

A C B B R I E F I N G P A P E R N o . 4 , 2 0 0 8

Public Participation in the Context of Patent Laws in South Africa



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1. Background

The African Centre for Biosafety (ACB) has only recently commenced its work in the field of bioprospecting and biopiracy. A booklet as part of our Biosafety, Biopiracy and Biopolitics series titled, "Bioprospecting, Biopiracy and Indigenous Knowledge: two case studies from the Eastern Cape Province, South Africa" by Koyama and Mayet, has been published. In addition, the ACB acting on the instructions of a community in the Eastern Cape Province, and supported by a Swiss based NGO, the Berne Declaration, has formally challenged two patents granted to German based Schwabe Pharmaceuticals on the grounds that the patents are illegal as they duplicate and misappropriate the traditional knowledge of communities in South Africa. The ACB is committed to the protection of South Africa's astonishingly rich biodiversity and traditional knowledge of its communities. Part of this interest is expressed by our interrogation of the regulations that promote the exploitation and privatisation of biodiversity and knowledge.

The ACB is vehemently opposed to the South African patent system because it *inter alia*, confers monopolistic rights to biodiversity and traditional knowledge, as demanded by the Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organisation. We are also deeply committed to advocating for public participation and the right to know, as integral components of an open, transparent and accountable government.

In this vein, we have put together this research paper, to bring attention to bear on South Africa's patent regime, which we describe as being inherently unfair and unconstitutional because it not only excludes the public from decision-making but goes to lengths to make public participation nigh impossible.

The South African government is not above the law and must be held accountable to the public for decisions it makes on behalf of the public. It is our hope that this paper will contribute to public awareness of the limitations of the patent regime, as well as the opportunities the public have, to assert their rights within the framework of the Constitution to bring about greater equity, fairness, justice to a skewed system.

Acronyms

| | |
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| ACB | African Centre for Biosafety |
| CIPRO | Companies and Intellectual Property Registration Office |
| DTI | Department of Trade and Industry |
| IPO | Intellectual Property Office's (UK) |
| NEMA | National Environmental Management Act |
| PAJA | Promotion of Administrative Justice Act |
| TRIPS | Trade Related Aspects of Intellectual Property |

2. Introduction

This study seeks to provide a brief description of the patent application, examination and granting process in South Africa as regulated by the Patents Act and Regulations, including applications where the invention involves an indigenous biological resource, a genetic resource or traditional knowledge or use. Relevant provisions of the National Environmental Management: Biodiversity Act and their interaction with the patenting process are also described. Provisions relating to public participation, including shortcomings in the regulatory system, are emphasized.

A brief overview of constitutional and legislative requirements relevant to public participation is provided. The extent to which these requirements are achieved in the patenting process is critically discussed, and is also compared with public participation opportunities provided for in the United Kingdom and Australia.

Relevant considerations relating to standing (*locus standi*) and costs are also described, and the study concludes with broad recommendations relating to possible legal interventions and reform.

3. Brief description of the patent application, examination and granting process

The patent application procedure is prescribed in the Patents Act¹ and Patent Regulations.² A patent is generally viewed as a *'monopoly granted for a specified period by the State to the patentee (i.e. the holder of the patent) for his invention in return for a full disclosure of information to the public'*.³ The patent gives the patentee the right to exclude other persons from making use of the invention for the period of the patent (twenty years), where after the public may make use of the invention.

South Africa is a member of the Convention on Biological Diversity, in terms of which an applicant can, within a year from the date of first filing an application in any convention country, apply in other convention countries for protection (the effective date being the date of filing of the first application).⁴

The procedure that applies to applications for a patent are described briefly in paragraph 3.1 below. The procedures for patent applications involving an indigenous biological resource, a genetic resource or traditional knowledge or use must, however, be read in conjunction with the Biodiversity Act, and are discussed in paragraph 3.2 and 3.3 below.

3.1 Patent applications

A person seeking to register a patent is required to lodge a complete patent application,⁵ which application is usually submitted by a patent attorney or patent agent on behalf of the applicant. Applications made in terms of the Patent Co-operation Treaty are also regarded as a complete patent application.

The patent registrar examines every application, and if it complies with the requirements of the Patents Act (for example relating to the form of the application⁶ and the contents of the specification⁷) he/she is required to accept the application.⁸ It has been pointed out that *'[a]lthough the Registrar is enjoined by the Patents Act 57 of 1978 to examine applications as to the merits of the subject matter of inventions... he cannot do so in practice. The fact is that the Patent Office simply does not have a staff with sufficient knowledge of the technology to make such examinations comprehensively. The result is that the Registrar and his staff confine their duties... to the examination of patent applications... in the "prescribed manner", which is limited to ensuring that formalities are met; and, more generally, to ensuring that the proper procedures are followed both before and after the grant of an application'*.⁹

If all the formalities for a patent application have been complied with and the complete specification has been accepted by the Patents Registrar, the Registrar gives written notice of this fact to the applicant. This notice includes the date of acceptance of the specification, and a statement that on publication by the applicant in the Patent Journal of the acceptance of the specification, the patent shall be deemed to have been sealed and granted as from the date of publication. The applicant is required to advertise its acceptance of the application in the Patents Journal within three months of acceptance (or within such further time as the registrar may allow on request).¹⁰ As soon as practicable after publication, a patent is granted to the applicant and the Registrar causes it to be sealed with the seal of the patent office.¹¹

Burrell states that under the repealed 1952 Patents Act, any person was entitled to lodge opposition to the granting of a patent, but that no such procedure was provided for in the 1978 Patents Act. He points out that because a patent is automatically sealed on advertisement of acceptance, no opposition is possible. As a consequence, an aggrieved person would have to apply to have the permit revoked.

While the Patents Act continues to provide that any person may at any time apply for the revocation of a patent on specified grounds,¹² the South African Companies and Intellectual Property Registration Office (CIPRO) website¹³ states that publication of the patent in the Patent Journal allows members of the public the opportunity to lodge objections. The website indicates that the Registrar will issue a Patent Certificate if after three months there are no objections.

This practice appears to be pursuant to regulation 54 of the Patents Regulations, which provides that any person who has been notified of a proposed action by the registrar and who opposes such action, or **any person who opposes any such action advertised in the journal** in regard to a matter to be determined by the Registrar, **shall do so within** two months of dispatch of such notification to him/her or within **two months from the date of the relevant advertisement in the journal**.¹⁴

Such opposition must be lodged on a Form P15, which refers to s50(3), i.e. section 50 (3), and s53 of the Patents Act. This is curious as these sections deal with correction of clerical errors and amendment of documents, and rectification of the register. Section 50(3) provides that where it is proposed to make a correction otherwise than on request, the Registrar shall give notice of the proposed correction to the patentee or the applicant for the patent, as the case may be, and to any other person who appears to him to be concerned, and shall give any such person **an opportunity of being heard** before the correction is made. s53 provides that the Registrar may order the register to be rectified by the making, amendment or deletion of any entry therein, and requires the Registrar to give notice of his intention to do so to the patentee or the applicant for the patent, as the case may be, and to any other person who appears to him to be concerned, and shall give such patentee or applicant or other person **an opportunity of being heard** before the correction is made.

These provisions are consistent with s16 of the Patents Act, which provides that whenever discretionary power is conferred upon the Registrar or the commissioner, he/she shall not exercise that power adversely to an applicant **or an objector or other person who appears to be an interested party**, without giving that applicant, objector or interested party **an opportunity of being heard**.¹⁵

On the face of it, an opportunity is provided for objections to be lodged within two months of notice of acceptance of a patent application and full specification being published in the Patent Journal. This appears to be in addition to the relief available to any person to apply at any time for revocation of a patent, as revocation proceedings can be brought at any time. Notwithstanding the opportunities provided to oppose or apply for a revocation of a patent, both of these remedies are available only after a patent is deemed to have been sealed and granted.

3.2 Patent applications relating to inventions involving an indigenous biological resource, a genetic resource or traditional knowledge or use

The Patents Act was amended by the Patents Amendment Act of 2005.¹⁶ In terms of this amendment, an applicant for a patent is required to furnish information relating to any role played by an indigenous biological resource, a genetic resource or traditional knowledge or use in an invention.

This amendment (together with amendments to the Biodiversity Act discussed in paragraph 3.3 below) originates from the Indigenous Knowledge Systems Policy, which was adopted by Cabinet in November 2004.¹⁷

As a consequence of this amendment, as from 14 December 2007 a patent applicant who lodges a complete specification is also required to lodge a statement indicating whether or not the invention for which protection is claimed is based on or derived from an indigenous biological resource, genetic resource, or traditional knowledge or use.¹⁸ Where the statement acknowledges that this is the case, the Registrar is required to call upon the applicant to furnish proof in the prescribed manner¹⁹ as to his or her title or authority to make use thereof.²⁰ This could include, amongst other things, a copy of any permit issued under Chapter 7 of the Biodiversity Act, proof that prior consent has been obtained as contemplated in Chapter 6 of the Biodiversity Act, and/or proof of a material transfer agreement as contemplated in Chapter 6 of the Biodiversity Act.

If the statement contains a false statement or representation which is material and which the patentee knew or ought reasonably to have known was false at the time when the statement or representation was made, any person may at any time apply in the prescribed manner for the revocation of the patent on these grounds. This suggests that if a false statement is lodged, any person may apply for revocation of the patent.²¹

3.3 National Environmental Management: Biodiversity Act and Regulations on Bioprospecting

Provisions in the National Environmental Management: Biodiversity Act²² aimed at regulating bioprospecting²³ involving indigenous biological resources²⁴ came into effect on 1 January 2006.²⁵ These provisions also seek to regulate the export from South African of indigenous biological resources for the purpose of bioprospecting or any other kind of research, as well as to provide for a fair and equitable sharing by stakeholders in benefits arising from bioprospecting involving indigenous biological resources.²⁶

Any person engaging in bioprospecting involving any indigenous biological resources, or engaging in exporting from the Republic any indigenous biological resources for the purpose of bioprospecting or any other kind of research, is required to have a permit issued in terms of Chapter 7 of the Biodiversity Act.²⁷ Regulations to further regulate this permit system and to set out the contents of, and the requirements and criteria for, benefit-sharing and material transfer agreements have been published in the Bioprospecting, Access and Benefit-Sharing Regulations of 2008.²⁸

Before any application for a Chapter 7 permit may be considered by the relevant issuing authority, the applicant must (if so requested by the authority) disclose all relevant information concerning the proposed bioprospecting and indigenous biological resources to be used.²⁹

In addition, the issuing authority considering the application for the permit is required to protect the interests that specified stakeholders may have in the proposed bioprospecting project.

These specified stakeholders include a person, including any organ of state or community, providing or giving access to the indigenous biological resources to which the application relates.³⁰ They also include an indigenous community whose traditional uses of the indigenous biological resources to which the application relates have initiated or will contribute to or form part of the proposed bioprospecting; or whose knowledge of or discoveries about the indigenous biological resources to which the application relates are to be used for the proposed bioprospecting.³¹

If a stakeholder has such an interest the issuing authority may issue a permit only if:

- (a) the applicant has disclosed all material information relating to the relevant bioprospecting to the stakeholder and on the basis of that disclosure has obtained the **prior consent** of the stakeholder for the provision of or access to such resources;
- (b) the applicant and the stakeholder have entered into:
 - (i) a **material transfer agreement**³² that regulates the provision of or access to such resources; and
 - (ii) a **benefit-sharing agreement**³³ that provides for sharing by the stakeholder in any future benefits that may be derived from the relevant bioprospecting; and
- (c) the Minister has approved such benefit-sharing and material transfer agreements.³⁴

The Biodiversity Act provides further that the issuing authority:

- (a) may engage the applicant and stakeholder on the terms and conditions of a benefit-sharing or material transfer agreement;
- (b) may facilitate negotiations between the applicant and stakeholder and ensure that those negotiations are conducted on an equal footing;
- (c) on request by the Minister, must ensure that any benefit-sharing arrangement agreed upon between the applicant and stakeholder is fair and equitable;
- (d) may make recommendations to the Minister; and
- (e) must perform any other functions that may be prescribed.³⁵

The Biodiversity Act also provides for the establishment of a Bioprospecting Trust Fund,³⁶ and for exemptions to be gazetted. An Exemption Notice was published on 8 February 2008 exempting a number of activities relating to indigenous biological resources.³⁷

Of relevance to public participation, s88 of the Biodiversity Act provides that a decision of the issuing authority to issue or refuse a chapter 7 permit or to issue it subject to conditions, must be consistent with, amongst other things, the applicable provisions of the Biodiversity Act, the national environmental management principles, the national biodiversity framework, any applicable international agreements binding on the Republic, the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), and any requirements that may be prescribed.

The Biodiversity Act itself makes provision for consultation and public participation. Before the issuing authority can exercise its power to make a decision on a permit application, the Minister must, amongst other things, allow public participation in the process in accordance with s100.³⁸

In terms of s100, the Minister is required to give notice of the proposed exercise of the power referred to in s99:

- (a) in the Gazette; and
- (b) in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.

This notice must:

- (a) invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and
- (b) contain sufficient information to enable members of the public to submit meaningful representations or objections.

The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person designated by the Minister.³⁹

The Minister must give due consideration to all representations or objections received or presented **before** exercising the power.⁴⁰

The effect of chapter 6 and chapter 7 of the Biodiversity Act is that in order to register a patent under the amended Patents Act (where such patent involves an indigenous biological resource, a genetic resource or traditional knowledge or use), an applicant would have to first obtain a permit under the Biodiversity Act. This permitting procedure requires (amongst other things) compliance with s100 of the Biodiversity Act, as well as compliance with the requirements of PAJA.

In terms of s94, an applicant who feels aggrieved by the decision of an issuing authority in terms of section 88 (2) (c) or (d), or a permit holder whose permit has been cancelled in terms of section 93, may lodge with the Minister an appeal against the decision within 30 days after having been informed of the decision. No provision appears to be made for internal appeal for any interested party opposing a permit decision.

4. Laws relevant to public participation and fair procedures

Various legal principles and statutes deal with public participation within the context of environmental decision-making in South Africa.

4.1 The right to be heard – *audi alteram partem* rule

The common law recognizes the right of persons to be heard. Hoexter points out that procedural fairness in the form of *audi alteram partem* (the ‘audi rule’) is concerned with giving people an opportunity to participate in decisions that will affect them, and a chance to influence the outcome of those decisions.⁴¹

It is relevant to note that our courts have held that there is a right to be heard where a statute empowers a public official to give a decision which may prejudicially affect another person, unless the statute either expressly or by necessary implication excludes such a right.⁴²

4.2 Constitution of the Republic of South Africa

In terms of the Constitution of the Republic of South Africa, everyone has the right to administrative action that is lawful, reasonable and procedurally fair.⁴³ In addition, everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.⁴⁴

Other rights that have relevance to this opinion include the right to an environment that is not harmful to health and well being, to have that environment protected for the benefit of present and future generations,⁴⁵ and the right of access to information.⁴⁶

Section 39(2) of the Constitution provides that when interpreting legislation, every court “*must promote the spirit, purport and objects of the Bill of Rights*”. The Constitutional Court has interpreted this to mean that “*that all statutes must be interpreted through the prism of the Bill of Rights*”.⁴⁷

The Constitution also emphasizes the constitutional commitment to open, transparent and accountable public administration.⁴⁸

4.3 Promotion of Administrative Justice Act

The Promotion of Administrative Justice Act⁴⁹ (PAJA) seeks to give effect to the constitutional right to administrative action that is lawful, reasonable and procedurally fair, as well as to the right to written reasons for administrative action.

PAJA is national legislation that applies to all administrative action taken by any department in any sphere of government or organ of state.⁵⁰

PAJA provides for two procedures for fair administrative action in sections 3 and 4. Section 3 provides for the procedure to be followed for administrative action that affects any person, while section 4 provides for the procedure to be followed when it affects the public. Where administrative action can affect both a person and the public, it follows that both procedures must be read and employed together.⁵¹

Section 3 of PAJA, which deals with administrative action affecting any person, provides that:

- (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
- (2) (a) A fair administrative procedure depends on the circumstances of each case.
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1):
 - (i) adequate notice of the nature and purpose of the proposed administrative action;
 - (ii) a reasonable opportunity to make representations;
 - (iii) a clear statement of the administrative action;
 - (iv) adequate notice of any right of review or internal appeal, where applicable; and

- (v) adequate notice of the right to request reasons in terms of section 5.
- (3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to:
- (a) obtain assistance and, in serious or complex cases, legal representation;
 - (b) present and dispute information and arguments; and
 - (c) appear in person.
- (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
- (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including:
- (i) the objects of the empowering provision;
 - (ii) the nature and purpose of, and the need to take, the administrative action;
 - (iii) the likely effect of the administrative action;
 - (iv) the urgency of taking the administrative action or the urgency of the matter; and
 - (v) the need to promote an efficient administration and good governance.
- (5) Where an administrator is empowered by any empowering provision to follow a procedure which is **fair but different** from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

Section 4 of PAJA, which deals with cases where an administrative action materially and adversely affects the rights of the public, provides that an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether:

- (a) to hold a public inquiry in terms of subsection (2);
- (b) to follow a notice and comment procedure in terms of subsection (3);
- (c) to follow the procedures in both subsections (2) and (3);
- (d) where the administrator is empowered by any empowering provision to follow a procedure which is **fair but different**, to follow that procedure; or
- (e) to follow another appropriate procedure which gives effect to section 3.

In the event that an administrator decides to follow a notice and comment procedure, the administrator is required in terms of s4(3) to:

- (a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
- (b) consider any comments received;
- (c) decide whether or not to take the administrative action, with or without changes; and
- (d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.

The administrator must observe the rules laid down by the Minister in the *Regulations on Fair Administrative Procedures*.⁵² These include the following:

- information must be published by way of notice in gazettes and in newspapers (depending on whether the proposed administrative action affects the rights of the public nationally, provincially or locally);
- the notice must contain sufficient information to enable members of the public to submit meaningful comment, and where appropriate must specify where further information will be available for public scrutiny;
- in order to ensure that a proposed administrative action is brought to the attention of the public, the information contained in the notices may be publicised by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets;
- the notice must be in at least two official languages, and must take account of the language preferences and usage in the area concerned;

- where the rights of specific communities could be affected and where a significant proportion cannot read or write (or who otherwise need special assistance), notice must be published in a form that will bring the proposed action to the attention of the public at large, and special steps must be taken to solicit the views of the community (e.g. public meetings).

In terms of section 5(1) of PAJA, any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action. The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action. If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure. In determining whether such a departure is reasonable and justifiable, an administrator must take into account all relevant factors, including-

- (i) the objects of the empowering provision;
- (ii) the nature, purpose and likely effect of the administrative action concerned;
- (iii) the nature and the extent of the departure;
- (iv) the relation between the departure and its purpose;
- (v) the importance of the purpose of the departure; and
- (vi) the need to promote an efficient administration and good governance.

4.4 National Environmental Management Act

The National Environmental Management Act (NEMA)⁵³ states in its preamble that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance.

NEMA also includes environmental management principles that apply throughout the Republic to the actions of all organs of state that may significantly affect the environment. Amongst other things, these principles serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of any statutory provision concerned with protection of the environment. The principles guide the interpretation, administration and implementation of NEMA and any other law concerned with protection or management of the environment.

The principles stipulate, amongst other things, that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably, and that development must be socially, environmentally and economically sustainable.

The principles state further that sustainable development requires the consideration of all relevant factors. Factors relevant to **public participation** include (but are not limited to) the following:

- the participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured;
- decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge;
- Community well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.

The general objectives of integrated environmental management stipulate that a general objective of integrated environmental management is to ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment.⁵⁴

5. Do the public participation opportunities provided for in the patents process meet the requirements of PAJA?

Bearing in mind that PAJA seeks to give effect to the constitutional right to administrative action that is lawful, reasonable and procedurally fair, this section of the study discusses the extent to which the public participation opportunities provided for in the patent application, examination and granting process complies with the requirements of procedurally fair administrative action. It has been highlighted above that the Patents Amendment Act has changed the procedure relating to patent applications involving an indigenous biological resource, a genetic resource or traditional knowledge or use in an invention. For convenience, this study commences with a discussion of public participation in patent applications not involving an indigenous biological resource, a genetic resource or traditional knowledge or use in an invention, and then proceeds to discuss public participation within the context of applications involving an indigenous biological resource, a genetic resource or traditional knowledge or use in an invention.

While a failure to provide adequate opportunities for public participation could potentially render legislation unconstitutional, it should be noted that the concept of fairness is highly variable, and that while our courts recognize fundamentals such as notice of threatened action and an opportunity to make representations to the relevant administrator, 'they have refused to lay down rigid rules concerning the content of fairness'.⁵⁵ The approach taken by our courts tends towards a contextual approach.⁵⁶ Because PAJA is legislation of a 'universal' kind,⁵⁷ in cases where the enabling legislation addresses the issue of fairness, but does so incompletely or inadequately, the provisions of PAJA supplement the enabling legislation and fill in the gaps where provisions are insufficiently detailed. The enabling legislation must now be read together with PAJA,⁵⁸ and would not necessarily be rendered unconstitutional.

In circumstances where enabling legislation addresses the issue of fairness incompletely or inadequately, a failure by a relevant authority to apply the requirements of PAJA could result in any decision being rendered unfair. Each case would, however, need to be considered on its own merits.

5.1 Patent applications not involving an indigenous biological resource, a genetic resource or traditional knowledge or use in an invention

The Patents Act requires that where the Registrar exercises any discretionary power, that power may not be exercised adversely to an applicant, an objector or other interested party without giving that person an opportunity to be heard.⁵⁹

In practice, no opportunities for interested and affected parties to make representations to the Registrar are provided prior to a patent applicant publishing notice in the Patent Journal of acceptance of its application and full specification. On publication of this notice the patent is deemed to have been granted and sealed as from the date of publication. Any objections must be lodged with the Registrar within two months of publication.

5.1.1 Administrative action affecting any person

Insofar as the granting of a patent is administrative action that materially or adversely affects the rights or legitimate expectations of any person, this administrative procedure must be fair and must comply with the requirements of s3 of PAJA. The patents application procedure is compared with the requirements of s3 below.

(a) No notice of proposed administrative action

The Patents Act and Regulations do not require that notice be given to any person who may be affected by the granting of a patent application prior to the application being accepted and published. While the applicant is required to publish notice of acceptance within three months, the fact that this notice coincides with the sealing and granting of the patent means that it cannot be construed as notice of **proposed** administrative action. This notice is after-the-fact, and on the face of it where a patent application is accepted without communicating the proposed administrative action to persons whose rights or legitimate expectations may be materially and adversely affected, the decision would arguably be unfair and subject to review.

(b) Inadequate notice

Requiring the patent applicant to publish notice of acceptance of the patent application in the Patent Journal is a form of notice. However, the Patent Journal is not readily available and accessible, and must be purchased from the government printers. Indigent or illiterate persons who could be materially affected by any patenting decision are unlikely to ever see this notice. Hoexter points out that in the constitutional era our courts have been quick to safeguard the rights of illiterate or unsophisticated people affected by administrative action, and have made creative suggestions as to methods of serving notice,⁶⁰ including providing individual notices⁶¹ and even using a loudhailer.⁶² Other methods could include pamphlets and radio broadcasts. Without adequate notice, it is possible that the first time a person affected by the grant of a patent would become aware of the patent having been granted would be when infringement proceedings were brought against him or her. On the face of it, publication of a notice of acceptance of the patent in the Patent Journal is inadequate notice that could render the decision to grant any patent unfair.

(c) A reasonable opportunity to make representations

Provision of adequate information to interested parties has an important bearing on their opportunity to make representations. As has been pointed out earlier in this study, no notice of the proposed acceptance of a patent application is given. This shortcoming is compounded by the reality that the patent application and linked documents are not available to the public prior to publication of the notice of acceptance. This is in contrast to the approach taken by our courts, which have held that in order to give effect to the right to a fair hearing, an interested party must be placed in a position to present and controvert evidence in a meaningful way. In order to do so, that party should know the substance of the case that it has to meet.⁶³ The failure of the Patents Act and regulations to make available the information upon which the decision on patenting will be based prior to acceptance of the application is a serious deficiency in the regulatory regime, and arguably renders the empowering provisions unconstitutional. On the face of it, it would also render any particular acceptance of a patent application procedurally unfair and subject to being overturned on review.

(d) Clear statement of decision

S3(2)(iii) of PAJA requires that in order to give effect to the right to procedurally fair administrative action, an administrator must give interested parties a clear statement of the administrative action. The affected person should be able to determine from the statement what has been decided, when, by whom and on what factual basis.⁶⁴

The Patents Act requires that notice and publication of acceptance of a complete specification shall contain:

- the date of acceptance of the specification; and
- a statement that on publication by the application of the acceptance of the specification, the patent concerned shall be deemed to have been sealed and granted as from the date of such publication.

In terms of the Patents Regulations, the applicant is required to advertise this acceptance in the Patents Journal within 3 months of acceptance. This publication should include the following information:

- official application number;
- lodging date;
- acceptance date;
- international disclosure;
- names of applicant and inventor;
- details of earliest priority date claimed;
- title of invention;
- abstract (and drawing);
- number of sheets in application;
- miscellaneous information (e.g. advertisements of amendments etc.).⁶⁵

Given that the inadequacies highlighted earlier regarding publication of the notice of acceptance of the patent, it is difficult to see how persons affected by the administrative action would receive a clear statement of the administrative action.

(e) Adequate notice of right internal appeal

Given that the notice published in the Patent Journal triggers the first opportunity for an affected person to make representations or object to the granting of a patent, no appeal lies against the decision until such time as the Registrar has considered the application and made a decision on the objection. S75 of the Patents Act provides that an appeal shall lie from any decision of the registrar to the commissioner, who shall hear the parties and the registrar if he desires to be heard. It is not clear how or whether notice of the right to internal appeal is given to objectors.

(f) Right to request reasons

Regulation 78 of the Patents Regulations provides that when any person objects to any order or decision of the registrar he/she may, **within one month** of the Registrar's order or decision or such further time as the Registrar may allow, on a Form P4 request the Registrar to state in writing the grounds for his decision and the data used by him/her in arriving thereat. The date of such statement shall be deemed to be the date of the Registrar's order or decision for the purpose of the appeal. There does not seem to be a requirement that for the notice published in the Patent Journal to also give notice of the right to request reasons. This problem is compounded by the reality that persons who might be materially and adversely affected by the grant of a patent may only become aware of the patent having been granted when infringement proceedings are brought against him/her.

5.1.2 Administrative action affecting the public

The Patents Act and Regulations make provision for a notice to be published in the Patent Journal, which affords objectors an opportunity to oppose the granting of a patent. This notice falls short of the requirements of section 4 of PAJA and the *Regulations on Fair Administrative Procedures* in that the notice is not required to be published in any newspapers (what is reasonable would depend on whether the granting of a patent could affect the rights of the public nationally, provincially or locally). In addition, the notice is not required to specify where further information will be available for public scrutiny (i.e. at the Patents Office), and does not include publication of the information contained in the notices by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.

There is also no requirement that, where the rights of specific communities could be affected and where a significant proportion cannot read or write (or who otherwise need special assistance), notice must be published in a form that will bring the proposed action to the attention of the public at large, or that special steps must be taken to solicit the views of the community (e.g. public meetings). It also does not appear as if the notice takes into account the language preferences and usage in the area concerned.

Given that PAJA is legislation of a universal kind that applies alongside the Patents Act, a failure by the Registrar to give adequate notice of the granting of a patent to members of the public who may be materially and adversely affected could result in the patent granting procedure being regarded as administratively unfair.

Consideration would also need to be given to the provisions of the Patents Act, which provide that any person may at any time apply for a revocation of a patent on specified grounds. Thus it is conceivable that, even in situations where the public (or a person for that matter) was not afforded adequate notice of the granting of a patent and failed to bring opposition proceedings within the prescribed time period, revocation proceedings on the specified grounds would be available as a remedy.

5.2 Patent applications relating to inventions involving an indigenous biological resources, a genetic resource or traditional knowledge or use

Where patent applications are made for inventions involving an indigenous biological resource, a genetic resource or traditional knowledge or use, a patent applicant is required to lodge a statement declaring this to be the case.

Should this statement contain a false statement or representation which is material and which the patent applicant knew or ought reasonably to have known was false, any interested and affected person would be entitled to apply for a revocation of any patent granted.

In the event that the statement discloses that the invention does involve an indigenous biological resource, a genetic resource or traditional knowledge or use, the Registrar is required to call for proof that the applicant has title or authority to make use of the indigenous biological resource, genetic resource or traditional knowledge or use. As discussed in paragraph 2.3 above, this would include a permit issued under Chapter 7 of the Biodiversity Act.

To obtain such a permit, the applicant would have to obtain the prior consent of the stakeholder, and would also have to enter into a material transfer agreement and benefit-sharing agreement with the stakeholder.

Any decision by the issuing authority to issue or refuse such a permit is required to be consistent with the provisions of PAJA. Any decision that fails to do so would be unfair and liable to be set aside on review.

The Biodiversity Act also specifies that prior to a decision on permitting being made, notice must be given in the Gazette and in at least one newspaper distributed nationally. If the permit would only affect a specific area, this notice may be published in at least one newspaper distributed in that area. The notice must invite members of the public to submit within 30 days written representations on or objections to the proposed permitting decision, and must also contain sufficient information to enable members of the public to submit meaningful representations or objections. Interested persons or communities may also be allowed in appropriate circumstances to present oral representations or objections to the decision-maker.

Interestingly, the Biodiversity Act only makes provision for an applicant who is aggrieved by a decision to appeal within 30 days of having been informed of the decision. In the absence of a right to appeal, an aggrieved objector would be entitled in appropriate circumstances to apply to the High Court to review the decision on permitting.

The lawfulness of any decision to grant a Chapter 7 permit would depend on the circumstances of each case. Clearly, the relevant provisions of both PAJA and the Biodiversity Act itself would apply, and any material failure to meet the requirements of these provisions would render the decision procedurally unfair and liable to being set aside on review.

6. Legal standing and costs

In South African law, a person suing in a court of law must have standing, or *locus standi in judicio*. This means that it is usually not enough for a complainant to show that an administrator is acting illegally. The complainant must also have the capacity to sue, and must have a sufficient interest in the case. An unsuccessful litigant usually bears the costs of the successful party, although the courts have discretion regarding the ordering of costs in certain circumstances.

The issue of who has a right to be heard under the Patents Act has been considered in a number of reported judgments. The general principles of *audi alteram partem* have been summarized as follows:

‘The gist of the rules of natural justice is contained in the maxim *audi alteram partem*. According to this rule a party to an administrative hearing or proceeding which may lead to action affecting his rights, privileges and liberties, is entitled to present his case and must be given the opportunity to do so. If no private rights are affected, there is no right to a hearing’.⁶⁶

In *F.L.O.J. Chauvier v. Peacock Investments (proprietary) Limited and Another*, the opinion was expressed that objectors should only be given an opportunity of being heard under circumstances where the Registrar exercises his discretion in such a way that it affects the rights, privileges and liberties of the objectors.⁶⁷ This effectively reflects the common law position that the applicant for judicial review must be able to show a sufficient, personal and direct interest in the case.⁶⁸

Applying this rule, any person seeking to judicially review the exercise of any discretionary power exercised by the Registrar in circumstances where that person was not afforded a right to be heard would have to demonstrate that his/her rights, privileges and liberties were affected by the decision. This would conceivably include any person whose prior use of the subject matter of a patent application would be affected by the granting of the patent.

However, it is important to note that there have been significant developments in the law relating to standing. Section 38 of the Constitution provides that where it is alleged that a right in the Bill of Rights has been threatened, the court may grant appropriate relief including a declaration of rights. While the common law position relating to standing is reflected, the section goes beyond the common law to allow class actions (i.e. anyone acting as a member of, or in the interest of, a group or class of persons) and an *actio popularis* (i.e. anyone acting in the public interest). The Constitutional Court has held that there is no good reason for adopting a narrow approach to the issue of standing on constitutional cases, and that a broad approach should be adopted.⁶⁹

Unfortunately, s38 of the Constitution refers specifically to cases where a right in the Bill of Rights has been infringed or threatened, and does not cater for cases outside the Bill of Rights ‘such as common law review and review of non-administrative action in general, including a review under the principle of legality’.⁷⁰ It is also unclear whether s38 applies to cases involving applications for review under PAJA (i.e. cases involving the indirect application of the Bill of Rights). Hoexter is of the view that s38 should apply in such instances, and refers to judicial support for this view. She expresses the view that in view of the fact that PAJA seeks to give effect to s33 of the Constitution, ‘the provisions of s38 must surely be read into the statute’.⁷¹

The effect is that any members of the public wishing to bring class actions to challenge any failure to afford them an opportunity to be heard in patenting applications would have to show that their constitutional rights to procedurally fair administrative decision-making were infringed or threatened. Likewise, any institution wishing to challenge the granting of any patent in the public interest would also have to show that the constitutional right to procedurally fair administrative action was being challenged. The specific requirements for standing in each of the above cases are beyond the scope of this study and are not discussed here, nor is the question of ripeness concerning the timing of any application for judicial review addressed.

It should also be noted that s32 of NEMA also goes beyond the common law. In terms of this section, any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of NEMA or any provision of a specific environmental management Act or of any other statutory provision concerned with protection of the environment or the use of natural resources. Such relief can be brought:

- (a) in that person’s or group of person’s own interests;
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment.

These provisions would aid any person, group of persons or institution seeking to enforce, for example, the requirements of chapter 6 and 7 of the Biodiversity Act in circumstances where the provisions of the Act relating to bioprospecting were breached by any person.

Notwithstanding the broad principles discussed in this paragraph above, the standing of any potential litigant would need to be considered with reference to the particular circumstances of each case. Failure to establish standing would result in the dismissal of any proceedings brought for appropriate relief, and could result in the unsuccessful party being ordered to pay the costs of the successful party. While the court has discretion under s32(2) of NEMA not to order costs against an unsuccessful party (if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought), there is always a risk that a court may not exercise this discretion in favour of the public interest litigant.

7. Brief comparison with patent application processes in other countries

In light of the South African patent application process providing no opportunities for public participation (i.e. opposition) or access to information prior to the granting of a patent, a brief comparison is made with the public participation or opposition provisions provided in the patenting regimes in the United Kingdom and Australia.

7.1 United Kingdom

Patents are regulated in the United Kingdom through the Patents Act of 1977. Patent applications are published in a Patents Journal, a searchable version of which is available on the Intellectual Property Office's (IPO) website.⁷²

Members of the public are afforded an opportunity to make observations about patentability under s21 of the Patents Act. Observations can be made after publication of a notice of application but **before the patent is granted**, which affords an interested party a period of 3 months within which to do so. Observations must be submitted in writing (either in hard copy or electronically), and are required to include details of the patent (e.g. patent application number and name of applicant) as well as any relevant evidence in support of the observation (e.g. a dated magazine or journal article showing the invention before the application's earliest filing date).

The IPO website allows for monitoring of a patent application by the public through checking of the search report, checking the parts of the application that are open to public inspection (including reports and correspondence between the IPO and the applicant or its attorney on the application file of a published application), or applying for a caveat so that the IPO will inform the interested person when something happens to the application.

England's IPO website also provides an online searchable patents office, giving members of the public free and easy access to patents applications, relevant information and an opportunity to comment on a patent application prior to it being granted.

7.2 Australia

Patent applications in Australia are regulated by the Patents Act 106 of 1990. This Act stipulates publication requirements in terms of which the Commissioner is required to publish prescribed information about the applicant and the application in the *Official Journal*, including a notice that the complete specification is open to public inspection. The rights of the patent applicant are protected once the application has become open to public inspection by affording the applicant the same

rights as he or she would have had if the patent was granted. An opportunity for either the Minister or any other person to oppose the grant of a standard patent is provided on the specified grounds only (e.g. that the invention is not a patentable invention). In terms of the Patents Regulations, notice of opposition must be filed within three months of publication in the *Official Journal* of the notice of acceptance. If there is no opposition or if the opposition has not been successful (including on appeal), the Commissioner is required to grant a standard patent by sealing it in the approved form.

8. New developments

Much attention is being focused by the Department of Trade and Industry (DTI) in order to give effect to the onus placed on it by the 2004 policy to review South Africa's IP legislation and propose amendments to protect traditional knowledge. This culminated in the approval by Cabinet in December 2007 of a policy framework on the protection of indigenous knowledge through the intellectual property system (IP Policy framework). Pursuant to this policy framework the Intellectual Property Laws Amendment Bill was published for comment on 5 May 2008. This Bill seeks to amend the country's intellectual property laws in an effort to protect traditional knowledge using South Africa's existing intellectual property system. Rengecas points out that the Patents Amendment Act 20 of 2005 and the Biodiversity Act are mechanisms used to regulate benefit-sharing, protect Biodiversity and award compensation to indigenous communities that are already in place, whereas the IP Laws Amendment Bill seeks to protect traditional and cultural expressions and folklore by amending various Acts.⁷³

New developments relating to the protection of bioprospecting are also included in the National Environmental Laws Amendment Bill (B66B of 2008). This Bill seeks to introduce notification requirements in the discovery phase of a bioprospecting project, and will require any person involved in the discovery phase of such a project to notify the minister and to sign a prescribed commitment to comply with the requirements of the commercialization phase of bioprospecting.

While it is important to note these developments, they are beyond the scope of this study and are not discussed further here.

9. Recommendations for legal interventions and reform

9.1 Legal interventions

The Patents Act and Regulations make provision for persons materially and adversely affected by a patent to either object or apply for a revocation of the patent. While the legislation makes provision for anyone affected by the exercise of any discretionary power by the Registrar to be heard, the actual opportunities provided are after the fact. On the face of it, the patent application, examination and granting procedure does not comply with administrative justice requirements of the Constitution or PAJA. These shortcomings would best be addressed through legislative amendments (see paragraph 9.2).

Bearing in mind that the requirements of PAJA would supplement the Patents Act where it addressed the issue of fairness but does so inadequately or incompletely, interested persons or institutions would be advised to assert their rights to the Registrar, including the right to adequate notice, provision of sufficient information to make meaningful representations, and an opportunity to make representations prior to the decision on permitting being granted.

Notwithstanding this, prospective litigants would also be advised to exhaust internal remedies before approaching the courts for relief. These remedies include both opposition proceedings

brought within two months of publication of notice of acceptance of a patent, as well as applications for revocation of patents on specified grounds. Revocation applications would also be the appropriate remedy should a patent applicant lodge a false statement or fail to declare that a particular patent is claimed for an invention involving an indigenous biological resource, a genetic resource or traditional knowledge or use.

Interested parties and institutions would also be afforded opportunities to participate in any bioprospecting permit applications brought under chapters 6 and 7 of the Biodiversity Act.

9.2 Reforms

The key shortcomings of the patenting regime regarding public participation is its failure to make provision for publication of adequate notice of proposed patent grants, as well as its failure to make provision for opportunities for interested persons to make informed representations to the Registrar prior to the patent being granted and sealed.

Ideally, the Patents Act and Regulations should be amended to provide a window (e.g. three months) between publication of acceptance of the application, and the grant and sealing of the patent.

Publication of the notice acceptance of the application should be extended to include publication on the CIPRO website, as well as in national or local newspapers, while individual notices should be given where the interests or rights of a particular person or community could be materially and adversely affected by the granting of a patent.

During the proposed window-period, interested and affected parties should be entitled, in their own interest or in the interests of a class of persons or the public, to lodge objections to the granting of a patent. This would have the benefit of putting salient information before the Registrar, and would help to ensure that patents are not granted in situations where no patent is merited.

The patent application and any relevant supporting document should be made available to any persons wishing to object or comment on a patent application, preferably on the CIPRO website. A caveat system where interested parties could register and thereafter be advised of developments in the patent application and examination process would also be desirable.

References

- 1 Act 57 of 1978 (as amended).
- 2 Patent Regulations, 1978 GN2470 GG6247 of 15 December 1978 (as amended).
- 3 John & Kernick *Patents, Trademarks, Copyrights, Designs & Licenses – An Introduction* (undated).
- 4 Chapter VA of the Patents Act deals with international applications under the Patent Co-operation Treaty. In terms of s43F, when processing the national phase of an international application, the Patent Co-operation Treaty, the regulations made thereunder and the administrative instructions issued under those regulations shall prevail in the event of any conflict with the Patent Act. s45F(4) provides that the provisions relating to an application for a patent accompanied by a complete specification shall *mutatis mutandis* apply to the national phase of an international application, and to any patent granted thereon.
- 5 A complete patent application comprises of Forms P1, P2 and P3, a fee of R266-00, full detailed descriptions, specifications and drawings. While a patent application can comprise of two stages, namely a provisional application and a complete application, the former can be dispensed with. Where a provisional application is made, a complete application must be filed within 12 months.
- 6 Patents Act, s30.
- 7 Ibid, s32.
- 8 Ibid, s34. In terms of s36(2), the Registrar is afforded the power to refuse applications in particular cases, namely if an application appears to the registrar to be frivolous (on the grounds that it claims as an invention anything obviously contrary to well established natural laws), or because the use of the invention would be generally expected to encourage offensive or immoral behaviour. In addition, the Registrar may refuse an application if it appears that the invention might be used in any manner contrary to law, unless the specification is amended by the addition of a disclaimer or other reference as the registrar may think fit.
- 9 Burrell T.D. *Burrell's South African Patent and Design Law*, 3rd ed., Butterworths (Dbn), 1999.
- 10 In terms of r46 of the Patents Regulations.
- 11 Patents Act, s44(1).
- 12 Patents Act, s61(a) to (i). These grounds include, amongst other things: fraud; an invention that is not patentable; or that application should have been refused in terms of s36. Application is served on the patentee and lodged with the Registrar, and the matter is decided by the Commissioner of Patents.
- 13 http://www.cipro.co.za/products_services/patents_registration.asp
- 14 Regulation 54. In terms of r55, this opposition must be lodged on form P15, together with any documents to be relied upon. Copies must be served on any other party involved, and proof of service furnished to the satisfaction of the registrar. In terms of r56, any person who wishes to become a party to the proceedings may within two months of notification or publication file a reply on form P15, together with relevant documents. These must also be served on the other party in the matter and proof of service furnished to the registrar. In terms of r58, once a reply has been filed, or the period for filing has expired and no reply has been filed, the Registrar may appoint a time and a date to determine the matter and will notify the parties accordingly.
- 15 Patents Act, s16.
- 16 Act 20 of 2005
- 17 This policy originates from 1999, when the Department of Arts, Culture, Science and Technology approached Cabinet to formulate a policy on indigenous knowledge systems (IKS). An interdepartmental task team embarked on a process of consultation and research, and the IKS Policy was adopted by Cabinet in November 2004. Various departments have since been tasked with developing policies and legislative amendments. The stated intention of the IKS Policy was to create a guide for the recognition, understanding and promotion of South Africa's IK resources. Areas identified for action included the protection of IK and its holders from exploitation, and to ensure that communities receive fair and sustained recognition and (where applicable) financial remuneration for the use of this knowledge.
- 18 Patents Act, S30(3A) (as amended). This statement must be lodged with the patents registrar in the prescribed form. An 'indigenous biological resource' is defined as having the same meaning ascribed to it in s1 of the Biodiversity Act. 'Genetic resources' are defined as meaning any indigenous genetic material or genetic potential or characteristics of an indigenous species. 'Traditional knowledge' is defined as the knowledge that an indigenous community has regarding the use of an indigenous biological or genetic resource. 'Traditional use' is defined as meaning the way in which or purpose for which an indigenous community has used an indigenous biological or genetic resource.
- 19 Patents Act, s30(3B).
- 20 If a false statement is lodged by a permit applicant, any interested party may apply for **revocation** of the patent. Amended s61(g) stipulates that any person may at any time apply in the prescribed manner (i.e. in terms of r89 to r94A of the Patents Regulations, using form P20) for the revocation of a patent on the grounds that the statement lodged in terms of s30(3A) contains a false statement or representation which is material and which the patentee knew or ought reasonably to have known was false at the time when the statement or representation was made.
- 21 Patents Act as amended, s61(g). The prescribed manner is set out in regulations 89 to 94A of the Patents Regulations, using form P20.
- 22 Act 10 of 2004.
- 23 The Biodiversity Act defines "bioprospecting" in relation to indigenous biological resources as meaning any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation, and includes:
 - (a) the systematic search, collection or gathering of such resources or making extractions from such resources for purposes of such research, development or application;

- (b) the utilisation for purposes of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities; or
 - (c) research on, or the application, development or modification of, any such traditional uses, for commercial or industrial exploitation.
- The Biodiversity Act excludes:
- (i) genetic material of human origin;
 - (ii) any exotic animals, plants or other organisms, other than exotic animals, plants or other organisms referred to in paragraph (a) (iii); and
 - (iii) indigenous biological resources listed in terms of the International Treaty on Plant Genetic Resources for Food and Agriculture.
- 24 The Biodiversity Act defines “*indigenous biological resources*” as including:
- (i) any indigenous biological resources as defined in paragraph (b) of the definition of “indigenous biological resource” in section 1, whether gathered from the wild or accessed from any other source, including any animals, plants or other organisms of an indigenous species cultivated, bred or kept in captivity or cultivated or altered in any way by means of biotechnology;
 - (ii) any cultivar, variety, strain, derivative, hybrid or fertile version of any indigenous species or of any animals, plants or other organisms referred to in subparagraph (i); and
 - (iii) any exotic animals, plants or other organisms, whether gathered from the wild or accessed from any other source which, through the use of biotechnology, have been altered with any genetic material or chemical compound found in any indigenous species or any animals, plants or other organisms referred to in subparagraph (i) or (ii).
- 25 In terms of s105 of the Biodiversity Act, anyone involved in a bioprospecting project at that date was allowed to continue for one year pending negotiation and bringing into force of an appropriate benefit sharing agreement.
- 26 Biodiversity Act, s80.
- 27 Ibid, s81(1)(a)&(b).
- 28 GNR 138 GG 30739 of 8 February 2008. These regulations commenced on 1 April 2008.
- 29 Op cit note 25, s81(2).
- 30 Ibid, s82(1)(a).
- 31 Ibid, s82(1)(b).
- 32 In terms of s84 of the Biodiversity Act, a **material transfer agreement** must:
- (a) be in a prescribed format;
 - (b) specify:
 - (i) particulars of the provider, and the exporter or recipient, of the indigenous biological resources;
 - (ii) the type of indigenous biological resources to be provided or to be given access to;
 - (iii) the area or source from which the indigenous biological resources are to be collected, obtained or provided;
 - (iv) the quantity of indigenous biological resources that is to be provided, collected, obtained or exported;
 - (v) the purpose for which such indigenous biological resources are to be exported;
 - (vi) the present potential uses of the indigenous biological resources; and
 - (vii) conditions under which the recipient may provide any such indigenous resources, or their progeny, to a third party.
- A material transfer agreement or any amendment to such an agreement:
- (a) must be submitted to the Minister for approval; and
 - (b) does not take effect unless approved by the Minister.
- 33 In terms of s83 of the Biodiversity Act, a **benefit-sharing agreement** must:
- (a) be in a prescribed format;
 - (b) specify:
 - (i) the type of indigenous biological resources to which the relevant bioprospecting relates;
 - (ii) the area or source from which the indigenous biological resources are to be collected or obtained;
 - (iii) the quantity of indigenous biological resources that is to be collected or obtained;
 - (iv) any traditional uses of the indigenous biological resources by an indigenous community; and
 - (v) the present potential uses of the indigenous biological resources;
 - (c) name the parties to the benefit-sharing agreement;
 - (d) set out the manner in which and the extent to which the indigenous biological resources are to be utilised or exploited for purposes of such bioprospecting;
 - (e) set out the manner in which and the extent to which the stakeholder will share in any benefits that may arise from such bioprospecting;
 - (f) provide for a regular review of the agreement by the parties as the bioprospecting progresses; and
 - (g) comply with any other matters that may be prescribed.
- Any benefit-sharing agreement or any amendment to such an agreement:
- (a) must be submitted to the Minister for approval; and
 - (b) does not take effect unless approved by the Minister.
- 34 Ibid, s82(2).
- 35 Ibid, s82.
- 36 s85 of the Biodiversity Act, in terms of which all moneys arising from benefit-sharing agreements and material transfer agreements, and due to stakeholders, must be paid, and from which all payments to, or for the benefit of, stakeholders must be made.
- 37 GNR 149 GG 30739 of 8 February 2008. The following activities are exempted:

- Research other than bioprospecting, provided that the research is conducted within the borders of South Africa, and is not conducted for the purposes of commercial or industrial exploitation;
 - The export of *ex situ* indigenous biological resources for the purposes of research other than bioprospecting, provided that the exporter has entered into an export agreement and notified the issuing authority thereof;
 - The trade of commercial products purchased from a bioprospector, provided that the bioprospector has complied with the Regulations on Bioprospecting, Access and Benefit-sharing;
 - The keeping, breeding, cultivation, moving, trading and use of wildlife (defined to include mammals, birds, reptiles, amphibians, arthropods, fish and plants) not directed at the development and production of:
 - products such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours and extracts; or
 - new plant varieties and products;
 - the collection, use, propagation, cultivation or trade of indigenous biological resources for domestic use or subsistence purposes;
 - the artificial propagation, multiplication or cultivation of flora species for the local and international cut flower and existing ornamental plant markets;
 - aquaculture or mariculture activities involving fresh water and marine species producing specimens for consumption purposes.
- 38 Biodiversity Act, s99.
- 39 Biodiversity Act, s100(3).
- 40 Biodiversity Act, s100(4).
- 41 Hoexter, p326.
- 42 *Attorney-General Eastern Cape v Blom and Others* 1988 (4) SA 645 (A), referred to in *Magingxa v National Commissioner, South African Police Service and Others* 2003 (4) SA 101 (TkH) at 112.
- 43 Act 108 of 1996, s33(1).
- 44 Op cit s33(2).
- 45 Op cit s24. The importance of this section was underlined in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA), where it was held that the inclusion of environmental rights as fundamental, justiciable human rights by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. The court stated further that together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.
- 46 Op cit s32.
- 47 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC) para 21; *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 91.
- 48 Sections 1(d), 36, 39(1)(a), 41(1)(c), 195(1)(e), (f) and (g)
- 49 Act 3 of 2000.
- 50 PAJA aims to give effect to constitutional rights and confers rights on all those who deal with administrators as defined in the Act. *Sasol Oil (Pty) Ltd v Metcalfe* NO 2004 5 SA 166C.
- 51 *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C).
- 52 GN R1022 in GG23674 of 31 July 2002.
- 53 107 of 1998 (as amended).
- 54 S23 of NEMA.
- 55 Hoexter, p328.
- 56 Hoexter, p329, referring to *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) and *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).
- 57 Hoexter, p331, citing Willis J in *Sasol Oil (Pty) Ltd v Metcalfe* NO 2004 (5) SA 161 (W) at 166C.
- 58 Hoexter, p331, referring to the judgment of Ngcobo J in *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC).
- 59 s16(1) of the Patents Act. This right to be heard is restricted to discretionary power. Given that s34 of the Patents Act states that the Registrar shall accept the application if it complies with requirements, it could be argued that the Registrar has no discretion regarding acceptance of the application. However, it is clear the Registrar does have the discretion to refuse an application in terms of s36, which arguably makes the decision a discretionary rather than a peremptory power.
- 60 Hoexter, p333.
- 61 *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 (2) SA 849(E).
- 62 *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 (2) SA 67 (C).
- 63 *Earthlife Africa Cape Town v Director-General: Department of Environmental Affairs and Tourism and Another* 2005(3) SA 156 (C) at 51, citing *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 232C–D; *Chairman, Board on Tariffs and Trade and Others v Brenco Inc & Others* 2001 (4) SA 511 (SCA) para 42 at 532G–H.
- 64 Hoexter, p337.
- 65 Burrell T.D. *Burrell's South African Patent & Design Law* 1999 (3rd edition), Butterworths, Durban, p113-114.
- 66 *The Law of South Africa* Vol. 1 page 50, cited in *F.L.O.J. Chauvier v. Peacock Investments (proprietary) Limited and Another* 1983 B.P. 297 (CP).
- 67 1983 B.P. 297 (CP) at p298.
- 68 Hoexter, p435.
- 69 *Ferreira v Levin* NO1996(1) SA984 (CC) para. 229, cited in Hoexter p439.
- 70 Hoexter, p 439.

71 Hoexter, p441.

72 <http://www.ipo.gov.uk/patent/p-journal/p-pj>

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