

## CASE COMMENTARY

The Court of Appeal recently had an opportunity of clarifying the meaning of a trademark under the Trademarks Act Cap. 426 Laws of the Federation of Nigeria, 1990. The case is FERODO LIMITED & ANOR –V- IBETO INDUSTRIES LTD [1999] 2 NWLR PT. 592 PAGE 509. The facts are that the applicant sued the respondent claiming that the respondent was infringing their trademark being marketed and known as “Ferodo”. They sought inter alia an injunction restraining the respondent from infringing the appellant’s trademark as well as damages. The respondent denied infringement of the Appellant’s trademark stating that its packet is marked “Union Supa”, “Union.”

The issue for determination revolved around whether the trademark “**Ferodo**” includes the colourful design surrounding the name as shown on the packet used in the marketing of the product.

The court in deciding the case drew a distinction between a name mark and a design mark. The court held that a careful and analytical consideration of the registered trade name of the appellant shows that only the name “Ferodo” was registered. In the words of the court:

*“Where a name or a graphic representation or any word is used and intended that it be registered as a trade name but the proprietors of the company decide to garnish the intended trade mark with other colourations or devices which make it appealing and decorative it cannot be assumed or taken that those fanciful and ornamental characters which colour the face of the package form part of the trademark.”*

By this decision, the court drew a distinction between a name and design. Although both are registrable trademarks, the registration of one does not automatically imply the registration of the other and a person seeking to protect both must obtain separate registration for both.

The court further used the opportunity presented by this case to restate the age long position of the law that an infringement of trademark consists not only in the similarity of two marks but also in the possibility of confusing one for the other. Relying on the U.S case of JAMES HEDDONS SONS MILLSITE STEEL –V- WIRE WORKS, 317 U.S. 474 and the Nigerian case of BELL SONS & CO. –V- GODWIN AKA & ORS. [1972] 1 S.C., 215 at 223, the court held that for one mark to constitute an infringement of another, the resemblance must be such as to be calculated to deceive a customer to buy the product of the infringer believing same to be the actual product he intended to buy.

- **Adefunke Adeyemi** -