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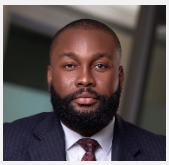
Key contacts

Adewale Atake, SAN
Partner and Head,
Dispute Resolution
wale.atake@templars-law.com



Oluyemi Adebo
Senior Associate,
Dispute Resolution
oluyemi.adebo@templars-law.com

Adedayo Adegbola
Associate,
Dispute Resolution
adedayo.adegbola@templars-law.com

TEMPLARS ThoughtLab

The Supreme Court's recent decision on the AG's Consent in Garnishee Proceedings: *Twilight of the Judgment Creditor's Albatross?*

Introduction

The dream of every successful litigant is that the substance of the judgment delivered in their favour, be brought to fruition. More often than not, this dream may not come to realisation until the judgment creditor goes through the pain of judgment enforcement proceedings.[1] When it comes to enforcement of money judgments, garnishee proceedings is arguably the predominant judgment enforcement mechanism in Nigeria.

Although judgment enforcement proceedings are generally not expected to be as protracted as the substantive proceedings giving rise to the judgment in question, from experience, the enforcement of money judgments through garnishee proceedings in Nigeria almost always culminates in fiercely contested and protracted litigation. More specifically, in garnishee proceedings pertaining to funds in the custody of public officers, a judgment creditor must face the herculean task of obtaining the consent of the Attorney General of the Federation or the Attorney General of a sub-national (as the case may be), before such funds can be attached in

[1] Aare Afe Babalola, SAN, Enforcement of Judgments (1st Edition, Intec Printers Limited, 2003) 1

fulfilment of the judgment debt.[2] Many have even termed this phase of judgment enforcement as nearly insurmountable, particularly in view of the practical challenges arising from securing the consent of the Attorney General (the "**AG"**).

Given the crucial nature of this issue, since the year 1979, it has formed the subject of several conflicting and sometimes, nuanced pronouncements by different courts of superior record, thereby compounding the prevalent uncertainty as to the position of the law. In the very recent case of ***Central Bank of Nigeria v Inagua Frankline Ochife & 3 Other (2025) LPELR-80220 (SC)***, the Supreme Court was again, invited to decide this vexed issue bordering on the workings and effect of section 84 of the *Sheriffs and Civil Process Act, CAP S6, LFN 2004* (''**SCPA**'') – a provision which provides for the consent of the AG before funds in custody of a public officer can be attached.

This article analyses the referenced judgment of the Supreme Court, which was delivered on 24 January 2025, with specific focus on the Apex Court's pronouncements on the requirement for the AG's consent. The article examines section 84 of the SCPA through the prism of individuals and businesses seeking to attach funds in custody of public officers, in satisfaction of judgment debts. It also considers the perceived unenforceability of money judgments in respect of funds in custody of public officers and ultimately, the potential demarketing of commercial litigation as a viable option for debt recovery when the judgment debt is *custodia legis*.

FACTS LEADING TO THE APPEAL BEFORE THE SUPREME COURT

In 2018, the Judgment Creditor commenced an action against the Inspector General of Police; the Commissioner of Police, Federal Capital Territory; and the Officer in Charge, Intelligence Response Team, Special Anti-Robbery Squad (SARS), Nigerian Police Force (the ''Judgment Debtors'') at the Federal High Court (FHC) sitting in Abuja and was awarded damages in the sum of ₦50,000,000 (Fifty Million Naira) in a judgment delivered by the FHC on 10 October 2018.

By a Motion *ex parte* filed on 14 November 2018, the Judgment Creditor commenced garnishee proceedings before the FHC, for enforcement of the judgment delivered in his favour. In the said garnishee proceedings, the Judgment Creditor sought to attach sums standing to the credit of the Judgment Debtors in accounts which they allegedly maintained with the Central Bank of Nigeria (the "**Garnishee"/ "CBN"**). In the Affidavit in support of his Motion *ex parte*, the judgment creditor barely stated that the Judgment Debtors maintained accounts with the CBN by virtue of the Treasury Single Accounts (**TSA**) policy of the Federal Government of Nigeria ("**FGN"**). The Judgment Creditor, however, failed to mention and/or identify the specific details of the Judgment Debtors' accounts with the CBN.

On 10 December 2018, the FHC granted a garnishee order *nisi* in favour of the Judgment Creditor. For context, when an order *nisi* is granted under Nigerian law, the court sets a timeline or return date to allow any party affected by such order to make objections to the court before the order in question is made absolute (i.e., final), or takes effect.

Thus, in its order *nisi*, the FHC directed the CBN to pay ₦50 Million from the funds held on behalf of the Judgment Debtors into the account of the Registrar of the FHC or, show cause why the order *nisi* should not be made absolute. In response to the order *nisi*, the CBN filed an Affidavit to show

[2] Section 84 of the Sheriffs and Civil Process Act, Cap S6, Laws of the Federation of Nigeria, 2004

cause, barely asserting that the Judgment Debtors do not maintain any account with the CBN and as such, the CBN would not be able to pay the judgment sum into the account of the Registrar of the FHC.

On the return date of 11 January 2019, the CBN was absent in court and was not represented by Counsel. Counsel to the Judgment Creditor then urged the court to disregard the Affidavit of the CBN to show cause because it was filed out of time and did not oppose the material facts of the Judgement Creditor's affidavit in support of the motion *ex parte* with specificity. In its judgment delivered on 21 January 2019, the FHC affirmed the Judgment Creditor's argument and made the order absolute.

Dissatisfied with the judgment of the FHC, the CBN appealed to the Court of Appeal ("**COA**"), seeking the COA's determination of a number of questions. Notably, one of the key questions raised before the COA was whether the FHC had the jurisdiction to hear the garnishee proceedings in the first place, when the Judgment Debtor had failed to obtain the consent of the AG prior to commencing proceedings.

In its decision, the COA held, *inter alia,* that where a judgment debtor does not contest the judgment on appeal, a garnishee cannot raise issues in the enforcement proceedings with a view to challenging the enforcement procedure adopted by the judgment creditor. According to the COA, in such circumstance, "*it is not the business of the garnishee to plead that the court lacks jurisdiction because the fiat of the AG was not obtained*". On the aggregate, the COA dismissed the appeal and affirmed the decision of the FHC granting the order absolute.

CBN's appeal to the Supreme Court

The CBN was dissatisfied with the judgment of the COA and consequently appealed to the Supreme Court, raising a number of questions for determination by the Supreme Court. **Of particular relevance to this article is the question bordering on the competence of the garnishee proceedings before the FHC in view of the Judgment Creditor's failure to obtain the consent of the AG, pursuant to section 84 of the SCPA**. For proper analysis of this aspect of the judgment, we have considered separately, the lead judgment of the Supreme Court and the '*dissenting judgment*' of Honourable Justice H.M. Ogunwumiju, J.S.C. as it relates to the issue at hand.

SUMMARY OF THE LEAD JUDGMENT OF THE SUPREME COURT

Failure to seek consent of the AG is a matter of procedural jurisdiction and must be raised at the earliest opportunity, or it will be deemed waived.

In its lead judgment, the Supreme Court, *per* H.A. Abiru, J.S.C., noted that issues of jurisdiction may either be procedural or substantive in nature, with differing effects. The Court went on to clarify that the failure of a party to comply with a condition precedent before embarking on a court action is a matter of procedural jurisdiction and that such must be raised at the earliest opportunity (before

taking any further step in the matter). Conversely, an issue as to the substantive jurisdiction of the court is foundational and can be raised at any time (even on appeal).[3]

Situating this position with the facts of the case, his Lordship, Abiru, J.S.C. held that the failure of the Judgment Creditor to obtain the consent of the AG was a procedural matter, and as such, the failure of the CBN to raise the said objection before the FHC meant that it had no right to subsequently raise the issue on appeal, for the first time. Based on this reasoning, the Apex Court held that the COA lacked the substantive jurisdiction to hear or determine the CBN's questions, or issues bordering on the subject of the AG's consent, given that they were never raised before the FHC and did not form part of the judgment of the FHC.

As can be gleaned from the above, although the Supreme Court was presented with another ample opportunity to reconsider the lingering issues surrounding the operation of section 84 of the SCPA, the lead judgment of the apex court approached the issue from a procedural viewpoint, as against a decisive pronouncement on the substance of the issue. To this end, we will now proceed to analyse the dissenting judgment of Honourable Justice H.M. Ogunwumiju, J.S.C., which touches on critical issues arising from the tenor and the implementation of section 84 of the SCPA.

For completeness, we should mention that on the aggregate, the Supreme Court found that the Judgment Creditor failed to discharge the burden on him to prove that the CBN indeed held funds belonging to the Judgment Debtors. The Court accordingly allowed the CBN's appeal and dismissed the garnishee order absolute.

THE DISSENTING JUDGMENT AND *OBITER DICTA* OF HONOURABLE JUSTICE H.M. OGUNWUMIJU, J.S.C.

Failure to obtain consent of the AG touches on substantive jurisdiction of the Court

Justice H.M. Ogunwumiju, J.S.C held a dissenting view as to the nature and timeline for raising an objection bordering on the failure of the judgment creditor to obtain consent of the AG. In his Lordship's view, the SCPA is a substantive law and the attendant procedural law for it is the Judgment Enforcement Rules. In his Lordship's view, since the requirement for the AG's consent is contained in the SCPA (a substantive law), it is a matter of substantive jurisdiction. His Lordship clarified that failure to adhere to a step in substantive law before initiating an action affects the substantive jurisdiction of a court, which cannot be waived and can therefore be raised at any time.

Requirement for consent of the AG under section 84 of the SCPA is unconstitutional

Justice Ogunwumiju J.S.C. then embarked on a history-tracing journey into the origin of the rule stipulating consent of the AG and its continued relevance in Nigerian jurisprudence. His Lordship mentioned that what is now known as section 84 of the SCPA was previously contained in section 251 (4) of the 1979 Constitution and same was deleted prior to the enactment of the 1999 Constitution, largely because it was considered a vestige of the military era.

[3] Julius Berger Nigeria Plc. v Almighty Projects Innovative Limited (2022) 11 NWLR (Pt. 1804) 201 at 257-258; Katsina Local Government v Makudawa (1971) 7 NSCC 119; Mobil Producing Nigeria Unlimited v LASEPA (2002) 18 NWLR (Pt.798) 1.

Justice Ogunwumiju J.S.C. observed and in our view, rightly too, that section 287 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) requires that all decisions of Nigerian courts shall be enforced in any part of the Federation by all authorities and persons. Accordingly, his Lordship held that the act of subjecting the enforcement of the final judgment of a Nigerian court to the requirement of further consent by the AG is a departure from section 287 of the Constitution which mandates the enforcement of decisions of courts across the federation by all persons and authorities (which includes the AG).

Separately, reference was made to section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which vests judicial powers in the federation in courts and guarantees the right of access to court for the determination of rights and liabilities. In this respect, his Lordship clarified that while there are certain laws which prescribe conditions precedent for filing actions or accessing courts, such laws (unlike section 84 of the SCPA) do not constitute a bar on right of access to court because they merely prescribe procedures or administrative steps to be followed. Importantly, once such formalities are carried out, the aggrieved party is free to file an action. An example of such laws are those requiring service of pre-action notices prior to bringing claims against public institutions. **However, in the view of his Lordship, unlike such other laws (where fulfilment of conditions precedent is always within the exclusive control of a litigant), section 84 of the SCPA transcends carrying out a formality**. **Rather, it imposes a requirement for the AG to, in his discretion, decide whether or not to consent to the enforcement of a valid judgment**.

Against this backdrop, his Lordship held that provision of section 84 of the SCPA constitutes an affront on the constitutional right of access to court, seeing as the AG needs to consent to the enforceability of a judgment. Furthermore, given the foundational precepts of Separation of Powers, granting the AG the discretion to consent to the enforcement of a court judgment was tantamount to subjecting the decisions of the judiciary to executive consent and approval. **On the aggregate, his Lordship pronounced that section 84 of the SCPA is in conflict with the Constitution and accordingly struck it down.**

OUR VIEW

Is the issue of AG's consent substantive or procedural?

While there may be reasonable justifications to support both the lead and dissenting judgments on this issue, there are certain perspectives which tend to tilt towards the position of Justice H.A. Abiru, J.S.C. in the lead judgment. In the landmark case of *Mobil Prod. (Nig.) Unlimited v LASEPA,*[4] the Supreme Court had held that although the distinction between substance and procedure is blurred, it is generally accepted that provisions which define the rights and obligations of the parties in controversy are matters of substance, whereas provisions which are mere vehicles which assist the court or tribunal in going into matters in controversy are matters of procedure.

[4] (2002) 18 NWLR (Pt. 798) 1

Juxtaposing the above pronouncement with the instant case, it is arguable that although section 84 of the SCPA is a provision contained in a substantive law, its purpose is to provide procedural guidance on the manner of enforcing a judgment debt against the government or any of its agencies. Thus, while procedural laws almost always contain procedural rules, a substantive law (just like the SCPA in the instant case) may indeed make procedural provisions. For example, the Supreme Court has declared certain provisions of the Constitution (the *grund norm* and the enabling substantive law in Nigeria) which prescribe timelines for carrying out certain acts to be matters of procedure.[5] Other examples are the provisions of the Companies and Allied Matters Act, 2020 (CAMA) which border on the mode of enforcements of certain rights.[6]

Does section 84 of the SCPA conflict with constitutional provisions?

Although the underlying philosophy behind section 84 of the SCPA is said to be the need to ensure sound public administration, protect public funds and avoid embarrassment to the government, it would seem that such issues are matters of administrative convenience for the executive arm of government, and ought not to take precedence over constitutional provisions and the doctrine of separation of powers. Importantly, considering that many litigants are unable to enforce judicial pronouncement in respect of monies in the custody of public officers unless they obtain the consent of the AG (another public officer), it would seem that the profound reasoning of Honourable Justice H.M. Ogunwumiju that section 84 of the SCPA is in conflict with the sections 6 and 287 of the Constitution, is compelling.

Is the consent of the AG still required to attach funds In the custody of public officers?

As a prefatory point, the constitutionality of section 84 of the SCPA was not an issue addressed in the lead judgment of the court, and as such, the pronouncements of Justice H.M. Ogunwumiju on the issue qualify as *obiter dicta* (statements made in passing).[7] Although the *obiter dicta* of learned Justices of the Supreme Court constitute illuminating guide which, by the weight of their views, all Courts below should accord utmost respect,[8] they are not binding precedents.

Accordingly, until Honourable Justice Ogunwumiju's *obiter dictum* constitutes the reasoning of the Supreme Court in a lead judgment or the section 84 of the SCPA is amended or deleted, consent of the AG, regrettably remains a condition precedent for attaching funds in custody of public officers, although as a matter of procedural jurisdiction.

[5] Toyin Obayemi v PDP (2019) 9 NWLR (Pt. 1676) 50
[6] Sections 346 and 353 of CAMA
[7] APC & Ors. v Anambra State INEC & Ors. (2022) LPELR-57828 (SC)
[8] Buhari & Ors. v Obasanjo (2003) LPELR-813 (SC); and Chevron (Nig) Ltd v AG Delta State & Anor. (2018) LPELR- 44837(CA)

Conclusion

"one must rue the day and shudder at the spectre of a monetary judgment of the Supreme Court of Nigeria being subject to the supervision of the AG or AGF pursuant to section 84 of the SCPA… in the comity of nations, it is more embarrassing for the judiciary of Nigeria to be seen as a toothless bulldog whose judgment can be ignored at the will of the executive. It is equally very embarrassing that a foreign judgment creditor would be told that after going through the judicial process to get his right, he has to go back to the executive to enforce it." ***– per Ogunwumiju, J.S.C.***

As earlier remarked, the underlying philosophy behind section 84 of the SCPA may seem valid. However, the wording and import of the section have deep constitutional implications. Presently, in Nigeria, once a judgment is delivered against a public institution, the much-dreaded albatross (the seldom granted consent of the AG) surfaces, and creates an almost insurmountable barrier. From the viewpoint of foreign investors who seek to attach funds in custody of Nigerian public officers, it would seem that the protection afforded to public authorities almost operates to stifle commercial interests. In our humble view, this may potentially affect foreign investment and portray judicial pronouncements on money judgments in Nigeria as difficult to enforce.

Worse still, it appears that the frustration many judgment creditors experience and the skepticism with which potential investors view the legal system may continue until a time when section 84 of the SCPA is deleted or amended to conform with international best practices. Pending such legislative reform, there may be a need for judicial intervention through affirmation of the sagacious pronouncements of Ogunwumiju, J.S.C. by the Supreme Court (as a majority decision).

Alternatively, a balanced approach would be for the courts to declare that **notice to the AG** will suffice for a judgment creditor to commence garnishee proceedings in respect of funds in custody of a public officer.[9]

Until such a time, judgment creditors and foreign investors who seek to attach monies in custody of public officials may have to devise other legally permissible means to achieve their goals. For instance, it has often been suggested that an available recourse for a judgment creditor where the AG has not given consent is to apply for an order of *mandamus* (known in England and Wales as a mandatory order) compelling the AG to give consent. In our opinion, however, this is not a silver bullet. This is because by law, an order of mandamus only compels a public officer to act one way or the other but cannot compel such public officer to exercise his discretion in any particular way.

In the circumstance, a more effective approach may be for foreign entities to seek enforcement of judgments against the assets of the government and its agencies in foreign jurisdictions. Although such decision certainly comes with additional costs such as fees for engagement of asset tracing companies, amongst others, it is a clearer path to reaping the benefits of judgments.

[9] In a number of previously decided cases, the courts have refused this argument. See – CBN v Ezeobika & Ors. (2021) LPELR-54148 (CA)