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2024 WIPO INTELLECTUAL PROPERTY JUDGES FORUM

The World Intellectual Property Organisation (WIPO) Judicial Institute organizes A Judges Forum annually. The Judicial Institute's main purpose is to strengthen judiciaries globally and provide a platform for judges to deliberate on various respects relating to IP adjudication. The Forum is convened for the exclusive participation of judges. Earlier this year some members of the South African Judiciary were invited to attend the 2024 WIPO Intellectual Property Judges Forum. Three South African Judges attended the forum, namely) President Molemela, Justice Hughes and Judge Kooverjie.



Pic: President Molemela (far right); Justice Hughes (middle) and Judge Kooverjie (left). Over 300 participants participated either virtually or in person. Participating in this forum has given us invaluable insights into how IP matters are adjudicated globally. Moreover, the WIPO Judicial Institute offers a vast library of interesting judgments from the various jurisdictions on IP's platform WIPO.lex.

The Forum was held over two days namely 9 and 10 October 2024. Various sessions were convened where specific topics were canvassed. The material provided for reading and referred to at the Forum were judgments from various jurisdictions, articles on the specific topics and various rules on procedures and regulations applicable in the various jurisdictions. Various participants were invited to speak on a range of IP topics as part of a panel. Participants were selected from various jurisdictions. Pursuant to her participation in the WIPO IP Masterclass earlier this year, President Molemela was selected as a speaker on Confidential Information and Trade Secrets.

Since the substantive IP law is universally similar, participants found a common platform to deliberate on issues. The following topics were covered during the respective sections. The first session dealt with was how Artificial Intelligence has come

to affect the determination for IP disputes. Panellists in the session shared insights by referring to recent court cases dealing with the patentability of AI assisted interventions and technologies. It was acknowledged that the fast-moving technological environment created challenges for defining and in interpreting licensing terms. The next session dealt with litigation surrounding standard essential patents. Beyond the traditional IP concepts, it was found that the courts in various jurisdictions are required to apply both contract and competition law in complex cases. More particularly, when determining what the appropriate remedies should be. These included aspects relating to patent validity, patent infringement and how to determine appropriate, fair and reasonable rates.

A session was also set aside where a discussion was held on the strength of a trademark, whether there are weak elements in such trademark, and to what extent such trademarks can be enforced. The panel referred to judgments from different jurisdictions addressing the complexities associated with enforcing trademarks that have distinctive characters. Further, a session was also held on copyright, exceptions and limitations. It is known that the copyright system makes provision for certain flexibilities regarding the granting of

rights, and it enables the use of protected works without the right-holder's consent and without the requirement for compensation. With the development of new technologies, the question of how these flexibilities should be considered in the technological space, becomes challenging. The panellists dealt with these challenges by referring to the respective authorities. Furthermore, a session was also dedicated on how to approach matters where permanent injunctions (interdicts) are sought. The panel again deliberated on various approaches that the court recently followed. Discussions were held around nuanced approaches when dealing with injunctions, more particularly the type of defences that are now raised against injunctive relief.

In another interesting session, discussions centred on cross-border IP proceedings. Panellists, with reference to judgments, addressed the difficulties when delivering matters that had a bearing on two or more jurisdictions as well as the impact their decisions had on the jurisdictions outside the local territory. Aspects such as: the validity of evidence obtained outside the local territory, when infringing acts are undertaken outside the local territory and the extent of damages for extra-territorial losses were canvassed.

A relevant topic dealt with in another session was the need for specialised judiciaries. Comparisons were drawn from different jurisdictions which have specialised IP courts in place. Their distinct IP procedural frameworks as well as their rules of procedure were highlighted. Countries such as India, Philippines, Korea and notably the United Patent Court (United Patent Court), have specialized courts. The UPC has already 18 of the 27 European members who are now members of this Patent Court. The UPC has its own procedural rules, it has both local and regional divisions all over Europe. The court also makes use of technical judges when technical issues come into play.



In the session discussing confidential information and trade secrets, the panellists presented their papers as well as their

experiences in adjudicating matters dealing with this aspect. President Molemela's presentation was on the protection of confidential information and trade secrets in South Africa. She dealt with evidentiary issues pertaining to that specific area of IP. She explained how breach of confidence claims are assessed and remedies available for such claims. She discussed the Supreme Court of Appeal decision, namely *Pexmart PC and Others v H Mocke Construction (Pty) Ltd and Another* (159/2018) [2018] ZACSA 175.

The case of *Pexmart CC v H. Mocke Construction (Pty) Ltd* is one of the recent judgments in which the Supreme Court of Appeal (SCA) recognized the enforcement of the duty not to disclose trade secrets and confidential information belonging to the employer in circumstances where there was no written confidentiality agreement. The central issue on appeal was whether Pexmart and Mr Henn had unlawfully made use of confidential information and trade secrets belonging to Mocke Construction and Mr Mocke in relation to a pipelining process.

In its judgment, the SCA confirmed that for information to qualify as a trade secret, three requirements must be met:

- the information must be secret or confidential (ie, reasonable measures must

have been taken by the holder to maintain secrecy, and it cannot be information already known to the public);

- the information must be of economic (business) value to the plaintiff; and
- the information must be capable of application in trade or industry.

Relevant holdings in relation to confidential information and trade secrets

Mr Mocke and Mr Gish's evidence regarding the confidential information and trade secrets developed over years and many hours of practical application in the industry was canvassed in extensive detail. This evidence was uncontroverted even though it called for rebuttal.

- drew an adverse inference from Mr Henn's failure to testify as he was at the centre of the dispute.
- The SCA concluded that the court below (the High Court) was correct in having regard to Mr Mocke's uncontroverted claims when assessing whether there was protectable confidential information in respect of the process, its machine, intellectual property, techniques and onsite training, technology and the know-how associated therewith.
- the reasoning and conclusion of the court below in relation to whether the processes adopted by the appellants were dissimilar to those employed by the respondents, could not be faulted.

- that the extensive details of the deforming process were not in the public domain and were known only to those with whom Mr Gish and Mr Mocke chose to work;

- it was evident that the confidential information in question had economic value to Mr Mocke and his licencees.

- The lack of a restraint provision or a written confidentiality agreement involving the former employee did not detract from the enforceable rights of the respondent.

- The SCA dismissed the appeal.

Instances where the Pexmart judgment was referred to or applied include the following judgments:

- *Milestone Beverage CC and Others v Scotch Whisky Association and Others* 2021 (2) SA 413 (SCA);
- *Nativa (Pty) Ltd v Austell Laboratories (Pty) Ltd* 2020 (5) SA 452 (SCA);
- *OMV (Pty) Ltd v Marais and Another* [2024] ZANWHC 137;
- *Technical Systems v Feed Chain Industries and Others* (7235/2017) [2024] ZAWCHC 113;
- *Universal Blending (Pty) Ltd v Henderson* (2021/21636) [2023] ZAGPJHC 266.