

Bekker v Steyn
[1998] 2 All SA 275 (CP)

Division: Court of the Commissioner of Patents
Date: 18 December 1997
Case No: 8467/95
Before: MacArthur J

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Patents - Applicant represented by an attorney acting in terms of the Rights of appearance in Courts Act

62 of 1995 - Attorney not admitted as a patent agent as required in terms of [sections 20](#) and [22](#) of the Patents Act [57 of 1978](#) - Such attorney not entitled to appear before the Commissioner of Patents.

Editor's Summary

This was a patent infringement case which was brought before the Court sitting as Commissioner of Patents. The Respondent raised a point *in limine* to the effect that the papers as launched by the Applicant, the patentee, were produced by an attorney who was not a patent agent as defined in the Patents Act 57 of

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1978 and was not the proper person to have initially prepared the papers and placed them before the Court. The Appellant's attorney relied upon the provisions of the Right of Appearance in Courts Act [62 of 1995](#). Section 34 of the Act provided that an attorney who has been granted the right of appearance in the High court shall also be entitled to discharge the other functions of an advocate in any proceedings in the High court. The Respondent challenged appellants contention and submitted that the only person entitled to act as an "agent" was a person who was qualified as a patent agent and who had passed his examinations in terms of sections 20 and 22 of the Patents Act. Appellant contended that authority for him to practice could be found in section 19(3) of the Patents Act which states that a party to any proceedings before the commissioner may appear in person or be represented thereat by an advocate or an agent.

Held - The approach of the Appellant's attorneys was incorrect and was a result of the misreading of the Right of Appearance in Courts Act. The Patents Act was a special act and was governed by its own specific legislation. It gives special privileges to certain attorneys or agents and a distinction must therefore be drawn between it and the general situation. The Appellants attorney therefore did not have the right to initiate proceedings in this Court as he did not have the qualifications as laid down in the Patents act. In the result the Respondents point *in limine* succeeded.

Notes

For Patents, see *LAWSA* (Vol 20, paragraphs 1-67)

Cases referred to in judgment

("C" means confirmed; "D" means distinguished; "F" means followed and "R" means reversed.)

Gentiruco AG v Firestone SA (Pty) Ltd [1972 \(1\) SA 589](#) (AD) - F

Judgment

MACARTHUR J

This is a patent infringement case which has been brought before me sitting as Commissioner of Patents. The respondent has taken a point *in limine* which is to the effect that the papers as launched by the applicant, who is the patentee in this matter were produced by an attorney, Mr *Van der Hoven*.

It is common cause, that Mr *Van der Hoven* is not a patent agent as defined in the Patents Act [57 of 1978](#) and in the past he would not have been the proper person to have initially prepared these papers and placed them before the court. However, what he relies upon is the position which is provided for in recent legislation viz. the Right of Appearance in Courts Act [62 of 1995](#) and in [section 34](#) of that Act, it is stated that an attorney who has been granted the right of appearance in the high court shall also be entitled to discharge the other functions of an advocate in any proceedings in the high court. It is because of that particular subsection read with other subsections to which Mr *Van der Hoven* has referred me that he contends he is empowered to represent his client today not only insofar as it is necessary to appear in this Court but also to initiate proceedings in the court of the Commissioner of Patents.

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Mr *Du Plessis*, for the respondent, has challenged that and has said that he is not entitled to initiate proceedings and certainly not those provided for in [section 9\(a\)](#) of the Patents Act of 1978.

The only person who is entitled, according to Mr *Du Plessis* is a person who is an agent. Only he can initiate those proceedings, and that means somebody who has qualified as a patent agent and who has passed the examinations in terms of those sections of the Patents Act to which I was referred viz. [sections 20](#) and [22](#) thereof.

Mr *Van der Hoven* says the authority for him to practice before this Court is to be found in [section 19\(3\)](#) of the Patents Act which says a party to any proceedings before the commissioner may appear in person or be represented thereat by an advocate or an agent.

I think Mr *Van der Hoven's* approach to the matter is wrong, and it is due to a misreading of the 1995 Act which is a general provision entitling an attorney with suitable qualifications to appear in any court in South Africa. The Patents Act is a special Act and governed by its own specific legislation. It gives special privileges to certain attorneys or agents and a distinction must therefore be drawn between it and the general situation. I think the maxim *generalia specialibus non derogant* must apply here and this was referred to and dealt with in *Gentiruco AG v Firestone SA (Pty) Ltd* [1972 \(1\) SA 589](#) (AD). I am particularly referring to page 603C where Trollip JA went on to say this:

"The exposition of the maxim most apposite to the present situation is that of Lord Selborne in *Seward v The Vera Cruz* (1884) 10 App Cas 59 at p 68:

'Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly, repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so.'

In my view that situation prevails here and without dealing and canvassing the question of Mr *Van der Hoven's* right to appear in this Court later on I will limit myself merely by saying at this stage that he does not have the right to initiate proceedings in this Court, as he does not have the qualifications as laid down in the Patents Act. It follows that the point *in limine* succeeds and accordingly I make the following order:

1. Attorney Mr *Van der Hoven*, was not entitled to represent the applicant in the application which was launched in this Court.
2. The application is postponed *sine die* in order to allow the applicant within two months from today's date to remedy the position as he may be advised to do.
3. The wasted costs of today are to be paid by the applicant and in the event of the applicant failing to take such steps as may be necessary to deal with the application and putting it in proper form and signed by the necessary and appropriate parties the applicant will have to pay the cost of the application as well.

For the applicant:

SWV van der Hoven instructed by *Van der Hoven & Partners*, Pretoria

For the respondent:

B du Plessis instructed by *J Kernich*, Pretoria