Technology Transfer Agreements
29th August 2019.

Uche Matthew[1] **Olukolade O. Ehinmosan**[2]

LEGAL IMPLICATION OF NON - REGISTRATION OF TECHNOLOGY TRANSFER AGREEMENTS UNDER THE NOTAP ACT:

CASE REVIEW OF *STANBIC IBTC V. FRCN & ANOR.*[3]

1. Introduction

The Nigerian Court of Appeal (Lagos Division) recently quashed the decision of the (trial) Federal High Court and held that the non-registration of a technology transfer agreement under the National Office for Technology Acquisition and Promotion (NOTAP) Act neither renders such agreement invalid nor unenforceable.

In reaching this decision, the Court beamed its searchlight on the literal interpretation of relevant sections of the NOTAP Act. The Court held that nothing in the Act portrays the intention of the lawmaker as meaning that the non-registration of a technology transfer agreement would render such agreement defective, invalid and unenforceable. The Court made this conclusion while softly deprecating the trial Court

[1] Associate, Corporate Finance & Capital Markets, SPA Ajibade & Co., Lagos, NIGERIA.
[2] Associate Intern, Corporate Finance & Capital Markets, SPA Ajibade & Co., Lagos, NIGERIA.
[3] (2018) LPELR-46507(CA).

for displaying 'purposeful judicial creativity' at the expense of giving literal effect to the clear and unambiguous words of the NOTAP Act.

2. Facts of the Case

Stanbic IBTC Bank (The Appellant) acquired banking software from outside Nigeria, enhanced it and then sold the software to its parent company in South Africa. Thereafter, the Appellant entered into a license agreement to use this software at a yearly fee. Stanbic also made yearly provisions and payments to its parent company without obtaining approval from NOTAP which is the official body responsible for registering all contracts or agreements for the transfer of foreign technology to Nigerian parties.

In 2015, the Financial Reporting Council of Nigeria (FRCN) carried out an investigation on the technology agreement for the software which was reported in Stanbic's audited accounts for 2013 and 2014. FRCN observed that Stanbic was yet to register a Technology Transfer Agreement with NOTAP and that such contract was therefore unenforceable and void. This implied that no provision should be made in a financial statement for any obligation under a Technology Transfer Agreement which has not been registered by NOTAP.

The Appellant took out an Originating Summons against the Financial Reporting Council of Nigeria (FRCN) and the National Office for Technology Acquisition and Promotion (NOTAP) seeking, *inter alia*, a declaration on the legal consequences of failure to register a registrable agreement under the NOTAP Act and under the FRCN Act, and certain other declaratory and injunctive reliefs.

The Court below (the Federal High Court) held that the non-registration of a registrable agreement under the NOTAP Act renders such agreement defective, invalid and unenforceable. The Appellant (then Plaintiff) dissatisfied with the trial Court decision consequently filed the instant appeal.

3. Relevant Legislations

The statutes considered by the Court of Appeal include the following:

3.1 The National Office for Technology Acquisition and Promotion Act (Cap. N10) LFN 2004;

3.2 The Financial Reporting Council (FRC) Act, No. 6, 2011.

4. Decision

The Respondents raised preliminary issues challenging the jurisdiction of the Court of Appeal by way of a Notice of Preliminary Objection. In a unanimous decision, the Court of Appeal discountenanced the preliminary objection and subsequently allowed the appeal. In determining the substantive appeal, the Court raised and answered some crucial questions and consequently held as follows:

4.1 On the definition of "Foreign Technology"

In determining the object of the NOTAP Act, the Court considered the purport of the phrase "Foreign Technology". According to the Court, the phrase was not expressly defined in the Act, but it undoubtedly means technology:

> ***"… which is not Nigerian, not indigenous to Nigeria, not of Nigerian origin, not invented by Nigerians in Nigeria, but technology invented outside the Nigerian State, invented in another country independent of Nigeria or of origin which is not Nigerian."***

By virtue of this therefore, Foreign Technology refers to any technology or invention which is not of Nigerian origin.

4.2 On the definition of "Imported Technology"

Again, the Court admitted that this phrase was not clearly defined in the NOTAP Act. However, the Court stated that the phrase "**does not mean anything else but technology brought into Nigeria from another country outside Nigeria; from a foreign country**".

5. On the object of the NOTAP Act

The Respondents had both respectively contended that the object of the NOTAP Act relates to the importation and exportation of foreign technology. The Appellant however, argued that the Act was enacted for the purpose of facilitating the importation of foreign technologies into Nigeria and not otherwise.

In disregarding the arguments of the Respondents and affirming those of the Appellant, the Court made copious references to the Title and Recital, as well as section 4(a-e) of the NOTAP Act relating to the establishment and functions of NOTAP. The Court held that the object of the NOTAP Act was the **importation** of foreign technology into Nigeria. In better detail, the Act plainly connects with or

relates to contracts entered into by parties for the transfer of foreign technology to Nigerian parties **in Nigeria**.[4]

6. On the purpose for which NOTAP was established

This issue is inextricably linked with the earlier elucidated issue on the object of the Act. A fortiori, it was raised and answered in between the lines of the first issue. According to the Court, the title, as well as the provisions of section 4 regarding the establishment and functions of NOTAP, when viewed holistically, leaves no doubt that NOTAP was established to:

> *Regulate and monitor the execution of contracts or agreements entered into by parties for the importation into Nigeria and acquisition of foreign technology in order to protect the best interests of Nigeria and Nigerians in the transfer from outside the country*.

7. On the effect of a failure to register an agreement that is registrable under the NOTAP Act

The Appellant cited section 4 (a) – (d) of the NOTAP Act and distilled four standpoints upon which it anchored its argument on the merits of this issue:

7.1 The NOTAP Act distinguished between payments made in local and in foreign currency by providing that section 4(a) (on NOTAP's functions) would only apply where payments for technology transfer or acquisition is made to a person outside Nigeria;

7.2 Furthermore, the payments in question must be in respect of contracts required to be registered under the Act – Technology importation or acquisition agreements;

7.3 More so, payments must be those required to be made by or on the authority of three (3) institutions – any licensed bank in Nigeria, the Central Bank of Nigeria (CBN) or the Federal Ministry of Finance;

7.4 In addition, the consequence of non-registration of an agreement for technology transfer is the prohibition of the making of payments to the foreign recipient rather than the abrogation of the underlying contractual obligations.

On their part, the Respondents argued that the procedure for technology transfer, including exportation, is well provided for in the NOTAP Act and that failure to comply

[4] Stanbic IBTC v. FRCN & Anor. (supra) pp. 53-54.

with the procedure is not only a criminal offence but would necessarily make the contract in question, a nullity.

The Court of Appeal resolved this issue in favour of the Appellant by giving literal interpretation to the provisions of section 7 and 8 of the NOTAP Act. According to the Court, a pure and plain interpretation of the NOTAP Act would reveal no statutory connection between section 7 and the validity, legality or non-registration of a registrable contract under the Act; the validity or legality of either, “any payments due under” or “a contract or agreement mentioned under section 4(d), was not within the contemplation or purview of the draftsman of the Act.”

8. Comments

With the unstoppable insurgence of digital technologies and globalization, the importance of technology transfer and acquisition to the performance of national economies cannot be underestimated. It is therefore no surprise that a law had been enacted as far back as 1979 in Nigeria for the monitoring of this crucial sector which, truth be told, has only a diminutive presence in Nigeria at the moment. In view of the modest degree of comparative advantage in the area of technology, laws that curtail the exploitation of Nigerians by foreigners/foreign interests as well as those that prevent the dumping of obsolete technologies on Nigeria are indispensable.

Meanwhile, the enactment of the NOTAP Act never promised to eliminate all possible problems incidental to cross-border technology transfer and acquisition. Indeed, the enactment of the Act was a statement of clear intent from the Government to ensure that it regulates the sector optimally. The same enactment has, however, occasioned a real conflict – the provisions of the Act appear to be an obstacle to its implementation in line with the mischief behind its enactment. This conflict is so economically important that it is capable of quashing any little prospect of foreign investment in technology.

Here, the Court of Appeal was faced again with the question of the legal implication of non-registration of a technology importation agreement under the NOTAP Act. The Respondents quite reasonably argued that the overall implication of the Act relates to contracts and payments on the importation and/or exportation of technology. Furthermore, the Respondents argued that the Act contains a mandatory procedure on technology transfer and acquisition and that regardless of the absence of a provision of the law for a sanction in the event of a default, any technology transfer or

acquisition contract which fails to satisfy these procedures is invalid, illegal and unenforceable.

However, it is our view that the Court of Appeal rightly discountenanced the contention of the Respondents. In allowing the appeal in this regard, the Court relied on a literal interpretation of a few salient provisions of the NOTAP Act, discussed hereunder.

Firstly, the Court of Appeal was right in resolving the first issue in favour of the Appellant. On the first issue, the Court held that certain key words and phrases deployed by the draftsman in the NOTAP Act lend undoubted support to the fact that the object of the Act is solely weaved around importation, acquisition or transfer of technology **into** Nigeria. Some of these key words and phrases are "imported technology", "foreign technology", et cetera.

Secondly, the authors equally align with the reasoning and decision of the Court that non-registration of a registrable agreement (such as one involving the transfer of non-indigenous technology into Nigeria) does not invalidate or make the agreement between parties illegal and unenforceable. The Court in reaching this holding gave premium to the literal canon of interpretation of statutes; the Court gave effect to the plain, ordinary and undiluted meaning of the provisions of the NOTAP Act as against any sentiment from the surrounding circumstances of the facts.

The Respondents made forceful but futile attempts to argue on the basis of an imaginarily designed intention of the lawmaker of the Act. The first Respondent argued on the authority of ***Adesanoye v. Adewole***[5] that where a statute provides for a mandatory procedure for the performance of an obligation or the carrying out of an operation but does not provide for a punishment or sanction, non-compliance with such mandatory procedure would render such operation or transaction null, void and unenforceable. The Second Respondent also argued, relying on the case of ***University of Nigeria v. Ademolekun***[6] that an interpretation of the NOTAP Act as not providing for a sanction in the event of non-registration of a registrable agreement would occasion manifest injustice and would betray the mischief behind the enactment of the Act.

These arguments of the Respondents quickly come crashing when placed head-on with the clear provisions of the Act. By section 7 of the Act, a sanction or restriction is

---

5 (2006) 14 NWLR (Pt. 1000) 242.

6 (1967) 1 All MLR 213; Awe v. Alabi (1970) 2 All NLR 16.

well provided for non-registration of an agreement – "***no payment shall be made in Nigeria to the credit of any person outside Nigeria***". In essence, where an agreement registrable under the Act (agreement for the importation of technology) is not registered with NOTAP, any payment made to the credit of any person outside Nigeria in contemplation or fulfilment of the agreement would be illegal. Meanwhile, as rightly held by the Court, this sanction does not *ipso facto* imply that the technology transfer agreement or transaction between the parties is in itself void, unenforceable or destitute of legal effect.

In light of the foregoing, it is apposite to commend the Court of Appeal for its firm stance in giving full effect to the literal interpretation of the NOTAP Act. Away from the foreign technological investment implications of this decision, it must be admitted that it is quite easier and in fact, a matter of sheer judicial impulse to imply (rather than to otherwise hold) that by the intention of the draftsman of the NOTAP Act, non-registration would legally make the contract a nullity. Such an interpretation would conflict with the plain words adopted in the statute under review.

Indeed, with respect to statutory interpretation, the need to consider the Golden Rule of statutory interpretation cannot be overemphasized. In ***Gana v. SDP & Ors.*** (2019) LPELR-47153(SC), the importance of this canon was enunciated thus:

> ***"The golden rule of interpretation is that where the words used in the Constitution or in a statute are clear and unambiguous, they must be given their natural and ordinary meaning, unless to do so would lead to absurdity or inconsistency with the rest of the statute. See Ibrahim v Barde (1996) 9 NWLR (Pt.474) 513; Ojokolobo v. Alamu (1987) 3 NWLR (Pt.61)377 at 402 paras F-H; Adisa v. Oyinwola & Ors. (2000) 6 SC (Pt.11) 47."***[7]

Clearly, the Respondents were neither able to convince the Court with its arguments on the mischief of the NOTAP Act nor did they properly isolate the alleged mischief behind the enactment of the NOTAP Act. Consequently, the Respondents and the trial Court did not pay proper attention to the trite law on the need to commence every analysis on interpretation of statutes based on the golden rule.

Quite curiously, the decision of the Court in the instant case is not unprecedented. The Court of Appeal had birthed the landmark which was followed in the instant case

[7] Per Galumje, JSC, p. 45, paras. A-D.

as far back as 1985. Certainly, a brief inquest into the facts and holding of the Court in this landmark decision is crucial at this juncture.

In ***Essdee Food Products (Nig.) Ltd. v. Beecham Group Limited,***[8] the Plaintiff/Respondent (Beecham Group Limited) sued the Defendant/Appellant (Essdee) for infringing on its Trademark "LUCOZADE" No. 5452. Originally, the name of the proprietor of the Trademark was **Lucozade Limited of Middlesex, England**. In 1974, the Trademark was transferred to the **Beecham Limited of Nigeria** under an agreement. The parties, however, failed to register this agreement under the defunct ***National Office of Industrial Property Decree No. 70, 1979*** (**NOIPD**).[9]

The Appellant contended on two grounds – firstly, that the Plaintiff/Respondent lacked *locus standi* to institute the suit at the trial Court on the basis that the non-registration of the agreement between the parties [Lucozade Limited (England) and Beecham (Nigeria)] under NOIPD invalidates the transaction between the parties and thus, disentitles the Respondent to both the Trademark and a claim for infringement; and secondly, that the party to the Trademark assignment was not the instant Respondent but "Beecham Limited of Nigeria".

The Court of Appeal unanimously agreed with the Respondent's submission and resolved the contention against the Appellant. In the words of the learned Justice:

> ***"Counsel argued, and quite correctly in my view, that the non-registration of such agreements and contracts did not in any way render them invalid or unenforceable. I agree entirely with Mr. Garrick, the learned Counsel for the Respondents in his brief that penalty has been provided for a violation of the provision of section 4(d) of Decree 70 of 1970. Under section 7 of the said Decree, foreign exchange will not be released in respect of any contract or agreement which is not registered as provided by section 4(d) of the Decree. This is the penalty for non-registration of the said agreements. It did not say that failure to register had rendered such agreements unenforceable or invalid."***

With the greatest respect, one therefore begins to wonder the intellectual prompt behind the trial Court's clear circumvention of this important decision, apparently on

[8] (1985) 3 NWLR (Pt. 11) 112.
[9] This was later 'reinvented' by the National Assembly as the NOTAP Act. The provision of the Act in contention in the Beecham's case is *in pari materia* the section in dispute in the instant case.

the altar of judicial law making. This thought was well documented by the Court of Appeal; the Court noted that the trial Judge ventured into display of judicial activism and creativity rather than giving literal effect to the clear and unambiguous wordings of the Act. Indeed, the role of judges is to state and interpret the law, not to make the law.[10] The Bench is such a hot and immersing seat and as such, Judges must exercise rare circumspection and pedantic attention to detail in reaching important decisions such as in the instant matter.

9. Aftermath of the Judgment / Post-Judgment Effects

In the aftermath of the *Stanbic* Court of Appeal decision, some crucial issues deserve informed legal analysis. Firstly, and evidently in consonance with the Court's decision, the FRCN recently issued a public notice revoking FRCN Rule 4.[11] By the said Rule 4:

> **"Transactions and/or events of a financial nature that require approval and/or registration or any act to be performed by a statutory body in Nigeria and/or where a statute clearly provides for a particular act to be performed and/or registration to be obtained; such transactions or events shall be regarded as having financial reporting implication only when such act is performed and/or such registration is obtained. Accordingly, the details of the required act and/or registration obtained from such statutory body shall be disclosed by way of note in the financial statements if the transaction is recognised as part of the financial reporting of the entity. For example, an agreement that requires registration from the National Office for Technology Acquisition and Promotion can only be accrued for or received into the financial reporting process when the registration of such agreement has been obtained. The details of the registration including, but not limited to, the registration certificate number, the approved basis and amount, subject matter and validity shall be disclosed in the annual report, financial report, returns or document of a financial nature by way of note…"**

---

10 Uwagba v. FRN (2009) LPELR-3443(SC), pp. 26-27, (2009) 15 NWLR (Pt. 1163) 91; Mamonu & Anor. v. Dikat & Ors. (2019) LPELR-46560(SC) p. 42.

11 Financial Reporting Council of Nigeria (FRCN), *Public Notice: Revocation of Rule 4*, (11 July 2019); available at: <https://drive.google.com/file/d/1sEO4_rFNADdFBYSaF-d1D5LoGO_ARyGH/view> accessed 19 August 2019 at 10:05 am.

In essence, by the erstwhile Rule 4, the financial details of an unregistered technology transfer agreement cannot be reflected on the financial statements of the transacting entity. This is substantial confirmation that the FRCN is not intent on filing an appeal before the Supreme Court.

Furthermore, the decision of the Court of Appeal has very sensitive implications. Prior to this decision, non-registration of technology transfer agreements was regarded by the FRCN as rendering such transaction incapable of entry into the company's financial statements. FRCN therefore rejected any financial statement giving credence to a technology transfer agreement which had not been registered under NOTAP. NOTAP therefore stood on a very strong pedestal; and parties to such agreements were compelled to register them or risk harmful financial and regulatory exposures.

However, this decision appears to have whittled down this pedestal. A likely effect of this decision is that registration of agreements under the NOTAP Act might now be regarded as, at best, negligible or a cosmetic surplusage. Since the penalty for non-registration under the NOTAP Act is the prohibition of payments to the foreign recipient (likely through authorised channels), a foreign technology recipient could circumvent registration requirements and explore other means such as subtle tweaks of financial records to cover for such transfer. Frequently, these entities and foreign investors have identified illegal avenues for circumventing the restrictions imposed by the NOTAP Act and accessing their funds even without NOTAP and CBN approval. In any case, this sanction as provided by the NOTAP Act is grossly inadequate. It mirrors a legal paradox of the legislature institutionalizing incentives for the violation of its own laws.

Apparently, to properly manage the effect of this defect, NOTAP, in exercise of its powers to register and monitor the inflow of foreign technology, issued Guidelines providing for administrative penalties for failure to register a technology transfer agreement under the Act. By the Guidelines, a default in the registration of a technology transfer agreement attracts a fine of one hundred thousand Naira (₦100,000.00).12 It is submitted that this administrative penalty would at least, serve as a viable deterrent and encourage adherence to the NOTAP Act pending such time

[12] National Office for Technology Acquisition and Promotion (NOTAP), *Revised Guidelines for Registration and Monitoring of Technology Transfer Agreements in Nigeria*, (April 2018) p. 13; <https://notap.gov.ng/sites/default/files/revised_guidelines_on_registration_of_technology_transfer_agreements_april_2019.pdf> accessed 19 August 2019 at 9:58 am.

that the legislature reviews the overall deterrent effect of merely blocking the transfer of royalty payments and other profits in foreign exchange outside Nigeria's shores.

10. Conclusion

Clearly, this decision exposes a loophole in the NOTAP Act. It is a clarion call for the National Assembly to spring into legislative action in ensuring an amendment of the Act to lay this issue to rest. This would certainly go a long way in bringing the Act in full conformity with the objects for which it has been enacted and possibly address other underlying issues occasioned by the globally dynamic facets of commercial and technological transactions.

At this juncture in our legislative history, the Nigerian justice system ought to be bidding farewell to energy-sapping, excruciating and time-wasting litigations. The remedy is quite simple; a touch of legislative review. It is our hope that the legislature wakes up to its responsibility in this regard. While we keep fingers crossed in awaiting new developments, it is advised that parties to impending technology transfer transactions should properly consult competent legal practitioners for a clearer and more comprehensive legal perspective to whatever they set out to do. Only through such proactive steps can parties forestall the possibility of dicey and commercially risky legal disputes.

For further information on this review and area of law please contact
Uche Matthew and **Olukolade O. Ehinmosan** at:
S. P. A. Ajibade & Co., Lagos by
Telephone (+234 1 472 9890), Fax (+234 1 4605092)
Mobile (+234 815-979-4216, +234-815-979-4265),
Email (umatthew@spaajibade.com or
oehinmosan@spaajibade.com)
www.spaajibade.com.