IS THERE TENSION BETWEEN THE ENFORCEMENT OF PATENT RIGHTS AND PROMOTION OF COMPETITION POLICY IN SOUTH AFRICA?

by

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DECLARATION

I, Student number: 397527, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

This research report examines the intersection between competition law and patent law. In particular, it examines the abuse of patent rights by dominant players that hinder access to life-changing products. It evaluates the potential tension between protecting patent rights and promoting competition, which raises concerns about equitable access to lifesaving products. Vertical and horizontal prohibited practices, including patent pools, cross-licensing agreements, and pay-for-delay settlements are also discussed, in terms of both encouraging co-operative opportunities benefitting society while also posing the risk of creating platforms for collusion that could lead to price fixing and market allocation for competing patented products. The focus for the South African competition authorities has been on addressing abuse of dominance by patent holders, particularly regarding excessive pricing and equitable access to patented life-saving medicines and vaccines. This research report examines the case law on excessive pricing and dominant firms' refusal to license patents patented medications, resulting in Competition Commission investigations. This report also addresses equitable access to life-saving medicine, particularly during the COVID-19 pandemic, including South Africa's request to the World Trade Organisation for a TRIPS waiver for patented COVID-19 vaccines. The research report concludes that while there is tension between these areas of law, competition plays a vital role in promoting fair pricing of, and equitable access to, life-saving patents.

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I. INTRODUCTION

This research report examines the possible tension between the protection and exploitation of products of novel inventions through intellectual property rights and fair access to vital products, and promotion of competition for the benefit of consumers. Most importantly, it examines the protection granted to intellectual property rights holders and how this affects the rights of consumers' access to critical life-changing products.

While there are several intellectual property rights,[1] this report focuses on patents. Patents allow inventors to preclude third parties from financially benefiting from their patented products for a period.[2] Patents grant exclusive rights of use for a limited duration[3] to prevent competing creators and innovators from producing similar products, which may restrict competition in a defined market.[4]

In contrast, competition policies and laws aim to promote fair market conditions, healthy competition, and consumer welfare through measures that prevent anti-competitive conduct by, for instance, dominant firms.[5] It is not anti-competitive to be dominant or have a monopoly position in a market.[6] However, dominant firms may not abuse their market power or monopoly through their patent rights to unreasonably deny consumers access to life-changing products.[7]

This report examines the extent to which patent rights and competition policies may conflict. It also assesses the extent to which competition is enhanced or diminished by the protection provided through patent rights and the extent to which patent rights should be limited in the public interest.[8]

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[1] Lee-Ann Tong 'Intellectual property rights and human rights' in APS van der Merwe (ed) *Law of Intellectual Property in South Africa* 2 ed (2016) 3.
[2] Corinne Langinier & GianCarlo Moschini 'The Economics of Patents: An Overview' in Scott Newman & Max Rothschild (eds) *Intellectual Property Rights and Patenting in Animal Breeding and Genetics* (2002) 1.
[3] Ibid.
[4] Frederick M. Abbott 'IP and competition law & policy, including South African law and policy options' available at *https://frederickabbott.com/sites/default/files/Abbott%20%20IP%20and%20competition%20law%20%26%20policy_0.pdf*, accessed on 1 March 2023 at 9.
[5] OECD 'Competition Law and Policy in South Africa' available at *https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf*, accessed on 24 June 2023 at 17 and 25.
[6] Shakti Wood & Derek Lötter 'South Africa' in Peter J Levitas (ed) *Getting the Deal Through: Intellectual Property and Antitrust* (2018) 71.
[7] Ibid.
[8] See OECD 'Competition, Patents and Innovation' (2006), available at *https://one.oecd.org/document/DAF/COMP(2007)40/en/pdf*, accessed on 4 March 2023 at 17. OECD 'Competition Policy and Intellectual Property Rights' (1997), available at *https://www.oecd.org/daf/competition/abuse/1920398.pdf*, accessed on 4 March 2023 at 7.

The second part of this report discusses intellectual property rights. A brief overview of how intellectual property rights are regulated internationally is provided. The third part discusses the regulation of patents in South Africa. Part four evaluates the intersection between competition law and patent law to determine whether there is any conflict between the two areas in relation to fair access to life-changing products. The role of competition law where patentees abuse their exclusive rights by preventing fair access to important products through, among others, excessive pricing, is assessed. Throughout the report, relevant legislation, regulations, policy documents, and case law are analysed with a view to recommending law reform.

II. INTELLECTUAL PROPERTY RIGHTS

a) Overview

Intellectual property rights[9] provide rightsholders the right to financially benefit from their products as compensation for research and development costs, market development costs, and investment, while preventing competitors from exploiting such products for a prescribed period.[10]

Intellectual property rights are largely classified into rights associated with industrial property and creative property. The latter includes copyright, performance rights,[11] trademarks and designs.[12] This report focuses on industrial property rights, and in particular patents, which together with plant breeders' rights[13] are protected by the Patents Act[14] and the Plant Breeders' Rights Act[15] respectively.

[9] Including designs, copyright, trademark, and patents.
[10] Chandra Nath Saha & Sanjib Bhattacharya 'Intellectual property rights: An overview and implications in pharmaceutical industry' (2011) 2(2) *Journal of Advanced Pharmaceutical Technology & Research* 88.
[11] CB Ncube 'Harnessing Intellectual Property for development: Some thoughts on an appropriate theoretical framework' (2013) 16 *PER / PELJ* at 373-487.
[12] These rights are governed in terms of the Copyright Act 98 of 1978, Performers' Protection Act 11 of 1967, the Trade Marks Act 194 of 1993 and Designs Act 195 of 1993 respectively.
[13] Ncube op cit note 11 at 373-487.
[14] Patents Act 57 of 1978.
[15] Plant Breeders' Rights Act 15 of 1976.

b) Constitutional Recognition

In South Africa, intellectual property rights are constitutionally protected as property,[16] in terms of section 25 of the Constitution of the Republic of South Africa.[17] In *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International*,[18] the Constitutional Court (hereafter 'CC') held that the Constitution implicitly bestows intellectual property rights upon rights holders. In *Phumelela Gaming and Leisure Ltd v Gründlingh*,[19] the CC held that intellectual property rights (including patent rights) constitute property in terms of section 25(1) of the Constitution. However, the CC noted that the right to property, like all other rights, can be limited.[20]

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance,* the CC relied on a multi-step method to determine whether a property right should be granted constitutional protection, and whether the lack of protection is acceptable.[21] The CC held that 'property' is not limited to immovable property or land.[22] The CC held that it was unnecessary to determine what amounted to 'property' for section 25 as it would be impractical 'and judicially unwise to attempt' to create a definitive list of what constitutes property. [23] It is therefore submitted that given this broad definition of 'property' by the CC, patent rights are property, and are therefore constitutionally protected. Any limitation of patent rights must not be arbitrary and must be fair and in the public interest.[24] There are also inherent restrictions in patent rights, such as the limited protection term that result in such patent rights not being unqualified.[25] The protection granted to a rights holder in terms of section 25 of the Constitution is '…against undue state interferences', including excessive restrictions on patent rights and expropriation without compensation.[26]

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[16] AJ van der Walt & RM Shay 'Constitutional analysis of intellectual property' (2014) 17(1) *PER / PELJ* 055-612.
[17] Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution').
[18] 2006 (1) SA 144 (CC) para 17.
[19] 2007 (6) SA 350 (CC) paras 27 and 30.
[20] Timothy Donald Burrell *Burrells South African Patent and Design Law* 4 ed (2016) 1.15.
[21] 2002 (4) SA 768 (CC) para 46 notes that courts must consider including whether the 'customs debt' being withheld amounted to 'property' in terms of section 25. If so, was FNB deprived of property, and whether such deprivation aligns with section 25(1). If so, does the expropriation comply with the Constitution and is it justifiable?
[22] *First National Bank* supra note 21 para 40.
[23] See *First National Bank* supra note 21 para 51. van der Walt & Shay op cit note 16 at 054-612.
[24] Mikhalien du Bois 'The appropriate scope of property rights in patents' (2018) *IPLJ* 74.
[25] du Bois op cit note 24 at 68.
[26] du Bois op cit note 24 at 72.

The importance of constitutionally protecting patents is not uniquely South African; US jurists and academics grapple with defining 'property' and government expropriation of property (through the US 'Takings Clause').[27] '[C]onstitutional security' of patented medications is important in '… public policy debates'.[28] Despite earlier jurisprudence holding that patents were constitutionally protected, [29] there is now less clarity in modern decisions.[30] Natural rights proponents argued that property rights are granted through the ability to 'acquire, use, and dispose of' property. Legal realists (relied on by modern jurists) argue that property rights provide 'the right to exclude'.[31] Despite early rulings, more recent cases[32] question patent protections under the Takings Clause.[33] It is submitted that, in contrast, the South African Constitution and jurisprudence are clear on patents being constitutionally protected property,[34] avoiding confusion and providing legal certainty to patentees.

c) International Protection

The World Intellectual Property Organization ('WIPO') developed the Patent Cooperation Treaty ('PCT') to enable parties to file, search and register patents concurrently in multiple jurisdictions around the world.[35] South Africa has been a contracting state to this treaty since 1999.[36] This allows South Africans to file patent applications at the South African Patent Office for all other contracting countries under the PCT.[37] WIPO has conducted several studies considering the relationship between intellectual property and competition.[38] WIPO noted that it could be anti-competitive to grant a patentee '…exclusivity over non-differentiating features',[39] such as patents that lack novelty or are not complementary.

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[27] Adam Mossoff 'Patents As Constitutional Private Property: The Historical Protection Of Patents Under The Takings Clause' (2007) 87 *Boston University Law Review* 690: '[N]or shall private property be taken for public use, without just compensation'.
[28] Mossoff op cit note 27 at 692.
[29] Mossoff op cit note 27 at 711.
[30] Mossoff op cit note 27 at 695.
[31] Mossoff op cit note 27 at 691.
[32] See *Zoltek Corp. v. United States*, 464 F.3d 1335, 1339 (Fed. Cir. 2006) and *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002).
[33] Mossoff op cit note 27 at 700.
[34] *Phumelela* supra 19 paras 27 and 30.
[35] WIPO 'PCT FAQs' available at *https://www.wipo.int/pct/en/faqs/faqs.html*, accessed on 25 February 2023.
[36] WIPO 'The PCT now has 157 Contracting States' available at *https://www.wipo.int/pct/en/pct_contracting_states.html*, accessed on 25 February 2023.
[37] HR Moubray 'Forms and Precedents: Intellectual Property 2 – Patents – Preliminary Note' (2010) available at *https://www.mylexisnexis.co.za/Index.aspx,* accessed on 4 March 2023 para 1.
[38] See for instance Patent Pools and Antitrust – A Comparative Analysis (2014) and Studies on the Interface between Exhaustion of IP Rights and Competition Law (2012).
[39] WIPO 'Intellectual Property and Competition Policy' available at *https://www.wipo.int/ip-competition/en/,* accessed on 5 March 2023.

South Africa is also a member of the World Trade Organisation ('WTO') and party to the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement'), since 1994.[40] The TRIPS Agreement allows patents to be registered for inventions that are 'new, involve an inventive step and are capable of industrial application',[41] but such patentable inventions must be 'useful'.[42] This agreement encourages adherence to competition legislation and regulations in each respective country ensuring that patented products are accessible. Article 8 of the TRIPS Agreement acknowledges the need for member states to take steps to prevent anti-competitive conduct, implementing patent and competition legislation concurrently to ensure consumer welfare.[43]

The ratification of treaties like the PCT and TRIPS Agreement is particularly important because patents are intangible assets that can be used concurrently in multiple jurisdictions. Creating international protection for patents is important,[44] for utilisation or transferral with relative ease.

International instruments only come into effect in South Africa if ratified by the legislature in terms of section 231 of the Constitution. International instruments help create important national guidelines on intellectual property that enhance research, innovation and development to the benefit of consumers and inventors, resulting in expansion of the economy.[45] The Companies Intellectual Property Commission ('CIPC') reported that there were approximately twelve and a half thousand patent applications in 2021/2022, half of which were PCT applications.[46] An increased number of PCT applications, and easier, efficient patent

[40] South Africa is also a party to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms.
[41] Article 27.1 of the TRIPS Agreement.
[42] Article 27.1 of the TRIPS Agreement at footnote 5.
[43] Intellectual Property Policy of the Republic of South Africa: Phase 1 in GN 518 GG 41870 of 31 August 2018 at 30.
[44] Jeremy De Beer, Jeremiah Baarbé & Caroline Ncube 'Evolution of Africa's intellectual property treaty ratification landscape' (2018) 22 *AJIC* at 54.
[45] South African Cultural Observatory 'Policy Implications of Changes in the Intellectual Property (IP) Legislative Environment and the Possible Impact Thereof on the Emerging 4th Industrial Revolution Commissioned Research Report' (2019) available at *https://www.southafricanculturalobservatory.org.za/download/comments/662/be3159ad04564bfb90db9e32851ebf9c/Policy+Implications+of+Changes+in+the+Intellectual+Property+%28IP%29+Legislative+Environment+and+the+Possible+Impact+Thereof+on+the+Emerging+4th+Industrial+Revol,* accessed on 12 March 2023 at 6.
[46] CIPC 'Annual Report 2021/2022' available at *https://www.cipc.co.za/wp-content/uploads/2022/10/30-September-2022-CIPC-Annual-Report-Final_2022.pdf,* accessed on 2 June 2023 at 26.

registration,[47] has resulted in financial advantages, including economic improvements, such as 'import substitution' and employment creation in the county.[48]

III. PROTECTION OF INNOVATION IN SOUTH AFRICA

a) The role of patents

Patents protect creators and innovators by granting exploitative control over their products for a defined period.[49] In South Africa, the Patents Act grants patent rights for 'any new invention involving an inventive step and capable of being used or applied in trade or industry or agriculture.'[50] Patent laws aim to recognise creators of important inventions which significantly benefit society.[51] Patentees are granted exclusive rights to the patented product, preventing third parties from using such product without the permission of the patentee. Such exclusivity provides a powerful market position over patented products leading to revenue earning, while preventing free-riding by competitors.[52] Free-riding occurs when a party '… benefits from the efforts of another without paying for or sharing the costs'.[53]

There is no reason to provide entities with a monopoly for an invention that is already in the public arena. Inventions must involve 'an inventive step… [that] is not obvious to a person skilled in the art'[54] of such matter. Patent protections are not granted for obvious

[47] PMG 'Explanatory Memorandum on the Ratification of the Madrid and Hague Systems on the Registration of Trade Marks and Designs' (2004) available at *https://static.pmg.org.za/docs/2004/appendices/040818memorandum.htm*, accessed on 12 March 2023.
[48] Ulrich SchmochI and Anastassios Pouris 'International patent applications and innovation in South Africa' (2021) *South African Journal of Economic and Management Sciences* 6.
[49] See OECD 'Patents and innovation: trends and policy challenges' available at *https://www.oecd.org/science/inno/24508541.pdf*, accessed on 23 June 2023 at 8. Swapan Kumar Patra & Mammo Muchie 'An assessment of South African technological capability using patent data from WIPO Patentscope database' (2022) 14 *African Journal of Science, Technology, Innovation and Development* at 335. OECD 'Patents and innovation' op cit note 49 at 5 noted patents are vital to aiding knowledge dissemination and increasing funding. Conversely, Roberto Mazzoleni & Richard R. Nelson 'The benefits and costs of strong patent protection: a contribution to the current debate' (1998) 27 *Research Policy* 273-279 noted that patents encourage 'follow-on' inventions, such as vaccines. Edwin Mansfield 'Patents and Innovation: An Empirical Study' (1986) 32 *Management Science* 180 noted patents are commonly used in chemical and pharmaceutical sectors, as patents offer more security than trade secrets.
[50] S 25(1) of the Patents Act.
[51] See JR Steyn 'Patents, The Law of South Africa' (2009) 20 LAWSA 148. OECD 'Patents and innovation' op cit note 49 at 26 and 27 noted 'well-functioning patent system[s]… enhance the circulation of technology' and contribute to 'increasing investment, achievements and commercialisation'.
[52] DTI 'Inventing the future: An Introduction to Patents and Functional Designs for Small and Medium Enterprises' available at *http://www.thedtic.gov.za/wp-content/uploads/Publication-Inventing_Future.pdf*, accessed on 20 May 2023 at 9.
[53] Jonathan M. Barnett 'Free riding' in Deborah Healey et al (eds) *The Global Dictionary of Competition Law* available at *https://www.concurrences.com/en/dictionary/Free-riding*, accessed on 13 February 2023.
[54] S 25(10) of the Patents Act.

inventions that do not provide advantages to the public, and therefore should not be granted monopoly protections.[55]

The Patents Act[56] provides exclusions to patentable inventions. Because inventions must be capable of being used, things like schemes, rules, theories, methods, and discoveries do not constitute inventions.[57] An invention relating to treatment methods, including surgeries, therapies or diagnosis of humans or animals, to biological processes for producing animals or plants, an invention encouraging immoral or offensive conduct, or an invention that is against natural laws would not be patentable.[58]

Over and above the costs of filing a patent, businesses invest money and time in research and development of inventions. Patents protect these companies to assist them to recover investment costs and make profit. Patentees can license their patents to third parties and receive royalties.[59] Patents also enable the patentee to reduce the risk of a third party creating a similar product.[60]

b) Filing a patent in South Africa

The South African patent system is a depository system, with patents being registered with the patent office of CIPC in a prescribed manner.[61] South Africa is a 'non-examining patent country'.[62] Applications are not examined from a quality or substantive perspective (i.e., weighing issues of novelty, utility and inventiveness) by the patent office, but if certain requirements are met and the appropriate documentation is submitted, the patent is granted on the basis that the formalities of the Patents Act are met.[63]

For registration, patentees must comply with several statutory formalities,[64] payment of a prescribed fee[65] and the provision of either provisional or complete specifications for the invention.[66] Patents are only granted for complete specifications, which receive preferential

[55] du Bois op cit note 24 at 71.
[56] S 25(2) and (4) of the Patents Act.
[57] S 25(2) of the Patents Act.
[58] Moubray op cit note 37 at para 4.
[59] DTI 'Inventing the future' op cit note 52 at 9. Burrell op cit note 20 at 1.1.
[60] DTI 'Inventing the future' op cit note 52 at 10.
[61] Daryl Dingley 'South Africa – The Intersection between patent law and competition law as it relates to the pharmaceutical sector in South Africa' in Giovanni Pitruzzella & Gabriella Muscolo (eds) *Competition and Patent Law in the Pharmaceutical Sector: An International Perspective* (2016) 472.
[62] Samantha Gregory 'Intellectual Property Rights and South Africa's Innovation Future' The South African Institute of International Affairs (2008) available at *https://saiia.org.za/wp-content/uploads/2013/06/23-dttp_rep_23_gregory.pdf*, accessed on 3 February 2023 at 12.
[63] Dingley op cit note 61 at 472.
[64] S 30(1) of the Patents Act.
[65] Ibid.
[66] Ibid.

processing.[67] Specifications must provide adequate details of the invention.[68] The application must indicate whether the invention is based on 'indigenous biological resource, genetic resource, or traditional knowledge'.[69] PCT applications have additional statutory requirements, including filing a priority document.[70]

If an invention is patentable in terms of the Patents Act and the statutory requirements are met,[71] a patent can be registered with the patent office. Once granted, the patentee will have rights over that patent for twenty years,[72] in alignment with TRIPS.[73] Patents cannot be extended beyond the twenty-year period.[74]

c) Acquiring rights through a licence

Patentees may contractually license a patent to a third party without having to comply with statutory requirements.[75] Licences can be verbal or tacit, but most are reduced to writing.[76] Parties can elect to file the licence with the patent office, enabling licensees to intervene in infringement proceedings and claim damages against infringing parties.[77]

Licensee rights are based on the agreement between the parties. Exclusivity and restrictions in the licence, such as area of use, product used and duration,[78] can raise competition law concerns.[79]

Compulsory licences for a patent may be granted to parties that prove 'that the rights in a patent are being abused…',[80] if the patent is not being used in South Africa, there is unmet demand for the patented products and an entity is prejudiced because of this, or an excessive price is charged for an imported product.[81] It must also be shown that the patentee refused to

[67] S 31(1) of the Patents Act.
[68] S 32(1) to (3) of the Patents Act.
[69] S 30(3A) of the Patents Act.
[70] Sec the PCT registration requirements set out in the Patents Act and the Patent Regulations in GN 2470 GG 6247 of 15 December 1978 (as amended), in particular, regulation 25 of the Patent Regulations. Moubray op cit note 37 at para 20.
[71] du Bois op cit note 24 at 72.
[72] S 46 of the Patents Act.
[73] See Ibid. Gregory op cit note 62 at 14.
[74] Wood & Lötter op cit note 6 at 67.
[75] Moubray op cit note 37 at para 41.
[76] Ibid.
[77] John Foster, Dirk Hanekom & Dina Biagio 'Intellectual Property Transactions in South Africa: Overview' available at *https://uk.practicallaw.thomsonreuters.com/6-519-5891?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a867689*, accessed on 26 March 2023 at 16.
[78] Foster, Hanekom & Biagio op cit note 77 at 15.
[79] See Section IV (c) below for a discussion on this.
[80] S 56 of the Patents Act.
[81] Gregory op cit note 62 at 15.

grant a licence on reasonable terms.[82]

If a patent is not being 'worked' in South Africa, it is deemed that it is being abused.[83] *Sanachem (Pty) Limited v British Technology Group PLC* defined 'work' broadly to include both 'exploitation' and 'importation'.[84] The court noted that demand for the product is determined on a case-by-case basis.[85] For import prices, the comparison must be between the local price of an imported product and the price charged where it is manufactured.[86]

The reasonableness of any royalty negotiations must be illustrated by the parties.[87] In *Syntheta*, a party's claim for a compulsory licence was for export only, resulting in no benefit to the South African public,[88] and as such, the applicant was unable to show that the patentee abused its patent and that a compulsory licence should be granted.[89]

The court in *Hoffmann-La Roche & Co A.G.'s Patent* held that a royalty calculation must consider research and development, and promotional expenditure, allowing a reasonable return on capital invested.[90] It is submitted that courts will consider these factors when determining whether a patentee's refusal to grant a licence was reasonable. A patentee will have to show that the royalty fee was calculated on fair and reasonable grounds, failing which a compulsory licence can be required.

While countries can legitimately require a compulsory licence for a life-saving patent in terms of its patent legislation, this is rarely done.[91] In fact, since the inception of the compulsory licence regime in South Africa, no compulsory licences have been granted.[92]

The TRIPS Agreement permits government use of a patent without a licence or patentee authorisation, as well as requiring compulsory licences where parties have been unable to obtain a licence from a patentee.[93] Compulsory licensing is also used by competition authorities

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[82] Ibid.
[83] S 56(2)(a) of the Patents Act.
[84] 1992 BP 276 (CP) para 285.
[85] *Sanachem* supra 84 para 296. Dina Biagio, Hugh Moubray & Lodewyk Cilliers 'A concise guide to patent law in South Africa' available at *https://www.lexology.com/library/detail.aspx?g=9e4d9f84-6177-4260-8c67-2773da2a3324*, accessed on 26 March 2023.
[86] Biagio, Moubray & Cilliers op cit note 85.
[87] *Syntheta (Pty) Ltd previously Delta G Scientific (Pty) Ltd v Janssen Pharmaceutica NV* 1999 (1) SA 85 (SCA) para 13.
[88] *Syntheta* supra note 87 para 9.
[89] *Syntheta* supra note 87 para 16.
[90] [1973] RPC 601 at 606.
[91] OECD 'Licensing of IP Rights and Competition Law' available at *https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf*, accessed on 19 June 2023 at 32.
[92] Somto Kizor-Akaraiwe 'South Africa Compulsory Licensing' available at *https://patentblog.kluweriplaw.com/2021/05/17/south-africa-compulsory-licensing/*, accessed on 19 June 2023.
[93] Article 31 of the TRIPS Agreement.

to address anti-competitive conduct.[94] For instance, when a patent amounts to a 'unique facility',[95] competition authorities could view refusing access to this patent as refusing access to an essential facility in an anti-competitive manner, reducing the entrance of potential competitors in the market.[96] Thus, compulsory licences enable third parties to access essential facilities.

Finally, licensing arrangements carry their own risks. Refusing to grant a licence could breach competition legislation, but requiring a licence could weaken protections granted through patent rights.[97] Requiring a compulsory licence could restrain innovation which could lessen the incentives for patent inventions, as well as lowering research and development funding and investment,[98] reducing the number of patents being filed,[99] and limiting access to new technology. In this respect, when patentees anticipate that they will be compelled to issue patents to third parties,[100] often under considerably stricter conditions and with lower profitability than would be the case in an open market situations, resulting in lower returns on investments than those initially anticipated from the exclusive rights,[101] it is submitted that the budget to undertake research and development on that patented product may be allocated elsewhere.

d) Consequences of infringements and revocation of patent rights

Patent protections promote public interest by ensuring development and improvement of inventions,[102] and protect the patentee from infringement by private parties.[103] Patentees are granted access to all benefits of the patent, including preventing third parties from using, making, importing, or disposing of the patent.[104] Patents can be revoked by the patent office following a complaint. Third parties can only object to a patent registration once the right is

[94] WTO 'Overview: the TRIPS Agreement' available at *https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#patents*, accessed on 26 March 2023.
[95] S1 of Competition Act refers to such facilities as 'essential facilities', which are defined as an 'infrastructure or resource that cannot reasonably be duplicated'.
[96] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 33.
[97] Dingley op cit note 61 at 464 and 468.
[98] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 33 and 34.
[99] Ibid.
[100] Jamie Feldman 'Compulsory Licenses: The Dangers Behind the Current Practice' (2009) 8 *Journal of International Business and Law* at 4.
[101] Ibid at 5.
[102] Yousuf A Vawda 'Analysing South Africa's Compulsory Licensing Jurisprudence: Is there room for the Public Interest (PI) in Intellectual Property (IP)?' (2019) *IPLJ* at 184.
[103] du Bois op cit note 24 at 72.
[104] Steyn op cit note 51 at 184, read with s 45 of the Patents Act and 186, read with s 69A, which notes that patent infringements do not extend to non-commercial making, using, disposing or importation.

granted, resulting in expensive litigation.[105] While patentees are protected from infringement by individuals and/or government interference, the state and a patentee can agree to license a patent or if a patent is deemed useful for public purposes, the state can require a patentee to license such patent.[106] This aligns with compulsory licensing or divestiture orders by the competition authorities. For infringement, patentees can request damages, interdicts, or orders that the infringing party provide any infringing products or part thereof.[107]

In *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation*,[108] the question of revocation for lack of novelty and not involving an inventive step,[109] as well as infringement of a patent were considered.[110] The proceedings were dependent on patent validity and the infringement proceedings were stayed.[111] The CC had to determine whether each subsection of section 61 of the Patent Acts constitutes a separate and independent cause of action, and whether res judicata could be relied upon.[112] In an equally split decision,[113] the first judgment found that the Patents Act creates two separate proceedings for patent dispute: revocation and infringement, and that revocation proceedings do not have a 'final, binding effect on a later infringement action'.[114] In addition, it was held that the individual '…grounds of revocation … constitute separate, distinct and independent causes of action' and are proven differently.[115] Further, given South Africa's non-examining patent system, 'testing the validity of patents is in the public interest because patents create artificial monopolies…'.[116] The first judgment provides an understanding of why the revocation grounds should be considered separately. It is submitted that viewing each ground of revocation as a separate and distinct ground allows the complainant 'multiple bites at the cherry'.

The second judgment held that there was justification to rely on a res judicata defence as Ascendis abandoned its obviousness argument and only introduced the lack of utility argument once its novelty argument was unsuccessful in the SCA.[117] It is submitted that the second judgment limits the abilities of parties to change tactics midway through a revocation

[105] Dingley op cit note 61 at 472.
[106] Steyn op cit note 51 at 187, read with s 4 of the Patents Act.
[107] Steyn op cit note 51 at 189, read with s 65(3) of the Patents Act.
[108] 2020 (1) SA 327 (CC) 1.
[109] *Ascendis* supra note 108 para 7.
[110] *Ascendis* supra note 108 para 8.
[111] *Ascendis* supra note 108 para 9.
[112] *Ascendis* supra note 108 para 27.
[113] There was no majority decision as equal numbers of justices upheld and dismissed the appeal. As per para 3, the CC held that the high court's decision remained in place.
[114] *Ascendis* supra note 108 para 105.
[115] *Ascendis* supra note 108 para 54.
[116] *Ascendis* supra note 108 para 100.
[117] *Ascendis* supra note 108 para 136 to 139.

process. This aligns better with procedural fairness ensuring that parties raise all possible grounds at the outset, allowing full ventilation of the issues.

It is submitted that the lack of clear guidance from the CC on revocation matters increases the risk of 'forum shopping', whereby parties (who have failed to have a patent revoked for patent-specific reasons) could file a competition law-related complaint for anti-competitive conduct relating to the patent.[118] Because of the non-examining patent system in South Africa, the procedure for revocations is vital to balance the artificial monopolies created by patents. If such procedures are insufficient, parties may turn to competition legislation to balance the creation of artificial monopolies.

e) The tension that arises with patent rights

It is complicated and expensive to develop and register patents because their registration attracts high prescribed fees and legal assistance is required. Patent protections serve as an incentive to invent new products, but also create barriers to entry into the market,[119] and can prevent introduction of life-changing products.[120] According to Whish, it is difficult to determine when patent rights have such a harmful effect on consumer rights that intervention by the competition authorities is justifiable.[121]

If patents are easily granted, parties can quickly gain market power, which can be detrimental to the public interest and healthy competition. Competition policy and law play a fundamental role in promoting innovation while simultaneously encouraging competition. Nonetheless, the OECD submit that the patent system should be corrected without competition policy-related interference.[122] Further, limiting rights and enforcing competition legislation against patentees can harm the incentive to create inventions.[123]

Conversely, according to WIPO, competition policies and laws limit the rights of patentees to prevent abuse and anti-competitive conduct. This includes, for instance, exclusive licences or restrictive selling practices that exclude competitors from entering a market, or

[118] Itumeleng Lesofe 'Finding the right balance between the enforcement of competition law and the protection of intellectual property rights' available at *http://www.compcom.co.za/wp-content/uploads/2017/09/Paper_Competition-and-IP-Law_Itumeleng-Lesofe_Final_24082017.pdf*, last accessed on 24 June 2023 at 16, noted that patent disputes are often referred to 'forums that are not necessarily designed to hear such disputes, such as competition agencies'.
[119] Intellectual Property Policy op cit note 43 at 30.
[120] See Dingley op cit note 61 at 464. *Hazel Tau v GlaxoSmithKline, Boehringer Ingelheim* (2002Sep226).
[121] Richard Whish & David Bailey 'The relationship between intellectual property rights and competition law' in Competition Law 9 ed (2018) 788.
[122] OECD 'Intellectual Property Rights' (2004) available at *https://www.oecd.org/daf/competition/34306055.pdf*, accessed on 2 April 2023 at 7.
[123] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 34.

patent rights used to price fix,[124] resulting in higher prices. Such conduct falls outside the protections granted by the patent system.[125]

It is submitted that these areas of law align more than they conflict, and both can be used to enhance innovation in the market.[126] When conduct relating to patent rights results in anti-competitive conduct, which harms the market, consumers and/or public interest, competition authorities must step in to mitigate harm.

IV. REGULATION OF COMPETITION IN SOUTH AFRICA

a) Legislative regulation[127]

Competition in South Africa is regulated by the Competition Act,[128] relevant regulations, and common law principles. Competition jurisprudence is developed by the South African Competition Tribunal ('Tribunal')[129] and superior courts in South Africa.[130] These bodies, together with the South African Competition Commission ('Commission'),[131] assess potentially anti-competitive conduct, including conduct relating to patent rights, under the 'effects doctrine', which requires demonstrable harm for such conduct to be considered a contravention of the Competition Act. [132]

The primary purpose of competition law is to enhance the economy and create fair trading conditions, by averting anti-competitive conduct.[133] The Commission recognises that

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[124] WIPO 'Competition and Patents' available at *https://www.wipo.int/patent-law/en/developments/competition.html*, accessed on 14 June 2023.
[125] WIPO 'Competition and Patents' op cit note 124.
[126] See Matthias Bornhäusser *The relation between intellectual property law and competition law using the example of standard essential patents* (unpublished LLM Thesis, University of Cape Town, 2014) 28, noted that competition law should be neutral towards patent law and that there is 'reluctance' for competition law to impose patent restrictions. Juletha-Marié Dercksen *The interface between competition and intellectual property law: Finding common ground and resolving the tensions between these areas of law from a South African perspective* (unpublished Doctoral Dissertation, Stellenbosch, 2023) 3-4, noted these areas 'share a common objective' to increase innovation, but patent law grants 'exclusive control' to the patentee, while '…competition law aims to prevent market barriers and benefit consumers' by increasing suppliers that can '…effectively compete' in a market.
[127] Although not within the scope of this paper, s 10(4) of the Competition Act allows a firm to apply for an exemption for any potentially anti-competitive conduct or agreements regarding intellectual property rights, including rights protected by, for instance, the Patents Act.
[128] Competition Act 89 of 1998.
[129] Established in terms of s 26 of the Competition Act. Notably, *The Competition Commission v Group Five Construction Limited* [2023] 1 CPLR 1 (CC) restricted the Tribunal's powers to review certain Commission administrative decisions. This was recently decided and the full implications are unclear.
[130] Appeals were previously referred to the SCA. Now s 64(4) of the Competition Act requires CAC decisions to be appealed to the CC, if matters have a constitutional component.
[131] Established in terms of s 19 of the Competition Act.
[132] Wood & Lötter op cit note 6 at 71.
[133] Republic of South Africa: Phase 1 in GN 518 GG 41870 of 31 August 2018 at 30.

patent rights must be protected to ensure growth in markets.[134] Further, these rights do not result in market power, and can be pro-competitive.[135] The Commission noted further that if conduct resulting from a patent does not harm competition, it should not be prohibited.[136]

According to Wood and Lötter, analysis of the effect of patent rights on competition should be undertaken in the same manner as other potential breaches of the Competition Act.[137] It is submitted that the approach suggested by Wood and Lötter is appropriate as it ensures that parties receive equal treatment under the law, preventing confusion that could create opportunities to bypass laws. During a patent term, the patentee determines a product's price, manufacture, and distribution, to the exclusion of others.[138] This can lead to restriction of competition by allocating[139] or dividing markets,[140] or by abusing the dominant position.[141]

Patentees' rights may be limited by competition policies and principles to prevent abuse. The extent to which patent rights advance or hinder competition has not yet been fully addressed in South Africa, and this interplay needs to be examined. In particular, the extent to which patentees can abuse market power, attracting the application of competition law, deserves academic attention. When patent rights create monopolies, important questions arise regarding equitable access to patented products and fair competition in markets.

Competition law deals with regulating competition in markets by considering the conduct of firms in competitive landscapes, and preventing anti-competitive behaviour by prohibiting practices that may be perpetrated by patentees. Generally, competition law is divided into two areas: prohibited practices (including horizontal and vertical prohibited practices, and abuse of dominance), and merger control (to address the negative impact of mergers, where there are existing patent rights).[142]

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[134] See Wood & Lötter op cit note 6 at 70. See Competition Commission 'Intellectual property and competition law' available at *https://www.compcom.co.za/wp-content/uploads/2020/02/June-01-Newsletter.pdf,* accessed on 8 June 2023 at 6.
[135] See Wood & Lötter op cit note 6 at 70. Competition Commission 'Intellectual property and competition law' op cit note 135 at 6.
[136] Competition Commission 'Intellectual property and competition law' op cit note 135 at 6.
[137] Wood & Lötter op cit note 6 at 71.
[138] Dingley op cit note 61 at 463.
[139] Dingley op cit note 61 at 466.
[140] Einer Elhauge & Damien Geradin 'Does Intellectual Property Law Justify Anticompetitive Restraints' in *Global Competition Law and Economics* 2 ed (2011) 237.
[141] S 8 of the Competition Act.
[142] Merger control is beyond the scope of this paper.

b) Prohibited practices

The Commission is entrusted with monitoring markets, increasing market transparency, and investigating and evaluating potentially anti-competitive practices that lessen or prevent competition.[143]

Although not explicitly mentioned in the Competition Act, competition legislation distinguishes between two types of prohibited conduct. The first includes conduct or agreements that are automatically characterised as anti-competitive, known as 'per se' prohibitions. This includes price fixing, market allocation, and/or collusive tendering between competitors,[144] minimum resale price maintenance between firms in vertical relationships (such as manufacturers and distributors),[145] and abuse of dominance by charging an excessive price[146] or refusing to allow a competitor access to an essential facility.[147]

The second type considers, on a case-by-case basis, conduct not in the above categories, to determine whether such conduct violates the Competition Act.[148] This is a 'rule of reason' approach.

Per se prohibitions cannot be justified, whereas rule of reason prohibitions depend on the justifiability of the conduct, if such conduct results in a 'technological, efficiency or other pro-competitive gain'.[149] In the context of patents, examples of prohibited practices are patent pools and cross-licensing agreements, pay-for-delay settlement agreements, and minimum resale price maintenance, and exclusionary conduct by a dominant firm such as excessive pricing.

c) The possible horizontal and vertical anti-competitive effects of patent rights

Pro-competitive gains of patent rights do not always trump anti-competitive effects. The Commission noted that patent rights 'may yield long-term pro-competitive benefits which are to be weighed against short-term anti-competitive effects'.[150]

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[143] See s 21 of the Competition Act for the Commission's functions.
[144] S 4(1)(b) of the Competition Act.
[145] S 5(2) of the Competition Act.
[146] S 8(1)(a) of the Competition Act.
[147] S 8(1)(b) of the Competition Act. S 1 of the Competition Act defines an 'essential facility' as 'infrastructure or resource that cannot reasonably be duplicated…' preventing competitors from reasonably supplying customers.
[148] Including conduct in s 4(1)(a), 5(1) and 8(1)(c) and (d) of the Competition Act. S 8(1)(c) and (d) read that, unless there are pro-competitive justifications, a dominant firm may not force a customer or supplier to not use a competitor, refuse to 'supply scarce goods or services…'; bundle and/or tie products; sell at 'predatory prices'; purchase scarce items needed by competitors; and/or engage in margin squeeze.
[149] See Wood & Lötter op cit note 6 at 71. Dingley op cit note 61 at 468.
[150] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 16.

As a balance to monopoly rights granted to patentees, the Commission, Tribunal and CAC, or any other relevant superior court considering a competition-related matter (collectively referred to herein as the 'Competition Authorities'), can recommend[151] or make orders against an infringing party,[152] including structural remedies such as divestment,[153] and behavioural remedies, such as compulsory licensing of patents.[154]

Whether prohibited conduct relating to a patent falls under a per se or rule of reason analysis, will depend on the section of the Act that is allegedly being infringed.

Patent licensing agreements are often vertical in nature, not between competitors. Horizontal agreements are discussed below. While there is a risk of minimum resale price maintenance in vertical arrangements,[155] most such arrangements are likely to be pro-competitive, or at the very least non-problematic,[156] and prohibitions will occur in specific instances, such as when barriers to entry are high.[157] Vertical arrangements analysed on a rule of reason basis include exclusive patent licence agreements, such as exclusive dealings whereby patentees prevent licensees from engaging in conduct relating to competing technologies in certain markets.[158] Exclusivity restrictions include field of use (whereby licensees are limited to certain technical applications of the patent, thereby encouraging patentees to license technology in a variety of fields), regional restrictions limiting intra-brand competition in a region, and customer restrictions. [159]

While this sounds similar to market allocation in terms of section 4 of the Competition Act, in the matter of *Competition Commission v South African Breweries Limited*, the CAC held that the actual relationship between the parties has to be considered to determine whether the agreement should be characterised as horizontal or vertical.[160] Exclusivity restrictions will only generally raise concerns when the parties are in horizontal relationships.[161] If the true nature of the agreement is vertical, the agreement will be assessed on a rule of reason basis.

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[151] Chan Park, Achal Prabhala & Jonathan Berger 'Using law to accelerate treatment access in South Africa' available at *https://www.undp.org/publications/using-law-accelerate-treatment-access-south-africa*, accessed on 24 June 2023 at 81, notes that the Commission 'investigates and 'prosecutes'.
[152] See s 58 of the Competition Act. Wood & Lötter op cit note 6 at 72.
[153] S 60(1) and S 60(2)(a) and (b) of the Competition Act.
[154] Competition Commission 'Compulsory Licensing of Intellectual Property Rights in Pharmaceutical Products: What Grounds for Competition Law?' available at *http://www.compcom.co.za/wp-content/uploads/2020/02/June-07-Newsletter-27.pdf*, accessed on 25 January 2023 at 5.
[155] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 15.
[156] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 14.
[157] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 15.
[158] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 18.
[159] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 19.
[160] 2015 (3) SA 329 (CAC) paras 38 and 45.
[161] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 19.

The focus in South Africa has not, for the most part, been on the tension between patent rights and horizontal prohibited practices. Other jurisdictions have considered that horizontal licensing agreements such as patent pools or cross-licensing, could be 'vehicle[s] for cartel arrangements'.[162] Competitors could engage in price fixing, market allocation, or market restrictions,[163] resulting in increased prices and reduced access to products for consumers.

i. Patent pools and cross-licensing

Patent pools allow patentees to enter into agreements with competitors to pool complementary technology, license patents as a package, and reduce the cost of licensing such patents, thereby providing easier and cheaper access for consumers.[164] This allows technology to be shared under a single licence, without the risk of patent infringement.[165]

Cross-licences are bilateral agreements that allow patentees to use the other party's licence.[166] In this respect, patentees license patents to another party, as a block of licences, to mitigate the need for 'patent-by-patent licensing'.[167]

Patent pools and cross-licensing agreements create opportunities for co-operation between competitors, benefiting society when complementary patents are licensed.[168] Conversely, these agreements can reduce competition[169] by creating platforms for collusion allowing for co-ordination of prices or production levels, particularly when patents are substitutable and not complementary.[170] Because parties to a patent pool do not compete, this could prevent a potential competitor (i.e. one of the parties) from entering the market independently,[171] as well as reducing incentives to develop new products independently.[172]

Patent pools and cross-licensing agreements can also prevent third parties (not party to the agreement) from entering the market, due to high barriers to entry created by the

[162] Kameel Pancham *Restricting pharmaceutical patent rights to realise the right to access to healthcare under the Constitution* (unpublished LLM Thesis, University of Pretoria, 2019) 46.
[163] Pancham op cit note 162 at 46.
[164] OECD 'Intellectual Property Rights' op cit note 122 at 8.
[165] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 25.
[166] See OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 24. Department of Justice 'Antitrust analysis of portfolio cross-licensing agreements and patent pools' available at *https://www.justice.gov/atr/chapter-3-antitrust-analysis-portfolio-cross-licensing-agreements-and-patent-pools*, accessed on 25 June 2023 at 59.
[167] Department of Justice op cit note 166 at 57.
[168] Dercksen op cit note 126 at 207, argues that these agreements should only be vertical and in instances where, without cross-licensing or pooling, parties will not be able to use their own patent.
[169] OECD 'Intellectual Property Rights' op cit note 122 at 8.
[170] See OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 25. Department of Justice op cit note 166 at 74.
[171] OECD 'Intellectual Property Rights' op cit note 122 at 8.
[172] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 25.

agreement,[173] which is submitted could raise prices for consumers. If competing firms with similar patents, operating in the same market, enter into an agreement that parties will not compete, this would constitute market allocation.[174]

There is further risk that cross-licensing agreements could result in collusion. Agreed royalty payments could reduce competition as the parties might not compete,[175] or parties might agree to fix a price, resulting in prohibitive royalty prices.

Patent pools and cross-licensing agreements are generally considered on a rule of reason basis, as they may have pro-competitive aspects. If they involve price fixing or market allocation, such conduct would be considered on a per se basis.[176]

ii. Pay-for-delay

'Pay-for-delay' settlement agreements[177] or 'paying off competition' agreements[178] include instances where a generics producer agrees with a patentee to suspend or limit its entry into the market in return for payment.[179] Such payment extends the patentee's monopoly beyond the prescribed term,[180] and allows patentees to continue to charge monopoly prices.[181]

Pay-for-delay also occurs when a patentee alleges that a generics manufacturer has infringed a patent, and an agreement is entered into between the parties to end the infringement dispute, thereby delaying availability of cheaper generic products.[182]

[173] Department of Justice op cit note 166 at 62.
[174] Dingley op cit note 61 at 468.
[175] Dingley op cit note 61 at 467.
[176] Department of Justice op cit note 166 at 63.
[177] Phillipa Dewey 'Beware of 'pay-for-delay' settlements' (2016) *Without Prejudice* 18.
[178] Hanna Stakheteva 'Intellectual Property and Competition Law: Understanding the Interplay' in Ashish Bharadwaj, Vishwas H. Devaiah & Indranath Gupta (eds) *Multi-dimensional Approaches Towards New Technology* 1 ed (2018) 10.
[179] Hardin Ratshisusu 'Competition in healthcare markets: access and affordability' available at *http://www.compcom.co.za/wp-content/uploads/2019/08/Healthcare-and-Pharmaceuticals-UNCTAD-IGE-12-July-2019.pdf*, accessed on 24 June 2023 at 8.
[180] Dewey op cit note 177 at 18.
[181] See Dewey op cit note 177 at 18. Federal Trade 'Oversight of the Enforcement of the Antitrust Laws' available at *https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-oversight-enforcement-antitrust-laws-presented/131115antitrustlawtestimony.pdf*, accessed on 25 June 2023 at 6.
[182] Stakheteva op cit note 178 at 10 to 11. Federal Trade 'Oversight of the Enforcement of the Antitrust Laws' op cit note 181 at 6.

Such agreements can significantly increase costs of products (in particular pharmaceuticals),[183] as it is submitted that patentee conduct is not curtailed by generics products.[184]

While this has not been considered in South Africa, in the *H. Lundbeck A/S and Lundbeck Ltd v European Commission*[185] matter in the EU, the court considered a settlement agreement between a pharmaceutical company, Lundbeck (the patentee) and various generics pharmaceutical manufacturers. It was agreed that, in exchange for a once-off payment, the generics companies would not enter the market for a patented medication. It was held that the intention of the agreement delayed entry, which in turn, restricted competition,[186] and would be considered on a per se (or by object) basis. It is submitted that this conduct results in competitors not entering the market, which could be detrimental to consumers by increasing prices and restricting access to life-saving patented products. Considering such agreements as a per se prohibition is correct, as the conduct stemming from the agreement results in an egregious horizontal prohibited practice – market allocation.

In the US, *Federal Trade Commission v Actavis, Inc*[187] related to a pay-for-delay settlement, where Actavis agreed to not produce and sell its generic of a patented medication in exchange for millions of dollars. The US Supreme Court approach to pay-for-delay agreements differed to the EU, and relied on a rule of reason analysis to determine whether such agreements were anti-competitive. The US Supreme Court held that patent-related pay-for-delay agreements must be considered on a case-by-case basis,[188] and are not 'presumptively unlawful',[189] but a patent is not a response to an 'antitrust question'.[190] It is submitted that while the US approach correctly identifies the need for interference in respect of such anti-competitive conduct, relying on a rule of reason analysis allows patentees to justify conduct that would (in other jurisdictions) be unjustifiable.

Pay-for-delay settlement agreements have not been considered in South Africa, but Dewey argues that such patent-related agreements are likely to be analysed under section 4(1)

[183] See Dewey op cit note 177 at 18. Federal Trade 'Oversight of the Enforcement of the Antitrust Laws' op cit note 181 at 6.
[184] Michael L Fialkoff 'Pay-For-Delay Settlements in the Wake of Actavis' (2014) 20 *Michigan Telecommunications and Technology Law Review* 523.
[185] T-472/13 ECLI:EU:T:2016:449 paras 410, 714, 764 and 765.
[186] Dewey op cit note 177 at 18 to 19.
[187] 133 S. Ct. 2223 (2013) at 14.
[188] Dewey op cit note 177 at 19.
[189] *Actavis* supra note 187 para 3.
[190] *Actavis* supra note 187 para 2.

of the Competition Act, in line with the rule of reason.[191] It is submitted that, instead, the EU approach should be adopted, as these agreements constitute market allocation between competitors.[192] Patent-related agreements preventing potential competitors from entering the market should be considered as per se prohibitions.

d) Abuse of dominance

While it is submitted that there is some risk that patentees might enter into anti-competitive horizontal or vertical agreements, case law shows few patent-related matters considered under these provisions in South Africa.[193] In practice, competition law infringements by patentees largely involve abuse of dominance in respect of section 8 of the Competition Act, for instance by setting excessive prices and acting in an exclusionary manner that prevents new entrants to the market.[194]

Market dominance is not prohibited.[195] However, a dominant firm may not abuse its dominance. A firm's dominance is based on its market power[196] which is: a firm's ability to control the prices of products, exclude competitors in a market, or act autonomously and without influence from suppliers, customers or competitors.[197] While patent rights do not automatically produce market power, it is produced 'often enough to justify… a presumption of market power'.[198] Patent protections enable patentees to restrict third parties from imitating or copying their patents,[199] resulting in patentees who hold monopolies over patented products being 'perceived as dominant',[200] increasing the risk of abuse.

In many jurisdictions, including South Africa, refusing to issue a patent licence can result in breach of competition legislation,[201] which can restrict the creation of new life-

[191] Dewey op cit note 177 at 20.
[192] S4(2)(ii) of the Competition Act.
[193] For the sake of completeness, while *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd* [2003] 2 CPLR 402 (CT) 68, is not strictly a patent matter, it briefly touches on patents. The Tribunal held that the agreement did not fall foul of horizontal prohibited practices. In respect of abuse of dominance, in paragraph 121, the Tribunal held that while '…patent protection confers a degree of monopoly power', the agreement does not confer 'additional' power. On appeal in *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* (15/CAC/Feb02) 53 and 54, the CAC held that pharmaceuticals do not constitute 'essential' facilities, because they are not 'infrastructure or resources' as per the Competition Act definition.
[194] OECD 'Competition Policy and Intellectual Property Rights' op cit note 8 at 9, which notes that abuse of dominance can raise concerns for patentees in respect of excessive prices or a refusal to license.
[195] Wood & Lötter op cit note 6 at 71.
[196] S 7 of the Competition Act.
[197] S 1 of the Competition Act.
[198] See Arial Katz 'Making sense of nonsense: intellectual property, antitrust and market power' (2007) 49 *Arizona Law Review* 873. Dercksen op cit note 126 at 146.
[199] See DTI 'Inventing the future' op cit note 52 at 9. WIPO 'Competition and Patents' op cit note 124.
[200] Stakheteva op cit note 178 at 3 and 4.
[201] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 32.

changing products, hindering competition and development in the market. In such instances, compulsory licences are used to address competition harms.

While not addressed further in this report, where parties are potentially able to abuse their dominant position post-merger because of the market power derived from a patent, remedies have been used to mitigate harm, including compulsory licences[202] and patent divestments, to address concerns.[203]

i. Excessive Pricing

As dominant firms, patentees determine prices for their patented products, which may be too expensive for consumers who need the product most,[204] This is especially a concern with life-changing medicine. Any agreements or conduct that allow dominant firms to charge '*an excessive price'*[205] for life-saving patented products including medicines or vaccinations, may attract the attention of the Commission.[206]

While not patent related, the CAC *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited*[207] relied on a four-step enquiry to determine if a price was excessive. This included considering the actual price of the product, the economic value of the product, whether the actual price exceeded the economic value of the product (to determine if there is a reasonable relation between actual price and economic value, if there's no reasonable relation the price would be excessive), and whether there was any detriment to consumers.[208] This analysis is both a factual and a value judgment test.[209]

In *Sasol Chemical Industries Limited v Competition Commission*[210] the CAC considered the four-step enquiry from *Mittal,* and held that to determine the actual costs of producing the product,[211] it was important to consider a '… refusal to pass on a cost

[202] OECD 'Licensing of IP Rights and Competition Law' op cit note 91 at 33.
[203] See for instance *Pioneer Hi-Bred and Pannar Seed merger* (113/CAC/Nov11) in respect of compulsory licences, *DowDupont Inc. and The Dow Chemical Company v E.I Du Pont De Nemours Company* (LM030May16) and *Bayer Aktiengesellschaft and Monsanto Company v Competition Commission of South Africa* (IM057May17) in respect of divestments of patents.
[204] *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* 2021 (6) SA 446 (CAC) at 21 noted that only dominant firms can commit excessive pricing.
[205] S 8(1)(a) of the Competition Act.
[206] Lucinda Verster 'South Africa: Dominance Comparative Guide' available at *https://www.mondaq.com/southafrica/antitrustcompetition-law/1160070/dominance-comparative-guide*, accessed on 20 May 2023.
[207] (unreported case no 70/CAC/Apr07) [2009] ZACAC 1.
[208] *Mittal* supra note 207 at para 32.
[209] Ibid.
[210] 2015 (5) SA 471 (CAC) 1.
[211] *Sasol* supra note 210 at para 110.

advantage…' based on correct prices.[212] The CAC further held that determining the economic value of a product includes the 'circumstances of the case' and 'non-costs factors such as the demand'.[213] Section 8(a) only prohibits prices that are higher than the economic value *and* also bear no reasonable relation thereto.[214] Prices charged must be 'substantially higher than the defined economic value before an adverse finding will be made',[215] and a 'price which is significantly less than 20% [of the economic value] … falls short of justifying judicial interference.'[216]

In addition, while not a patent-related case, the CAC in *Sasol Chemical Industries* criticised the Tribunal for incorrectly implying that it would be impossible to bring a 'successful excessive pricing case' against a patentee.[217] The CAC held that patentees must not view patents as permission to price excessively and that the price must remain reasonable in relation to the economic value of the patented product.[218]

In *Babelegi,*[219] regarding excessive pricing of masks, the CAC held that to determine whether a price is excessive, a party must be dominant[220] and that the price must be prima facie excessive.[221] If so, the onus shifts to the dominant firm to prove that the price is not unreasonable,[222] requiring factual analysis.[223] The CAC held that Babelegi abused its dominance by charging an excessive price.[224] It is submitted that it is unfortunate that this was the Commission's first successful excessive pricing case and the first matter determined following the amendments to the Competition Act, given that it related to the temporary dominance of a firm that priced excessively for 76 boxes of masks, and not to a 'real' dominant firm. In this respect, while Babelegi met the market share and financial thresholds for dominance (with annual turnover or assets in the South Africa exceeding R5 million for the duration of the complaint period),[225] it is submitted that Babelegi, unlike other dominant firms, did not have significant market share or turnover for a sustained period. The determination of

[212] *Sasol* supra note 210 at para 111.
[213] Ibid.
[214] *Sasol* supra note 210 at para 162 and 163, per *Mittal* a price bearing a reasonable relation to economic value involves a value judgment.
[215] *Sasol* supra note 210 at para 175.
[216] Ibid.
[217] *Sasol* supra note 210 at para 172.
[218] Ibid.
[219] *Babelegi* supra note 204.
[220] S 8(1) of the Competition Act.
[221] S 8(2) of the Competition Act. This must be shown by the Commission.
[222] S 8(3) of the Competition Act. *Babelegi* supra note 204 para 58.
[223] *Babelegi* supra note 204 para 59.
[224] *Babelegi* supra note 204 para 82.
[225] Determination of Threshold in GN 253 in GG 22025 of 1 February 2001, as amended by GN 562 in GG 22128 of 9 March 2001 at 174.

whether a price is excessive is complex and is based on multiple factors set out in section 8(3) of the Competition Act.

Although not considered by the Tribunal,[226] the matter of *Hazel Tau v GlaxoSmithKline and Boehringer Ingelheim*[227] related to excessive pricing of antiretroviral ('ARV') medicines by dominant firms, which resulted in the medicines being unaffordable for many people.[228] The patented medication was sold at prices far above production cost and was priced much higher than generics. Despite appeals from producers of generic pharmaceuticals for licences, GlaxoSmithKline and Boehringer Ingelheim ('GSK' and 'BI' respectively) refused to license the patented medication.[229] GSK and BI also refused to 'cross-license' to each other, resulting in the much-needed combination of medications, creating a single-pill therapy, being unavailable. The Commission contended that the high prices and a refusal to license amounted to engaging in exclusionary conduct, excessive pricing and a refusal to grant a competitor access to an essential facility. The Commission requested that the Tribunal order GSK and BI to provide licences for the patents for a reasonable fee,[230] as there was no pro-competitive gain from the exclusive use of the patent, that outweighed the anti-competitive effects.[231] A settlement agreement was signed prior to the Tribunal considering the matter, with GSK and BI offering licences for the patented medications to South African and Indian generic pharmaceuticals suppliers, allowing the medication to be sold at lower prices.[232]

This matter is considered by some as '…the single most important invocation by a developing country of competition law in respect to patents'.[233] It is submitted that it is unfortunate that the matter was not considered by the Tribunal, as the approach of the Tribunal to life-saving patents would have set precedent. GSK and BI's refusal to cross-license was clearly exclusionary conduct, but it would have been helpful to test whether such conduct could have been justified on pro-competitive grounds, despite depriving consumers of a patented product. It can however be presumed from this matter that the Commission views the exclusive

[226] Wood & Lötter op cit note 6 at 73.
[227] *Hazel Tau* supra note 120.
[228] Frederick Abbott et al 'Using Competition Law to Promote Access to Health Technologies' United Nations Development Programme available at *https://www.undp.org/publications/using-competition-law-promote-access-health-technologies-supplement-guidebook-low-and-middle-income-countries*, accessed on 22 January 2023 at 14.
[229] Abbott et al op cit note 228 at 14.
[230] Ibid.
[231] Dingley op cit note 61 at 465.
[232] F.M. Scherer & Jayashree Watal 'Competition Policy and Intellectual Property: Insights from Developed Country Experience' (2014) available at *https://www.hks.harvard.edu/centers/mrcbg/programs/growthpolicy/competition-policy-and-intellectual-property-insights-developed*, accessed on 10 February 2023.
[233] Frederick M. Abbott, Carlos M. Correa & Peter Drahos 'Emerging Markets and the World Patent Order' 2013 available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2380680*, accessed on 10 February 2023 at 24.

use of a patent by a dominant firm to the detriment of public interest as anti-competitive conduct.[234]

In *Treatment Action Campaign v Merck & Co, Inc and MSD (Pty) Ltd,*[235] the Treatment Action Campaign ('TAC') filed a complaint with the Commission alleging that Merck & Co, Inc/MSD (Pty) Ltd ('MSD') abused its dominance by engaging in exclusionary conduct in respect of its patented ARV 'efavirenz'.[236] This included refusing to license efavirenz to third parties for the use, importation and/or manufacturing.[237] This would allow generics producers to provide ARVs to South Africans on 'reasonable and non-discriminatory terms'.[238] As a result of the Commission's investigation (which was not referred to the Tribunal), the complaint was settled on the basis that MSD would provide licences for the medication to third parties.[239] It is submitted that while this matter was not tested by the courts, it allowed more competitors access to the patented product through a licence, promoting competition and increasing supply. MSD was still able to continue to supply its products locally and globally, and consumers were able to access vital, life-saving patented medications cheaper and more efficiently.

Hazel Tau and *TAC* show that licensing agreements enabled third parties to enter markets and provide access to cheaper lifesaving medications. Sutherland and Kemp noted most patent licensing agreements encourage competition, as more parties can access the patent and it can be distributed more competitively to consumers.[240]

In 2017, the Commission initiated investigations into alleged abuse of dominance and excessive pricing of patented cancer medicines by pharmaceutical companies, including Roche Holding AG (Roche).[241] Subsequently, in 2022, the Commission referred a complaint to the Tribunal against Roche for alleged excessive pricing of a cancer treatment medication. As a result of these allegedly excessive prices, the Commission estimated that approximately ten thousand cancer patients were denied treatment, and that Roche's alleged conduct infringed

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[234] Wood & Lötter op cit note 6 at 72.
[235] (2007Nov3328).
[236] Competition Commission 'Generic pharmaceuticals and competition in South Africa' available at *http://www.compcom.co.za/wp-content/uploads/2020/02/Competition-News-Edition-49.pdf*, accessed on 24 June 2023 at 18.
[237] Competition Commission 'Generic pharmaceuticals and competition in South Africa' op cit note 236 at 18.
[238] Ibid.
[239] See Wood & Lötter op cit note 6 at 72. See Competition Commission 'Generic pharmaceuticals and competition in South Africa' op cit note 236 at 18.
[240] Philip Sutherland & Katharine Kemp 'Restrictive horizontal practices' in *Competition Law of South Africa* (2022) 5-10.
[241] Competition Commission 'Press Release – Update: Pharmaceutical Investigations' available at *http://www.compcom.co.za/wp-content/uploads/2017/01/Update-Pharmaceutical-Investigations.pdf* accessed on 11 June 2011.

constitutional rights.[242] The matter is under consideration, but there has been limited success with excessive pricing cases.[243]

ii. Equitable access to life-saving medicine

The COVID-19 pandemic raised concerns about access to life-saving patented medicine. In October 2020, South Africa (and sixty other states) requested a TRIPS waiver from the WTO for patent information regarding COVID-19.[244] It was submitted that the TRIPS agreement prevented access to patented COVID-19 vaccines, and the voluntary TRIPS licence provisions were insufficient to ensure access to life-saving medication.[245]

The WTO declined the request,[246] and developing nations were unable to equitably access the vaccine until months after first-world nations,[247] resulting in loss of lives. This demonstrated that voluntary patent licensing is not always appropriate for urgent life-saving medication, necessitating intervention of human rights and competition law principles.[248]

Waiver proponents argued that the TRIPS patent protection provisions should not prevent access to affordable vaccines, with patents protecting 'profit over public health'.[249] While patent protection provides patentees with 'privilege against competitors', during a pandemic, competition protection should not be prioritised.[250] Similar vaccine patent applications stifle research and development, blocking competitors from the market.[251] Also, without the waiver, prices of vaccines could be higher prices for developing countries.[252]

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[242] Competition Commission 'Press Release – Competition Commission prosecutes a multinational healthcare company, Roche, for excessive pricing of a breast cancer treatment drug' available at *https://www.compcom.co.za/wp-content/uploads/2022/02/competition-commission-prosecutes-a-multinational-healthcare-company-roche-for-excessive-pricing-of-a-breast-cancer-treatment-drug.pdf,* accessed on 11 June 2011.

[243] *Babelegi* supra note 204.

[244] Mina Hosseini 'A Covid Competition Dilemma: Legal and Ethical Challenges Regarding the Covid-19 Vaccine Policies during and after the Crisis' (2021) 6 *Public Governance, Administration and Finances Law Review* 56.

[245] 'WTO declines to waive TRIPS provisions for COVID-19 drugs' available at *https://www.lifesciencesipreview.com/news/wto-declines-to-waive-trips-provisions-for-covid-19-drugs-4337*, accessed on 11 June 2023.

[246] 'WTO declines to waive TRIPS provisions for COVID-19 drugs' op cit note 245.

[247] See 'Africa's long wait for the Covid-19 vaccine' available at *https://www.bbc.com/news/world-africa-55751714*, accessed on 11 June 2023. Aisha Abdool Karim and Joan van Dyk 'Here's how phase 2 of SA's COVID vaccine roll-out works' available from *https://bhekisisa.org/health-news-south-africa/2021-05-17-phase-2-of-sas-covid-vaccine-roll-out-starts-today-heres-how-it-works/,* accessed on 11 June 2023.

[248] 'WTO declines to waive TRIPS provisions for COVID-19 drugs' op cit note 245.

[249] Nabeel Mahdi Althabhawi & Ali Adil Kashef Al-Ghetaa 'The COVID-19 vaccine patent: a right without rationale' (2022) 26 *Medical Humanities* 1.

[250] Ibid.

[251] Ibid.

[252] Ibid.

TRIPS allows for compulsory licensing, but requires negotiation with and payments to patentees, creating difficulties for lower-income countries, which also may not have production facilities.[253]

Opponents of the waiver argued that it would not increase vaccine production, as raw materials were already limited.[254] Further, waivers should only be used in instances of total inability to supply vaccines.[255] Prices would also not be lowered by a waiver, as vaccines were being produced on a non-profit basis, and prices were based on technology needed for production.[256] A waiver weakens protection against competitors, reduces funding for important healthcare-related inventions, and while certain high-income nations supported a limited waiver, TRIPS has too many hurdles to make this viable.[257]

Global patent model issues were highlighted by COVID-19 and the right to healthcare.[258] Opponents of the waiver applied 'theories of …domestic patent system[s]…', but the waiver was sought at an international level.[259] Althabhawi and Al-Ghetaa noted that international patent systems prevent lower-income countries from accessing advancements, particularly life-saving inventions like the COVID-19 vaccine,[260] and domestic policies should not apply to global trade.[261]

It may be difficult to prove that the Competition Authorities' extra-territorial jurisdictional powers[262] extend to vaccines not supplied in South Africa by firms that (potentially) do not operate in South Africa. Although refusing to waive patent protections for life-saving vaccines is problematic from a public interest perspective, these concerns need to be addressed globally and not by domestic competition laws.

V. CONCLUSION

There is evidently tension between the enforcement of competition policy and the promotion of patent rights. It is submitted that, on one hand, interference by competition authorities in patent rights should be a last resort. On the other, in a country with dire socio-economic

[253] Althabhawi & Al-Ghetaa op cit note 249 at 2.
[254] Ibid.
[255] Ibid.
[256] Althabhawi & Al-Ghetaa op cit note 249 at 2-3.
[257] Althabhawi & Al-Ghetaa op cit note 249 at 3.
[258] Ibid.
[259] Althabhawi & Al-Ghetaa op cit note 249 at 4.
[260] Ibid.
[261] Althabhawi & Al-Ghetaa op cit note 249 at 5.
[262] Per section 3(1) of the Competition Act applies 'all economic activity within, or having an effect within, South Africa'.

inequality, where patent legislation and authorities do not necessarily ensure access to essential healthcare and medicines, other bodies, such as the Competition Authorities, must provide oversight.

While compulsory licences can be required for life-saving patents in respect of patent legislation, no such licences have been granted.[263] The Competition Authorities can require licensing or divestment, to ensure that patented products are affordable and accessible.

Competition policy promotes fair competition, prevents monopolies and enhances consumer welfare. The South African government and the Competition Authorities have not, however, provided clear 'safe harbour' guidelines patentees, such as appropriate patent licensing arrangements and recommended conduct for dominant parties.

Additionally, the Competition Authorities' extra-territorial powers are limited by both the Competition Act and compliance with international treaties, whereas patent rights are often multijurisdictional, creating hurdles to ensuring fair access to life-saving patents, such as the COVID-19 vaccine. Requiring that foreign patentees (without a local nexus) license or divest patents falls outside the scope of South African patent and competition legislation. International policy must play a role in addressing intellectual property standards imposed on African countries by high-income countries as 'most international IP instruments do not reflect or support the realities in many African countries'.[264]

In conclusion, competition policy and patent protection complexities in South Africa require unique solutions. The competition authorities may not be the most appropriate channel to address patent-related concerns, but as one of the few highly effective bodies in the country, balancing innovation while promoting competition falls largely to the Competition Authorities.

[263] Kizor-Akaraiwe op cit note 92.
[264] De Beer, Baarbé & Ncube op cit note 44 at 54.

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