive Parties (APC) to the People Democratic Party (PDP) while Senator Godswill Akpabio, the political godfather of the Akwa Ibom State Governor, Mr. Udom Emmanuel, defected to the APC. Few days after Mr. Ortom's defection, the EFCC alleged that the Governor of Benue State had committed fraud to the tune of N22 billion but the Governor denied the allegation. The EFCC allegedly claimed that its investigations revealed that between June 30, 2005 and March 2008, Governor Ortom ordered the withdrawal of N21.3 billion from

²³ EFCC Act (n1) s. 17 (a) (b).

²⁴ *Ibid*, S.18 (1) (a)-(d).

²⁵ *Ibid*, s.18 (2).

²⁶ O. Agbakoba, 'EFCC Powers: Agbakoba Seeks Court Declaration' *ThisDay News Paper* (Lagos: 3rd January, 2023)v.

²⁷ *Ibid*.

government's account in Guaranty Trust Bank, First Bank of Nigeria and the United Bank for Africa. According to the Commission, the records revealed that about N19 billion was used for the payment of six security agencies that were deployed to the State to contain the incessant clashes between the herdsmen and the farmers.²⁸ On the other hand, on freezing the bank account of Akwa Ibom State, the Commission claimed to have traced N1.4 billion belonging to the State being paid to about 11 accounts operated by unnamed lawyers in Nigeria. Rather than freezing the alleged accounts of the unnamed lawyers in Nigeria, the State's bank accounts were frozen²⁹. This was, however, considered by many as a vendetta against perceived political enemy, because the freezing came hard on the heels of giving the sack to Senator Akpabio's brother and one other who were loyal to Senator Akpabio³⁰. Thus, the freezing of these States' accounts is smacked of flagrant disregard of, and non-compliance with, the constitutional provisions relating to the powers inured on the State House of Assembly of the affected States to initiate investigations into the accounts of the State through the procedures contained therein in cases of corruption, inefficiency and waste.³¹

Section 128 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides:

- (1) Subject to the provisions of the Constitution, a House of Assembly shall have power by resolution published in its journal or in the office gazette of the Government of the State to direct or cause to be directed an enquiry or investigation into :-
 - a) any matter or thing with respect to which it has powers to make laws; and
 - b) the conduct of affairs of any person, authority, ministry or government department charged, or intended to be charged, with the duty of or responsibility for-
 - mi) executing or administering laws enacted by that House of Assembly, and
 - i) disbursing or administering money appropriated or to be appropriated by such House.
- 2) The Power conferred on a House of Assembly under the provision of this section are exercisable only for the purpose of enabling the House to-
 - a) make laws with respect to any matter within its legislative competence and correct any defects in existing laws; and
 - b) expose corruption, inefficiency or waste in the execution of or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.

Section 129 of the Constitution of the Federal Republic of Nigeria also provides that: 1) For the purpose of any investigation under section 128 of this Constitution and subject to the provisions thereof, a House of Assembly or a committee appointed in accordance with section 103 of the Constitution shall have power to- a) to

²⁸ N. Francis and Others, 'EFCC Freezes Benue, A'Ibom Govt. Accounts' *Thisday Newspaper* (Lagos: 9 August, 2018)

²⁹ *Ibid.*

³⁰ U. E. Ogwashi, 'Freezing Proceeds of Corruption: Evaluating the Legality of the Freezing of States' Account by the Economic and Financial Crime Commission' (2019)(10) (1) *The Journal of Property Law and Contemporary Issues*, Faculty of Law, Rivers State University, Nkpolu-Oroworukwo, Port-Harcourt, Nigeria, 149-160.

³¹ CFRN 1999 (as amended) ss.128 and 129.

procure all such evidence, written or oral, direct or circumstantial, as it may think necessary or desirable, and examine all persons as witnesses whose evidence maybe material or relevant to the subject matter;
b) require such evidence to be given on oath; c)

summon any person in Nigeria to give evidence at any place or produce any document or other thing in his possession or control, and examine him as witness and require him to produce any document or other thing in his possession or under his control subject to all just exceptions;

d) issue a warrant to compel the attendance of any person who, after having being summoned to attend,, fails, refuses or neglects to do so and does not excuse such failure, refusal or neglect to the satisfaction of the House of Assembly or the Committee, and order him to pay all cost, which may have been occasioned in compelling his attendance or by reason of his failure, refusal or neglect to obey the summons and also to impose such fines as may be prescribed for any such failure, refusal or neglect; and any fine so imposed shall be recoverable in the same manner as a fine imposed by a court of law.

2) A summon or warrant issued under this section may be served or executed by any member of the Nigeria Police Force or by a person authorized in that behalf by the Speaker of the House of Assembly of the State.

However, The EFCC Act provides for the freezing of account of private individuals, corporate bodies or organisations. Section 6(d) of the EFCC act provides that *The Commission shall be responsible for the adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorists activities, economic and financial crimes related offences or the properties the value of which corresponds to such proceeds.*

Similarly, the EFCC Act provides for the freezing of bank accounts of an individual or organization in banks or other related financial institutions by the Commission in section 34 thus:

1) Notwithstanding anything contained in any other enactment or law, the Chairman of the Commission or any officer authorized by him may, if satisfied that the money in the account of a person is made through the commission of an offence under this Act and/or any of the enactments specified in section 7(2) (a)-(f) of this Act, apply to the Court ex-parte for powers to issue as specified in Form B of the Schedule to this Act, address to the manager of the bank or any person in control of the financial institution or designated non-financial institution where the account is or believed by him to be or the head of the bank, other financial institutions or designated non-financial institutions to freeze the account.

2) The Chairman of the Commission or any officer authorized by him may by any order issued under section (1) of this section, direct the bank, other financial institution or designated non-financial institution to supply any information and produce books and documents relating to the accounts and to stop all outward payments, operations or transaction (including any bill of exchange) in respect of the account of the person. (3) The manager or any other person in control of the financial institution shall take necessary steps to comply with the requirements of the order made pursuant to subsection (2) of this section.

Indeed, like the constitutional provisions for the State house of Assembly, the EFCC is apparently empowered by its enabling Act to exercise its freezing powers upon satisfaction that the money in the account is made through the commission of any crime under the EFCC Act and any of the enactment of the other anti-graft agencies under it as a coordinating agency. Flowing from the foregoing, the following can be deduced:

Firstly, the EFCC Act specifically provides for the freezing of persons' accounts – individual account- but not State's account that embodies the public funds meant to finance the activities of government.

Second, the Chairman of the Commission is to exercise its freezing powers on persons' accounts whose money are the proceeds of economic and financial crimes that are under the purview of the Commission. However, in most cases, the Commission tends to exceed its bounds by basking in the liberal definition as provided by section 46 of the EFCC Act on items that constitute financial and economic crimes.

Third, it is succinctly provided under the Constitution of the Federal Republic of Nigeria, that the State House of Assembly is the only body to initiate investigations by procuring evidence, summoning of indicted corrupt public office holders and issuance of warrant of arrest on matters bordering on corruption or inefficiency or waste of public funds. The EFCC is not the appropriate body to initiate investigation and possible freezing of State's account on the ground of misappropriation of public funds by a Governor or other highly placed office holder.

Fourthly, admitted but not conceding that the EFCC is imbued statutorily with the power to freeze and possibly confiscate any bank account whose money is satisfactorily believed by the Commission to have been derived from the proceeds of crimes, the provision of the Constitution is specific, sacrosanct and devoid of any compromise. This is because, the Constitution is supreme, and thus its provisions bind on all authorities and persons to such extent that any other law that tends to be inconsistent with it, is rendered null and void to the extent of its inconsistency³². Thus, it is apparent that the EFCC exceeded its bounds by freezing or attempting to freeze the affected States' bank accounts on grounds of misappropriation of public funds by governors. Consequently, it is imperative for the EFCC to exercise its investigative and prosecuting functions within the provisions of the law so as to maintain its independence and integrity.³³

In *EFCC v Chief Patrick Chidolue*³⁴, the appellant, sometimes in 2005, received a petition against Chief Alamieyeseigha. A former Governor of Bayelsa State. During the investigation which followed the petition, it was found that the former Governor bought the property known as Chelsea Hotel Abuja with funds belonging to Bayelsa State Government, using one of his companies, Herbage Global Services Ltd. The property was sold to Alamieyeseigha by Panasonic Industries Ltd, a company owned by the respondent, for one billion, five hundred million naira (1.5 billion) and a sale agreement evidencing the sale was made. Following the filing of a charge against Chief DSP Alamieyeseigha and Herbage Global Services Ltd, the appellant obtained an order of temporary forfeiture against the properties of the accused person in the charge. While the said temporary forfeiture was pending and after Alamieyeseigha

³² CFRN 1999 (as amended), ss. 1(1) and (3).

³³ Ogwashi (n.30) 160.

³⁴ (2019) 2 N.W.L.R. (Pt. 1657) 293-573.

was impeached, the respondent entered into another agreement with the new government of Bayelsa State with the sole aim of re-transferring Chelsea Hotel Abuja to Bayelsa State Government and in the process, he misled the government that he sold the property for two billion naira and that he was only paid one and half a billion naira, leaving a balance of N500,000,000.00. For this wrong advice, a fresh agreement was entered between the respondent and the Bayelsa State Government for N 400,000,000.00. As a result, a cheque of N400,000,000.00 was issued to the respondent. The investigation report and the cheque that was issued to the respondent by the Bayelsa State Government were not part of the evidence in the appeal. According to the appellant, its operatives got to know of the foregoing and the respondent was invited for interview and questioning. A charge was drafted against the respondent for tampering with a property in respect of which a temporary forfeiture order has been obtained. The appellant added that the respondent offered to refund the sum of N400,000,000.00 he collected from Bayelsa State Government and deposited a cheque of N100,000,000.00 as part payment of the said sum. All these happened in May 2006.

The respondent disputed the above facts as presented by the appellant. Rather, he stated that he offered to sell the hotel for the sum of N2,000,000,000.00 (two billion naira). The sale agreement was made in two batches. The main agreement was for N1.5 billion (One billion, five hundred naira), while the second one was for five hundred million naira (N500, 000, 000.00). Both agreements were prepared and executed on the same date. That the respondent continued to keep the title deed after payment of N1, 500,000,000.00 pending when the balance would be paid. These agreements were with the appellant. According to the respondent, he was detained in appellant's custody for over 30 days and was later granted administrative bail after a statement under caution, signing of bail bond and payment of N100,000,000.00 with Standard Chartered Bank Cheque No. 00052310. That during this period, there were threats that he would not come out of the detention alive, unless he refunded the one billion, nine hundred million naira (N1,900,000,000.00) that he collected, which was later changed to four hundred million naira (N400,000,000.00). The respondent concluded that he paid the sum of one hundred million naira (N100,000,000.00) under the circumstances of threat and fear of his life. Following the respondent's release on bail, he wrote several letters to the appellant to return the money they collected by force, but to no avail. The respondent commenced an action that led to the instant appeal at the Federal High Court Abuja, by originating summons, claiming the following relief:

- 1 A declaration that the defendant's forfeiture of the plaintiff's Standard Chartered Trust Bank Cheque No. 00052310 for the sum of N100,000,000.00 (one hundred million naira) only is a violation of the plaintiff's right to property guaranteed under section 44 of the Constitution of the Federal Republic of Nigeria, 1999 and is accordingly unconstitutional and void.
- 2 An order of mandatory injunction directing the defendant to release forthwith to the plaintiff his Standard Chartered Bank Cheque No. 00052310 for the sum of N100, 000,000 (one hundred million naira) only which the defendant forfeited to the plaintiff without lawful authority.
- 3 An order of perpetual injunction restraining the defendant by themselves, their agents/servants or privies from forfeiting the plaintiff's property in anyway and violating the

plaintiff's right to property guaranteed under section 44 of the Constitution of the Federal Republic of Nigeria, 1999.

The respondent, on the other hand, submitted two questions for determination as follows:

- 1 Whether the Economic and Financial Crime Commission (establishment) Act³⁵, which established the defendant conferred on it power to compulsorily take possession or forfeit the property of a citizen of Nigeria without a court order first sought and obtained.
- 2 If the answer to the above is negative, whether the defendant is bound to return to the plaintiff the Standard Chartered Bank Cheque No. 00052310 for the sum of N100,000,000.00 (one million naira) which the defendant compulsorily forfeited from the plaintiff.

The originating summons which was accompanied by a 17-paragraph affidavit was heard by the Federal High Court Abuja, and in a reserved and considered judgment delivered on 11th February 2010, the trial judge dismissed the respondent's claim on the ground that the claims were not proved. Dissatisfied with the judgment of the trial court, the respondent appealed to the Court of Appeal which allowed the appeal in part and directed the appellant to release to the respondent the Standard Chartered Bank Cheque for the sum of N100,000,000 (one hundred million naira). Dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Supreme Court which, inter alia, reviewed section 14(2) and (3) of the Economic and Financial Crime Commission in arriving at its decisions.

- 14 (2) Subject to the provision of section 174 of the Constitution of the Federal Republic of Nigeria, 1999 (which relates to the power of the Attorney-General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sum of money as it deems fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.
- (3) All moneys received by the Commission under the provisions of sub-section (2) shall be paid into the Consolidated Revenue Fund of the Federation.

On the power of the Economic and Financial Crime Commission to compound an offence, the

Supreme Court held per Okoro JSC, thus:

From the provisions of section 14(2) and (3) of the Economic and Financial Crimes Commission (Establishment) Act, 2004, the Economic and Financial Crime Commission is empowered to do the following:

- (a) Compound any offence punishable under the EFCC Act (subject to the provision of the Constitution Federal Republic of Nigeria (as amended).

³⁵ Cap. E1 LFN 2004.

- (b) By accepting such sums of money as it thinks fit.
- (c) However, such sums of money must exceed the maximum to which that person would have been liable if he had been convicted of that offence.
- (d) Such money shall be paid into the Consolidated Revenue Fund of the Federation.

Thus, where a person, be it Federal Government, State Government, Local Government, an institution or an individual complains to the EFCC that someone has defrauded him or it, and the EFCC in the process of investigation, makes some financial recoveries, such recoveries being part of the monies of the complainant, belongs to the complainant and ought to be paid to the complainant. It is not the money contemplated under subsection (3) which is to be paid into the Consolidated Revenue Fund of the Federation. This is the context under which the Court of Appeal and even the trial court described the N100,000,000 paid by the respondent to the appellant as money belonging to the Bayelsa State Government. However, where an offence has been established against an accused person and a charge is drafted against him, and the accused person accept he committed the offence, both parties, that is, the EFCC and the accused may agree to compound the offence. That is to say, the accused accepts to pay a certain sum of money to the EFCC to avoid being prosecuted. This money must of course exceed the maximum amount to which that person would have been liable if he had been convicted of that offence. It is this other money which, by subsection (3) must be paid into the Consolidated Revenue Fund of the Federation. Definitely, not the money recovered on behalf of the complainant.

The apex Court further expounded on the meaning of compounding of offence and how it can be properly done as follows:

Compounding of an offence consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on a person who has commit a crime. To properly compound an offence under the EFCC the following must co-exist:

- (a) the accused must not only have knowledge of the offence, there must be the actual commission of the offence;
- (b) there must be an agreement not to prosecute;
- (c) there must be a receipt of consideration, that is, sums of money exceeding the maximum amount to which that person would have been liable if he had been convicted of the offence;
- (d) the offence must be punishable under the EFCC Act.

In the instant case, although the respondent was arraigned and detained for over 30 days by the appellant on the allegation of the commission of some offence, there was no evidence that the respondent accepted that he committed the offence. It must be noted that the respondent was not tried in court and as such there are no findings by the court of these issues. Secondly, the Court of Appeal held that there was no evidence that there was an agreement between the appellant and the respondent on the issue of compounding the crime for which the respondent was to be charged. The Supreme Court, per Okoro JSC, reiterated thus:

By the appellant's showing, it is clear that the sum of N100m collected from the respondent was part of the N400m collected from Bayelsa State Government and the said money was a deposit as the respondent is alleged to have promised to refund the balance at three instalments. Clearly, that sum of N100m was not money for compounding but part of money belonging to Bayelsa State Government as stated by the appellant itself. The question may be asked, had the respondent refunded the entire N400m, could the appellant have paid into the Consolidated Revenue Fund of the Federation? I do not think so. The reason is that the money contemplated in section 14 (2) of the EFCC Act is the fine exceeding the maximum amount to which the respondent would have been liable if he had been convicted of that offence. Definitely, not the monies belonging to the complainant. Conviction takes place in court, not at the EFCCC office.

Again, there is no evidence that the money was returned to the Bayelsa State Government or paid into the Consolidated Revenue Fund of the Federation. Had it been returned to the Bayelsa State Government, the court would have held that the money had been given to the said Government as part of N400,000,000.00 it allegedly paid to the respondent. Conversely, if it was paid into the Consolidated Revenue Fund of the Federation, it would have been deemed to be in accordance with section 14(3) of the Economic and Financial Crimes Commission Act. There is no evidence that either of these steps was taken. The question may be asked: where is the money? The only reasonable guess would be that it is in the custody of the appellant. This money was paid in 2006 but up to 2008, when the respondent filed his case in court, nothing happened. The respondent was neither charge to court nor further payments made.

The next question which may be ask is what was the maximum amount to which the respondent would have been liable if he had been convicted of that offence. Unfortunately, evidence of this is also lacking. All I have endeavoured to say above tend to, and in fact, do support the decision of the court bellow that the collection of the N100m from the respondent by the appellant was not in accordance with section 14(2) of the EFCC Act.

The Apex Court further harped on the power of the Economic and Financial Crimes Commission to compound offences and the procedure thereof thus:

The Economic and Financial Crimes Commission has an unfettered statutory power to compound offences. However, it has to do so with an agreement which will show that an offence has been committed, the accused must agree that he has committed the offence, the offence must be punishable under the EFCC Act, the accused must agree to pay a certain amount to the EFCC which amount must exceed the maximum sum he would have paid had he been convicted of that offence. The conclusion of the agreement must state that the accused has paid the said sum of money which has been paid into the Consolidate Revenue Fund of the Federation and a receipt thereto attached. Both parties would then append their signatures to the said agreement. These

steps were lacking in the present appeal. The Supreme Court, therefore, agreed with the Court of Appeal that the appellant did not collect the N100m from the respondent in accordance with section 14(2) of the EFCC Act.

Thus, the foregoing facts and decision of the Supreme Court in the instant case further illustrate the apparent abuse of the powers conferred on the anti-corrupt agency - Economic and Financial Crimes Commission and go further to justify the alleged excesses of the Commission in the course of performing its statutory functions.

Similarly, in *Dr. Joseph Nwobike, SAN v FRN*,³⁶ a recent case, the apex court has shrewdly deprecated the somewhat omnibus nature of the EFCC functions and powers as anti-graft agency. In the instant case the appellant, a legal practitioner and Senior Advocate of Nigeria, was charged before the High Court of Lagos State for the offence of offering gratification to a public officer contrary to section 64(1) of the Criminal Law of Lagos State No. 11 of 2011; attempting to pervert the course of justice contrary to section 97(3) of the Criminal Law of Lagos State, and making false information to an officer of the Economic and Financial Crime Commission (EFCC), contrary to section 39(2) of the Economic and Financial Crime Commission (Establishment) Act, 2004. At the conclusion of the trial, the trial Court found the appellant not guilty of the offences relating to offering of gratification to a public official and making false information to an officer of the EFCC, and was discharged and acquitted on the related counts. However, the Court found him guilty and convicted him on the counts relating to attempting to pervert the course of justice and sentenced him to thirty (30) days imprisonment on each count; the term of imprisonment to run concurrently. Aggrieved, the appellant appealed to the Court of Appeal which set aside his conviction and sentence on all the counts except those relating to attempting to pervert the course of justice which it affirmed. Still aggrieved the appellant further appealed to the Supreme Court.

At the Supreme Court, the fulcrum of the appellant's arguments was that the EFCC did not have jurisdiction to prosecute him of the offence of attempting to pervert the course of justice and the offences for which he was convicted by the trial court; which the Court of Appeal affirmed, were not financial crimes to make them come within the scope of the powers of the EFCC.

In determining the appeal, the Supreme Court considered the provisions of section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended); sections 6, 7 and 46 of the Economic and Financial Crime Commission (Establishment) Act and Article 15 of the United Nations Convention Against Corruption. Section 36 (12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides thus:

Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

³⁶ (2020) 6 N.W.L.R. (Pt.1826) 293

Sections 6 and 7 are as produced above under the review of the functions of the EFCC in this paper. Section 46 of the EFCC Act exhaustively provides for the meaning of economic and financial crimes as follows:

‘Economic and financial crimes’ means the non-violent criminal and illicit activity committed with the objective of earning wealth either individually or in a group or organized manner thereby violating existing legislation governing economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, foreign exchange malpractice including counterfeiting of the currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.

Article 15 of the United Nations Convention against Corruption provides in relation to bribery of national public officials thus:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally.

In the light of the foregoing constitutional and statutory provisions, the Apex Court held, in the instant case, that the respondent (EFCC) erroneously assumed unimaginable and all-encompassing powers supposedly granted under section 46 of the Economic and Financial Crimes Commission Act to prosecute the appellant for the offence of attempting to pervert the course of justice contrary to section 97(3) of the Criminal Law of Lagos State No.11 of 2011. The offence captured in counts 7, 8, 10, 11, 13, 15, 16 and 17 of the amended information, is clearly outside the purview of the powers granted the respondent by the Act to investigate and prosecute offences bordering on financial crimes, and thereby robbed the court of jurisdiction to determine the charge on those counts. The apex Court further stated that the phrase “*and any form of corrupt malpractices*” in section 46 of the Economic and Financial Crimes Commission Act does not refer to all forms of corrupt practices at large. The legislature rather contemplated any other form of malpractices bordering on financial impropriety in the class of “...money laundering, embezzlement, bribery, looting” already mentioned. The trial court was, therefore, in error to determine the charge on counts 7-11, 13, 15-17 which were an attempt to pervert the course of justice contrary to section 97(3) of the Criminal Law of Lagos State. The power to investigate and prosecute an offender for violating that law was clearly outside the contemplation of the EFCC Act. According to the apex Court, a literary interpretation of the expression ‘*any form of corrupt malpractice*’ would be ineffective in discovering the intention of the legislature and would also mean that the powers of the EFCC would be at large and open-ended thereby making every criminal and illicit activity committed to fall within the scope of “corrupt malpractices” and consequently be regarded as economic and financial crimes which will in turn fall within the purview of the EFCC to investigate. So doing will make a pigmy of other legislations and render them sterile which was not the intention of the legislature necessitating the enactment of the EFCC Act. In the instant case, the Apex Court succinctly held *per* Abubakar JSC thus:

Again, if the definition of corrupt malpractices is not properly defined and demarcated, the EFCC will assume some supernatural strength as to render it all in all, thereby dwarfing other similar agencies vested with the powers to investigate and prosecute criminal offences, and bring the EFCC assume the corresponding powers of the Chief Law Officer of the Country. Such open-ended powers, if not defined, will escalate the status of the agency to that of ruthless, ungovernable monster. I am sure this is not the intention of the legislature necessitating the establishment of the EFCC and enactment of the Act...

4.0 Conclusion

It can be gleaned from the foregoing analysis of the opinions of some erudite scholars of law together with the decisions of the courts, especially the apex Court in the cases analysed such as the *EFCC v Chief Patrick Chidolue*, *Nwobike v FRN* and others, the apparent intrusion and overlapping of powers and functions of the EFCC with other anti-graft agencies in the investigation and prosecution of offences bordering on corruption generally that are outside the precinct of 'economic and financial crimes'. This has ignited the concerns of some legal luminaries including the former President of the Nigerian Bar Association, Dr. Olisa Agbakoba SAN, to advocate for a judicial interpretation and declaration as to the exact scope of the powers and authority of the Economic and Financial Crime Commission (EFCC) in relation to the States of the Federation. Thus, the decision of the apex Court in *Nwobike v FRN* is apt and apposite. Thus, it is particularly apposite that, in undertaking the investigation, initiating and conducting of prosecution, the Economic and Financial Crime Commission (EFCC) not to exceed the limits set to its powers and authority. It also incumbent on the legislature and the drafters of the EFCC Act in particular, to do the needful by rephrasing by way of amendment or excising completely the clause '...and any form of corrupt malpractice' as contained in section 46 of the EFCC Act, 2004 which appears to have been ambiguously worded and a conundrum of some sort, and has, thus, triggered a groundswell of public outrage against the perceived excesses of the Commission in relation to its scope of powers and authority.