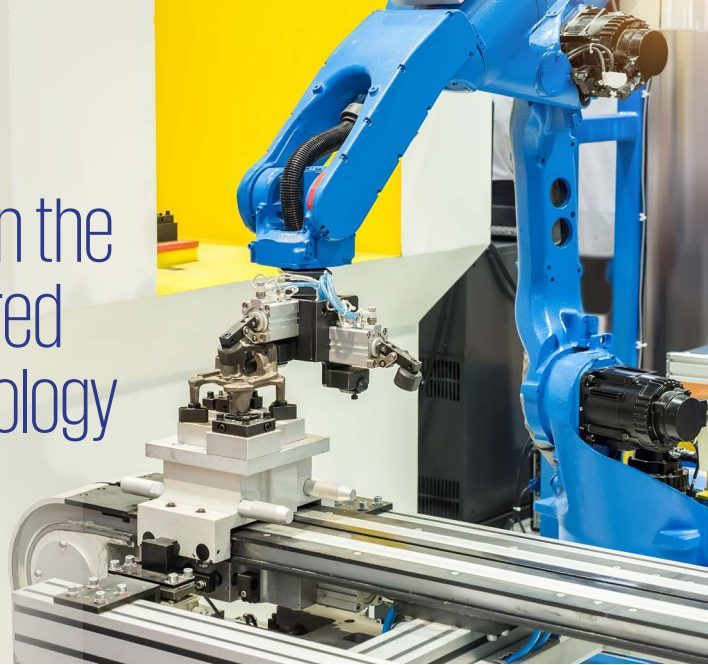


The Court of Appeal judgement on the effect of agreements not registered with the National Office for Technology Acquisition and Promotion

KPMG in Nigeria

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The Court of Appeal (CoA) delivered a judgement in an appeal against the decision of the Federal High Court (FHC) in the case of *Stanbic IBTC Holding Plc ('Stanbic IBTC' or the 'Appellant') v. the Financial Reporting Council of Nigeria ('FRCN') and National Office for Technology Acquisition and Promotion ('NOTAP')*. The CoA ruled that failure to register an agreement with NOTAP does not render it illegal, null and void.

Prior to the ruling of the CoA, the FRCN had issued the Rule 4 - *Transactions requiring registration from statutory bodies such as the National Office for Technology Acquisition and Promotion in 2016*. The implication of the rule was that businesses were mandated to obtain regulatory approval before recognizing certain expenses in their financial statements.

Facts of the case and issues for determination

Stanbic IBTC entered into an agreement to sell a locally developed/enhanced software to its majority shareholder, Standard Bank of South Africa ('SBSA'). It was agreed between both parties that Stanbic IBTC would license the same software from SBSA, after the sale had been completed. The terms of the sale and licensing transactions were contained in a Sale, Purchase and Assignment (the 'First Agreement') signed in 2012.

Stanbic IBTC submitted the First Agreement to NOTAP for approval and registration. NOTAP did not approve the agreement on the basis that it does not have regulatory oversight over such agreements. NOTAP separately advised that Stanbic IBTC license the software to SBSA rather than sell it. Stanbic IBTC, however, disregarded NOTAP's advice and proceeded with the transaction as planned. It is noteworthy that NOTAP's advice was not legally binding on Stanbic IBTC.

After NOTAP's initial response, Stanbic IBTC submitted a Software License Agreement (the 'Second Agreement') to NOTAP for approval and registration. The Second Agreement was for the licensing of the same software from SBSA to Stanbic IBTC. NOTAP approved and registered the Second Agreement in 2013. The period covered by NOTAP's approval was 2012 to 2015 financial years.

The FRCN reviewed Stanbic IBTC's financial records for 2013 and 2014 and directed that the company withdraw and re-issue its financial statements for the respective years. In addition, the FRCN levied Stanbic IBTC with a fine. The directive to withdraw and reissue its financial statements and pay a fine was premised on the facts that the Sale Purchase and Assignment Agreement (the First Agreement) was not approved and registered by NOTAP. Furthermore, FRCN took the view that the Software Licensing Agreement was illegal since the First Agreement was not approved by NOTAP.

Stanbic IBTC disagreed with FRCN's position and instituted legal action at the FHC against FRCN and NOTAP. Stanbic IBTC lost the case at the FHC in a judgement delivered on 14 December 2015, and subsequently filed an appeal at the CoA. The issues for determination at the CoA are as follows:

- a. Whether NOTAP Act applies to technology exportation from Nigeria to another country;
- b. Whether the Software License Agreement was approved and registered by NOTAP; and
- c. The effect of a failure to register a registrable agreement with NOTAP.

The CoA held that the title, establishment and functions assigned under Section 4 of the NOTAP Act leaves no doubt that the purpose for which NOTAP was established was to regulate and monitor the execution of contracts or agreements entered into by parties, for the importation into Nigeria and acquisition of foreign technology. The CoA underscored this point by stating that there is no reference to exportation of technology in the NOTAP Act.

On issue two, the CoA concluded that Stanbic obtained the relevant approval from NOTAP. This conclusion was reached by relying on the evidence of NOTAP approval presented by the Appellant. NOTAP did not refute the Appellant's claim.

The CoA also declared that, failure to register an agreement with NOTAP does not render it illegal, null and void. Rather, the implication of non-registration of an agreement is a prohibition from making payments from Nigeria through any licensed bank in Nigeria to any person outside Nigeria. To render an agreement illegal, null and void because of a failure to register it with NOTAP would be stepping out of the limits of the provisions of the NOTAP Act.

Comments

Prior to the disagreement between Stanbic and FRCN, it was generally understood and accepted that NOTAP approval is not required for technology exportation, that there is no correlation between NOTAP approval and accounting recognition of an expense and that failure to register a registrable agreement will only have payment implications¹. These were the principles on which accountants, auditors and other experts operated for several years. The ruling of the FHC changed the status quo for Nigerian Companies.

According to FRCN Rule 4, income, expenses, assets or liabilities arising from agreements that require regulatory approval should not be recognized in any financial statement prior to obtaining approval for that agreement. Several companies, on the back of this Rule, were unable to recognize valid business expenses in their financial statements – despite their best effort to obtain NOTAP approval.

The FRCN has, following the judgement of the CoA, now rescinded Rule 4 via a Public Notice. The effective date of revocation is July 11, 2019 and the revocation can only be applied prospectively - from the effective date. Meaning, companies can now accrue expenses for agreements that require regulatory approvals without first obtaining the same. The revocation of Rule 4 is a welcome development for accountants in practice as it effectively lays to rest the controversies attendant to its enforcement in March 2016.

¹Section 7 of the NOTAP Act provides that no payment shall be made in Nigeria to the credit of any person outside Nigeria by or on the authority of the Federal Ministry of Finance, Central Bank of Nigeria or any licensed bank in Nigeria in respect of any payments due under a contract or agreement unless a certificate of registration is presented.

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