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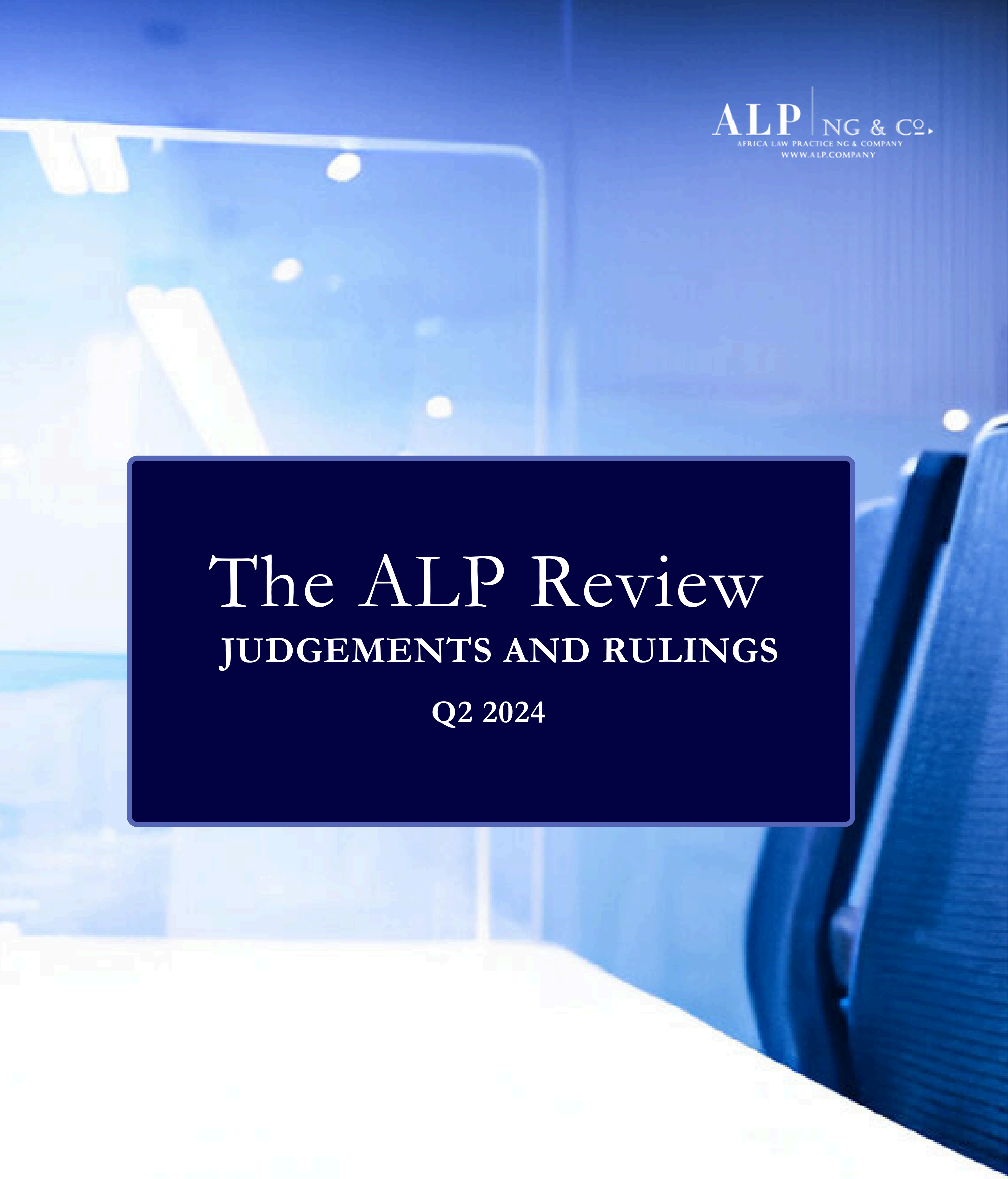

The ALP Review

JUDGEMENTS AND RULINGS

Q2 2024

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(1) Suit No: CA/LAG/CV/568/2020- Union Bank of Nigeria Plc v. Nuraff Bureau De Change & Anor (delivered on 2 May 2024)

- A party being aware of a restriction of his account cannot claim damages for defamation on a dishonoured cheque.

Summary of Facts

The Economic and Financial Crimes Commission (EFCC) during its investigation on Nuraff Bureau De Change (the 1st Respondent) wrote a letter to Union Bank of Nigeria Plc (Appellant) to place a Post No Debit (PND) restriction on the 1st Respondent's account with the Appellant. Subsequently, the 1st Respondent issued cheques to three of its customers which were dishonoured by the Appellant on the ground that the 1st Respondent's account was being restricted from making any withdrawals from his account. Following this, the 1st Respondent and its Managing Director in the person of Mr. Nuradeen Abdullahi (the 2nd Respondent) via a writ of summons instituted an action against the Appellant wherein they sought amongst other reliefs, a declaration that the Appellant's wrongful refusal to grant them access to operate their account was illegal and unconstitutional. The Respondents sought to ensure the continuation of their banking operations and to restrain the Appellant from further interference. In response, the Appellant filed a Statement of Defence and a Counterclaim to the Respondent's action.

Upon conclusion of the trial, the High Court of Lagos state (trial court) ruled in favour of the Respondents, and granted their reliefs to wit – reinstating access to their bank accounts and restraining the Appellants from further interference, while the counterclaim of the Appellant was dismissed.

The Appellant dissatisfied with the trial court's decision, appealed at the Court of Appeal.

Notable Issue for Determination

One of the issues among several issues considered for determination was: *Whether a party who is aware of restriction on his account can claim damages for defamation in relation to a dishonoured cheque?*

Arguments

The learned counsel for the Appellant argued that the Respondents issued cheques knowing fully well that they would not be honoured (in view of the restriction) with the intention of initiating litigation. They argued that because of this, and under the law, documents in anticipation of litigation are inadmissible and should be expunged from the records. Counsel further argued that the damage to reputation that the Respondents are claiming to have suffered is of no basis as the Respondents were aware of the restriction on its account and went ahead to issue the cheques, thus evidencing the non-existence of the reputation in question. In submission, the learned counsel prayed the court to grant the appeal and set aside the judgment of the trial court.

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In response, the learned counsel for the Respondents contended that the Appellant cannot use an obiter dictum given by the trial court as a basis for their appeal. He argued further that the Appellants have failed to provide justification for withholding access to the Respondents' account, hence justifying their liability.

In conclusion, counsel submitted that the Appellant's action has led to their reputational damage as a result of which they were entitled to the reliefs which the trial court granted. They prayed the court to grant the Respondent's reliefs by upholding the judgment of the trial court and in turn award damages against the Appellant.

Decision of the Court

In resolving the appeal, the Court of Appeal held that:

The Respondents being aware of the restriction placed on their account prior to issuing the cheque cannot institute a defamatory action against the Appellant. Thus, the award of damages cannot be sustained against the Appellant as the Respondents knew that the cheques issued to their customers would not be honoured. As such, the Respondents cannot in good conscience claim any injury to their reputation, as they had prior knowledge of the restriction on their account and went ahead to issue the cheques thus disproving their claim of having suffered damage to their reputation. On this note, the court resolved the appeal in favour of the Appellant.

Comments

This reiterates the maxim "ex turpi causa non oritur actio (he who comes to equity must come with clean hands)". The court in several decisions have held that the reputation of a person is lowered when there is a reputation in the first place. A person is said to have a reputation when he has character and deals fairly with people. This means that a person is not entitled to claim damages where he knows that he has dealt in an inequitable manner. In the instant case, the Respondents sought to benefit from their own wrong by knowingly issuing cheques with the awareness that there exists a restriction on its account

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(2) CA/L/1313/2016- Kandelite Engineering Co. Ltd v. FIRS (delivered on 17 July 2023)- *A company incurs liability when it fails to remit the Value Added Tax of its customers*

Summary of Facts

The Federal Internal Revenue Service (Respondent) conducted an audit on Kandelite Engineering Limited (Appellant) in respect of the filing of its tax returns. Upon the conclusion of the audit, the Respondent found the Appellant liable for failure to file tax returns for a certain period of years.

This allegation was refuted by the Appellant on the ground that it had fulfilled its obligation of issuing invoices in respect of Value Added Tax (VAT) to its customers. The Tax Appeal Tribunal (Tribunal) in its decision, ordered the Appellant to pay to the Respondent a withholding Tax of N3,641,462.00 (Three Million, Six Hundred and Forty-One Thousand, Four Hundred and Sixty-Two Naira Only) with the outstanding Value

Added Tax of N4,327,012.00 (Four Million, Three Hundred and Twenty-Seven Thousand, Twelve Naira Only) for 2004, penalties for late filing of Company Income Tax, Education Tax returns of N1,175,000.00 (One Million, One Hundred and Seventy-Five Thousand Naira Only), and the VAT and Penalties for late returns, totalling ₦21,105,875.31 (Twenty-One Million, One Hundred and five Thousand, Eight Hundred and Seventy-Five Naira, Thirty-One Kobo). The Appellant was aggrieved by the decision of the Tribunal and appealed to the Federal High Court, sitting as an appellate court. The Federal High Court upheld the decision of the Tribunal that the Appellant was liable for its failure to file tax returns.

Further dissatisfied with the decision of the Federal High Court, the Appellant appealed to the Court of Appeal.

Notable Issue for Determination

One of the issues considered for determination was: *Whether the Appellant was liable for the non-remittance of Value Added Tax by its customers of the Appellant, considering the fact that invoices were issued but the customers wilfully refused to pay the VAT despite being informed that same was issued for payment for and on behalf of the Respondent.*

Arguments

The learned counsel for the Appellant argued that it was not liable for not remitting the VAT of its customers as held by the Respondent. This was because it had included the amount payable as VAT in the invoices sent to its customers, and the customers failed to pay the VAT despite being informed by the Appellant that it was a mandatory requirement.

In response, the learned counsel to the Respondent argued that the Appellant was liable as decided by the Tribunal and the Federal High Court as the Respondent had failed to fulfil its obligation as stipulated by the Value Added Tax Act by failing to collect or ensure that its customers remitted VAT to the Respondent. He further argued that the Appellant had fallen short of its obligation under the law which is to ensure the collection and remittance of the VAT on behalf of the Respondent, and not the mere issuance of invoice to its customers and disregarding the mandatory nature of VAT.

Decision of the Court

In resolving the appeal, the Court of Appeal held that:

Issuing invoices without more does not satisfy the test of a reasonable agent/collector as required by the Value Added Tax Act. The court further stated that the position of the law is that a company is obligated to not only issue VAT alongside the invoice for the provision of goods and services to its customers but to also ensure that the VAT is paid and remitted to the relevant tax agency which in this circumstance is the Respondent. Furthermore, the court held that by virtue of Section 8 of the Value Added Tax Act, 2004, the Appellant, upon its registration under the Act, becomes a "taxable person", for the purposes of collection, from 3rd parties/customers, and remittance of Value Added Tax so collected, to the Respondent-Tax Board, for the Federal Government of Nigeria. The court held that the reason given by the Respondent was not valid and obtainable under the law as the duty of the Appellant did not end at mere issuing of invoices in respect of VAT to its customers but ensuring that it is paid and remitting it to the Respondent. The court held the Appellant liable for failure to remit VAT to the Respondent.

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Comments

This decision reiterates the position of the law on a service provider's obligation to collect Value Added Tax from its customers for services rendered. This obligation does not end at issuing invoices but also ensuring that its customers pay it as the service provider bears the consequences for non-remittance of Value Added Tax. Section 34 of the VAT Act provides that a taxable person who fails to collect tax under this Act is liable to pay a penalty of 150% of the amount not collected, plus 5% interest above the Central Bank of Nigeria's rediscount rate. Currently the VAT rate is 7.5% and is due on or before the 21st day of the month following the month of the transaction.

(3) Suit No ABJ/CS/1480/2023: IHS Nigeria Limited and INT Towers Limited v. Nigerian Midstream and Downstream Petroleum Regulatory Authority ("NMDPRA") - *Companies holding a petroleum product import permit for importation of petroleum product in wholesale & for operational use must remit levies to the Authority Fund and Midstream and Downstream Gas Infrastructure Fund (MDGIF) & Nigerian Midstream and Downstream Petroleum Regulatory Authority ("NMDPRA").*

Summary of Facts

At the Federal High Court (trial court), the Court affirmed the powers of the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA) (Defendant) to impose and collect levies on petroleum products and natural gas sold in Nigeria and confirm the duty to pay the 0.5% authority fund and levy on holders of the petroleum product import permit issued by NMDPRA.

IHS Nigeria Limited and INT Towers Limited ("IHS and INT", which are the Plaintiffs), are affiliate companies engaged in the provision of telecommunications & infrastructure services. The Plaintiffs' primary source of energy is Automotive Gas Oil (AGO) which is used for the running of their extensive Base Transceiver Stations (BTS) and other site locations across Nigeria. The Plaintiffs subsequently obtained Petroleum Products Import Permits from the Defendant, due to the substantial amount of AGO needed to power this station because the nature of their business is such that requires a 100% power supply consistency. Further to these permit and storage licenses obtained from the Defendant, IHS contracted a Throughput and Service Agreement with Chisco Limited for the exclusive use of its tank farm in Apapa, Lagos while INT operated its storage tank facility in Delta State. The Defendant in June 2023 issued a notice via email to the Plaintiffs informing them that loading programmes submitted to them, among other requisite information, must include ex-depot price. The Plaintiffs however submitted their loading programme without the ex-depot price due to the fact that they utilise AGO for their operational activities and do not resell it. On this basis, the Defendant did not approve the Plaintiffs' loading programmes.

The Plaintiffs, in a bid to resolve the issue, met with the Defendant several times individually and through their umbrella body, the Association of Licensed Telecoms Operators of Nigeria (ALTON) however, the issue was not resolved. Subsequently, the Plaintiffs instituted an action before the trial court on the ground that they do not trade or

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sell the imported AGO and as such, cannot have an ex-depot price, therefore, their use of AGO to fulfil their operational needs does not fall within the definition of "petroleum products sold in Nigeria" under the Petroleum Industry Act, ("PIA") therefore, they cannot be made to pay both the Authority Fund and Midstream and Downstream Gas Infrastructure Fund (MIDGIF) levies. The Defendants on the contrary insisted that the Plaintiffs are obligated to pay the Authority Fund and MIDGIF levies.

Notable Issue for Determination

In this case, among the several issues raised, one of the issues considered for determination was : *Whether IHS and INT as importers with the express permit of the NMDPRA and who are not licensees engaging in bulk sale of petroleum products pursuant to the Petroleum Industry Act 2021, (PIA) are bound by the Operations Regulations, which seek to regulate holders of licenses under the PIA engaging in the sale of petroleum products, issued by the Defendant*

Arguments

Learned counsel for the Plaintiffs argued before the court that the Plaintiffs were not liable to pay the 0.5% levy for the NMDPRA's Authority Fund (the Authority Fund) and the Midstream and Downstream Gas Infrastructure Fund (MDGIF levies) respectively, because their products are not sold in Nigeria but rather used for their business operations and therefore does not fall within the category of petroleum products that are subject to the levies. Counsel further submitted that the two key regulations listed above overreached the provision of sections 47(2) and 57(7) of the PIA and amounted to a breach of their constitutional right to personal property, and to this end urged the court to declare null and void, the two key regulations for the implementation of the PIA – Midstream and Downstream Petroleum Operations ("MDPO") Regulations 2023 (which define the concept of 'sold in Nigeria') and the Petroleum (Transportation and Shipment) ("PTS") Regulations 2023 (which sets out the information the NMDPRA may demand from a permit holder).

In response, learned counsel for the Defendant argued that the Plaintiffs are obligated to pay the Authority fund and MDGIF levies, on the ground that the terms - "permits" and "licenses" are used interchangeably to imply that licensed importers of petroleum products qualify as wholesale petroleum liquids suppliers based on the PIA. Therefore, the Plaintiffs being wholesale petroleum liquids suppliers, are regarded as wholesale customers when they load products from each other or load these petroleum products that they have imported. They further asserted that a sale is considered to have transpired upon transfer of the imported petroleum products to a storage facility and the Plaintiffs being companies engaging in commercial transactions with third parties for petroleum products for a charge amongst other cost items, will be subject to these levies.

Decision of the Court

In resolving this issue, the Court held that:

The NMDPRA possesses broad authority under sections 125(3) and 174(3) of the PIA to enact regulations that govern the administration of midstream and downstream petroleum liquids operations and mandate additional activities contingent on holding a license or permit. There is no conflict or overreach in the definition of the term "sold in Nigeria" provided in Regulation 48 of the Midstream and Downstream Petroleum Operations Regulations 2023 (MDPOR) and Sections 47(2)(c) and 52(7)(a) of the Petroleum Industry Act, as the act itself does not explicitly define the term. The definition in the

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Operations Regulations, which the court interpreted to cover goods are sold Free on Board in Nigeria or territorial waters, where they are loaded or offloaded for sale within a wholesale point in Nigeria, or where the transaction, originates, occurs or is concluded in Nigeria, which serves to clarify and augment the provisions of the act regarding the Authority Fund and MDGIF levies. The court further held that the claimants were liable to the levy because upon obtaining the licenses and permits from the defendant and commencing business activities pursuant to these licenses, they are deemed to have implicitly consented to the terms and conditions of the licenses and permits. The court further affirmed the validity of the Midstream and Downstream Operations Regulations 2023 and the Petroleum (Transportation and Shipment) Regulations 2023 and the power of the Nigerian Midstream and Downstream Petroleum Regulatory Authority to impose and collect levies on petroleum products sold in Nigeria.

Comments

The decision of the court in this matter, if not appealed and upturned, greatly affects petroleum products import permit holders pursuant to the PIA who import petroleum products for consumption and use and the downstream oil and gas industry at large. The decision of the court in affirming the power of NMDPRA under the PIA to impose the levies and to enforce the criteria for issuing permits and licenses is laudable as it forecloses any further litigation on this subject matter. The decision in this matter should serve as a call for a more comprehensive definition for petroleum products “sold in Nigeria” that are liable to pay these levies to cover wholesale importers of petroleum products for operational use under the PIA.

The decision of the court also points out the different types of licenses and their implications, the court held that the license issued to the Plaintiffs are depot licenses and not storage licenses, in consideration of this the claimants are licensed to sell these petroleum products and not to store them. It is by reason of this type of license that the claimants will be liable to pay the levies. It is therefore important for operators to understand the conditions attached to the different types of licenses issued by the NMDPRA so as to obtain the most appropriate type for their businesses.

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(4) Case Name: Suit No: LCN/2158(CA)/2006 Dike Geo Motors Limited & anor v. Allied Signal INC & Anor. - *The subsequent registration of a competing trademark registration under a different trademark class does not foreclose the right to sue for trademark infringement*

Summary of Facts

Allied Signal INC and Allied Signal Aftermarket Euro (The 1st and 2nd Respondents), who were the Plaintiffs at the Federal High Court (trial court) are foreign companies who had been marketing in Nigeria for several years. The Respondents are group companies and owners of the trademarks; “Allied and device”, "Bendix and device", "DBA with parallel lines design" and "e5". Their business objects include manufacturing and selling of brake and clutch fluids for motor vehicles, and they use a distinctive black, red, and white an design for their products. Sometime in 1992, the Respondents realised that Dike Geo Motors Limited and Francis Umeh (the 1st and 2nd Appellants, which were the Defendants at the trial court), who are manufacturers, importers and sellers of brake and clutch fluid had started using the Respondents’ trademark “Allied” and the design of their brake and clutch fluid cans which were allegedly similar to their designs.

The Respondents in reaction to this, instituted an action on trademark infringement and passing off, at the trial court, against the 1st and 2nd Appellants. The Respondent’s claimed that the Appellants had infringed on its registered trademarks and passed off the design of its product packaging. The Appellants, in response to this, filed a preliminary objection, 3 months into the trial, challenging the jurisdiction of the court to hear the suit on the ground that the claims were frivolous, vexatious and the action was an abuse of court process and prayed the court to dismiss the suit. The trial court in ruling on the preliminary objection dismissed the application, assuming jurisdiction over the suit and held that the action did not constitute an abuse of court process.

The Appellants, being displeased with the decision of the trial court appealed to the court of appeal (lower court). The Lower court however upheld the decision of the trial court and dismissed the appeal.

In reaction to this, the Appellants further appealed to the Supreme Court.

Notable Issue for Determination

One of the issues considered for determination was: *Whether the successful registration of an existing trademark under a different class as the prior existing trademark forecloses the right to sue for trademark infringement and to make such suit an abuse of court process.*

Arguments

Learned counsel for the Appellant argued that the Appellants were not manufacturers but distributors of the said products, which they purchase from Dom Frank Nigeria Limited. It was further argued that the "Allied and Device" trademark was registered as a trademark under class 4 in favour of Dom Frank and that the Respondents had raised an objection to the registration of the trademark, yet the trademark was still registered. It was argued that the trademarks were registered under different classes, therefore there is no reasonable cause of action. It was further contended that the Respondents initiated and participated in the opposition proceedings that culminated in the registration of the trademark in the name of Dom Frank. They however failed to appeal against the decision of the Trademark Registrar after the Trademark was successfully registered.

It was argued that under Section 13(2) of the Trademark Act, it is permitted to use two identical registered trademarks independently and each party claims bona fide. In conclusion, the Appellant submitted that trademark registration is a complete defence to a trademark infringement action, therefore, the Respondents' action ought to abate in limine, and urged the court to uphold this argument. In response, the learned counsel for the Respondents argued that the registration of the trademark in question by the Respondents and Dom Frank under different classes makes the Respondent's claims viable. It was further argued that the opposition proceedings initiated against Dom Frank's application to register the trademark in question was validly terminated under suspicious circumstances

On the failure of the Respondent to appeal the Trademark Registrar's decision to register the trademark in favour on Dom Frank as provided under Section 13 (2) of the Trademark Act, it was argued that proceedings brought before the Registrar of Trademarks does not stop any action from being brought before the trial court, and this section only gives the court the discretion to stay proceedings in an infringement action where a person attempts to register an existing trademark. Furthermore, it was submitted that the claim for passing off remains viable and to be decided by the Court below as the registration of a trademark does not give the right to use it to deceive the general public. Learned Respondents' Counsel substantially argued that the registration of a trademark is not a complete defence to an action for trademark infringement, therefore there is no abuse of court process in the suit instituted, particularly if the registered trademark was capable of deceiving or where it was deployed in aid of passing off.

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Decision of the Court

In resolving this issue, the Supreme Court held that having a valid defence to a claim does not make the action frivolous, vexatious and an abuse of court process. The attempt by the Appellant to rely on Section 13 of the Trademark Act, which provides for honest concurrent use of conflicting trademarks as a defence to trademark infringement, would fail because such assertion must be cogent, honest and proved. Therefore, in the court's view, using that provision as a basis to assert abuse of court process is misconceived and premature. The argument between the parties regarding the trademark class that the product in question falls into is a fact in issue which must be decided at the trial court to determine whether there has been a trademark infringement. The powers of the Registrar of Trademark under the Trademark Act do not foreclose any right to redress in the courts. Aggrieved parties have a right to seek legal recourse for any alleged wrong decision either by way of an appeal under Section 56 of the Trademark Act, Rectification Proceedings under Section 38 Trademark Act or by way of an action for trademark Infringement as the Respondent did in this case.

The implication of this is that the Respondent's action before the Federal High Court would survive the adverse decision of the Trademark Registrar conferring the Trademark in dispute on Dom Frank, therefore the Appellants' argument that the action ought to abate in *limine* upon the Dom Frank trademark registration fails. In light of the above, the Supreme Court dismissed the appeal for lack of merit and ruled that the case be sent back to the Federal High Court for the substantive suit to be expeditiously dealt with.

Comments

The decision of the Supreme Court in this case is highly commendable. It interpreted certain provisions of the Trademark Act and affirmed the rights and powers of the Registrar of Trademarks to determine priority on similar trademarks, reject an opposition to a trademark registration and rectify the trademark register. In affirming the powers of the Registrar, the court further reiterated that these powers do not eliminate the rights of parties to institute actions and bring claims on trademark infringement in court. The Supreme Court recognized and affirmed the right of a party whose trademark (whether registered or unregistered) has been infringed upon, to seek redress in court through an action for passing off or trademark infringement or to apply for rectification of the Trademark Registrar. Conclusively, an important principle established in this case that impacts the jurisprudence of trademarks in Nigeria is that trademark registration is a not a complete defence to a trademark infringement action and having a valid defence to a claim does not in itself make an action for trademark infringement frivolous, vexatious or an abuse of court process.

(5) SUIT NO: CA/C/232/2013 - FIDELITY BANK PLC v. MRS OKON PETER AND 2 ORS (Delivered on 5 January 2024) - *A Bank's Liability Extends to the Actions and Inactions of its Employees during the Course of Employment.*

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Summary of Fact

Mrs Okon Peter (the Respondent) sought to open a fixed deposit account with Fidelity Bank Plc (the Appellant). In the process, the Respondent was engaged by the branch manager of the Appellant, Mr Inyang Emmah (2nd Defendant) who assisted with her application to fix at first instance the sum of N100,000.00, at the second instance N150,000.00 and N600,000.00 out of the sum of N678,841.03 as a gratuity paid to her through a first bank cheque. The 2nd Defendant further assisted with the payment of her fixed deposits. The Respondent sought to obtain the fixed deposit certificates from the 2nd Defendant, however, the 2nd Defendant evaded the Respondent's requests. The Respondent further attempted to withdraw some money from the fixed deposits she had with the Appellant however, the Appellant refused to pay her, on the ground that the bank was not officially involved in the transactions with the 2nd Defendant. Consequently, the Respondent filed a complaint against the Appellant at the High Court of Akwa Ibom State. The Respondent sought several reliefs against the Appellant on the grounds that the Appellant was vicariously liable for the actions of the 2nd Defendant. The Appellant on this ground argued that the Respondent negotiated with Mr Emmah Inyang in his individual capacity and that the Appellant was not formally involved in the transaction. The Appellant also contended that the Respondent's claims are not the Appellant's responsibility. The Court in its judgement found in favour of the Respondent.

The Appellant dissatisfied, appealed the court's decision.

Notable Issue for Determination

One of the issues considered for determination was: *Whether the trial court was right in holding the Appellant liable for the actions of Mr. Inyang Emmah.*

Arguments

Arguing this issue, the Appellant's learned counsel submitted that Mr. Inyang Emmah acted outside the scope of his employment and engaged in criminal or fraudulent conduct for which the appellant should not be held responsible. Counsel argued that the transactions between the respondent and Mr. Inyang Emmah were private and personal and that all deposits were made across the counter with the cashiers and Mr. Emmah was not a cashier, neither was he authorized to receive fixed deposits. The Appellant's counsel argued further that the 2nd Respondent acted outside the scope of his employment and that the actions of the 2nd Respondent were not authorized by the Appellant but rather were private and personal dealings.

The Respondent's counsel on the other hand submitted that the trial court found that the Respondent satisfactorily proved her case to merit a judgement in her favour. He stated that the Respondent had presented convincing evidence of the origins and conditions of the transaction and that the Appellant, whose witness had admitted total ignorance of the facts of the case, had refuted or contested none of the evidence before the trial court.

Decision of the Court

In resolving the issues, the court held that:

It is not in dispute that at all material times, that Mr. Inyang Okon Emmah was the Branch Manager of the Appellant at its office at Abak Road, Uyo, Akwa Ibom State. The major contention of the Appellant is that Mr. Inyang Emmah acted outside the scope of his employment and that his dealings with the

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respondent were done in his personal and private capacity and the bank should not be liable. It is a cheap attempt to obscure the position and responsibilities of a branch manager (who is the head of the branch and to whom all branch workers report) to claim that the manager was not the cashier and was thus not permitted to accept fixed deposits from bank clients. In order to ensure that the branch's services to its clients are effective and efficient overall, the branch manager has the authority to provide instructions to any member of staff and even carry out some staff tasks. The court also stated that the Appellant also failed to inform the Court how a customer who dealt with the branch manager, the head and alter ego of the bank in a branch, committed a wrong for dealing directly with the highest authority in the branch.

Finally, the court held that the 1st Respondent having dealt with the 2nd Respondent who had the official capacity as an agent of the Appellant as branch manager and was legally empowered to act on behalf of the Appellant, there was no doubt that the Appellant is liable for the acts of its servant, Mr. Inyang Emmah, even if done wrongfully and fraudulently without authority. This is because the actions of Mr. Inyang Emmah were carried out in the course of his employment with the Appellant.

Comments

When an agent engages in dishonest and deceitful conduct as a result of his/her position, the principal will be held vicariously liable. A principal may also be held vicariously responsible for tortious or fraudulent conduct perpetrated by his servant while on the job. In other instances where a bank extends its personnel to a client, it is assumed that the bank has faith in their ability, morality, and character to manage the bank's affairs and their interactions with consumers.

(6) SUIT NO: CA/AK/355/2019 AKINMOSIN v. AKINMOSIN[1][2023] - *A spouse who has committed adultery can be entitled to the custody of the child of the marriage*

Summary of Facts

Mr Akinmosin (Appellant) who was married to Mrs Akinmosin (Respondent), had behaved in an intolerable manner by committing adultery, and treating her unfairly. As a result of this, the Respondent initiated an action before the High Court of Ondo State (a family court) by way of a Petition for the dissolution of their marriage as well as custody of the children of the marriage, on the ground that the marriage had broken down irretrievably and that the Appellant has behaved in such a way that the Respondent cannot be reasonably expected to live with the Appellant . The Appellant also filed an Answer to the Petition as well as a Cross-Petition, seeking for dissolution of the marriage and custody of the children of the marriage.

1 https://lawpavilion.com/blog/who-is-granted-custody-of-the-children-after-a-marriage-dissolution/

Upon conclusion, the family court found in favour of the Respondent, and granted a decree for the dissolution of the marriage and also granted the Respondent custody of the children of the marriage. The court also ordered the Appellant to pay a certain sum to the Respondent on a monthly basis for maintenance of the children.

Being dissatisfied with the decision of the family court, the Appellant appealed to the Court of Appeal.

Notable issue for Determination

One of the issues raised for determination was: *Whether the trial Court was right in awarding custody of all the children of the marriage to the Respondent*

Arguments

In arguing this issue, the Appellant's counsel submitted that from the evidence put forth before the court, it was in the interest of the children that custody should be awarded to him because he would be able to devote more time and attention to the children in comparison to the Respondent who spends her time in the banking hall and travels frequently for seminars and workshops. Counsel further argued that the Appellant being a businessman would be afforded enough time to take care of the children, especially the male child who would have the opportunity to be with the Appellant.

In response, the Respondent's counsel contended that the Respondent being a banker does not hinder her from catering for the needs of her children. The evidence further showed that the Respondent has been the one ensuring their school fees and any other necessary fees are paid while having her job at the bank. In essence, counsel to the Respondent argued that the basis of the appeal was frivolous and that the rightful place for the children is with the Respondent. The Respondent's counsel also noted that there has been no instance where the Appellant was denied access to the children.
The Court found in favour of the Respondent.

Decision of the Court

The Court held that the trite position of the law in respect of the custody of children where a marriage has totally broken down and where the children are of a tender age, it is presumed that the child will be happier with the mother and no order will be made against this presumption unless it is abundantly clear that the contrary is the situation. Therefore, the issue of custody of children and all orders made by the lower Court in that behalf is hereby sustained and accordingly resolved in favour of respondent.

Comments

The court in this case reiterated the presumption that in determining which parent should have custody, the court takes cognisance of the presumption that the children of the marriage will be afforded the due care and attention with the mother. However, it is important to note that the court recognised that this presumption can be rebutted. It has been established in several cases that parents of a marriage have an equal chance of obtaining custody of the children of the marriage however, to determine this, the court considers whether it is in the best interest of the child to grant custody to the mother of the father of the children (Williams v Williams [1987] 2 NWLR (Pt. 54) 66, p.74 para. G.).

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