

THE ROLE OF INTELLECTUAL PROPERTY LAW IN THE REGULATION OF MICRO AND SMALL AND MEDIUM ENTERPRISES *

Abstract

A lot of businesses start with humble beginnings and grow into big corporations, therefore how it starts matters. The hallmark of a good business is its product and the way to distinguish one product from another is through the use of trademarks and its registered name. While trademarks consist of signs as it is used to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or as a registered user to use the mark, a business name is simply an alphabetic name used for the identification of business registered to become a legal entity. The crux of this paper is to examine the legal framework for the regulation of business names and trademarks in Nigeria. The paper adopts a doctrinal research methodology. It analyses the various forms of business unit in Nigeria by examining the legal implications. Thus, the article presents an introduction to the general structure of Micro and Small and Medium (MSMEs), business names and trademarks law. This is followed by offering an analysis that focus on the MSMEs and what they need to know to help boost the total outlook and of the business. The paper however concludes that MSMEs need to know the laws and regulations that guide the setting up of their business as trademarks are important assets of any business and their use must be done in relation to other law and regulation.

Keywords: ‘MSMEs’, ‘Business Names’, ‘Trademarks’, ‘Business Name’, ‘Advertisement’, ‘MSMEs’.

1. Introduction

With the increase in the number of entrepreneurs over the years, the government has enunciated a large number of laws or policies addressing various sectors area of development, many of these laws and policies have far-reaching implications for MSMEs. Currently, MSMEs provide enormous benefit to the country in the area of employment generation, wealth creation, poverty reduction and growth and its potential to grow far beyond where it abounds. The national workforce of MSMEs as of December 2017 was 59,647,954 person including owners, Lagos State generated the highest employment by SMEs.¹ The staggering statistic reveals the opportunities that MSMEs offers.

The legal considerations that MSMEs have to note when setting up a business are numerous, however, it is necessary to streamline the important ones to avoid unnecessary expense, penalties and loss of rights that may follow as a result. The awareness of the laws that regulate them is of great significance, which brings to fore, the regulation of vital aspects such as business enterprise, and protection of intellectual property rights matters to the growth of any nation. Thus, this paper examines the legal process of registration of business and trademarks intending to project its essence for MSMEs. The rest of the paper is structured as follows: section 2 discusses generally the micro small and medium

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¹ National Survey of National Survey of Micro Small Medium Enterprises Report available at [http://smedan.gov.ng/images/NATIONAL%20SURVEY%20OF%20MICRO%20SMALL%20&%20MEDIUM%20ENTERPRISES%20\(MSMES\),%20%202017%201.pdf](http://smedan.gov.ng/images/NATIONAL%20SURVEY%20OF%20MICRO%20SMALL%20&%20MEDIUM%20ENTERPRISES%20(MSMES),%20%202017%201.pdf) accessed 18 December 2020

enterprise and its benefits for the growth of the economy; section 3 discusses the legal structures available and how they differ, section 4 relates to the protection of intellectual property and its requirement and the last two sections form the conclusion and recommendation.

2. Micro, Small and Medium Enterprises (MSMEs)

The MSME stands for Micro, Small and Medium Enterprises. MSMEs are the backbone of the Nigerian economy, the sector contributes to job creation and skill development, industrial diversification, exports and helps to stimulate the economy,² it also can improve local technology, output diversification, and development of indigenous entrepreneurship and drive integration with large-scale industries.³ Current statistics show that the sub-sector is credited with (85%) of total industrial employment. MSMEs are categorized by employment and asset, Micro Enterprises are those enterprises whose total assets (excluding land and buildings) are less than Ten Million Naira with employees not exceeding ten while Small Enterprises are those enterprises whose total assets (excluding land and building) are above Ten Million Naira but not exceeding One Hundred Million Naira with total employees of above ten, but not exceeding forty-nine employees on the other hand Medium Enterprises are those enterprises with total assets excluding land and building) are above Fifty Million Naira, but not exceeding One Billion Naira with total employees of between 50 and 199.

The 2017 edition of the Small Medium Enterprises Development Agency of Nigeria (SMEDAN) survey revealed that MSMEs nation-wide/across all sub-national entities, the components are 41,469,947 micro enterprises (MEs) and 73,081 small and medium enterprises (SMEs) together they make up a total employment contribution of 59,647,954 persons, including owners, (which is equal to 76.5 per cent of national workforce), 49.78 per cent of GDP and 7.64 per cent of export receipts.⁴ The staggering statistic reveals the size of this sector accordingly government has enacted laws and over the years various initiatives and support measures have been created to spur economic growth and promotion of MSMEs by successive governments in Nigeria.⁵

As expected, SMEDAN report noted that 34.32 million MEs (or 82.8%) did not utilize professional services, these results are also consistent with the largely informal nature of these entities,⁶ hence the need to layout the required legal consideration. The SMEDAN Report stated the significance of MSMEs and how they are relevant to advance the economic growth of the country, it listed reasons why they are regarded as the boon in the country. These reasons include:

1. The low level of capital required for the establishment of these enterprises.
2. Their large number and labor-intensive modes of operation guarantee employment for a large number of persons.

² *Ibid.* p.3.

³ *Ibid.* p 5.

⁴ *Ibid.* p.7

⁵ Example of Government initiative of MSMEs Peoples Bank of Nigeria (1989). National Economic Reconstruction Fund (1992); Small and Medium Scale Enterprises Loan Scheme (1997); African Development Bank – Export Stimulation Loan Scheme (ADBESL), 1988; Bank of Industry (BoI) –2001; Small and Medium Enterprises Development Agency of Nigeria (SMEDAN), 2003; Establishment of Micro Finance Banks. Small and Medium Enterprises Credit Guarantee Scheme for MSMEs, 2010; N-Power Scheme, Ease of Doing Business/PEBEC 2016; Incentivizing Business Registration Compliance for MSMEs 2017 TraderMoni Scheme 2018.

⁶ *Ibid.* p16.

2. Inventions, adaptations, and general technological development are common in these enterprises.
3. More equitable distribution of income is usually achieved through this sub-sector.
4. Development is assured. The evolution of indigenous enterprise is facilitated by MSMEs sub-sector. v. development is assured.
5. The evolution of indigenous enterprise is facilitated by MSMEs. vii. General enhancement of the tempo of industrial development is accelerated by these enterprises.
6. Tendency among these enterprises to become feeders of large-scale enterprises and thus serves as production outposts for the latter.

The above reasons have been advocated by MSMEs advocates in Nigeria to showcase the need to invest in this sector.

3. Choice of Business Unit: The Legal Structures

One of the major decisions is to decide how the business will be structured to operate, which includes the legal format that the business will take. The legal form MSMEs take depends on the idea the owner has and the type of business to be carried out. There are different types of legal structure available under the Companies and Allied Matters Act (CAMA).⁷ Once a business owner narrows down the name to use for the enterprise or company, the name needs to be checked for its availability at the search portal, after which the name can be reserved for a period of 28 or 60 days respectively. Pre-registration of the enterprise or company will then be done by completing the form (CAC-BNo1) or on the Company Registration Portal (CRP) respectively. There are various types of legal entity the common examples of business structures include sole proprietorship, partnerships, and limited liability companies.

3.1. Incorporation of Companies

A company may be formed by any two or more persons complying with the requirements of CAMA in respect of registration of the company. Also, one person may be allowed to form a private company if the requirements of the CAMA are complied with.⁸ Section 19 enumerates the types of companies that can be incorporated as a company limited by shares, a company limited by guarantee and an unlimited company and any of these companies may be private or public. MSMEs can make a choice base on the list of the type of company they want and go ahead and make a name reservation pending the registration of the company upon the payment of the requisite fees. The reservation shall not exceed 60 days and the business shall be registered under the reserved name, however the Corporate Affairs Commission (CAC)⁹ may withdraw or cancel a reserved name if it discovers there is a company with an identical or nearly resembling name in existence.¹⁰

Registration of the company is done in accordance with the memorandum and articles which are originally framed by a special resolution of the shareholders. The memorandum sets up the company while the article dictates how it should be run. After the reservation of name and its availability, an application is required for registration stating the following:

⁷ Companies and Allied Matters Act, 2020 No. 3 A 13.

⁸ CAMA 2020, section 18.

⁹ Hereinafter referred to as the "Commission".

¹⁰ Section 31.

- (a) The company's proposed name;
- (b) The registered office address and head office address if different from the registered office address;
- (c) Whether the liability of the members of the company is to be limited and if so, whether it is to be limited by shares or by guarantee; and
- (d) Whether the company is to be a private or a public company.¹¹

Upon the eventual registration of the company evidenced by the issuance of a certificate of incorporation, the business becomes a body corporate known by the name on the certificate or memorandum, capable of exercising all the powers and performing all functions of an incorporated company including the power to hold land, and having perpetual succession, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in the Act. However, where it is discovered that the certificate was fraudulently, unlawfully or improperly procured, the Commission may withdraw, cancel or revoke a certificate of incorporation issued under the Act.¹²

3.2. Business Name

A business name is mostly suitable for a small business venture.¹³ It is registered under Part E of the CAMA. Section 815 (1) CAMA makes it mandatory for every firm, individual or corporation required to be registered under Part E, to be registered within Twenty-Eight (28) days from the date of the commencement of the business for which registration is required. The applicant is required to provide the principal place of business of the individual, firm or company is situated, a statement in writing in the prescribed form, signed as required by this section and containing the following particulars—

- (a) the business name or, if the business is carried on under two or more business names, each of those business names;
- (b) the general nature of the business;
- (c) the full postal address of the principal place of business;
- (d) the full postal address of every other place of business;
- (e) where the registration to be affected is that of a firm—

Business names registration can be for an individual, firm or company. If the registration is for an individual, the form must contain the present forenames and surname, any former forenames or surnames, the nationality and, if that nationality is not the nationality of origin, the nationality of origin, the age, the sex, the usual residence and any other business occupation of the individual. For a firm, the partners will provide what an individual will provide as well. On the other hand, if the registration is by a company, the information required include name and registered office of the company; and the date of commencement of the business, whether before or after the coming into operation of the Act.¹⁴ On the registration of any individual, firm or corporation under the Act, the Registrar shall issue a certificate in the prescribed form containing the business name of the individual, firm or corporation.¹⁵

¹¹ Section 36 (2).

¹² Section 41(7).

¹³ For micro-small, small businesses and professional businesses (law, catering, clothing etc) owned by one person.

¹⁴ See generally section 815.

¹⁵ Section 817 (2).

A business name can be registered as a Sole Proprietorship or as a Partnership, thus the attraction for MSMEs which shows the distribution of micro enterprises (MEs) in 2017, has Sole Proprietorship, at 97.1 per cent occurrence, while partnerships were 2.2 per cent. For MSMEs, there are sure advantages that make business owner gravitate towards this form of business.¹⁶ Business names are much easier and cheaper to register, then they require a small amount of capital to run, informal administration of the business, the business owner only pays personal income tax in his/her State of residence, above all, the business can be formed by one person, although this is no longer an advantage as incorporated companies can now be run by sole shareholders.¹⁷

4. MSMEs and Intellectual Property Rights

A lot of MSMEs believe that once the name is registered as a legal entity such business name of the company or partnership suffices. There is a difference between a name registered at the Corporate Affairs Commission (CAC) and a name or mark registered as a trademark at the Trademarks and Patent Registry. The rights that accrue from the two registrations protect different rights, while the name registered at the CAC protects the name of the enterprise or the company, a trademark identifies and gives information about the origin or quality of goods and services of the enterprise or company. Trademarks are part of the assets of the business it can be used as collateral based on its identification as property. The World Intellectual Property Organization offers a comprehensive approach to the meaning of IP by stating that:

IP refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce ... IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.¹⁸

Intellectual property rights are important to MSMEs but they are usually taken for granted and more often than not they are not recognized as valuable assets. It is essential to note that Intellectual property promotes innovation and creativity, which in turn generates jobs and improves competitiveness, the literary and entertainment industry, has shown that IP can contribute to economic growth.¹⁹ Most MSMEs need to be aware that the protection of IPRs can set their business apart from that of a competitor. The benefits of protecting IP are ample as they consist of bundles of rights that can be of use in numerous ways; for example, a trademark can be licensed or franchised thereby providing an additional source of revenue. The different types of IP will be explored below with greater emphasis on trademarks.

4.1. Copyright

This area of IP grants protection automatically upon compliance with the requirement of the law which provides that the work must be fixed in a tangible medium of expression now known or later developed and it must be original.²⁰ Although, the Act does not define copyright the Federal High Court (FHC)

¹⁶ SMEDAN Report p.5.

¹⁷ CAMA section 18.

¹⁸ What is IP? Available at <https://www.wipo.int/about-ip/en/> accessed 19 October 2020.

¹⁹ The Industry is a significant part of the Arts, Entertainment and Recreation Sector which contributed 2.3% (NGN239billion) to Nigeria's Gross Domestic Product (GDP) in 2016.

²⁰ Section 1 Copyright Act (as amended), Cap. C28, Laws of the Federation of Nigeria 2004.

in *Sarg Aims Aluminium v. Stanley Akagha & Anor.*²¹ defined copyright as “the right of literary property as recognised and sanctioned by positive law. It is, in essence, an intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic production whereby he has invested, for a specified period with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.” This area of IP grants protection automatically upon compliance with the requirement of the law which provides that the work must be fixed in a tangible medium of expression now known or later developed and it must be original.²²

The WIPO elucidates the meaning of copyright by stating that:

Copyright (or author’s right) is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.

The Copyright Act enumerates the works that are eligible for copyright protection under the following broad categories of works, namely literary works, musical works, artistic works, cinematograph works, sound recording and broadcasts.²³ This protection extends only to expressions, and not to ideas, procedures, methods of operation or mathematical concepts.

4.2. Patent

Patent rights are protected under the Patent and Designs Act of 1970.²⁴ The conferment of a patent is affected by section 2 of the PDA. The PDA in section 1 provides that a patent may be granted for an invention if it is new,²⁵ results from inventive activity²⁶ and is capable of industrial application.²⁷ In addition, inventions that result from an improvement upon a patented invention that is new, result from inventive activity and are capable of industrial application are patentable.²⁸ This provision is one of the hallmarks of the PDA as it is capable of stimulating indigenous invention,²⁹ although it has been underutilised. The right to a patent is vested in the statutory inventor: this is the person who, whether or not he is the true inventor, is the first to file or validly claim a foreign priority for a patent application in respect of an invention.³⁰ The true inventor, whether or not he is also the statutory inventor, is entitled

²¹ (1994) 3 I.P.R.L. 219, FHC/KD/1/92.

²² Copyright Act, Section 1.

²³ Copy Right Act section 1.

²⁴ Patent and Design Act 1970 P2 Laws of the Federation of Nigeria 2004.

²⁵“New” according to the PDA mean an invention is new if it does not form part of the state of the art. (“the state of the art” means everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time whatever using a written or oral description, by use or in any other way before the date of the filing of the patent application relating to the invention of the foreign priority date validly claimed in respect thereof) PDA 1970 P2 LFN 2004, section 1(2) (a).

²⁶Inventive activity according to the PDA must be an invention that results from an inventive activity if it does not follow from the state of the art, either as to the method, the application, the combination of methods, or the product which it concerns or as to the industrial result it produces. See section 1(2) (b) PDA.

²⁷ PDA, section 1(1) (a).

²⁸ PDA, section 1(1) (b).

²⁹ A O Oyewunmi; ‘Industrial Property Law’ E O Akanki *ed. Commercial Law in Nigeria* (Lagos: University of Lagos Press, 2005) p. 45.

³⁰PDA, section 2(1). The PDA does not define statutory inventor or true inventor.

to be named in the patent as such, and the entitlement in question shall not be modifiable by contract.³¹ The law regards the statutory inventor as the applicant that is, the person who applies for a patent, whereas the true inventor is the person who invented the product or process, that is, the person who conceives the subject matter in question, as opposed to someone who only contributes suggestions about the invention before or after conception.³² This depiction makes it impossible for companies sponsoring research and innovation to be named as inventors, as the law does not allow this provision to be modified by contracts.³³ The procedure for granting a patent in Nigeria includes certain formalities which must be complied with. Patent applications require specific features for the application to be processed. All patent applications are to be made to the Registrar, Patents Branch of the Trademarks, Patent and Design Registry.³⁴

Under section 3, the patent application should be made in the prescribed format which shall include the applicant's³⁵ full name and address,³⁶ a description of the relevant invention with any appropriate plans and drawings,³⁷ a specification,³⁸ a claim or claims³⁹ and other matters as may be specified accompanied by the prescribed fee. A declaration by the true inventor is signed requesting that he be mentioned in the patent where appropriate.⁴⁰ A signed power of attorney or authorisation of the agent is required if the application is made by an agent.⁴¹

4.3. Trademarks

Businesses need trademarks to identify their products, while customers need guidance when considering their choice between the competing goods. Trademarks are necessary to communicate and reach out to the consumers⁴² and preventing confusion in the market place. A trademark is a mark used or proposed to be used in relation to goods for the purpose of indicating, or to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as a registered user to use the mark, whether with or without any indication of the identity of that person.⁴³ A mark that

³¹ PDA, section 2(2).

³² J M Davison, L Ann. M & L Wiseman *Australian Intellectual Property Law* Cambridge University Press 2008 p. 482.

³³ PDA, section 2(2).

³⁴ Commercial Law Department, Federal Ministry of Trade and Investment in Nigeria Federal Capital Territory, Abuja.

³⁵ The applicant can be the true inventor, the statutory inventor or an agent enable with a power of attorney; section 3 (1) (b) (iii) PDA 1970 P2 LFN 2004.

³⁶ If that address is outside Nigeria, an address for service in Nigeria.

³⁷ The PDA states that the description shall disclose the relevant invention in a manner sufficiently clear and complete for the invention to be put into effect by a person skilled in the art or field of knowledge to which the invention relates. Section 3 (2) PDA 1970 P2 LFN 2004; rule 11(c) Patent Rules L.N. 96 of 1971.

³⁸ The specification shall describe the relevant invention in a manner sufficiently clear and complete for the invention to be put into effect by a person skilled in the art or field of knowledge to which the invention relates. Rule 12 (1) Patent Rules L.N. 96 of 1971.

³⁹ Claims are required to define the protection sought and shall not go beyond the limits of the said description. See Section 3 (2) PDA 1970 P2 LFN 2004 and rule 12(2) Patent Rule L.N. 96 of 1971.

⁴⁰ PDA 1970 P2 LFN 2004, section 3 (1) (b) (ii).

⁴¹ PDA 1970 P2 LFN 2004, section 3 (1) (b) (iii). See also rule 11 (e) Patent Rules L.N. 96 of 1971.

⁴² WIPO, Introduction to Trademark Law & Practice the Basic Concepts, A WIPO Training Manual WIPO Publication No 653 (E) P.9 https://www.wipo.int/edocs/pubdocs/en/wipo_pub_653.pdf accessed 21 January 2021.

⁴³ Trademarks Act Cap T13 Laws of the Federation Nigeria 2004, Section 67.

can be used as a trademark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof.⁴⁴

4.3.1. Distinctiveness of a Trademark

Trademark protection revolves around its distinctive abilities. Trademarks are regarded as source identities which, in turn, mean that they are capable of differentiating the product based on their distinctive marks.⁴⁵ Registration of a mark is based only upon evidence of distinctiveness of the name, signature or invented word or words.⁴⁶ In *Boot v Niger Imports*,⁴⁷ the court in determining if a mark has acquired distinctiveness held that where the mark which seeks protection consists of words and characters in everyday or common usage, the plaintiff must prove that such has become singularly attached to the goods in question and not to any other.

4.3.2. Registration of a Trademark

The ability to register a mark offers a great advantage over non-registration⁴⁸ and it stipulates that a person who registers a mark will be entitled to institute any proceeding to prevent infringement and to recover damages for such infringement. The owner of an unregistered trademark, on the other hand, only has a right of action against any person for passing off and can only recover damages in relation to the same.⁴⁹ It is unambiguous under the Act that a trademark may either be registered or not. The dissimilarity between a registered trademark and a non-registered trademark lies in the ability of a registered mark to bring an action for infringement.⁵⁰

The courts have been quite active in this area of law. In the case of *Dyktrade Ltd v Omnia Nig Ltd*,⁵¹ the Supreme Court opined thus “Trademarks when registered will entitle the proprietor to sue or institute an action for any infringement of the trademark. Registration entitles the proprietor to the exclusive use of the trademark and also the right to sue for passing off the goods of the proprietor”. Most names and marks used for businesses locally are not usually registered as a trademark.

A lot of MSMEs believe that once the name is registered as a legal entity such business name of the company or partnership, it suffices. There is a difference between a name registered at the Corporate Affairs Commission (CAC) and a name or mark registered as a trademark at the Trademarks and Patent Registry. The rights that accrue from the two registrations protect different rights, while the name registered at the CAC protects the name of the enterprise or the company, a trademark identifies and gives information about the origin or quality of goods and services of the enterprise or company. Trademarks are part of the assets of the business it can be used as collateral based on its identification as property.

⁴⁴ Trade Mark Act, Section 67.

⁴⁵ T Oloko *Impact of the WTO TRIPS Agreement* (Lagos: LASU Publisher 2019) p218.

⁴⁶ TMA 1965 Cap T13 LFN 2004, section 9.

⁴⁷ [1977-1989] 3 IPLR 1.

⁴⁸ Trade Mark Act 1965 Cap T13 LFN 2004, Section 3.

⁴⁹ *Elebute & Another v Olugbenga Ogunkua* [1990-1997] 3 IPLR 1.

⁵⁰ Trade Marks Act 1965 T13 LFN 2004, section 3.

⁵¹ (2000) 12 NWLR (PART 680) pages 1 at page 8 paras G–H per Belgore, J.S.C.

5. Conclusion

The foregoing has revealed that MSMEs are a very important part of the economy in the country and as such the laws and regulations that guide the setting up of small ventures are essential for the creation of wealth, advancement of technology and eradication of poverty in the society.

The article undertook an appraisal of the laws necessary for MSMEs to consider at the commencement of their businesses. As a result of this examination, it was found that the attainment of full potentials of MSMEs in Nigeria is largely dependent on these legal considerations to create substantial economic growth.

It is evident that MSMEs do not take advantage of the legal framework to boost their businesses, the laws are merely seen as regulatory.

6. Recommendations

Intellectual property protection and awareness need to be created so that business owners can know the benefits of protecting their intellectual property rights.

The lack of knowledge of the use of IP makes the MSMEs lose possible protection as they run to the make with their products and service instead of obtaining protection for it first Intellectual property rights are a valuable asset that MSMEs need to pay more attention to as they can be as valuable as real property. IPRs helps convert ideas into products and services to make them commercially viable.

For MSMEs to be able to key into the need for intellectual property protection and avail themselves of the service of the various IP registries IP Advisory Units need to be set up SMEDAN to encourage the protection and promote easy access to registration where necessary. With this, adequate and in-depth information, direction, benefits and facilities for protecting their IP would be given to help MSMEs in dealing with the IPRs.

Financial institutions must begin to place a premium on IPR by understanding it as an intangible asset that is valuable and can be used as collateral, this can be done by evaluation of the IP asset to determine its worth. A lot of financial assistance has been created for MSMEs but none has been created specifically to support research and development (R&D) which can enhance technological knowledge, for any country to develop concentration on research especially in the area of technology is vital and there should be specific grants earmarked for such purpose for MSMEs.