GEPLAW Focus

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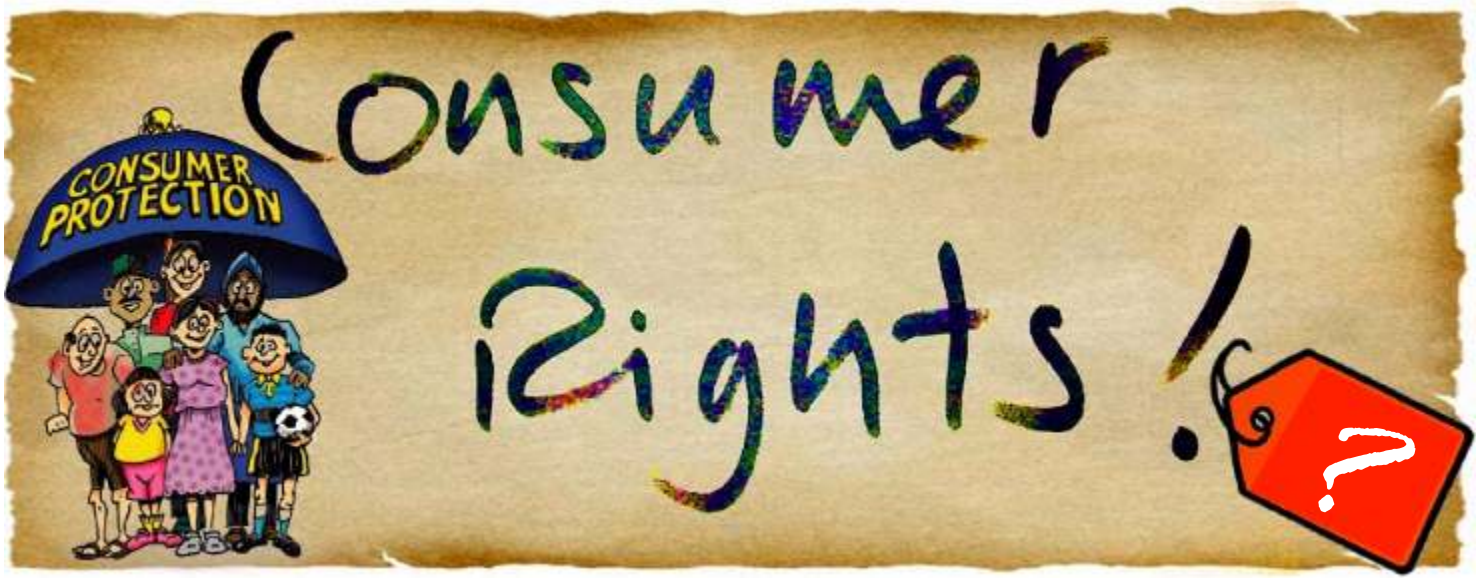
CONSUMER PROTECTION IN NIGERIA: ANALYSIS OF THE CASE BETWEEN FIJABI ADEBO HOLDINGS LIMITED & ANOR. VS. NIGERIA BOTTLING COMPANY PLC. & ANOR:



On Wednesday 15th of February, 2017, the High Court of Lagos State per Honourable Justice Adedayo Oyebanji (Mrs.) delivered a judgment in the now notorious case of Fijabi Adebo Holdings Limited & Dr. Emmanuel Fijabi Adebo Vs. Nigeria Bottling Company Plc & National Agency for Food and Drug Administration and Control (NAFDAC) in Suit No. LD/13/2008.

The Court ordered the National Agency for Food and Drug Administration and Control ("NAFDAC") to, within 90 days from the date of the judgment, include on all bottles of Fanta and Sprite soft drinks manufactured by the Nigeria Bottling Company, a written warning that the content of the said bottles of Fanta and Sprite soft drinks could not be taken with Vitamin C as same becomes poisonous when taken with Vitamin C. Furthermore, the Court awarded cost of N2, 000, 000 (Two Million Naira) against NAFDAC.

This GEPLAW Focus report analyses the issues raised, the judgment of the Honourable Court as well as the implications on global perception of regulatory efficiency in Nigeria.

SUMMARY OF THE FACTS

The suit was commenced against the Defendants, Nigeria Bottling Company Plc ("NBC") and National Agency for Food and Drug Administration and Control ("NAFDAC") by the Claimants, Fijabi Adebo Holdings Limited and Dr. Emmanuel Fijabi Adebo on the 8th of January, 2008. The 2nd Claimant, Dr Emmanuel Fijabi Adebo, sometime in the months of January and March, 2007 respectively purchased large quantities of Coca-Cola, Fanta Orange, Sprite, Fanta Lemon, Fanta Pineapple and Soda Water from the 1st Defendant, NBC which were exported to the United Kingdom (UK) for retail purposes. The Coca-Cola soft drinks were allowed into the UK but the Fanta and Sprite soft drinks were seized and destroyed after health authorities at the Stockport Metropolitan Borough Council's Trading Standard of Department of Environment and Economy Directorate raised fundamental health related issues on the contents and composition of the Fanta and Sprite products.

The "Benzoic Acid" and "Sunset Yellow" content of the products were said to have exceeded the recommended

level for safe human consumption. Findings by the UK health authorities were also corroborated by the Coca Cola European Union which found the products to contain excessive levels of sunset yellow and benzoic acid, said to be unsafe for human consumption.

The Claimants could not sell the Fanta and Sprite products due to the irregularities and harmful content of the soft drinks which were said to be capable of causing cancer to the consumer, thereby incurring losses. The Claimants, therefore, sued NBC for the losses incurred, negligence and breach of duty of care. NAFDAC was also sued for allegedly failing to carry out requisite tests to determine the safety of the drinks for human consumption amongst others.

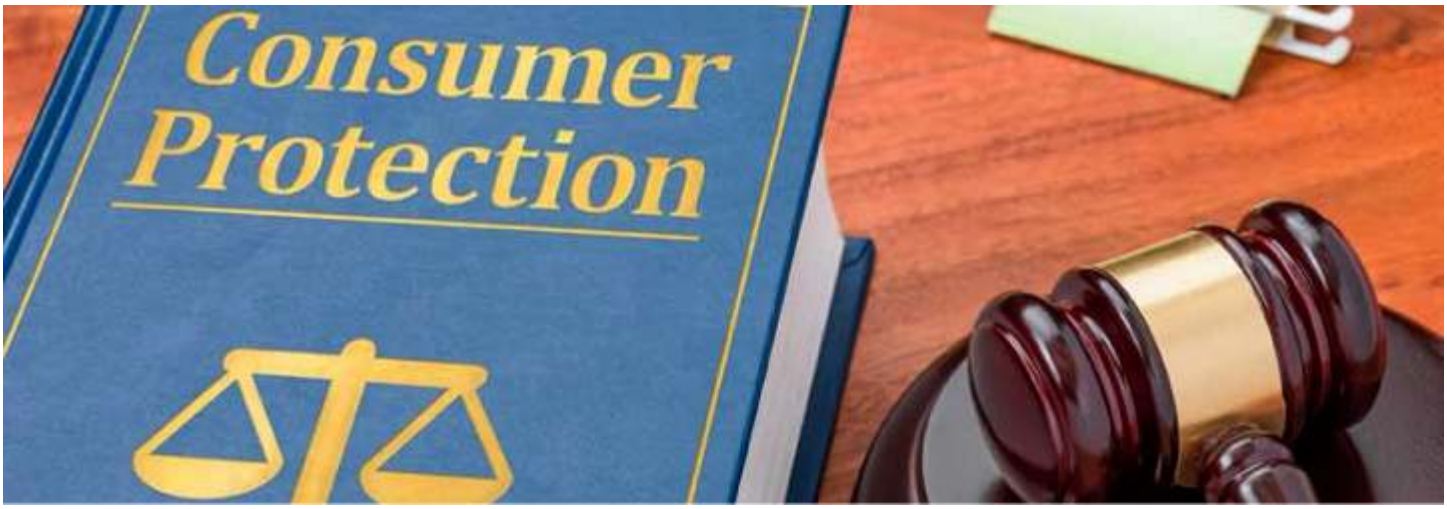
The Claimants, amongst other reliefs, urged the Court to declare that NBC was negligent and breached the duty of care owed to their customer by producing Fanta and Sprite contaminated with excessive benzoic acid and sunset yellow; and to also award the sum of N150,000,000.00 (One Hundred and Fifty Million Naira) as general damages against the 1st Defendant; the sum of N15,119,619.37 (Fifteen Million, One Hundred and Nineteen Thousand, Six Hundred and Nineteen Naira, Thirty Seven Kobo) against the 1st Defendant; and a refund of N1,622,000 being the money NBC admitted receiving from the Claimants.

The Claimants also asked for an interest of 18% on the total judgment sum from the date of judgment till the day of total liquidation of the total judgment sum; an order directing the immediate return to the Claimants 1,277 empty crates of Coca-Cola and other products' bottles deposited as an agreed pre-sale of product condition held at the 1st Defendant's Apapa Plant; interest of 21% on the total sum of N1,622,000 (One Million, Six Hundred and Twenty Two Thousand Naira) owed by the 1st Defendant to the Claimants and interest of 21% per annum on the total judgment sum until same is liquidated by the 1st Defendant.

Furthermore, the Claimants sought an order directing the 2nd Defendant, NAFDAC, to conduct and carry out routine laboratory tests of all the soft drinks and allied products of the 1st Defendant to ensure and guarantee the safety of the consumable products, produced from the 1st Defendant's factory; and an award of the sum of N3,000,000.00 (Three Million Naira) as the cost of instituting and prosecuting the case.

THE JUDGMENT

The Court held that the 1st Defendant being a manufacturer of soft drinks meant for human consumption owed a duty of care to the Claimants and indeed to all consumers of its products to ensure that its products are safe for human consumption. On whether there had been a breach of the duty of care owed the Claimants by the 1st Defendant, the Court held that there was no breach of duty of care on the part of the 1st Defendant in view of the fact that all soft drinks manufactured by the 1st Defendant were certified by the 2nd Defendant, NAFDAC (the regulatory body charged with the responsibility of setting standards for the manufacture of consumable products in Nigeria) as being fit for human consumption, the chemical component of same being within acceptable limits. Furthermore, the Court noted that it was manifest from the pleadings and evidence led in the case that the regulation governing the chemical component of Coca-Cola products in Nigeria is different from that which



is applicable in the United Kingdom. Therefore, the "Nigerian exporter has a duty to ascertain the quality acceptable in the country to which the export is intended before the goods are exported. Failure to meet the standard in another country cannot be laid at the door step of the manufacturers". However, in the same breadth, the Court agreed with the Claimant that soft drinks manufactured by the 1st Defendant ought to be fit for human consumption irrespective of colour or creed.

The Court stated that "it is manifest that NAFDAC has been grossly irresponsible in its regulatory duties to the consumers of Fanta and Sprite manufactured by Nigeria Bottling Company. In my respectful view, NAFDAC has failed the citizens of this great nation by its certification as satisfactory for human consumption products, which in the United Kingdom failed sample test for human consumption, and which become poisonous in the presence of Ascorbic Acid ordinarily known as Vitamin C, which can be freely taken by the unsuspecting public with the company's Fanta or Sprite. As earlier stated, the court is in absolute agreement with the learned Counsel for the Claimants that consumable products ought to be fit for human consumption irrespective of race, colour or creed. In spite of the fact that different countries have different limited for additives, the applicable limit for additives in Nigeria must be safe for human consumption whether on its own or when taken with other consumables"

"By its certification as satisfactory, fanta orange and sprite products manufactured by the 1st Defendant without any written warning on the products that it cannot be taken with Vitamin C, the 2nd Defendant would have by its grossly irresponsible and unacceptable action caused great harm to the health of the unsuspecting public"

Therefore in view of the above, the Court ordered NAFDAC to issue a written warning, within 90 days from the date of the judgment, to be placed on all the bottles of Fanta and Sprite that the content of the said bottles of Fanta and Sprite soft drinks cannot be taken with Vitamin C as same becomes poisonous if taken with Vitamin C.

The Court also held that the Claimants were not entitled to an award of damages claimed against the 1st Defendant. Regarding, the claim of N3,000,000 (Three Million Naira) as the cost of instituting and prosecuting the Suit, the Court held that: "this is a specie of special damages which must be specifically proven. Sadly, the Claimants' pleadings and written statement on oath are bereft of facts which will entitle the Claimants to this claim. The Claimants have failed to prove the said claim. It therefore fails".

The Court awarded cost of N2, 000, 000 (Two Million Naira) against NAFDAC, in view of the fact that the case was filed in 2008 and had been in Court for about 9 years.

GEP COMMENTS

The 1st Issue formulated by the 1st Defendant which was adopted by the Court, read:

Whether the 1st Defendant was negligent and breached the duty of care owed to its valuable customers including the 1st Claimant, in the production of its Fanta and Sprite Soft drinks, which, according to the Claimants, allegedly contained excessive Sunset Yellow and Benzoic Acid?

The issue essentially revolved around the duty of care and negligence. The Honourable Court relied on Edward Okwejiminor V. G Gbakeji & Anr. (2008) 5 NWLR (Pt. 1079) 172 in defining negligence. Negligence was defined as the "omission to do something, which a reasonable man guided upon those considerations that ordinarily regulate the conduct of human affairs, would do or doing something, which a prudent and reasonable man would not do."

The court also cited the decision of the Supreme Court in Agbonmagbe Bank Limited V C.F.A.O Limited (1967) N.M.L.R 173 on the applicability of the tort of negligence when it held that "the Plaintiff must show that the Defendant

owed him a duty of care, and that he has suffered damage in consequence of the defendant's failure to take care."

The Court after considering the evidence before it concluded that the 1st Defendant, as a manufacturer of soft drinks, owed a duty of care to the Claimants but had not breached that duty having had its products certified by the 2nd Defendant, NAFDAC.

Having resolved the 1st issue against the Claimants, the Court was obligated to also resolve the 2nd issue against the Claimants, revolving around the reliefs they would have been entitled to if the 1st Defendant had been found to have breached its duty of care.

Public anxiety about the safety of the 1st Defendant's products, in light of the Court's decision, largely stemmed from the Honourable Judge's rebuke of the 2nd Defendant. The conclusion of the Honourable Judge about the 2nd Defendant's alleged negligence does not however in our opinion properly arise from a careful consideration of the evidence presented before the Honourable Court. In our view, it is unsustainable to conclude that the 2nd Defendant had failed in its duty to the nation by certifying a product fit for consumption simply because the same product was rejected by the authorities in the United Kingdom.

Merely looking at Exhibit B5, the letter written by the Stockport Metropolitan Borough Council to the 1st Claimant, the complaint was about the products – Fanta and Sprite – failing to comply with EU legislation. The Court also appeared to have ignored the results of laboratory tests conducted by NAFDAC which showed that the Benzoic Acid in all the drinks produced by NBC were within acceptable limit. It similarly refused to consider the testimony of Abiodun Adeola Falana, the head of NAFDAC's laboratory who was subpoenaed. She clearly informed the Court that the World Health Organisation set a maximum limit of 600 milligram of Benzoic Acid per litre of drink, Nigeria approved 250 milligram which the products of the 1st Defendant complied with.

Further noting that the Honourable Judge admitted being aware that the regulation governing the chemical component of Coca-Cola products in Nigeria was different from that applicable in the UK, we are constrained to state respectfully that the Honourable Court misdirected itself when the Court pronounced NAFDAC as negligent because the authorities in the UK turned down a drink approved by NAFDAC.

The position taken by the Court is possibly injurious to the reputation of regulatory agencies in Nigeria and may further subject goods intended for export to a stricter level of scrutiny. It is indeed saddening that the Court failed to properly consider the evidence before it or seek the assistance of neutral scientific experts who could have easily advised on how the standards had been met.

CONCLUSION

In conclusion, the failure of the Claimants to do their due diligence before seeking to export Coca-Cola products cannot and should not be blamed on NAFDAC. It is commendable that the Regulatory Agency and the Health Ministry have speedily addressed the public on the safety of the Fanta and Sprite drinks. The advice of the Health Ministry that drugs be taken with water to avoid unforeseen negative reactions is one that meets a reasonable man test and is one that the Court would possibly have been moved to adopt if it sought expert assistance rather than directing NAFDAC to place a warning that the drinks become poisonous when taken with Vitamin C.