

**JURISDICTION OF COURT AND THE ENFORCEABILITY OF TRADE SECRETS IN NIGERIA\***

**Abstract**

*Trade secrets in Nigeria as an intellectual property (IP) has no specialized legislation, unlike other IPs, like trade mark, copyright, patents and designs. The lack of legislation on trade secrets has also beclouded the question of which Court has the jurisdiction to adjudicate over matters involving infringement of trade secrets. This research critically examined the jurisdiction of the Court with competence to enforce trade secrets to discover whether it is the Federal High Court that has the jurisdiction to enforce same, like other intellectual property rights (IPRs), or it is the State High Court. The methodology used in this research was the doctrinal research method, which involved a systematic analysis of the primary and secondary source materials, including statutes, decisions of courts, texts, journals and internet sources on the subject. The study found that although there is no single specialized legislation on trade secrets in Nigeria, it remains an enforceable IP. It was further revealed that it is the State High Court that has the jurisdiction to enforce trade secret as an IP in Nigeria. The study recommended, amongst others, the immediate enactment of a specialized legislation on trade secrets.*

**Keywords:** Trade Secret, Enforceability, Jurisdiction, Federal High Court, Nigeria

**1. Introduction**

Trade secret refers to any valuable business information that, if known by a competitor, would afford the competitor some benefit or advantage over the other. It is therefore the secrecy in such information that makes it valuable and enforceable. Any information can be protected as long as it has commercial value, once it is not in the public domain, and its owner has made reasonable attempts to maintain its secrecy. Information that may qualify as trade secret, include, customer lists, formulae, marketing plans, financial information, takeover targets, and business methods. Protectable rights arise as soon as the trade secret comes into existence, as no registration or other formalities are required for the protection of trade secret. As important as trade secret is, it has a serious limitation of codification in Nigeria, therein lies the problem of its enforceability in Nigeria. Indeed, under the Nigerian criminal law jurisprudence, it is settled beyond every prevarication, that no one can be punished for any criminal offence, which is not defined and the penalty provided for in a written law.<sup>1</sup> Although, the lack of codification in the Nigerian civil jurisprudence is not as extreme as that of the criminal law jurisprudence, lack of codification under the civil law jurisprudence nonetheless poses a great limitation to the enforcement of such civil rights, as the true extent of such rights and remedies are left open and vague.

**2. Codification of Trade Secrets in Nigeria**

As stated above, there is no single legislation that is dedicated to trade secrets as an intellectual property right (IPR) in Nigeria, unlike its other counterparts of trade mark,<sup>2</sup> copyright,<sup>3</sup> patent and industrial design.<sup>4</sup> However, certain other national legislation made passing provisions about this intellectual property (IP), like the Freedom of Information Act 2011 and the Statistics Act 2007 acknowledge the existence of trade secrets and stipulate that they ought to be protected. As highlighted above, trade secrets are a type of IP that consists of certain information, expertise or knowhow that has been developed or acquired by firms. This knowledge frequently gives firms their competitive edge in the market and it has to be kept as a secret. Trade secrets are generally considered to include information set out, contained or embodied in, but not limited to, a formula, pattern, plan, compilation, list, computer programme, method, technique, process, product, device or mechanism; it may be information of any sort; an idea of a scientific nature, or of a literary nature, as long as they grant an economical advantage to the business and improve its value, then it qualifies as a trade secret.<sup>5</sup> It is important to point out here that trade secret thrives on secrecy, hence, there must be some element of secrecy, otherwise, such a trade secret loses its protection and relevance, as no man pays for what is generally known. The Black's Law Dictionary<sup>6</sup> defines trade secret as:

A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information - including a formula, pattern, compilation, program, device, method, technique or process - that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its

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<sup>1</sup> This is the provision of Section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 (As amended).

<sup>2</sup> Under the Trade Marks Act Cap T13 LFN 2004.

<sup>3</sup> This is provided for under the Copyright Act 2022.

<sup>4</sup> This is also provided for under the Patents and Designs Act Cap P2 LFN 2004.

<sup>5</sup> DE Bouchoux, *Intellectual Property, The Law of Trademarks, Copyrights, Patents and Trade Secrets* (Delmar Cengage Learning, New York 2012) 4<sup>th</sup> Edition, 468-469.

<sup>6</sup> BA. Garner (ed) (West Publishing Co., 2004) 8<sup>th</sup> edition, 1533.

disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.

In realization of the importance of trade secrets as an aspect of the Nigerian Intellectual Property Law and in a bid to protect it, the Freedom of Information Act 2011 in section 15 (1) expressly provides:

A public institution shall deny an application for information that contains-(a) Trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party. Provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure;

The above position of the law was given a judicial imprimatur by the Court of Appeal in the case of *CBN & Anor v PPDC Ltd/Gte*,<sup>7</sup> wherein it was held that the protection from disclosure by section 15 of the Freedom of information Act should be understood that it is in the same public interest that makes it necessary for certain kind of information not to be made available to the public on request to avoid chaos. Similarly, the Statistics Act, section 26(1)<sup>8</sup> clearly provides that the provisions of the Act shall not affect any law relating to the disclosure or non-disclosure of any official, secret or confidential information or trade secret. It is recommended that since other laws recognise the existence and importance of trade secrets, it is imperative that a special legislation be promulgated to properly protect trade secrets, as lack of a specialized legislation constitutes a challenge to its enforcement. The absence of a specialized law on trade secrets in Nigeria has made business owners to resort to covenants, non-compete and non-disclosure agreements to protect their trade secrets. These agreements in themselves are not without their pitfalls and are sometimes struck down, as the Court always construe clauses in restraint of trade strictly.

One outstanding advantage of trade secret is that its protection can last for a lifetime or in perpetuity. So, once a trade secret remains secret, the law protects such trade secret and comes hard on anyone involved in the infringement of the trade secret. The scope of protection of trade secret is also in no way subject to any form of registration or formality. Yet, it is undoubtedly under perpetual threat of being obliterated. This is so because once a person independently develops his own trade secret, without copying the trade secret of the other person, no infringement is committed and the protection afforded by the law is immediately lost. Also, where a person registers a patent over what another person regards as his trade secret, the patentee can competently exclude the owner of the trade secret from utilizing same. It therefore means that while trade secret enjoys the benefit of non-registration and its existence is in perpetuity, its existence and enforceability is also perpetually under threat.<sup>9</sup> Also, unlike other intellectual property rights that are enforceable at the Federal High Court vide the Constitution of the Federal Republic of Nigeria, 1999 (As amended), section 251(1)(f), trade secrets is not even mentioned, thereby leaving its enforceability in Nigeria Courts in a doubtful state. Section 251(1)(f) of the Constitution provides:

Notwithstanding anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters –

(f) any Federal enactment relating to copyright, patent, designs, trademarks and passing-off, industrial designs and merchandize marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards;

By the above provision of the Constitution, trade secret is conspicuously omitted from the list and going by the canon of interpretation rendered in the latin maxim *expressio unius est exclusio alterius*, meaning, the express mention of a thing results in the exclusion of all others, trade secret is surely not a subject-matter for adjudication by the Federal High Court.

As at today, trade secret is the only IP that suffers a lack of certainty of the Court with jurisdiction to enforce same, unlike other IPRs, including passing off, over which the jurisdiction to entertain and determine same is vested in the Federal High Court. Admittedly, not until recently, passing off was in the same class with trade secret and the Court to enforce it was said to be the State High Court.<sup>10</sup> However, in the case of *Dike Geo Motors Ltd & Anor v Allied Signal Inc & Anor*,<sup>11</sup> the issue arose whether the Federal High Court has jurisdiction to entertain an action for passing off and the issue was determined in the affirmative by the Supreme Court. This decision heralds a radical departure in our laws, which was long established in the earlier decisions of the same Supreme Court in *Patkun Industries v Niger Shoes*<sup>12</sup> and *Ayman Enterprises Limited v Akuma Industries Limited & Ors*<sup>13</sup> that the Federal High Court lacks the jurisdiction to entertain an action in passing off, unless it arises from a registered trade mark. Due to the importance of the dictum in *Dike Geo Motors Ltd & Anor v Allied Signal Inc & Anor*<sup>14</sup> to our jurisprudence, it shall be quoted in *extenso*. The Supreme Court<sup>15</sup> held thus:

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<sup>7</sup> (2018) LPELR-45856(CA) per Mohammed Mustapha, JCA @ 9 – 21, paras C – B.

<sup>8</sup> 2007.

<sup>9</sup> D Vaver, *Intellectual Property Law: Copyright-Patents-Trade-Marks* (Irwin Law, 1997) 114.

<sup>10</sup> See the cases of *Ayman Enterprises Limited v Akuma Industries Ltd & Ors* [2003] 23 NWLR (Pt. 836) 21 and *Patkun Industries v Niger Shoes* [1998] 5 NWLR (Pt. 93) 138.

<sup>11</sup> (2024) LPELR-61780(SC).

<sup>12</sup> (supra).

<sup>13</sup> (supra).

<sup>14</sup> (supra).

<sup>15</sup> Per Helen Moronkeji Ogunwumiju, JSC @ 21 – 31, Paras F – A.

My Lords, it is important to settle the issue of the jurisdiction of the Federal High Court in relation to the subject matter of the dispute when the cause of action arose in 1995. It is important to delve into and settle this tangential but pivotal issue so that the issue of jurisdiction in this case with its chequered history can be resolved on the merit once and for all... My Lords, it is important to note that the jurisdiction conferred on the Federal High Court by section 251 of the 1999 Constitution of the Federal Republic of Nigeria is in addition to any other jurisdiction which might be conferred on the Court by an Act of the National Assembly. Therefore, the jurisdiction of the Federal High Court is not limited to that prescribed in the Constitution ... Section 7 of the Federal High Court Act, 1973 was amended by the Federal High Court (Amendment) Decree 1991 (Decree No.60). Though the decree was promulgated on 30th December, 1991, it was suspended two days later by the Federal High Court (Amendment) Decree 1992 (Decree No. 16), promulgated on 1st January, 1992. Subsequently, on 25th August 1993, by Statutory Instrument No. 9 of 1993, 26th August 1993 was appointed as the date on which the Federal High Court (Amendment) Decree 1991 shall come into force...Section 7(1)(f) of the Federal High Court Act, as amended by the provisions of Decree No. 60 of 1991 provides as follows: ‘7(1). The Court shall to the exclusion of any other Court have original jurisdiction to try civil causes and matters connected with or pertaining to; (f). any Federal enactment or common law relating to copyright, patents, designs, trademarks and passing-off, industrial designs and merchandise marks, business names and commercial industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards’ (emphasis supplied). An immediately noticeable difference between Section 230 (1)(f) of the 1979 Constitution as amended and Section 7(1)(f) of the Federal High Court Act 1973 as amended by Decree No. 60 of 1991 is that the words ‘or common law’ appears after the words ‘Federal enactment’ in the amendment to the 1973 Act. The insertion of the phrase ‘or common law’ makes it obvious that it was the intention of the legislature at the time the 1991 amendment Decree was promulgated that the jurisdiction of the Federal High Court in respect of actions for passing-off should not be limited to actions arising from Federal enactments relating to trademarks or passing-off, but should extend to common law actions for passing-off as well...Consequently, the Federal High Court has jurisdiction to hear and determine the claim for passing-off contained in the statement of claim filed by the Respondents whether or not that claim arises from the infringement of a registered or unregistered trademark.

The lack of a specialized legislation on trade secret notwithstanding, it is submitted that trade secrets can also be enforced in the various State High Courts across the country. This is so because while the Federal High Court is a Court with enumerated jurisdiction, the State High Court has ‘unlimited’ jurisdiction.<sup>16</sup> In other words, the matters over which the Federal High Court has jurisdiction have been clearly itemized and once a subject-matter is not part of the list of items, like trade secret, then the Federal High Court lacks the jurisdiction to entertain same. In the case of *Opia v INEC & Anor*,<sup>17</sup> the apex Court on the nature of the jurisdiction of the Federal High Court held:

...it must be noted that all the matters that fall within the exclusive jurisdiction of the Federal High Court under Section 251 of the 1999 Constitution (supra) have been specifically listed out. The legal implication is that the nature of the declaration or injunction being sought for it to be within the exclusive jurisdiction of the Federal High Court must be in respect of the major items enumerated under the said Section 251 (supra). The Draftsman in no mistaken terms painstakingly itemized the subject matters that fall within the exclusive jurisdiction of the Federal High Court. See *Oladipo v. NCSB* (2009) 12 NWLR (pt. 1156) 563 at 585. In *Olutola v. UNILORIN* (2004) 18 NWLR (pt. 905) 416 at 462 this Court held inter alia that: ‘The implication of this technique is that the said Federal High Court is actually a Court of enumerated jurisdiction that is a Court whose jurisdiction is not only delimited by statute but whose jurisdiction is delimited in relation only to the subject matters enumerated therein. It would therefore amount to wreaking havoc on the express letters and intendment of the said Section 251 to construct it as granting the said Court a carte blanche to deal with every conceivable matter that is beyond those expressly enumerated. The effect of the circumscription of the jurisdiction of the Court to those eighteen major items is that wherever the question of jurisdiction of the Court is canvassed, attention ought to be focused on the subject matter of the suit, if the subject matter of the suit cannot be pitch-forked into any of those eighteen major items, then that Court is not the proper forum for the ventilation of that action...’<sup>18</sup>

This is the jurisdictional advantage the State High Court has over the Federal High Court. The State High Court is therefore the Court with jurisdiction in Nigeria to enforce trade secret.

### **3. Conclusion**

While it is almost indubitable that the State High Court is the Court vested with jurisdiction to entertain and enforce trade secret infringement, as opposed to the Federal High Court, for the sake of certainty in our jurisprudence, it is recommended that there should be a specialized legislation for trade secret like we have for the other IPRs.

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<sup>16</sup> Under the 1979 Constitution of the Federal Republic of Nigeria, the State High Court jurisdiction was clearly expressed to be unlimited. Although, it is no longer so stated in the 1999 Constitution, it is still generally accepted that the State High Court has a wider jurisdiction compared to the Federal High Court. See also the case of *Globerstar Engr. Co. Ltd v Omatseye & Ors* (2008) LPELR-4203(CA).

<sup>17</sup> (2014) LPELR-22185(SC).

<sup>18</sup> Per Suleiman Galadima, JSC @30 – 31, paras D – E.