



GEMFARM INVESTMENTS (PTY)LTD v TRANS HEX GROUP LTD AND
ANOTHER

CASE NO. P I 445/2005

2009/04/07

Damaseb, J.P. *et* Maritz, J.

PATENT LAW
CONSTITUTIONAL LAW
PRACTICE

Patent Law - Patents and Designs Proclamation, 1923 - s.5 – application of certain provisions of Union Patents, Designs, Trade Marks and Copyright Act, 1916 to patents in Territory – provisions so applied not relating to granting of patents under section 3 of Proclamation – repeal of patent provisions in 1916-Act and re-enactment thereof in South Africa by Patents Act, 1952 not affecting provisions under which patents were being granted in Territory – s.3 of Proclamation still of application to granting of patents in Namibia after Independence

Patent Law - Patents and Designs Proclamation, 1923 - Section 18 – “Union Act” defined as “the Union Patents, Designs, Trade Marks and Copyright Act, 1916 (Act No. 9 of 1916) and any amendment thereof” - repeal of patent provisions in 1916-Act and re-enactment in South Africa by Patents Act, 1952 – such not resulting in repeal of those provisions of 1916-Act applied to patents in Territory by s.5 of Proclamation – 1916-Act still “Union Act” as defined in s.18 of Proclamation

Patent Law - Patents and Designs Proclamation, 1923 - s.1(1) – persons who may apply for the grant of patents – “importer” of invention precluded from applying – meaning of “importer” – meaning at least inclusive of “communicatee”, “first and true importer” and “mere importer” – in Namibia s.1(1) to be read with definition of “Patent” in s.18 of Proclamation – such meaning “letters-patent for an invention in the Territory” – result that only inventions in Namibia may be patented by persons who are not importers

Patent law – actions for infringement – proviso in s.36(3) of the 1916-Act that “no proceeding shall be taken in respect of an infringement committed before the publication of the acceptance of the complete specification” – publication referred to prescribed by s.23(2) of the 1916-Act – s.23(2) of 1916 Act relates to applications for grant of patents – section not amongst those of the 1916-Act which apply to Namibia pursuant to s.5 of

Proclamation – failure to publish registrar’s acceptance of complete specifications no bar to infringement action.

Constitutional law – power to make laws for the Territory vested in South African Parliament under Mandate for South West Africa; in Governor-General by Treaty of Peace and South West Africa Mandate Act, 1919 and in Administrator by Proclamation 1 of 1921 discussed - application of South African Acts of Parliament to Territory – legislative mechanisms used for such application discussed - intended extraterritorial application to be gathered from express or implied language used in statute itself – s. 22(5) of the South West Africa Affairs Amendment Act, 1949 requiring such to be published in the *Official Gazette* – power of Governor-General and Administrator to apply South African Statutes by Proclamation to Territory – requirement of promulgation by publication discussed and applied.

Practice – Exceptions – approach of Court - excipient to satisfy the Court that, on all reasonable constructions of the plaintiff’s particulars of claim as amplified and amended and on all possible evidence that may be led on the pleadings that no cause of action is or can be disclosed – Court not so satisfied – exceptions dismissed

“REPORTABLE”

CASE NO. (P) I 445/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GEMFARM INVESTMENTS (PTY) LTD

Plaintiff

Versus

TRANS HEX GROUP LIMITED

First Defendant

MOONSTONE DIAMONDS (SOUTH AFRICA) (PTY) LTD **Second Defendant**

CORAM: DAMASEB, J.P. *et* MARITZ, J.

Heard on: 26 May 2005

Delivered on: 07 April 2009

JUDGMENT

MARITZ, J.: [1] All the exceptions raised in this action concern the application or interpretation of probably the most neglected area of statutory regulation in Namibia: patent legislation. In a world increasingly driven by globalised economies and markets; in an age where more technological advances have been made in a single century than in all the centuries which have preceded it combined; at a time when commerce and industries are increasingly based on and benefiting from the power of knowledge converted into ideas, inventions and technologies for the benefit of humankind and its environment, it should be a serious legislative concern that our statutory laws designed to record, preserve and protect those ideas, inventions and technologies are marooned in outdated, vague and patently inadequate enactments passed by colonial authorities in this country about a century ago. Yet, it is by those laws that this Court is called upon to adjudicate the defendant's exceptions to the plaintiff's Particulars of Claim.

[2] The plaintiff, a Namibian company, claims that it is the patentee and registered proprietor of an invention for the "method of, and apparatus for, underwater mining" of mineral deposits known as a "pebble jetting system" (the "invention"). The invention is more fully described in the Complete Specification thereof which was accepted by the Registrar of Patents on 8 August 2001. It is not necessary for purposes of these exceptions to detail the specifications of the invention other than to state that, amongst others, the specifications describe a method of mining underwater mineral deposits which comprises an apparatus inducing an upwards stream of water, air and gravel in a pipe extending upwardly from the deposit to a mining vessel above it from where it is again pumped down to the deposit so that the water with the gravel entrained in it impacts on the deposit and breaks it up, thereby enhancing lifting thereof to the vessel with the upwardly flowing

water and air. Letters Patent No. 2001/0050 for the invention were issued on 22 April 2002. On the face thereof, the Registrar of Patents in Namibia recorded under his hand that the Letters have been made patents and were dated and sealed as of 13 February 2002.

[3] The Plaintiff avers that the defendants have infringed its patent for the invention my making, or causing to be made, an installation and an airlift comprising integers of the invention, more fully described in its Particulars of Claim, and fitting them (or causing them to be fitted) on the MV “Namakwa” and the MV “Ivan Prinsep”, two motor vessels chartered by the first defendant (or caused to be chartered by it) from the second defendant. As a result of the infringement, the plaintiff avers, it suffered damages in the amount of US\$8 416 950.00 (approximately N\$ 80 million) for the loss of contracts and royalties pertaining to the exploration and exploitation of underwater mineral deposits in certain defined areas. The correction of an erroneous description of a particular component of the invention aside, the plaintiff, therefore, is seeking a declarator to the effect that the defendants have infringed its patent; an interdict restraining defendants from continuing to do so; an order for the payment of damages in the amount of US\$8 416 950.00 plus interest thereon *a tempore morae* by the defendants jointly and severally and a *mandamus* directing the defendants and all those possessing any such equipment under them, to deliver up to plaintiff any and all made or used by them in contravention of Plaintiff’s invention within ten days of the order.

[4] The defendants excepted to the plaintiff’s Particulars of Claim (as amplified by its further particulars) on the basis that it either does not disclose a cause of action or lacks the necessary averments to sustain the relief claimed and submits that the plaintiff’s claims fall to be dismissed with costs.

[5] The main thrust of the first exception is that the Patents and Designs Proclamation, No. 17 of 1923 (the “Proclamation”) upon which the plaintiff relies for the registration of its patent had been repealed by the Patents Act, No 37 of 1952 (the “1952-Act”) and was therefore no longer in force in Namibia when the patent was sealed or granted. Hence, the excipients plead that the grant was a nullity and, consequently, that the letters patent purportedly issued thereunder were of no force and effect. Therefore, they aver, the plaintiff’s reliance thereon cannot sustain its action and the relief claimed.

[6] This exception invites the Court to examine the statutory basis for the granting of patents in Namibia and, in particular, to determine whether the Proclamation was still of application in 2002 when the patent was sealed and the letters issued.

[7] The contents and structure of the Proclamation, as will become evident, is hardly an inspirational model of legal drafting. Seen in its historical context, it is part of the larger body of laws hastily drafted and promulgated to fill the legislative and regulative void which followed in the wake of the occupation of the Territory, then a German protectorate known as German South West Africa, during the First World War by military forces of the then Union of South Africa and the subsequent conferral of a Mandate to administer the territory¹ upon the Union². Under Article 2 of the *Mandate for South West Africa*, the Union had to “promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory”. To that end she was given, subject to the Mandate, “full power of administration and legislation over the territory ... as an integral

¹ By the League of Nations in agreement with the Principal Allied and Associated Powers under Article 22 of Part 1 of its Covenant after Germany had renounced in favour of them all her rights over her oversea possessions (including German South-West Africa) under Article 119 of the Peace Treaty of Versailles.

² To be exercised by its Government on behalf of “His Britannic Majesty” (Compare: the Mandate for South West Africa dated 17 December 1920).

portion of the Union of South Africa” and authorised to “apply the laws of the Union of South Africa to the territory subject to such local modifications as circumstances may require.”

[8] The Proclamation is perhaps one of the earliest examples where the Union had one of its statutes applied to the Territory subject to local modifications – not by an express or implied provision contained in the statute itself, but by reference in legislation of local application promulgated by the Administrator, a delegated lawgiver installed in the Territory. In its original form, it was structured as follows: Sections 1-4 deal with the granting and registration of patents; sections 6-8 with the registration of designs; sections 10-12 with the registration of trade marks; sections 14-16 with copyright in registered works; sections 18-24 with general provisions and sections 5, 9, 13 and 17 apply the provisions of the “Union Act” in so far as they are applicable to the balance of matters mentioned in those sections, *mutatis mutandis* to patents granted and designs, trade marks and the copyright in works registered under the Proclamation. It is of some significance in the determination of the issues which follow that the “Union Act” was not applied to the Territory by some or other provision in the Act itself but by the legislative act of a delegated lawgiver in the Territory and that the “Union Act” was not applied by the Proclamation to the Territory in its entirety but only in part and subject to the substantive provisions of the Proclamation dealing with the grant or registration of the various components of intellectual property. So, for example, is the right to apply for a patent; the contents of such an application; the granting of a patent by the Registrar and the keeping of a register of patents regulated in sections 1-4 of the Proclamation in a manner which is substantially different to the treatment of the same topics in the “Union Act”. The “Union Act” is also applied in a truncated form: the limitation is apparent from the wording in s.5.

“5. The provisions of the Union Act with regard to the effect and duration of a patent, the renewal, extension, surrender and revocation of patents, the grant of compulsory licences, the amendment of Specifications, actions for infringement and the rectification of the register shall, in so far as such provisions are applicable, apply, mutatis mutandis, to patents granted under this Proclamation.”

[9] The “Union Act” is defined in s.18 as “the Union Patents, Designs, Trade Marks and Copyright Act, 1916 (Act No. 9 of 1916) and any amendment thereof”. The difficulty which presents itself in the first exception arises from the later repeal of sections 6-75 of the 1916-Act and so much of the rest of that Act (and of a 1947-amendment thereof) as relates to patents in the Union of South Africa by s.103(1) of the 1952-Act. The 1952-Act, which comprehensively consolidated and amended the law relating to patents in South Africa, also expunged the reference to “patents” from the 1916-Act’s title and long title. The net effect thereof in South Africa was that the remainder of the 1916-Act continued to be in force for the time being, but was limited in its application to designs, trade marks and copyrights. The excipients aver that the territorial and legislative sweep of the 1952-repeal extended beyond South Africa’s borders and was not limited to the provisions of the 1916-Act: regard being had to the provisions of s.5 of the Proclamation and the definition of “Union Act” in s. 18 thereof, they plead that the 1952-Act also applied to the Territory and that it repealed and replaced both the 1916-Act (as it applied in the Territory) and the Proclamation.

[10] The first exception, taken in those terms, is clearly too wide to sustain. The 1952-Act, as pointed out earlier, did not repeal the whole of the 1916-Act in the Union. It repealed only the provisions relating to patents. The remainder of the 1916-Act dealing with designs, trade marks and copyrights remained unaffected for the time being. Thus, the

1916-Act continued to be in force in South Africa as the Designs, Trade Marks and Copyright Act, 1916. It follows that, even if it is assumed that the 1952-Act applied in the Territory, it cannot be contended that it repealed or amended any of the provisions of the 1916-Act which applied to the Territory by virtue of sections 9 (designs), 13 (trade marks) and 17 (copyrights) of the Proclamation. Those provisions were still of full force and effect after the 1952-Act had come into operation. Moreover, absent any express repeal in the 1952-Act of the substantive provisions of the Proclamation protecting and regulating designs, trade marks and copyrights, there is no basis – and none has been suggested in argument – why the 1952-repeal of provisions in the 1916-Act bearing on patents only can, either by reading the repealing provisions by themselves or in conjunction with sections 5 and 18 of the Proclamation, be construed as a repeal of the entire Proclamation – as the broad manner in which the first exception has been formulated suggests. I therefore hold that the 1952-Act did not in any way repeal or otherwise affect the application or enforceability of the Proclamation in the Territory dealing with designs, trade marks and copyrights and that, for the protection and regulation for those aspects of intellectual property, sections 6-24 of the Proclamation and – to the extent that it has been incorporated by reference in those sections – the 1916-Act continued to be the “Union Act” mentioned in s.18 thereof. As it were, the provisions of the 1916-Act dealing with trademarks were repealed in South Africa by s.82 of the Trademarks Act, No. 62 of 1963 and those relating to copyrights by s.48(1)-(3) of the Copyright Act, No. 63 of 1965. Section 48(4) of the latter Act, which was expressly applied to the Territory, repealed sections 14-17 of the Proclamation (dealing with copyrights) and subsection (6) amended the name of the Proclamation to the “Patents, Designs and Trade Marks Proclamation”. The name was again amended to the “Patents and Designs Proclamation” by s.83(2) of the Trade Marks in South West Africa Act, No.48 of 1973 when sections 10-13 of the Proclamation (dealing

with trademarks) were repealed by s.82(1) of the latter Act, which was also expressly applied to the Territory. I pause here to note that the legislative method and language employed by the South African Parliament in these statutes when it intended to bring about an amendment of a law in the Territory – and of the Proclamation in particular – is instructive in considering the excipients' submissions which will be discussed hereunder. So too, are the amendments brought about to the title of the Proclamation: Every time it expunged a particular *species* of intellectual property from the Proclamation to regulate it comprehensively in new legislation, the title of and preamble to the Proclamation were also amended to reflect only the remainder of the intellectual property rights still being dealt with therein.

[11] By reading down the first exception to assert that the 1952-Act repealed the provisions of the 1916-Act as it applied to patents in the Territory and, when read in conjunction with sections 5 and 18 of the Proclamation, it in effect also repealed the sections of the Proclamation bearing on patents, the exception is more in line with the submissions eventually pressed in argument by Adv. Jansen SC (assisted by Adv. Schimming-Chase) on behalf of the excipient. He submits that although s.18 of the Proclamation defined the “Union Act” as the 1916-Act, the definition expressly added “and any amendment thereof”. The repeal of the 1916-Act (and I shall assume for purposes of this judgment that he referred only to the provisions thereof relating to patents) was done, regard being had to the long title of the 1952-Act, to “consolidate and amend the law relating to patents”. Moreover, a comparison of the sections in the two Acts, he contends, demonstrates that the 1952-Act repealed and re-enacted provisions of the 1916-Act in a modified form. Referring to s.11(1) of the *Interpretation Proclamation*, 1920 and the analysis of a similar provision in s.12(1) of the *Interpretation Act*, 1957 (RSA) in *R v B*,

1959(3) SA 87 (D) and *D v Minister of the Interior*, 1960(4) SA 905 (T) and of the latter's predecessor, s.13(1) of the *Interpretation Act*, 1910 (RSA) in *R v Ngcobo*, 1941 AD 412, he submits that the 1952-Act repealed and amended the 1916-Act and the Proclamation (in so far as they related to patents). Therefore, he concludes, the provisions of the Proclamation relating to patents had been repealed in 1952 and the purported registration of the patent in 2002 on which the plaintiff relies for its cause of action had been a nullity.

[12] When considering the merits of these submissions, it must be noted at the outset that s.3 of the Proclamation deals with the granting of patents. It provides that "(t)he Registrar may, if it appears to him that the application and Complete Specification are substantially in order, grant a patent in the prescribed form, and such patent shall be dated and sealed as of the date of application." The Registrar's authority to grant a patent is not derived from any provision of the "Union Act". It has been pointed out earlier in this judgment that the extent to which the "Union Act" was applied to patents in the Territory must be gathered from the wording of s.5 of the Proclamation (quoted earlier). Section 5 does not – and cannot be construed to – apply any of the provisions of the "Union Act" authorising the grant of patents. As it is, the section expressly provides that provisions of the "Union Act" relating to the effect, duration, renewal, extension, surrender and revocation of patents and the like shall "apply, *mutatis mutandis*, to patents granted under this Proclamation". (The underlining is mine). The section premises the application of the "Union Act" only to patents which have been granted in terms of the substantive provisions of the Proclamation.

[13] It follows, that the most fundamental question to be answered for purposes of the first exception is whether the 1952-Act repealed the provisions of the Proclamation under

which patents are being granted. Only if it did, can it be said that the patent relied on by the plaintiff for its cause of action was registered “in terms of legislation that was not applicable in the Republic of Namibia anymore” – as averred in the first exception.

[14] Adv. Oosthuizen SC (assisted by Adv. Van Eeden) submits on behalf of the plaintiff that, even if it were to be accepted in favour of the excipients that the 1952-Act repealed the patent-provisions of the 1916-Act as it had been applied in the Territory, the repeal did not affect the validity of the Proclamation. He argues that there is no legal principle under which it could be contended that, where a specific Act incorporates, by reference, the provisions of another Act, the former is invalidated or repealed by the fact that the latter Act has been repealed. In the context of the constitutional and legislative dispensation applicable to this case, the submission is persuasive.

[15] Although the South African Parliament had plenary powers to legislate for the Territory “as an integral portion of the Union” under Article 2 of the Mandate at the time, it had to do so “subject to local modifications as circumstances may require”. For this reason, not every law made by the Union Parliament was applied without more to the Territory. There is nothing in the language of the 1952-Act which suggests that it was intended to have extraterritorial effect or to impose its provisions on the legislative dispensation in the Territory – neither expressly (as was done, for example, in the Copyright Act, No. 63 of 1965 and the Trade Marks in South West Africa Act, No.48 of 1973) nor by necessary implication. The extent of its application in the Territory, if any at all, could therefore only have been by the application of s.5 read with the definition of “Union Act” in s.18 of the Proclamation. Even if it is assumed in favour of the excipients that the 1952-Act amended the 1916-Act as applied in the Territory, the impact of the

amendment must be gathered from and be limited by the provisions of s.5. Its position as an Act of limited application in the legislative structure and dispensation created by the Proclamation cannot be wider than that which the corresponding provisions of the 1916-Act had – and those provisions neither authorised nor regulated the granting of patents. In the result, I find that the provisions of the Proclamation under which the patent in issue has been granted, were not repealed or amended by the 1952-Act; that those provisions still applied in the Territory immediately before the date of Independence; that they continued to be of force and effect after that date by virtue of Article 140(1) of the Constitution and were good law at the time the patent was granted in 2002. For this reason alone, the first exception falls to be dismissed.

[16] There is, in addition, also a second reason why it must be dismissed. It relates to the definition of “Union Act” in s.18 of the Proclamation and, more in particular, is to be found in the answer to the question whether the 1952-Act, which repealed the patent provisions of the 1916-Act in South Africa, also applied to the Territory and became the “Union Act” for purposes of patents. Originally, the “Union Act” was defined to “mean the Union Patents, Designs, Trade Marks and Copyright Act, 1916 (Act No. 9 of 1916) and any amendment thereof”. Whilst it is clear that the words “and any amendment thereof” would include any amendment to the Act which might have been enacted prior to the promulgation of the Proclamation, there is a significant divergence of opinion on the application of subsequent enactments in the Union either amending or repealing its provisions. They range from one school of thought which contends that none of the Acts

passed by the Union Parliament to amend the 1916-Act in South Africa applied to the Territory³ and others which suggest that all of them, including the 1952-Act, are.⁴

[17] The excipients propose the latter interpretation. Adv. Jansen contends with reference to *Rex v Offen*, 1935 AD 4 and a number of other cases (to which I shall refer hereunder) that the 1952-Act applied in the Territory, particularly if regard is had to the definition of “Union Act” in the Proclamation, the provisions of s.11(1) of the Interpretation Proclamation and the fact that it “has been published in the South West African statutes”. Adv. Oosthuizen, in turn, referred to s.22(5) of the South West Africa Affairs Amendment Act, No 23 of 1949 and the unreported judgment of this Court’s constitutional predecessor in *Ex Parte Krekel* (handed down by Bethune J on 11 November 1983). Distinguishing the issues in *Offen*’s-case from those at hand, he contends that it is apparent from the provisions of the 1952-Act that it was not applied to the Territory.

[18] Subject to and in anticipation of the Mandate to be conferred, the Union Parliament authorised the Governor-General by s.1 of the *Treaty of Peace and South West Africa Mandate Act*, 1919 to “make such appointments, establish such offices, issue such proclamations and regulations and do such things as appear to him to be necessary for giving effect, so far as concerns the Union, to any of the provisions of the said Treaty or to any Mandate issued in pursuance of the Treaty to the Union with reference to the territory of South West Africa” and, subject to s.4, to “by proclamation at any time – (a) repeal,

³ C.f. *Burrell’s South African Patent and Design Law*, 3rd ed., p. 4, footnote 20 in which he states the following: “The question of whether or not amendments affected to Act 9 of 1916 after 17 May 1923, that is after the date of promulgation of Proclamation 17 of 1923, are applicable in Namibia has not been settled. In my view the amendments are not applicable but the official view is that they are applicable.

⁴ Compare the footnote by the editor of the annotated reprint of the Laws of South West Africa, Vol. 2 (1923 – 1927), p. 107: “The provisions relating to patents in Act No 9 of 1916 have been repealed and replaced by Act No 37 of 1952 as amended by Act No 28 of 1953. The relevant sections of Act No 37 of 1952, which now appear to apply to South West Africa, in terms of section 5 of Proc 17 of 1923 as read with the definition of ‘Union Act’ in section 18, are now inserted herein.”

alter, amend or modify any laws in force within the said territory including such proclamations as have been or may be promulgated during the military occupation thereof; (b) make new laws applicable to the said territory; (c) delegate his authority in this behalf to such officer in the said territory as he may designate to act under his instructions” (See: s.2 of the Act). The Governor-General appointed the Administrator of the Territory in the exercise of his powers as contemplated in paragraph (c) and delegated essentially the same legislative powers to him to be exercised “subject always to such instructions as may from time to time be issued for his guidance by proper authority” (See: Proclamation 1 of 1921). The Union Parliament, although it had the power to legislate for the Territory (as Van Den Heever, J held in an extensive judgment on this issue in *R v Offen*, 1934 SWA 73), initially applied only a few of its statutes to the Territory. Those related mainly to trans-national matters such as customs (Acts 35 of 1921 and 36 of 1925), railways (Act 20 of 1922), harbours (the administration of the port and settlement of Walvis Bay by Act 24 of 1922) public servants in the administration (Act 27 of 1923), on matters of constitutional importance to the Territory (the *South West Africa Constitution Act*, No. 42 of 1925) and the like. The primary responsibility to legislate on general matters applicable to the Territory was initially borne by the Administrator whose Proclamations, like that of the Governor-General, had to be published in the *Official Gazette*, before acquiring the force of law (See: s.44(1) of Act 42 of 1925).

[19] The need to publish Union statutes in the Territory before they obtained the force of law was a matter already raised and thoroughly argued in *Offen*'s case. Both in the court *a quo* and on appeal (reported as *R v Offen*, 1935 AD 4) it was held, in keeping with judicial thinking at the time, that publication of the law in question (the *Customs and Excise Amendment Act*, No. 36 of 1925) in the *Union Gazette* sufficed because, although the port

and settlement of Walvis Bay was being administered “as if it were part of the mandated territory and as if the inhabitants of the said port and settlement were inhabitants of the mandated territory” (under s.1(1) of Act 24 of 1922), it nevertheless remained part of the territory of the Union of South Africa. Wessels, CJ quoted s.38(1) of Act 36 of 1925 and continued:

“Sec. 38 of that Act reads as follows: ‘The mandated territory of South-West Africa shall, for the purpose of the collection of customs and excise duties, be regarded as a part of the Union.’ If that is so, then Union legislation which is valid Union legislation *ipso facto* applies to the mandated territory and is in force in Walvis Bay and sub-sec. (3) provides specifically that the provisions of the Act shall, apply to Walvis Bay, ‘which for the purposes of this section shall be deemed to be a part of the mandated territory.’ It is perfectly clear from that sub-section that it makes the Act applicable to Walvis Bay on promulgation in the Union Gazette, not as part of the Union territory only but as part of the Union territory which is deemed to be part of the mandated territory. There is therefore no need for it to be promulgated in the mandated territory if it is a Union Act of force in the Union and therefore of force in mandated territory and Walvis Bay.”

This approach was followed (again in respect of legislation applicable in Walvis Bay) in *R v Ackermann*, 1954(1) SA 95 (SWA) at 96F-H.

[20] The matter again received scrutiny by Brebner J in an instructive judgement about the judicial thinking at the time in *Faul v S.A. Railways & Harbours*, 1949 (1) SA 630 (SWA). After considering the Governor-General’s power to apply a Union law to the Territory; the principle in Roman-Dutch Law (as applied to the Territory by s.1(1) of Proclamation 21 of 1919) that promulgation of a law is required before such law can have a binding effect upon the subjects it pertains to; the meaning of the words

“commencement” and “taking effect” in s.12(1) of the *Interpretation of Laws Proclamation, 1920* and *Offen’s*-case, he concluded (at 636 and 367):

“It seems to me that legislation of the Union Parliament can only become operative in the Mandated Territory, if either on the one hand the Territory is, for the purposes of the particular Act, deemed to be part of the Union ...or the expression ‘the Union’ is defined as including the Mandated Territory ..., or on the other hand, the legislation is made applicable by proclamation by the Governor-General or the Administrator under delegated authority under and by virtue of the powers conferred by sec. 2 of Act 49 of 1919, and when such proclamation is stated to be issued under the authority of sec. 2 of Act 49 of 1919, it can only have the force of law within the Territory if it is published in the *Gazette* of the Territory in terms of sec. 44 (1) of Act 26 of 1925. So if the particular Act of the Union deals specifically with the Mandated Territory, it must be promulgated in the *Official Gazette* of the Territory before it can bind the inhabitants therein. Legislation is ordinarily territorial in its operation, and does not bind persons resident beyond the territorial boundaries of the law-giver, since such legislation cannot be made effective while the persons affected are resident abroad. ...

The Union Parliament has authority to legislate extra-territorially, but such legislation cannot be binding upon residents of a foreign territory except by convention or in the case of the Mandated Territory by promulgation of the legislation in the *Gazette* of the Territory. The Mandated Territory occupies a peculiar position: on the one hand it is a foreign country territorially *vis-à-vis* the Union, on the other hand, the Union Parliament has power of legislation in respect thereof, but the operative effect of such legislation within the Territory is not dependent upon conventions or treaty or international law, but upon promulgation of the legislation within the Mandated Territory, or upon the Union Act incorporating the Mandated Territory as part of the Union Territory.”

[21] In *R v Grundlingh*, 1954(4) SA 235 (SWA) at 236D it was confirmed that no publication of a Union Act is necessary in the Territory where the Act declares that for the purposes of the Act the Mandated Territory shall be deemed to be part of the Union and, in *R v Ntoni en ‘n Ander*, 1961(3) SA 507 (SWA), that it is also not necessary in those instances where the “Union” is defined in an Act as including the Territory.

[22] Counsel for the plaintiff, pointing out that the date of commencement the 1952-Act was 1 January 1953, drew the Court's attention to s. 22(5) of the *South West Africa Affairs Amendment Act*, No 23 of 1949, which was in force at the time and provided as follows:

“Notwithstanding anything to the contrary contained in the Interpretation Act, 1920 (Act 5 of 1910) an Act of Parliament which is expressed to apply in the territory shall not have the force of law in the Territory until it has been published in the *Official Gazette* of the Territory”.

He argues that the section found expression in many subsequent Acts of the Union Parliament promulgated around that time which provided, in express terms, that they would apply to the Territory or that they might be rendered applicable to the Territory by Proclamation of the Governor-General (such as s.13 of the *Railways & Harbour Acts Amendment Act*, No 45 of 1952, s.25 of the *Boxing & Wrestling Control Act*, No 39 of 1954, s.17 of the *Archives Act*, No 22 of 1953, s.180 of the *Water Act*, No 54 of 1956, s.52 of the *Friendly Societies Act*, No 25 of 1956 and s.153 of the *Defence Act*, No 44 of 1957).

[23] Measured by any of the criteria in the cases of *Offen*, *Faul*, *Ackermann*, *Grundlingh* and *Ntoni* or by s. 22(5) of the *South West Africa Affairs Amendment Act*, No 23 of 1949, there is nothing in the language of the 1952-Act which either expressly or by necessary implication indicates that the Union Parliament intended to apply its provisions to the Territory: the Territory is not included in the definition of the “Union”; the Act does not contain a provision to the effect that the Territory is deemed to be part of the Union for purposes of the Act and it has not been applied to the Territory by proclamation of either the Administrator or the Governor-General. An allegation in the exception to the effect that

the 1952-Act “was promulgated in a Gazette of the territory” remained unsubstantiated. No reference was made in argument to the *Official Gazette* referred to and I have not been able to find any.

[24] Ultimately, the excipients are left to rely on the definition of “Union Act” in s. 18 of the Proclamation and on s 11(1) of the Interpretation Proclamation, 1920. The phrase “and any amendment thereof” in the definition section must, given the reasoning by Brebner J in *Faul’s* case, be understood to refer to an amendment of the 1916-Act which is of application in the Territory – having been promulgated or, at least, published in the *Official Gazette*. Clearly, the Union Parliament would have been entitled to insert a provision in the 1952-Act to the effect that it does not repeal or amend the 1916-Act to the extent that the latter may apply in the Territory. Such a provision would have put the matter beyond the pale. However, given the provisions of s. 22(5) of the *South West Africa Affairs Amendment Act*, No 23 of 1949 and the absence of any provision in the 1952-Act evidencing an intention that it should apply in the Territory, the Union Parliament was entitled to assume that it would not apply. It was therefore not necessary to include such a provision. The same reasoning applies, *mutatis mutandis*, to s.11(1) of the Interpretation Proclamation, 1920. The subsection’s reference to a law which “repeals and re-enacts, with or without modifications, any provisions of a former law”, by necessary implication refer to a repeal and re-enactment applicable in the Territory, i.e. the territory within which the Interpretation Proclamation applies.

[25] These findings are underscored by three examples in point - all relating to the direct or indirect repeal and re-enactment of provisions of the 1916-Act. Section 82(1) of the *Trade Marks Act*, No. 62 of 1963 repealed sections 96 -140*bis* of the 1916-Act in the same

manner in which s.103(1) of the 1952-Act repealed sections 6-75 thereof. Section 103(2) of the 1952-Act changed the title and long title of the 1916-Act by removing any reference to patents therein in much the same way as s. 82(2) of the *Trade Marks Act*, 1963 (having expunged the trade marks provisions from the 1916-Act) in effect changed its name from the "*Designs, Trade Marks and Copyright Act, 1916*" to the "*Designs and Copyright Act, 1916*". Like the 1952-Act, the *Trade Marks Act* was not expressly applied to the territory. It did not bring about any changes to the 1916-Act as applied by the Proclamation to trade marks. Hence, the need arose in 1973 for the South African Parliament to amend the antiquated laws in the Territory relating to trade marks. It did so by the *Trade Marks in South West Africa Act*, No. 48 of 1973 which applied to the Territory and, by the repeal of sections 10-13 of the Proclamation, it also indirectly repealed the trade mark provisions of the 1916-Act as they applied in the Territory by virtue of s.13 of the Proclamation. In 1965 the South African Parliament repealed sections 140-160 of the 1916-Act (relating to copyrights) by s. 48(2) of the *Copyright Act*, No. 63 of 1965 and, having deleted all the provisions relating to copyrights therein, also changed its name to the "*Designs Act, 1916*". The *Copyright Act*, which was expressly applied to the Territory by s. 49 thereof, is perhaps the clearest example of how the Legislature in South Africa formulated legislation when it intended its application to be of force to intellectual property in the Territory. In s. 48(4) it repealed sections 14-17*bis* of the Proclamation and, in subsection (6) effectively amended its name to the "*Patents, Designs and Trade Marks Proclamation*" - which was later again changed by s. 83(2) of the *Trade Marks in South West Africa Act*, 1973 to the "*Patents and Designs Proclamation*".

[26] Finally, the principle of *subsecutio observatio* by the constitutional predecessor of this Court's over four decades (at least) supports the conclusion that the 1952-Act was

never applied by it to patents as the “Union Act” under the Proclamation. That much is clear from the judgment in *Krekel’s-case, supra*, where Bethune J said the following (at p. 2 *in fine* – 3):

“Act No. 9 of 1916, together with any amendments thereto, is applicable to South West Africa in terms of section 5 (read with section 18) of Proclamation No. 17 of 1923.

In South Africa, Act No. 9 of 1916 was repealed by the patents Act No. 37 of 1952, but the latter Act was not made applicable to South West Africa. Act No. 57 of 1978 which repealed Act No. 37 of 1952 was also not made applicable to South West Africa.

In a footnote appearing on p. 107 of Volume 2 of Rosenow’s annotated reprint of the Laws of South West Africa, the editor made the submission that the relevant sections of Act No.37 of 1952 ‘would appear to apply to South West Africa’. With due respect to the learned editor, I am of the opinion that the submission is wrong. Act No. 37 of 1952 was not an amending Act. It repealed Act No. 9 of 1916 as far as the Union of South Africa was concerned. If the Legislature intended Act No. 37 of 1952 to apply to South West Africa it would have said so. I am fortified in this view by the fact that this Court and its predecessor, the South West Africa Division of the Supreme Court of South Africa, have on several occasions since 1952 issued orders on the basis that Act 9 of 1916 remained in force in South West Africa.

It is very unsatisfactory that patent matters in South West Africa are still regulated by a South African Act which was repealed in its country of origin more than thirty years ago.”

I agree. For these and the other reasons mentioned earlier, I find that the 1952-Act did not apply to the Territory and that the first exception must also fail on this ground.

[27] Anticipating the possibility that their first arrow may not be on target, the excipients had a second in their quiver: In the alternative to the first exception, that is, in the event of

the Court finding that the Proclamation and parts of the 1916-Act are applicable in the Republic of Namibia, they maintain that the plaintiff's claim is excipiable because it does not allege that acceptance of the complete specifications has been published before the alleged infringement of the patent. Given the provisions of s.36(3) of the 1916-Act, publication was a legal prerequisite to the institution of this action and an allegation to that effect is necessary to sustain the plaintiff's cause of action. The subsection provides as follows:

“Subject to the provisions of this Act, every patent shall be dated and sealed as of the date of the application: provided that no proceeding shall be taken in respect of an infringement committed before the publication of the acceptance of the complete specification.”

[28] This section, counsel for the excipients contends, must be read with s.23(2) of the 1916-Act which requires of an applicant for the grant of a patent to advertise acceptance of the complete specification by the Registrar in the prescribed manner. Counsel also underlined that, in the absence of any regulations made by the Administrator as contemplated in s.19 of the Proclamation, those made under s.192 of the 1916-Act apply and that regulation 27 thereof prescribes the manner in which the plaintiff should have published the Registrar's acceptance. The plaintiff having failed to allege publication of the acceptance as required by s.23(2) in the manner prescribed by regulation 27, he contends that the proviso in s. 36(3) of the 1916-Act which precludes the institution of legal proceedings in respect of an infringement committed before the publication of the acceptance of the complete specification applies and that the Particulars of Claim lack averments necessary to sustain the plaintiff's cause of action.

[29] The interpretation to be accorded to sections 33(2), 36(3) and regulation 27 in the context of the 1916-Act does not seem to be in issue – what is, is the application thereof to the Territory. Counsel for the plaintiff submits that sections 1-3 of the Proclamation introduced a simplified application procedure for the granting of patents which does not require advertisement of the specifications' acceptance. Hence, counsel argues, neither the requirements of s.33(2) nor the consequences of failure to comply therewith contained in the proviso to s.36(3) apply to patents granted under the Proclamation and this exception should therefore fail.

[30] Even a cursory comparison between the sections of the Proclamation and those in the 1916-Act dealing with applications for the grant of patents shows that the latter is much more comprehensively regulated. Applications for patents are dealt with, somewhat tersely, in the first two sections of the Proclamation. The same subject matter is covered considerably more extensively in sections 11-35 of the 1916-Act. The 1916-Act caters for a number of contingencies and, for its time, weaved a fair and comprehensive regulatory network for applications of that nature. By comparison, the basic, almost oversimplified procedure envisaged by the Proclamation leaves much to be desired – even if one were to take into consideration the reasons underlying the Territory's classification as a C-Mandate (c.f. Verloren Van Themaat and Wiechers, *Staatsreg*, 2nd ed. p 407) and the relative urgency with which the legislative vacuum (alluded to at the outset of this judgement) had to be addressed. But, whatever criticism may justifiably be levelled against the terse treatment of the application procedure by sections 1 and 2 of the Proclamation, they – and not sections 11-35 of the 1916-Act – are to be applied. The reasons for their application are same as those discussed earlier on why patents in the Territory are being granted under s.3 of the Proclamation and not in terms of the Union Act as defined: The extent to which

the Union Act has been applied to the law of patents in the Territory must be gained from s.5 of the Proclamation and, although the section applies the Union Act to a wide range of specified matters, it does not apply it to applications for - or to the granting of - patents. On the latter matters, the provisions of the Proclamation apply to the exclusion of the 1916-Act.

[31] I agree with the contentions of both counsel that the phrase "the publication of the acceptance of the complete specification" in s. 36 (3) refers to the publication contemplated by s.23 of the 1916-Act. The latter section, appearing in subdivision "(a) Application" of Part III ("Procedure for Obtaining the Grant of Letters Patent"), follows in the structure of the 1916-Act upon sections dealing with who may apply for a patent; the form of an application for a patent; the form and contents of the specifications; the duties and powers of the registrar in respect of the examination of applications and specifications; the power of the registrar to refuse to accept, or refer for amendment, applications, specifications or drawings; appeals from the registrar; the refusal of the registrar to accept specifications; appeals against the registrar's refusal to accept the specifications and the lapsing of applications for patents. Section 23 then provides as follows:

“(1) When an application and specification have been accepted the registrar shall give written notice of that fact to the applicant, and shall transmit one of the specifications to the Attorney-General at Cape Town, Pietermaritzburg and Bloemfontein.

(2) The acceptance of the complete specification shall be advertised in the prescribed manner, and if the acceptance is not advertised within the prescribed period or within such further time as the registrar may allow the application shall lapse.

The “prescribed manner” in which acceptance of the complete specification must be advertised is to be found in rule 27 of the Patent Rules, 1917 made under s.192 of the 1916-Act. It reads:

“On acceptance of a provisional or complete specification the Registrar shall give notice thereof to the applicant who shall advertise the acceptance of the complete specification in three consecutive issues of the *Gazette*.”

The “*Gazette*” referred to was, according to the *Interpretation Act*, 1910 of the Union, the *Government Gazette*.

[32] The mere reading of sections 11-35 of the 1916-Act demonstrates how foreign the procedure for patent-applications prescribed by them are to that the one envisaged in sections 1 and 2 of the Proclamation. Moreover, the requirement in s.23(1) that the approved specifications must be forwarded by the registrar to the Attorneys-General in three South African cities and that the fact of acceptance by the registrar must be published in a *Gazette* of the Union (not in the *Official Gazette* of the Territory), clearly illustrate how inappropriate the application of those provisions would be in the context of sections 1 and 2 of the Proclamation; in the legislative setting for patents which the Proclamation created in the Territory and, even more so, in the legislative setting currently prevailing in Namibia. In the view I take, the requirement by s. 23(2) of the 1916-Act that acceptance of the complete specification must be published in the prescribed manner, never applied to the Territory and is therefore not part of the law of Namibia.

[33] In arriving at this conclusion, I am mindful that s.5 of the Proclamation applied the provisions of the 1916-Act relating to “actions for infringement” to the Territory and that

the proviso in s.36(3) contemplates a bar to actions of that nature in respect of infringements committed before the publication of the acceptance of the complete specification. However, it is important to note that s.5 only incorporates those provisions in the 1916-Act “in so far as (they) are applicable”. If publication of the registrar’s acceptance prescribed by s.23(2) is not applicable in Namibia, it follows that the proviso to s. 36(3), which contemplates a bar to the institution of actions for infringements committed before such publication, is equally not of application. It does not form part of our law. Part V of the 1916-Act deals extensively in sections 61-65 with actions for infringements of patents and it is those sections which have been applied *mutatis mutandis* to the Territory by s.5 of the Proclamation. I am also mindful of the purpose underlying the requirement of publication by s.23(2) and the inconsistencies which arise from the requirement in s. 47(2) of the 1916-Act that proposed amendments to specifications must be advertised in the prescribed manner and the finding that publication of the registrar’s acceptance of the specifications in the initial application is not required. Counsel is quite correct in submitting that, if publication is required in the case of amendments, *a fortiori*, publication of the complete specifications should have been required. Idiosyncrasies of this nature are the unfortunate result of the mechanism adopted in the Proclamation to address the void in patent legislation at the time: legislating in an oversimplified manner on certain aspects of patent law and, as regards all other aspects, incorporating complex foreign legislation. The marriage between the two, as is to be expected, may not always be harmonious or produce satisfactory results.

[34] The excipient’s reliance on rule 27 regarding publication is also misplaced. It’s assertion that the Administrator did not make regulations “which are necessary or convenient for giving effect to any of the provisions of (the) Proclamation” is common

cause. So is its counsel's contention that, in the absence of regulations by the Administrator, those made under the 1916-Act generally apply. They, however, apply pursuant to the proviso in s.19 of the Proclamation which reads:

“Provided that until such tariff, forms and regulations (to be prescribed by the Administrator) are in force, the fees, forms and regulations prescribed in the Union Act and Rules framed thereunder, shall, *in so far as such fees, forms and regulations are applicable*, be the prescribed fees, forms and regulations for the purposes of this Proclamation.”

(My insertion and emphasis).

If s.23(2) of the 1916-Act requiring publication of acceptance is not of application – as I have held – neither can rule 27 (prescribing the manner of publication envisaged thereunder) be. In the result, the first alternative to the first exception must also be dismissed.

[35] The final alternative to the first exception is brought on the premise that the Proclamation should be read with the applicable parts of the 1952-Act. Based on that premise, the excipients aver that in terms of s.53 of the 1952-Act, an action for the infringement of a patent must be heard by a commissioner of patents appointed under s.4 of the Act and that under s.77 thereof, “no tribunal other than the commissioner shall have jurisdiction in the first instance to hear and determine any action or proceedings” in that regard. This Court, it is asserted, lacks jurisdiction to adjudicate the action for infringement instituted by the plaintiff.

[36] In *Viljoen v Federated Trust Ltd*, 1971 (1) SA 750 (O) Steyn AJ was called upon to decide whether a lack of jurisdiction, which is clear *ex facie* the pleadings objected to, is a

fit subject for an exception and whether the meaning of the phrase, "lacks averments which are necessary to sustain an action" is wide enough to include an exception based upon such an apparent and clear lack of jurisdiction. He held (at 769F-770E) that it was, reasoning as follows:

“Rule 23 (1) clearly envisages, *inter alia*, that an exception can be taken to a pleading which does not disclose a cause of action. The words ‘cause of action’ have been defined as ‘every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court’...

The words "sustain an action" in sub-rule (1) of Rule 23 mean, in my opinion, to sustain an action in the Court in which such action is brought. One of the averments necessary to sustain an action in a particular Court is clearly that such Court has jurisdiction to entertain the action. If the Court has no jurisdiction in the matter the action cannot be sustained in that Court. Absence of jurisdiction is, therefore, a good defence in such an action. The usual method of raising a defence of absence of jurisdiction is by way of a special plea. See Beck, *Pleading in Civil Actions*, *supra* at p. 127, para. 71. The reason why such a defence is normally raised by way of a special plea is that the lack of jurisdiction is often not apparent from the allegations contained in the pleadings objected to and must, therefore, be proved with fresh matter introduced by way of evidence which cannot be done in the case of an exception.

If, however, it is apparent *ex facie* the pleading itself that the Court concerned has no such jurisdiction, a defence based upon the absence of jurisdiction can be established without the introduction of any fresh matter. In the case of *Brown v. Vlok*, 1925 AD 56, INNES, C.J., said at p. 58, that:

‘... a plea in bar is one which, apart from the merits, raises some special defence, not apparent *ex facie* the declaration - for in that case it would be taken by way of exception - which either destroys or postpones the operation of the cause of action”.

In *Herbstein and van Winsen*, *op. cit.* at p. 307A - B, the position is described thus:

‘The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the declaration. The defence which he raises on exception must appear from the declaration itself; he must accept as true the allegations contained therein and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the declaration. If they did then the exception

procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the declaration and these facts have to be established by evidence in the usual way."

In my opinion it is clear, therefore, that the above-quoted phrase in sub-rule (1) of Rule 23 has a meaning which is wide enough to cover a case where the absence of the necessary jurisdiction is apparent *ex facie* the pleading concerned, and that a defence based upon the absence of such jurisdiction can validly be raised by way of exception."

[37] Although this Court expressed some reservations during argument about the appropriateness of a jurisdictional challenge by exception rather than by special plea (where it may be open for the plaintiff to challenge the constitutionality of the Court's ouster as a *forum* of first instance under the provisions of Articles 12(1)(a), 25 and 80(2) of the Constitution), the point was not specifically raised or argued by the plaintiff. In any event, given this Court's finding that the 1952-Act has not been applied in the Territory, the premise on which the exception is based falls away and the second alternative exception, therefore, cannot be sustained – thus obviating the need to decide whether the jurisdictional issue should not be deferred as one to be raised and determined on a special plea in abatement.

[38] The second exception, taken on the premise that the Court finds the Proclamation to be of force and effect, is based on sections 1(1), 1(2) and the definition of "Patent" in s. 18 of the Proclamation. It avers that, read together, the sections only allow the grant of a patent for an invention in Namibia and preclude patents for inventions which have been imported. Relying on the allegations made in the pleadings, the excipients plead that it is evident that the inventor was domiciled outside Namibia at the time of the invention; that the invention constituted an incorporeal right which, by its nature, was situated at the domicile of the inventor in South Africa at the time of the invention and that the invention

was thus imported into Namibia by the plaintiff, a Namibian registered company, to be registered here. Consequently the grant of the patent in respect of an imported invention was a nullity, accorded no protection to the invention and does not sustain a cause of action for damages or an interdict based on the alleged infringement thereof.

[39] A patent under the Proclamation is granted for an “invention” defined in s.1(2) as “any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement thereof, capable of being used or applied in trade or industry, *and not known or used by others in the Territory and not on sale for more than two years in any country outside the Territory, prior to the application for a patent under this Proclamation*”. The part of this definition in parenthesis (which is mine), it must be noted, differs from that in s. 6 of the 1916-Act which, instead, stipulates: “...and not known or used by others in the Union, and not patented or described in any printed publication in the Union or any other country, before the application for a patent in respect of the same”.

[40] It is, however, not anyone who may apply for the registration thereof. Section 1(1) of the Proclamation limits that right in the following terms:

“Any person, *not being an importer*, who is legally in possession of an invention, may either alone or jointly with one or more other persons apply for a patent for such invention.”

(emphasis added)

This provision, it must be noted, differs from its equivalent (s. 14(1) read with the definition of “inventor” in s.6) in the 1916-Act.

[41] Both counsel referred the Court in argument to the historical background which resulted in provisions denying importers the right to apply for patents but seek to draw different conclusions from the language used in the sections. In assessing their conflicting submissions, it is expedient to briefly reflect on the circumstances which gave rise to the formulation of the impediment. Its origin is to be found in the very technical – somewhat contrived – meaning given in English law to the phrase “true and first inventor” which was originally used in s. 6 of the English *Statute of Monopolies*, 1623. The meaning accorded to the phrase is perhaps most succinctly treated by Beadle CJ in *Lonrho Ltd v Salisbury Municipality*, 1970 (4) SA 1 (RA) where, quoting the following conclusion arrived at by Lord Jessel in *Plimpton v Malcolmson*, (1876) 3 Ch. D. 531 at p. 555:

“As I understand, shortly after the passing of the *statute*, the question arose whether a man could be called a first and true inventor who, in the popular sense, had never invented anything, but who, having learned abroad (that is, out of the realm, in a foreign country, because it has been decided that Scotland is within the realm for this purpose) that somebody else had invented something, quietly copied the invention, and brought it over to this country, and then took out a patent. As I said before, in the popular sense he had invented nothing. But it was decided, and now, therefore, is the legal sense and meaning of the statute, that he was a first and true inventor within the *statute* . . .” ,

he summarised the English law in point as follows (at 2H-3A):

“With the development of patent law in England, the words 'true and first inventor' came to acquire a highly specialised meaning - a meaning peculiar to patent law and not consistent with the popular meaning of these words. The technical and specialised meaning of these words in patent law has come to include not only the actual inventor himself but also the 'importer' (which includes a 'communiquee') of the invention, and, indeed, in England it would appear that a common method of registering a foreign patent is for the foreign inventor to have the patent registered first in the name of his local patent agent, as the

'communicatee' of the invention, and then, subsequently, for the patent agent to assign the patent to him, much as was done in the instant case.”

[42] Whilst recognising that the expression “true and first inventor” is not limited to its meaning in the popular sense but had become a term of art (also including the “true and first importers” into the realm) under English patent law, the Transvaal Court was clearly not persuaded to ascribe the same technical meaning to an identical term in the Transvaal Patent Act, No. 6 of 1887. Morice, J summarised the Court’s findings in *Andrew v The Robinson Gold Mining Company* (1894) 1 OR 151 as follows (at p 277 of his judgment in *Hay v African Gold Recovery Co*, (1896) 3 OR 244):

“But it has been already decided ...that the words ‘first and true inventor’ are not to be taken in the artificial sense of the English Law, but in their natural sense. They are not limited to persons within the State; nor can “inventor” carry the meaning of “importer.” The ‘first and true inventor’ signifies that the person so described made the discovery himself, and that he did so before anyone else in any part of the world...If another interpretation had been put upon the Law the industrial development of a new country, such as the Transvaal, might have been retarded by the acquisition of monopolies for all sorts of inventions, well known abroad, but never previously introduced into or published in the Transvaal. Other countries, such as England and the United States, are by reason of their greater age less exposed to this danger. Further, a previous publication within these countries is regarded as a ground for the cancellation of a patent; and in countries in which there are extensive libraries, as is unfortunately not the case here, it is probable that there will be publication of discoveries known abroad.”

Kotzé CJ was even more outspoken in *The Robinson Gold Mining*-case when he said (at p 153):

“It cannot be the intention of the law that a foreigner, so far as the obtaining of a patent is concerned, should stand on a better footing than a citizen of this State. If this interpretation

be not given to sub-sect. (b) the law will directly promote fraud and hamper industry, to the detriment of the inhabitants of this country; for it would then be an easy matter for any unscrupulous person, who may choose to do so, to come to this country and obtain patents for inventions known and in use in other countries (whether these are patented there or not), and in this way prohibit the use of appliances or other inventions well known elsewhere, unless he be first bought off or satisfied by the payment of large sums of money. For the law to permit a practice of this kind is tantamount to legalising extortion. I am aware that in some countries the law allows the pirating and patenting of another's invention...But to admit to the soundness of the language of the Vice-Chancellor as a matter of general principle would certainly be contrary to the true interests of commerce and industry in this State.”

[43] Seeking to avoid the detrimental consequences highlighted by judicial pronouncements in South Africa on the technical meaning given by English law to the phrase “first and true invention”, the South African Legislature determined in s. 6 of the 1916-Act that an “inventor” shall not include a person importing an invention from outside the Union” (See: *Lonrho Ltd v Municipality of Salisbury*, 1969 (2) SA 678 (R) at 687 H). When read together with s. 14 of the Act, the result is that the “importer” of an invention would not be entitled to obtain a patent for it. The meaning to be attributed to “importer” was keenly debated by counsel at the hearing. The excipients’ counsel contend that the “importer” of an invention under the 1916-Act would include a communicatee thereof (c.f. Gertholtz, *South African Patent Law*, (1971) p. 227 and the Rhodesian Appellate Division judgment in *Lonrho Ltd v Municipality of Salisbury*, *supra*, at 4D-F). So limited, this contention, it seems, is not really in issue. It is also not in issue that the “mere importer” or “true and first importer” falls within the meaning of the word “importer” (See: *Carnes v Maeder*, 1939 WLD 207 at 214 and *Ex Parte Schneider*, 1943 TPD 84 at 93). What is, is whether a person should be regarded as an importer (and therefore be denied the right to apply for a patent) if the work leading to the invention was done, wholly or in part, elsewhere than in the country where the application is made and

whether an importer may not either jointly with the inventor or as the assignee of an interest or part interest in the invention apply for a patent thereon. Given the provisions of s. 14(1) of the 1916-Act, the answer to the last question may well be in the affirmative. But, however much the plaintiff is seeking to read the definition of “inventor” in s.6 of the 1916-Act into the Proclamation (drawing on s.5 of the Proclamation read with sections 62, 55, and 27-35 of the 1916-Act), the intention of the lawgiver in the Territory must be found with reference to the contents of the Proclamation read as a whole.

[44] Counsel for the plaintiff argues that the meaning of “importer” may be ascertained, firstly, by an analytical and linguistic consideration of the other provisions of the Proclamation and, secondly, by determining what the mischief is that the Proclamation sought to curb or prevent. Emphasising that s. 1(1) does not require the applicant for a patent to be the inventor but simply to be legally in possession of the invention and that an invention is defined in subsection (2) as something “not known or used by others in the Territory, and not on sale for more than two years in any country outside the Territory, prior to the application of a patent under this Proclamation”, plaintiff’s counsel reasons that something invented outside of the Territory may qualify as a patentable invention within the meaning of s.1(1). All that is then required of an applicant is that he should be legally in possession of the invention. Someone who acquired such an extraterritorially known invention by sale, or assignment, would fall into this category. It follows from this, counsel submits, that there is nothing in s.1 of the Proclamation precluding a person from applying for a patent in respect of something invented by another who was, at the time of such invention, domiciled elsewhere. Moreover, given the specific form of the mischief that the legislature sought to curb (which I have referred to earlier), there would be nothing preventing someone who has legally obtained possession of something invented elsewhere,

from applying for the patenting thereof in Namibia (as long as the invention sought to be patented meets the requirements of Section 1 (2)).

[45] In formulating s.1(1) of the Proclamation to deny importers of inventions the right to apply for patents, a drafting technique different to that used in the 1916-Act was employed. The result it produced, in my view, is not identical to the one which may follow on the application of s. 14 when read together with the definition of “inventor” in s.6 of the 1916-Act. Whereas the 1916-Act might have been construed prior to its repeal to allow an importer to apply for a patent either jointly with the inventor or as an assignee of the whole or a part interest in the invention, a reading of s.1(1) of the Proclamation accords the right to apply for a patent only to persons, not being importers, who are legally in possession of inventions. In its ordinary sense, I understand the subsection to mean that even an importer who is legally in possession of an invention may not apply for its registration as a patent.

[46] The provisions of s.1(2) of the Proclamation do not derogate from such an interpretation – as contended for by counsel for the plaintiff. There is nothing in the subsection which justifies the suggestion that the words “not known or used by others in the Territory and not on sale for more than two years in any country outside the Territory, prior to the application for a patent under this Proclamation” contemplate by necessary implication that inventions may be imported. The phrase may equally apply to an invention in Namibia, not known or used by others here, but sold by the inventor in another country for a period of less than 2 years.

[47] Any doubt that s.1 must be interpreted accordingly, is removed if one considers the definition of “patent” in s.18 of the Proclamation. It means “letters-patent for an invention

in the Territory” (the emphasis is mine). It differs from the definition of a “patent” in s. 6 of the 1916-Act where the concept is defined as “letters patent for an invention granted in the Union”. Concerned that the word “granted” might have been left out by accident in the English text or in the reproduction of the Proclamation, the Court consulted the text of the original Proclamation in its archives – bearing the signature and official seal of the Administrator. It shows that the English text was signed and sealed by the Administrator; that the word “granted” does not appear in the definition of “Patent” in s.18 and that the Dutch version of the Proclamation defined “Patent” as “een patentbrief voor een uitvinding in het Gebied” – thus corresponding with the English text.

[48] The conclusion forced upon the Court by the language of the Proclamation, however out of tune it may be with patent laws in other countries, is inescapable: Only inventions in Namibia may be registered as patents and then only by persons who are not importers. Adv. Jansen argued that the reason for the limitation is to be found in the Administrator’s desire not to hamper the development in the Territory by allowing foreign inventions to be patented here. Given the status of the Territory as a C-mandate at the time – a classification reserved in the submission Genl. Smuts (who, according to Verloren Van Themaat and Wiechers, *Staatsreg, supra*, at 407, designed the Mandate system adopted by the League of Nations) for German colonies inhabited by underdeveloped populations – it might well have been so. It may also explain why the Proclamation, unlike the 1916-Act, does not allow patents to be granted to the actual inventors of imported inventions.

[49] It is with this interpretation in mind that the second exception falls to be assessed. The approach to be adopted on an exception was restated by this Court in *Namibia*

Breweries Ltd v Seelenbinder, Henning & Partners, 2002 NR 155 (HC) at 159H-160A in the following terms:

“(The excipient) must satisfy the Court that, on all reasonable constructions of the plaintiff’s particulars of claim as amplified and amended ...and on all possible evidence that may be led on the pleadings ...(that) no cause of action is or can be disclosed.”

(The words in brackets have been added)

[50] It appears from the excipient’s request for security for costs that Ben Tovim is the sole director and shareholder of the plaintiff. The Plaintiff is, according to the pleadings, the grantee of the letters patent signed and sealed by the registrar for the invention made by Tovim who, at the time of the invention, was domiciled in South Africa.

[51] The excipients, relying on the decision of the Appellate Division of South Africa in *Estate Agents Board v Lek*, 1979(3) SA 1048 (A), submit that, inasmuch as an intellectual property right is incorporeal, it vests or is situated at the place where the inventor is domiciled. In a more recent judgment, reported as *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd*, 2000(4) SA 746 (SCA), that Court recognised (at 753F-G) that “(i)ntangibles by their very nature cannot have a physical locality. They do not attach to the objects to which they relate”. In the context of personal rights, it confirmed that South African Courts have followed the view of *Grotius* that “the situs of an incorporeal right is where the debtor ...resides”. Although the approach is somewhat different in Namibia (compare the judgment of the full bench of this Court in *Bourgwells Ltd v Shepavolov and Others*, 1999 NR 410 (HC) at 421E-422D) nothing of significance turns on the distinction for purposes of this judgment.

[52] In deciding whether the exception is well-taken, the Court must assess whether the allegation that Tovim was domiciled in the Republic of South Africa at the time he invented the pebble jetting system excludes, on all possible evidence that may be led on the pleadings, that the patent for the invention was lawfully granted under the Proclamation to the plaintiff – a company of which Tovim is the only shareholder and director. There is no allegation in the pleadings which excludes the possibility that, when Tovim invented the pebble jetting system, he did not act as an employee or officer of the plaintiff in the discharge of his duties and obligations as such; or, for that matter, that he was not contractually obliged as an employee or officer of the plaintiff to assign to the plaintiff any invention made by him in the course and scope of his employment or the discharge of his duties as such. There is also no averment suggesting where the invention was made or to justify the inference that no evidence can be adduced to show that the invention was not imported. Given the evidential presumption of validity which attaches to the official act of granting a patent, expressed by the maxim *omnia praesumuntur rite esse acta*, one would expect that the registrar was satisfied that the requirements of the Proclamation had been met before he or she granted the patent in question.

[53] In the result, I am not satisfied that the averments made on the pleadings exclude, on all possible evidence that may be led thereon, that the patent for the invention has not been granted lawfully under the Proclamation to the plaintiff. For this reason, this exception must also fail.

[54] The issues raised by the exceptions are complex and the litigants on both sides deemed it necessary to employ, in addition to instructing counsel, at least two instructed counsel. The order of costs to be made should be cast in corresponding terms.

The following order is therefore made:

All the exceptions against the plaintiff's claim are dismissed with costs, such costs to include the costs consequent upon the employment of one instructing and two instructed counsel.

MARITZ, J

I agree.

DAMASEB, JP

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