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THE FEDERAL COMPETITION AND
CONSUMER PROTECTION ACT:
CURBING COUNTERFEITING AND
TRADEMARK INFRINGEMENT

Counterfeiting and trademark Infringement continue to pose serious challenges to innovation and industry, especially in the 21st century. Counterfeiting and trademark infringement consistently take new forms and shapes despite legislative measures, such as the extant Trademarks Act[1] and the Copyright Act[2], and the international treaties designed to combat their prevalence.

The dynamic nature of these challenges makes it imperative to have progressive and up to date laws and measures. In that spirit of advancement and innovation, 2019 saw the introduction of the Federal Competition and Consumer Protection Act (“the FCCPA”) which made wide-ranging provisions for the promotion of competition in the Nigerian markets and adopted mechanisms to combat adverse market practices such as counterfeiting and trademark infringement.

The FCCPA, which establishes the Federal Competition and Consumer Protection Commission (“the FCCPC”) and the Competition and Consumer Protection Tribunal (“the Tribunal”), seeks to protect manufacturers, proprietors and owners of trademarks against counterfeiting and infringement. The FCCPA expressly prohibits trading under false representations[3] such as the unauthorised use of another’s trademarks or the passing off of goods or services as those of another.

INNOVATIONS UNDER THE FCCPA – THE FCCPC

The FCCPA contains explicit provisions which empower the FCCPC to take a variety of actions which could aid protection against counterfeiting and trademark infringement. The FCCPC is empowered to seal up premises where there is reasonable suspicion that such premises contain, harbour or are being used to produce or disseminate goods or services that are fake or substandard.[4]

Further, the FCCPC may publish a list of goods and services which are not approved by Nigeria and any foreign government, or which are banned or restricted by the FCCPC for being fake or substandard.[5]

The FCCPA also contains succinct provisions on warrants, searches and seizure of items - which are pivotal instruments in combating counterfeiting and trademark infringement. Section 27(1) of the FCCPA provides that the FCCPC may, for the purpose of ascertaining whether any undertaking has engaged, is engaging or is likely to engage in conduct constituting or likely to constitute a contravention of the FCCPA, require an authorised officer[6] to:

- (a) enter and search any premises; and
- (b) inspect and remove from the premises any article, document or extract in the possession or under the control of any person.

[1] Cap T13, Laws of the Federation of Nigeria, 2004

[2] Cap C28, Laws of the Federation of Nigeria, 2004

[3] Section 125 of the FCCPA

[4] Section 18(1)(f) of the FCCPA

[5] Section 17(n) the FCCPA

[6] An authorised person is defined in the FCCPA as any person appointed as such by the FCCPC for the purposes of implementation of the provisions of the FCCPA;

The search and evidence-seizure order can be obtained following the grant of a warrant by a Justice of the Court of Appeal,[7] similar to the traditional Anton Piller order[8] which is an age-long component of Nigeria's jurisprudence. However, we note that the restriction of the power to grant the warrant to a Justice of the Court of Appeal is potentially counter-productive. This is because Justices of the Court of Appeal are known to have very busy dockets, and often adjourn matters by several months. One may therefore argue that it would be a challenge to get Justices of the Court of Appeal to give timely dates for the hearing of applications for the warrant as contemplated by the FCCPA.

Notably, however, the FCCPA makes provisions for the FCCPC to exercise a quasi-judicial function by empowering an authorised officer to search and seize pending the issuance of a warrant by a Justice to that effect. This power is exercisable where the Executive Vice Chairman of the FCCPC deposes to an affidavit verifying grounds stating the belief that a violation, civil or criminal, of the provisions of the FCCPA or regulations made thereunder, was, is being or will be committed.[9] This provision will potentially hasten the process of securing evidence for prosecution of counterfeiting and trademark infringement cases.

Outside the specific powers conferred on the FCCPC under the FCCPA, the FCCPC also has general powers to carry out investigations or inquiries,[10] and do such other things as it considers necessary for the effective performance of its functions under the FCCPA.[11]

INNOVATIONS UNDER THE FCCPA – THE TRIBUNAL

The Tribunal, which is empowered to primarily adjudicate over conducts prohibited under the FCCPA,[12] has jurisdiction throughout Nigeria.[13]

The Tribunal may impose administrative penalties for (a) a prohibited practice under the FCCPA; or (b) the contravention of, or failure to comply with, an interim order of the Tribunal.[14]

An order, ruling, award or judgment of the Tribunal is binding on the parties before the Tribunal and can be registered with the Federal High Court for enforcement. [15]

Appeals against an order, ruling, award or judgment of the Tribunal lie to the Court of Appeal,[16] implying concurrent jurisdiction between the Tribunal and the High Courts of the States and the Federal High Court in terms of hierarchy of courts in Nigeria.

CONCLUSION

Although the FCCPA is not without limitations, one of which is that it limits the power to grant warrants to the Justices of the Court of Appeal who are already considered too busy, the FCCPA is largely a positive step in combating adverse market practices, such as counterfeiting and trademark infringement, which has clear potential to be largely successful. Additionally, the implementation of its lofty provisions over the next few years may boost the Nigerian market by the increasing profitability of innovation and industry.

[7] Section 28(1) of the FCCPA [8] An Anton Piller order is a court order which gives the right to search premises and seize evidence, without prior warning, usually to prevent the destruction of relevant evidence in cases of alleged trademark, copyright or patent infringements. [9] Section 27(3) and (4) of the FCCPA [10] Section 17(e) of the FCCPA [11] Section 18(3)(h) of the FCCPA [12] Section 39(1) and (2) of the FCCPA [13] Section 39(3) of the FCCPA [14] Section 51(1) of the FCCPA [15] Section 54 of the FCCPA [16] Section 55 of the FCCPA

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