A GUIDE TO PATENT PROTECTION IN SOUTH AFRICA

IN TERMS OF THE PATENTS ACT NO. 57 OF 1978 | SOUTH AFRICA



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A ROUGH IDEA | AN INTRODUCTION TO INTELLECTUAL PROPERTY AND PATENTS

A valid patent may be granted for any invention which is patentable, meaning that the invention must be new, that it must involve an inventive step and that it must be capable of being used or applied in trade or industry or agriculture. Nothing in the South African Patents Act ("the Act") defines what qualifies as an "invention" but it does exclude certain subject matter from patentability (see below). Thus, in essence, an invention may be regarded as any subject matter that is not excluded from patentability, and that meets the abovementioned patentability requirements.

Some examples of subject matter that may be suitable for patent protection include devices, processes or methods for producing or manufacturing products, and chemical substances or formulations. In many cases the subject matter that is patentable does not constitute the whole device, process or method, or substance, but a specific part thereof.

A patent provides the holder thereof (the "patentee") with the right to exclude others, within the jurisdiction in which the patent has been granted (e.g. within South Africa), from making, using, selling, offering for sale, or importing the patented invention for the term of the patent, as long as the patent is maintained in force. The effect of a patent is therefore exclusive, not permissive.

Over and above the fact that the granting of a valid patent requires a patentable invention, it is required of a patentee to disclose their invention, in a patent specification that would accompany an application for a patent, in enough detail for the invention to be put into practice by a person skilled in the art of the invention. Thus, keeping an invention a secret and obtaining patent protection for it, are mutually exclusive. It is one, or the other; although it may be possible to keep certain technical aspects related to an invention confidential as trade secrets in certain circumstances, insofar doing so does not obviate the possibility of carrying out the invention on the strength of the disclosure provided in the patent specification.

> "Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trade marks or copyrighted works to benefit from their own work or investment in a creation. The importance of intellectual property was first recognised in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties are administered by the World Intellectual Property Organization (WIPO).
>
> *- WIPO*

VIRTUAL CONSULTATION (A.K.A. FAQ)

WHY SHOULD I CONSIDER PURSUING PATENT PROTECTION? – Patent protection enables a patentee to maximise the financial returns from an invention. More particularly, it affords a patentee a monopoly in respect of an invention in the sense that the patentee can exclude others, within the jurisdiction in which the patent is registered, from making, using, exercising, disposing or offering to dispose or, or importing the patented invention. Obviously, being able to assert such exclusivity is commercially valuable.

In addition, the exclusivity enjoyed by a patentee allows the patentee selectively to trade with their exclusivity, e.g. by licensing others to exploit the invention, in exchange for a royalty.

Furthermore, since intellectual property is viewed as an intangible asset in the financial world, patents can be reflected as assets in the financial statements of a business, and in fact add significantly to the value of that business. In the absence of a patent, characterisation of potentially patentable technologies of a business for the purpose of such inclusion may be challenging, and may leave businesses ignorant in relation to it, thus potentially limiting the value of the business's assets.

CAN I PURSUE PATENT PROTECTION FOR MY INVENTION AFTER I HAVE NON-CONFIDENTIALLY DISCLOSED IT TO SOMEONE? – The short, and in most cases correct, answer is no, since the novelty of the invention has been destroyed by the disclosure. Maintaining secrecy is vital. Non-confidential disclosure of an invention generally obviates the possibility of pursuing patent protection for it. However, if disclosure has occurred and patent protection is desired, it may still be worth investigating the possibility of doing so, since a certain quality of disclosure is required for it to have destroyed novelty. For example, in South Africa disclosure by way of reasonable technical trial is excused, as is unauthorised disclosure by third parties.

I HAVE DEVELOPED AN INVENTION THAT DISPELS THE LAWS OF NATURE! CAN I PATENT IT? – No, you have not. And no, you cannot. Relevant non-patentable subject matter includes alleged perpetual motion devices, devices that allegedly do not require energy input, and the like.

I HAVE SEEN A COOL INVENTION ON THE MARKET ABROAD. CAN I PATENT IT IN SOUTH AFRICA? No. A patent application can only be filed by the inventor of an invention, or their successor in title. In addition, that the invention is in the public domain constitutes a disclosure that has destroyed its novelty, regardless of the fact that the disclosure took place in a different country. Novelty is assessed against all disclosures anywhere in the world.

CAN I GET A "WORLDWIDE PATENT"? – No. Patent protection must be pursued separately in each country in which it is desired. It follows that a patent only affords protection in the country in which it has been granted. A pursuit of foreign patent protection can, however, be initiated by the filing of a South African patent application, which can serve as basis for later foreign applications. There is something called a PCT application, which can be thought of as a temporary international patent application, but it is still not a worldwide patent.

CAN I GET A PATENT AND KEEP MY INVENTION SECRET? – No. Patent protection is inextricably linked with publication. Therefore, as mentioned earlier, obtaining a patent and keeping an invention secret are mutually exclusive. Large parts of the patent application process do take place confidentially, but ultimately, if a patent is granted, details regarding the invention are published.

HOW MUCH INFORMATION ON MY INVENTION MUST I INCLUDE IN AN APPLICATION FOR A PATENT? – The general standard is that a patent application must include enough technical

- information on an invention to enable a person skilled in the art of the invention to put the invention into practice.

I HAVE FILED A PATENT APPLICATION. WHAT ENFORCEABLE RIGHTS DO I HAVE? – Essentially, none. Enforceable rights only arise from a granted patent, and therefore the patent application must be prosecuted to grant to obtain such rights. This may take several years in some countries. In South Africa, it takes about 24 months.

IS IT GUARANTEED THAT I WOULD BE GRANTED A PATENT IF I APPLY FOR ONE? – No, although in countries which only examine patent applications in respect of formality requirements, such as South Africa, grant is virtually guaranteed. Many countries conduct substantive patentability examination, however, and have the discretion to refuse granting patent protection if they find an invention non-patentable.

IF I AM GRANTED A PATENT, AM I GUARANTEED OF THE VALIDITY OF THE PATENT? – No. Third parties may always challenge the validity of a patent.

WHO WILL ENFORCE MY PATENT AGAINST AN ALLEGED INFRINGER? – The responsibility to enforce a patent lies with the patentee, as does the onus to prove that an alleged infringer is infringing. This must be effected in a court process; in South Africa it is in the Court of the Commissioner of Patents.

DOES MY GRANTED PATENT ENTITLE ME TO EXPLOIT MY PATENTED INVENTION? – No. A granted patent entitles you to exclude others from exploiting your patented invention. Your exploitation of your invention remains subject to prior rights of others. For example, an earlier, broader patent may exist that you may infringe in exploiting your invention.

DOES MY GRANTED PATENT ASSURE ME THAT I AM NOT INFRINGING OTHER PATENTS? – No. As indicated above, prior rights of other may exist that may be infringed by exploitation of a patented invention.

EXCLUDED INVENTIONS

As mentioned above, there are certain exclusions from patentability. These are a discovery; a scientific theory; a mathematical method; a literary, dramatic, musical or artistic work or any other aesthetic creation; a scheme, rule or method for performing a mental act, playing a game or doing business; a program for a computer; and the presentation of information. These are not, as such, regarded as inventions for the purposes of the Patents Act. This does not mean that an invention relating to one or more of these, or incorporating one or more of these, is not patentable, and each case must therefore be judged on its merits.

A patent will also not be granted for an invention of which the publication or exploitation can generally be expected to encourage offensive or immoral behaviour; or which may be used in a manner contrary to law; nor for anything contrary to well established natural laws. An example of the latter is perpetual motion devices, which cannot be patented.

A patent will also not be granted for any variety of animal or plant or any essentially biological process for the production of animals or plants, not being a microbiological process or the product of such a process. It is, however, possible to obtain protection for plant varieties by the grant of plant breeders' rights in terms of the Plant Breeders' Rights Act no. 15 of 1976.

Furthermore, an invention consisting of a method of treatment of the human or animal body by surgery or therapy or of diagnosis, practised on the human or animal body, is not patentable. However, a substance or composition for use in such a method of treatment or diagnosis is patentable, even if the substance or composition itself is known, provided its use in a method of treatment is 'new', i.e. is the first medical use of the sustance or composition.

REQUIREMENT OF NOVELTY

The most important prerequisite for the patentability of an invention is that it must be 'new' as defined in the Act. An invention is deemed to be new if it does not form part of the 'state of the art' immediately before the priority date of the invention, which is effectively the date on which a pursuit of patent protection for the invention was first initiated, and prosecuted thereafter.

The state of the art comprises all matter (whether a product, a process, information about either, or anything else that is technically relevant) that has been made available to the public (whether in the Republic of South Africa or elsewhere, i.e. anywhere in the world) by written or oral description, by use or in any other way. The state of the art for purposes of determining novelty in South Africa also comprises matter contained in a pending patent application in South Africa where such matter has an earlier priority date. An invention used secretly but on a commercial scale within South Africa will also form part of the state of the art for the purposes of determining novelty in South Africa (this does not necessarily apply in foreign countries, and secret commercial scale use in South Africa therefore does not necessarily obviate a pursuit of foreign patent protection).

Novelty may be assessed by conducting a prior art search, as discussed below in more detail. It is, however, not possible conclusively to regard any invention as novel, in light of the volume of information that qualifies as constituting the state of the art.

It is noteworthy that the South African patent office, in contrast to most foreign patent offices, does not currently conduct substantive patent examination. This means that the novelty (and inventiveness – see below) of an invention is not assessed by the South African patent office when it decides whether or not to grant a patent on a patent application in respect of an invention. All that is assessed is whether or not the formality requirements have been complied with. The onus therefore lies on the applicant to assess the novelty of their invention, and to ensure that they pursue a scope of protection that they regard as valid from this perspective. Failing to do so may be uncurable after grant, and cause invalidity and therefore unenforceability of a patent granted for the invention. The applicant and, later, the patentee, are responsible for maintaining their patent in a valid form. The grant of a South African patent (or any patent, in fact) is therefore no guarantee that the patent is, in fact, valid. Any person may at any time apply for revocation of a South African patent, e.g. on the ground that the invention is not, in fact, patentable.

Of course, as pointed out above (and below), it is not possible conclusively to assess the patentability of an invention before filing a patent application for it, and applicants must therefore accept that even if their invention may be novel in their eyes, unknown prior disclosures by third parties may exist that may obviate the patentability of the invention, and thus render invalid and unenforceable any patent granted in respect of it. In the case of pursuing foreign patent protection this risk is more pronounced, in light of the practice of substantive examination. Whereas, in South Africa, grant of a patent is a virtual certainty and proving invalidity is in the hands of third parties, foreign patent offices that conduct substantive patent examination have a discretion to reject a patent application on the basis that the invention to which it is directed is not patentable in light of prior art revealed during independent searching conducted by such patent offices. Therefore, pursuing foreign patent protection should be approached mindful thereof that financial investment in it is associated with a real risk of loss.



IT IS VITAL TO MAINTAIN SECRECY BEFORE FILING

One aspect of the novelty requirement is that disclosures by the inventor and/or by the prospective applicant for patent protection would be seriously prejudicial to the novelty of an invention. Therefore, an inventor and/or prospective applicant should ensure that an invention is kept secret until such time as a patent application for the invention has been filed and, if it is kept secret, that it is not secretly used on a commercial scale before such a time (as mentioned above, secret use on a commercial scale is novelty-destroying for the purpose of pursuing patent protection in South Africa). If, before a patent application is filed, it is necessary to disclose details of the invention to other persons (e.g. for the purpose of preparing drawings or to obtain technical assistance, or in order to obtain financial assistance), such disclosure should be made under a pledge of secrecy that should preferably be in writing. A non-confidential disclosure of an invention before a patent application is filed may destroy the novelty of the invention and rule out any hope of obtaining valid patent protection for the invention.

CERTAIN PRIOR DISCLOSURES ARE EXCUSED

Unauthorised disclosure of an invention by another person/s before the filing of a patent application can be excused provided the applicant files application with all reasonable diligence after having learned of the disclosure. Disclosure of the invention prior to filing as a result of the invention being worked in South Africa by way of reasonable technical trial or experiment by the applicant or a predecessor in title can also be excused. There is, however, little judicial guidance on what constitutes reasonable technical or experiment. It is therefore preferred to file a patent application before commencing non-confidential technical trials or experiments.

REQUIREMENT OF INVENTIVENESS



Another important prerequisite for patentability is that an invention must involve an 'inventive step'. This involves an inquiry into whether or not the invention is obvious to a person skilled in the art, having regard to the state of the art. The relevant state of the art for assessing inventiveness is somewhat narrower in scope than that which applies to the assessment of novelty: The subject matter of earlier pending patent applications and prior secret commercial use of an invention do not form part of the state of the art when inventiveness is assessed.



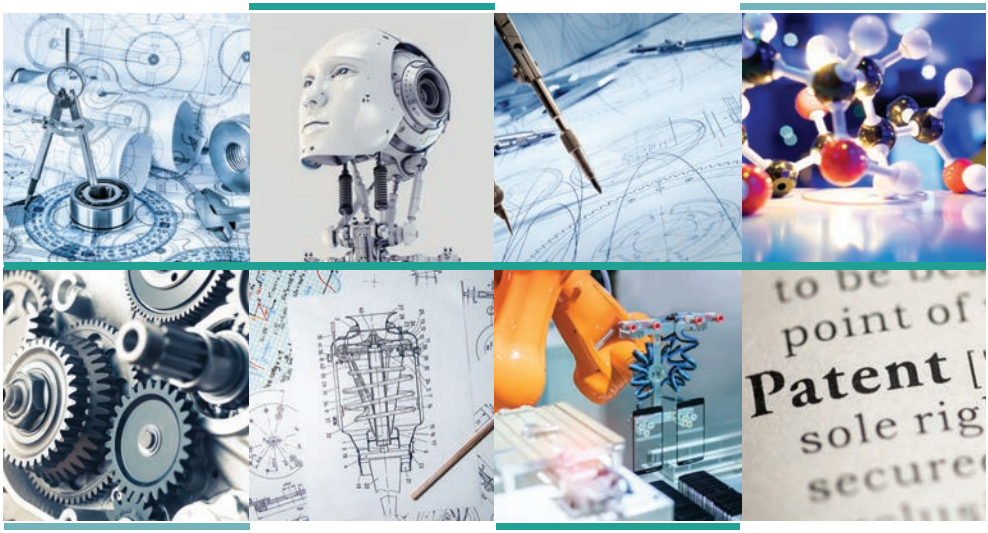
As indicated above, inventiveness is assessed with reference to the interpretation of the so-called "person skilled in the art" of the invention. Practically this person is, in South Africa, the Court of the Commissioner of Patents, or a succeeding appellant court, as lead by expert evidence. In most foreign countries, this person is a patent examiner in the first instance.



The subjective nature of the assessment of inventiveness makes it virtually impossible for an inventor or prospective applicant to make a conclusive determination of inventiveness in deciding whether or not to pursue patent protection. Accordingly, prospective applicants and patentees must accept that there is always a risk that an invention, even if it is novel, may be found to lack inventiveness, and that this risk is not absolutely quantifiable.



In fact, it must be emphasised that, as mentioned, the risk that an invention may lack novelty is also not absolutely quantifiable, since it is impossible absolutely to determine that an invention is novel. This is since, as mentioned, novelty is assessed against all disclosures that have ever been made, worldwide. It is obviously not possible to conduct a comprehensive search through all such potentially relevant information.



MANNER OF APPLYING FOR PATENT PROTECTION

Broadly speaking, there are two ways of initiating a pursuit of patent protection for an invention: One is by way of a so-called provisional patent application, and the other is by way of a so-called complete patent application.

A provisional patent application, importantly, does not directly lead to the grant of a patent. The effect thereof is, instead, to reserve the rights of the applicant to pursue patent protection for the invention to which the application is directed, within a period of 12 months of its filing date. This reserving effect applies in South Africa, in terms of the South African Patents Act, and also applies in virtually all countries of the world, in terms of the Paris Convention on Industrial Property Rights.

A complete patent application does directly lead to the grant of a patent. It may, as suggested above, be based on a provisional patent application that was filed no later than 12 months earlier. It does not, however, need to be based on a provisional patent application, and it may therefore be filed in the first instance. In such a case, it would have, for a period of 12 months, the same reserving effect as a provisional patent application.

PROVISIONAL PATENT APPLICATION

The filing of a provisional patent application has substantial advantages over filing a complete patent application in the first instance:

- A provisional patent application can usually be prepared and filed within a relatively short timeframe, mainly because patent claims are not required in a provisional specification and since the specification needs only 'fairly' to describe the invention. This is compared to a longer timeframe associated with the preparation and filing of a complete patent application, due to more onerous requirements for describing the invention. It follows that a provisional application can usually also be filed at an earlier stage of development of an invention than a complete application (see below as well).

- A provisional application affords an opportunity, through its reserving effect, for the novelty, technical merit, and commercial prospects of an invention to be investigated without prejudice, before further patenting costs are incurred. It remains essential, however, to maintain confidentiality or, if it is not maintained, to ensure further prosecution of the rights reserved by a provisional patent application, to avoid potential prejudice.

- As mentioned above, the reserving effect of a provisional application, coupled with the requirement only fairly to describe an invention, allows for early filing while further development and improvement of the invention takes place. Developments and improvements that realise after filing a provisional patent application can then be incorporated into a later application (e.g. into a following complete patent application), provided that the novelty requirement is still complied with. In light hereof, it is advisable to maintain confidentiality even after a provisional patent application has been filed, particularly of further developments and improvements in an invention.

- If a provisional application is not followed by the filing of a complete application within 12 months, it lapses without being published. Thus, provided that the applicant in a provisional patent application kept their invention secret during the pendency of their provisional application, abandoning the provisional application would not prejudice the applicant's rights again to file a provisional application at a later stage. This is not necessarily the case in respect of complete patent applications, which ultimately do become open to public inspection.

SEARCHES

It is advisable, though not essential, for a prospective applicant or applicant to have searches conducted. Generally, infringement and novelty searches can be distinguished. An infringement search is conducted to investigate whether or not exploitation of an invention in a particular jurisdiction would infringe a prior patent in that jurisdiction in the name of some other person. An infringement search is advisable before heavy capital costs are incurred in commencing exploitation of an invention. A novelty search is conducted to obtain an indication of the extent to which the invention is novel, and therefore patentable. Such searches should preferably be done before filing patent applications abroad on an extensive scale. It must be understood that a novelty search, as mentioned earlier, can only provide an indication of whether or not an invention is novel, and cannot be conclusive in this respect, except if a clear indication of lack of novelty is obtained.



COMPLETE PATENT APPLICATION IN THE FIRST INSTANCE

The filing of a complete patent application in the first instance, instead of a provisional patent application, is only advisable if the applicant is completely satisfied that the invention has been perfected and that further improvements or modifications thereof are unlikely.

In a complete specification, the invention and the manner in which it is to be put into practice must be fully described, and the best method known to the inventor of exercising the invention should be disclosed. Thus, if such information is not yet available, the filing of a complete patent application is not advised.



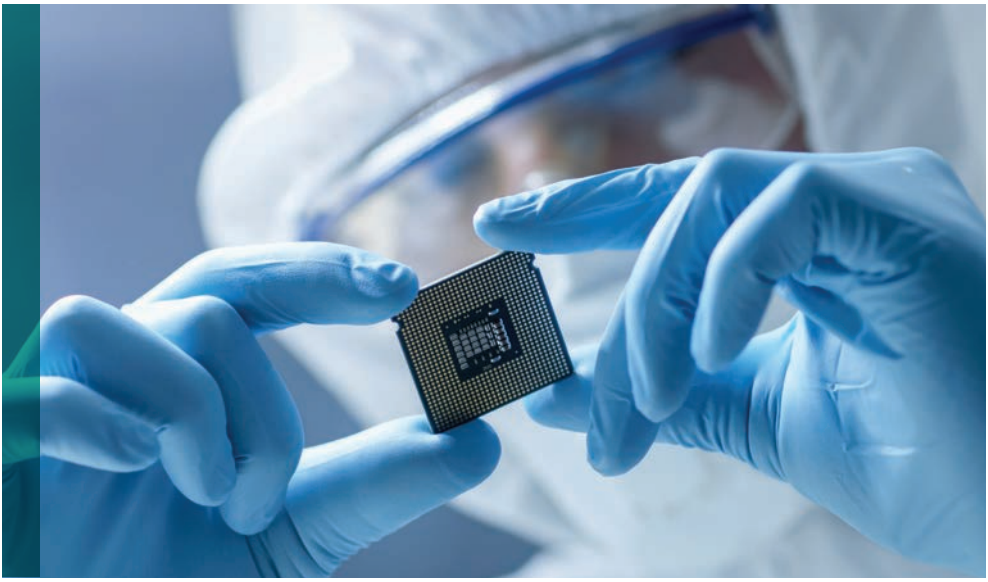
COMPLETE APPLICATION BASED ON A PRIOR APPLICATION

As indicated above, a complete application may be based on a prior application, which may be a South African provisional application, or a prior South African complete application which is not based on a prior application, or a first application for the relevant invention as filed in another country which is a signatory to the Paris Convention.

A complete application filed pursuant to a prior South African application may claim priority from the filing date of the prior application, provided such earlier application was filed no more than 12 months before (or in the case of the prior application being a South African prior application, 15 months upon payment of an extension fee). A complete application based on an application in another country and filed as a so-called convention application, may claim the priority date of the prior application filed in a convention country not more than 12 months before, in terms of the Paris Convention (see below).



The advantage of claiming priority from an earlier application is that the patentability of the invention would be assessed at the filing date of the earlier application, thus excluding publications between the filing date of the earlier application and the later application from the state of the art.



COMMERCIALISATION OF AN INVENTION

The patentability of an invention is not necessarily a measure of its commercial value. Thus, an invention may have adequate subject matter to be patentable, yet it may have little commercial value. The converse also applies in that just because an invention is not patentable, does not mean that it does not have commercial value.

If a patented article is commercialised, it would be advisable to mark the article, and any associated packaging or advertising with the patent application number (e.g. 'RSA Patent Application No. 99/1234'). It is important to note that the word "Patented" can only be used where an invention is the subject of a granted patent, otherwise the use of this word would be a misrepresentation, which is regarded as an offence under the Patents Act.

If the inventor or applicant enters into arrangements for the sale or licensing of the invention, a proper written agreement should be concluded so as to avoid misunderstandings and litigation. In this regard expert knowledge is required, since depending on the facts of the matter, the subject matter and rights that are the subject of a licence or sale may be any one or more of know-how, trade secrets, confidential information, a patented invention, or a patent itself. Each of these must be dealt with appropriately.

EFFECT OF A GRANTED PATENT

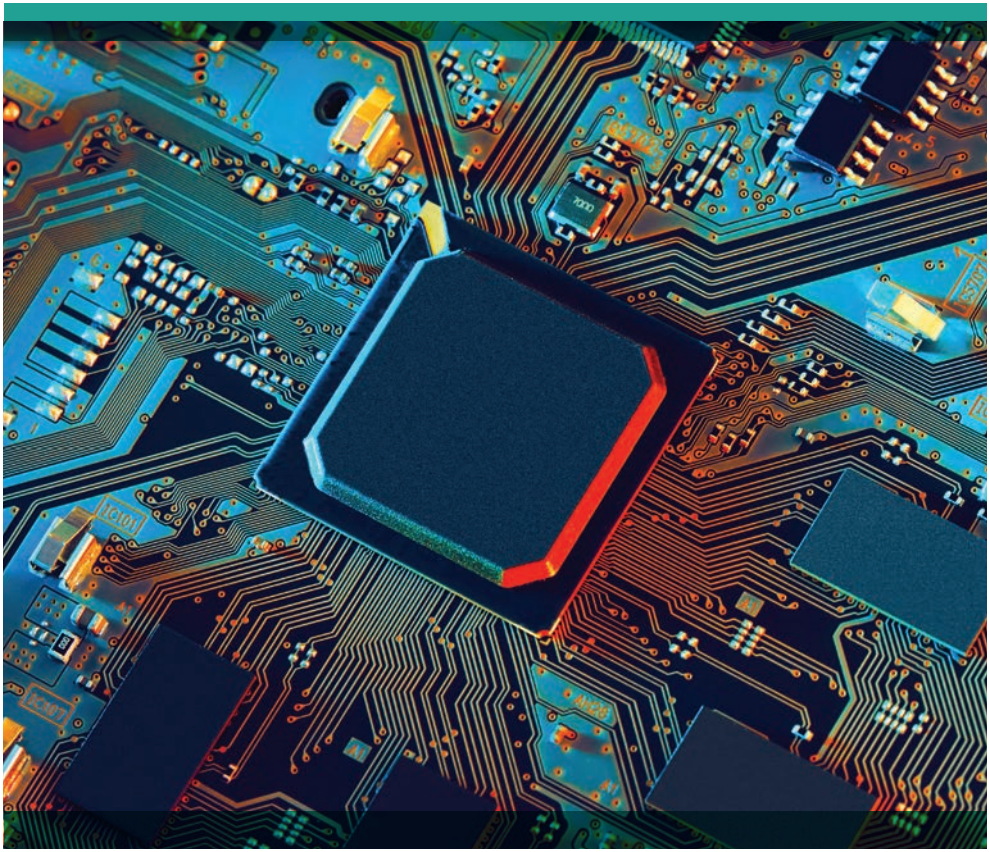
As mentioned above, a patent, when granted, confers upon the patentee in South Africa, for the duration of the patent (as long as it is maintained in force by the payment of the renewal fees), the right to exclude other persons from making, using, exercising, disposing or offering to dispose of, or importing the invention, so that he shall have and enjoy the whole profit and advantage accruing by reason of the invention.

- The sale in South Africa of a patented article by or on behalf of a patentee or his licensee shall, subject to other patent rights, give the purchaser the right to use and dispose of that article.

As has been mentioned, the fact that a patent has been granted does not mean that it cannot be revoked. At any time after the grant of a patent, any person has the right to apply for the revocation of the patent on any of the grounds prescribed by the Act. As has also been mentioned, the grant of a patent also does not entitle a patentee to exploit the invention; it merely entitles him to exclude others from competing with him. The right to exploit depends upon whether or not prior rights are held by other parties.

TERM AND MAINTENANCE OF A PATENT

The term of a patent is 20 (twenty) years dating from the date of filing, subject to the patent being maintained in force by the payment of the prescribed renewal fees. In order to maintain the patent in force, it is necessary for annual renewal fees to be paid, commencing at the end of the third year after filing. Failure to pay the renewal fees timeously results in the lapsing of the patent.



PATENT PROTECTION IN COUNTRIES OTHER THAN SOUTH AFRICA

A patent granted in this country affords rights in South Africa only, and not in any neighbouring country such as Namibia, Botswana, Lesotho or Swaziland, nor any other country in the world.

If patent protection for the invention is required in any country outside South Africa, separate patent protection must be pursued in each country. Thus, a separate patent application must be filed in each country or regional (where applicable) in which patent protection is desired. An option of filing an intermediate PCT (Patent Cooperation Treaty) patent application also exists (see below). The priority benefits of the Paris Convention (see below) can be claimed in appropriate cases.

PARIS CONVENTION BENEFITS

As has been mentioned, South Africa is a signatory of the Paris Convention for the Protection of Industrial Property, as are most other countries in the world.

In terms of the Paris Convention, if an applicant for a South African patent files a corresponding application in another convention country within a year of the date of filing of the first South African application, the priority of that first South African filing date can be claimed in respect of the application in the convention country. The effective date at which the novelty requirements of that country need to be satisfied will then be the date of filing of the South African application. The practical effect is that having filed the South African application, the applicant may then disclose the invention without prejudicing the possibility to file subsequent applications in convention countries, as long as these subsequent applications are filed within a year of the first filed South African application and priority is claimed.

PCT APPLICATIONS

The Patent Cooperation Treaty is an international agreement, to which South Africa has acceded with effect from 16 March 1999. In terms of PCT, a national or resident of any member country can, before filing national or regional patent applications in pursuit of patent protection, file a single PCT application designating any number of other member countries as designated countries in which patent protection is to be pursued by way of later national applications.

Priority can be claimed from a basic application in a member country.

The PCT application must therefore be followed by a national patent application in those countries where patent rights are desired. In other words, a PCT application itself does not lead directly to the grant of any rights and does not replace the necessity to file a patent application in each country in which patent protection is desired. This procedure entails a number of advantages (including cost advantages) where a national or resident of a PCT member country wishes to file multiple corresponding patent applications in other PCT member countries. Please ask for our separate memorandum on the PCT for more information.





REGISTERED DESIGN PROTECTION

In South Africa, and in most foreign countries, another form of protection, namely registered design protection, is available. This form of protection is directed to the physical appearance of an article of manufacture, rather than to underlying aspects of its function. In this respect, registered design protection is therefore distinct from patent protection.

Often, registered design protection is a useful alternative or supplement to patent protection, depending on the facts of the matter. If you require more information in relation to registered design protection, please ask for our separate pamphlet that deals with it in more detail.

ADAMS & ADAMS PATENT SERVICES

The Adams & Adams patent partners and associates are all qualified attorneys and patent agents, and all have engineering or science degrees. Technical areas in which we have specific experience include chemistry, chemical engineering, nuclear energy, renewable energy, pharmaceuticals, petrochemicals, information and communications technology, mechanical engineering, electrical and electronic engineering, and biotechnology.

Our highly experienced team provides services in all aspects of patent law, including drafting and filing of patent applications for locally originating inventions; drafting and filing patent applications originating from abroad; drafting and filing of patent applications in the rest of Africa through our network of African offices; patent prosecution abroad; patent litigation; and patent recordal and renewals. The team is also able to assist inventors with valuations, due diligence investigations and contractual aspects including licensing and assignments.



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