

## **A NOTE FROM THE PATENT OFFICE**

Year 2023 is already in full swing as we now rarely receive out-of-office replies. As the Patent Office, we would like to wish all patent attorneys and practitioners, members and non-members of the South African Institute of Intellectual Property Law (SAIIPL), a prosperous and healthy 2023.

The beginning of the year is an opportune time for reflecting on the previous year, sharing observations of the yesteryear, and to shed some light on new possibilities. First, we would like to thank members of various organizations, including SAIIPL and Pretoria Lawyers Association, for constantly cooperating and engaging with the Patent Office, in its efforts to improve services. Over the past year, continuous engagements with the practitioners has enabled the Office to identify areas of concern, calling for improvements on our side. This year, our efforts will be focused on modernizing our systems to ensure efficient registration and maintenance of patent and design rights. However, the efforts of the Patent Office will only yield meaningful outcome if we continue to cooperate and make a step further from where we ended the race in 2022.

In 2022, the Patent Office received 13976 patent applications. This number translates to an increase of 28%, compared to 2021. A closer look at these numbers reveals that 46% applications were derived from PCT international applications and 34% were filed by foreign applicants as first instance applications, claiming no priority. The Patent Office, like all stakeholders who make use of the South African Patent system or patent data, is interested in better understanding this apparent increase. Is it a bubble, a sustainable increase or a reflection of ills of our depository system? Interestingly, a majority of these first instance foreign applications were accompanied by requests to expedite their acceptance.

Although the Patent Office is not officially performing substantive examination of patent applications, the Office does have limited capacity to identify patent applications that patently do not meet intrinsic and/or extrinsic patentability requirements. The Office is therefore in a position to inform the practitioners that a reasonable and perturbing number of first instance foreign applications are merely replicas of inventions which were already applied for and published in other jurisdictions. Upon entry into South Africa, these applications claim no priority

and are in the name of other/different applicants in foreign jurisdictions. The Netherlands Patent Office recently wrestled with the same phenomenon and as of 01 September 2022, the Netherlands Patent Office rejects "re-used applications" on the grounds of abuse of law or legal process.<sup>1</sup> As the South African Patent office, we view the above-mentioned issue as manifest abuse of the depository patent system.

As a general principle, and in terms of the current legislation, patent applicants are required to appoint qualified patent attorneys or agents to file and prosecute complete patent applications at the Patent Office. Therefore, the "re-used applications" pass through the hands of qualified patent attorneys, and are accompanied by signed declarations and prescribed forms. In this regard, our office is grappling with the question of whether there is a duty on patent applicants and their representatives to conduct filing and prosecution of patent applications in good faith. It can be implied from some of the judgements that patent applicants have a duty of good faith. For instance, in *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd*, the court emphasized that *"It is in the interest of public policy to ensure that patentees only file patents for inventions which they believe are valid, thereby protecting the patent system against abuse."*<sup>2</sup> Recently, the Constitutional Court has confirmed that the doctrine of unclean hands may find application in patent litigation.<sup>3</sup> The decision of the apex court opens a question of whether the doctrine of unclean hands can be successfully raised in circumstances where the patent applicant did not conduct filing and prosecution of the patent application in good faith.

We therefore appeal to all practitioners to use the current system in a manner that preserves its shaky credibility. In the course of 2023, we will monitor the influx of the "re-used applications" and put measures in place to deal with such abuse of the system.

As we begin 2023, we look forward to continued cooperation. And once again, we extend our best wishes for 2023.

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<sup>1</sup> <https://english.rvo.nl/information/patents-and-intellectual-property-rights/patent-professionals/notification-re-used-patent-applications>

<sup>2</sup> *Gallagher Group Ltd and another v IO Tech Manufacturing (Pty) Ltd and others* 2013 BIP 45 (CP).

<sup>3</sup> *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42.