UNIVERSITY OF KWAZULU-NATAL
COLLEGE OF LAW AND MANAGEMENT STUDIES AND
SCHOOL OF LAW

A STEP IN THE RIGHT DIRECTION: AN ANALYSIS OF THE VIABILITY OF A SPECIALISED INTELLECTUAL PROPERTY COURT IN SOUTH AFRICA

Name of Candidate: **Yashmeka Parbhoo**

Student Number: **211551471**

This Research Project is submitted in partial fulfilment of the regulations for the LLM Degree at the University of KwaZulu-Natal.

Supervisor: **Devarasi Bellengere**
Co-Supervisor: **Adrian Bellengere**

Date of Submission: **27 February 2019**

SIGNED STATEMENT OF ORIGINALITY

I, YASHMEKA PARBHOO, hereby declare that:

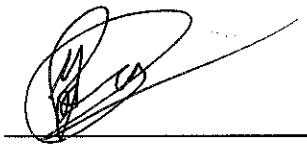
i. This thesis is an original piece of work which is made available for photocopying and for inter-library loan.

ii. This thesis has not been submitted for any degree or examination at any other university.

iii. This thesis does not contain text, graphics or tables copied and pasted from the internet, unless specifically acknowledged, with the source being detailed in the thesis and in the references sections.

iv. This thesis does not contain other persons' writing, unless specifically acknowledged as being sourced. Where such persons have not been quoted:
   (a) Their words have been re-written, but the general information attributed to them has been referenced.
   (b) Where their exact words have been used, their writing has been placed inside quotation marks, and referenced.

Signed and dated at **Durban** on **27 February 2019**.



Yashmeka Parbhoo

ACKNOWLEDGMENTS

I would like to thank God for always having a guiding hand over me.

I would like to take this opportunity to also thank my family, friends, and the academic staff at the UKZN Faculty of Law who supported, guided, motivated and prayed for me not only with this dissertation but throughout my Masters.

I expressly afford my sincere thanks and appreciation to Dev and Adrian Bellengere, my supervisors, who mentored me through the most challenging circumstances, guided me and ensured that I achieved this task even when it seemed almost impossible.

To my mother, Meena Parbhoo, who has been a pillar of strength, whose prayers has always been a source of comfort and relief, I am forever indebted for your unconditional love. To Anushka, Divash, Dipika and my cute nephews Riquel and Neyhal your laughs, smiles and encouragement means the world to me always.

My Dear Kirshen Moodley and My Sweetest friend Nicolette Naidoo, your support has been unwavering and your belief in my abilities has not only been an inspiration but also a driving force to know that you will be meeting me at the finish line, always cheering me on and being my greatest fans.

.

CONTENTS

1. INTRODUCTION 7

1.1 Research Problem and Background 8

1.1.1 Case backlog issues in the generalist courts 8

1.1.2 Access to court 8

1.1.3 The lack of judicial expertise 9

1.1.4 The volume of IP matters and the cost of establishing a special IP court 9

1.2 Purpose and Aim of this Research 10

1.3 Research Objectives 10

1.4 Relevance of This Research 10

1.5 Research Questions 11

1.6 Methodology 11

1.7 Structure of Dissertation 12

2. INTELLECTUAL PROPERTY RIGHTS PROTECTION AND THE SOUTH AFRICAN DISPUTE RESOLUTION PROCESS 14

2.1 IP Rights Protection and the Court Processes in South Africa 14

2.1.1 The protection of IP rights in terms of the common law 14

2.1.2 The protection of IP rights in terms of statutory law 16

2.2 Advantages and Disadvantages of the Current Process 21

2.2.1 *Disadvantages of the current system* 22

2.2.2 *Advantages of the current system* 26

2.3 South Africa's First Attempt to Institute a Specialised IP Court 28

2.4 Conclusion 28

3. SPECIAL COURTS IN SOUTH AFRICA 30

3.1 Introduction 30

3.2 The Advantages of Specialised Courts 30

3.3 The Disadvantages of Specialised Courts 32

3.4 Specialised Courts in South Africa 34

3.4.1 *The labour court and the council for conciliation, mediation and arbitration* 35

3.4.2 The land claims court 40

3.4.3 Other specialised courts in South Africa 42

3.5 Conclusion 45

4. INTERNATIONAL TRENDS IN INTELLECTUAL PROPERTY RESOLUTION 47

4.1 Introduction 47

4.2 Types of Specialised Forums 47

4.3 Specialised Divisions within the Generalist Courts 48

4.3.1 *Japan* 48
4.3.2 Italy 49
4.4 Specialised IP Courts 49
4.4.1 *Thailand* 49
4.4.2 China 51
4.4.3 Taiwan 52
4.4.4 Turkey 54
4.4.5 Russia 55
4.4.6 Finland 56
4.5 Appellate Division Courts That Preside Specifically Over IP Matters 57
Matters 57
4.5.1 Brazil 57
4.5.2 Germany 57
4.6 Specialised Tribunals which Preside Over Different Types of IP Matters 58
IP Matters 58
4.6.1 *Australia* 58
4.6.2 Kenya 59
4.7 Conclusion 59
5. THE INTELLECTUAL PROPERTY ENTERPRISE COURT IN THE UNITED KINGDOM 62
5.1 Introduction 62
5.2 Procedures in the IPEC 63
5.3 Have the Reforms Of The IPEC Brought about Positive Changes with Regard to IP Litigation? 66
5.3.1 Advantages of the IPEC 66
5.3.2 The disadvantages of the IPEC 67
5.4 Conclusion 69
6. CONCLUSION AND RECOMMENDATIONS 70
6.1 Introduction 70
6.2 The Viability of a Specialised IP Court 70
6.3 Recommendations for South Africa 71
6.4 *Conclusion* 72
7. BIBLIOGRAPHY 74
Primary Sources 74
Statutes 74
Secondary Sources 74
Books 74

Journals and Unpublished Academic work..... 74
Theses..... 75
Commission Reports..... 76
Magazine Articles..... 76
Internet Sources..... 76

1. INTRODUCTION

Intellectual Property (IP) includes those ideas which are created through our minds via creative thought processes. IP law encapsulates the protection of property that is created by the human mind in order to provide the property owner with rights and entitlements, protection of those rights and processes to follow in relation to the protection of their IP[1]. As with many laws, it creates the need for, and depends upon, courts in order to provide a platform to remedy disputes and interpret the laws. It also requires individuals trained and skilled in the law, generally, to carry out the task of judging matters before these courts.

In addition, the complex facts involved in IP matters, especially those involving patents, requires individuals highly skilled in IP law to adjudicate on such matters. The institution of specialised IP courts around the world is rooted in the complexity and uniqueness of IP matters. Various judicial systems around the world have specialised units dealing with IP matters, which function well and produce speedy and effective decisions. It is therefore imperative that foreign specialised IP courts be studied in order to establish how they work and to determine whether or not South Africa could and should adopt a similar system.

It has in recent times become apparent that the South African Supreme Court of Appeal lacks judges with experience in deciding IP matters[2]. A study of whether a specialised IP court with trained judicial officers would perhaps be a viable alternative in order to avoid such inadequacies in IP adjudication is therefore necessary.

[1]World Intellectual Property Organisation. "What is Intellectual Property?" Available at http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf. Last accessed 16/04/2015.
[2]Dean, O. "The Supreme Court of Appeal losing its shape". The Anton Mostert Chair of Intellectual Property. Available at http://blogs.sun.ac.za/iplaw/2015/01/29/supreme-court-of-appeal-losing-its-shape/. Last accessed 16/04/2015.

1.1 Research Problem and Background

1.1.1 Case backlog issues in the generalist courts

IP matters are litigated in the generalist courts in South Africa. There are no streamlined procedures provided for IP cases in South Africa. IP matters thus have to face lengthy waiting periods and lengthy trial procedures when they eventually reach the adjudication stage. This is detrimental to IP matters since the value of the IP is at risk of severe devaluation due to the lengthy processes before the dispute is resolved. There is significant contributory relationship between the protection of IP and economic development[3] which expresses the importance of expeditious and effective protection of IP. The manner in which IP matters are litigated currently in South Africa will be looked at further in this dissertation in order to assess the advantages and disadvantages.

1.1.2 Access to court

The majority of IP issues such as patent, copyright and trademark disputes are adjudicated by the North Gauteng High Court. Ease of access to court thus becomes a challenge for individuals who reside outside the court's jurisdiction. This often results in increased costs of litigation for such litigants. Litigants often abandon their claims due to the costs of litigation exceeding the value of the claim. This is especially the case with small to medium sized businesses and individuals whose IP rights are infringed. The court process in South Africa will be compared to procedures in foreign jurisdictions in order to ascertain whether they have overcome accessibility and cost issues and, if so, whether the methods used can be employed in South Africa with the same effect.

[3] Karjiker S and Kleyn M M. "Commentary: Draft Intellectual Property Policy Phase 1 2017", The Anton Mostert Chair of Intellectual Property. available at http://blogs.sun.ac.za/iplaw/2017/11/08/commentary-draft-intellectual-property-policy-phase-1-2017/. Last accessed 23/02/2019.

1.1.3 The lack of judicial expertise

There is a lack of judges on the bench with IP expertise in the courts provided with the jurisdiction to preside over IP matters. Complex IP matters are thus adjudicated by judges who sometimes have a general understanding of IP law and who lack experience in the adjudication of IP matters[4]. This results in judgments emanating which create unreliable precedent[5]. Further given the technological complexities of IP matters, especially those involving patents, receiving evidence from technological experts may be of assistance when deciding a matter at hand[6]. It is vital that a judge base their decisions on a full understanding of the law and of the technological complexities of the matter. During October 2018, the Judge President of the Gauteng Division of the High Court provided a Commercial Court Practice Directive which includes IP matters, amongst others, within its jurisdiction. Only those IP matters which have been determined to be commercial in nature by the Judge or Deputy Judge President will be heard before the Commercial Court. South Africa, although attempting to move slightly into a more specialised dispute resolution system for IP matters, still does not have a court dedicated only to the adjudication IP matters. This dissertation will take a closer look at the viability of the creation of a special IP court in South Africa.

1.1.4 The volume of IP matters and the cost of establishing a special IP court

The possible implementation of a specialised IP court has long been debated. However, major concerns about an insufficient amount of IP matters to justify a specialist court and the high costs involved in establishing such a court have pushed this idea aside. This dissertation will seek to show that these issues are not unique and that foreign jurisdictions have also been faced with such difficulties. However, the implementation of special IP courts in foreign

[4] Gibbons, J (1986) "Intellectual Property Rights in an age of electronics and information", US Congress Office of Technology, US Government Printing Office, page 297.
[5] De Weraa J, (2016) "Specialised Intellectual Property Courts- Issues and Challenges", International Centre for Trade and Sustainable Development, page 24.
[6] Ibid.

jurisdictions has often resulted in more IP matters coming to the fore, thereby increasing the volumes of IP litigation, as a result of which such courts become self-sustaining.

1.2 Purpose and Aim of this Research

The aim of this research will be to ascertain whether a specialised IP court is a viable option for South Africa. Various international trends in IP litigation will be looked at in order to ascertain the efficiency and effectiveness of specialised IP courts. The main purpose of this dissertation in aiming to assess the viability of a specialised IP court in South Africa will be to single out various IP litigation procedures from foreign jurisdictions which could be of use in South Africa. In discussing tried and tested procedures used in foreign jurisdictions, the idea of a specialised IP court in South Africa can be analysed in order to determine if such is a workable idea.

1.3 Research Objectives

The objective of this research will be to provide recommendations should South Africa reconsider the implementation of a specialised IP court. This dissertation will provide an overview of special courts already in use in South Africa. In addition, a brief overview of common practices in IP litigation in selected foreign jurisdictions will be provided. More specifically, the IP litigation procedures in the United Kingdom will be discussed in order learn from a jurisdiction which has an immense amount of experience with specialised IP court structures.

1.4 Relevance of This Research

In 1997 a request was made by the South African Institute of Intellectual Property for the implementation of a specialised IP court in South Africa. The Hoexter Commission investigated the issue and provided reasons against the implementation of a specialised IP court in South Africa[7]. Amongst these reasons certain challenges were

[7] The Hoexter Commission's Recommendations to establish a specialised court in South Africa',(1996), .Available at http://www.polity.org.za/polity/govdocs/commissions/r3v1b2.pdf. last accessed on 16 April 2015. Page 4.

raised such as the lack of a sufficient number of IP court cases and limited resources being available in South Africa for the implementation of such a special court[8]. This dissertation will look at these, and other, challenges in an effort to make recommendations that will overcome them. There has been no recent study providing specific procedural recommendations that can be used when reconsidering the viability of a specialised IP court in South Africa in the present era. Procedures in foreign jurisdictions have not been examined and extrapolated for application in a South African context. This dissertation will add to the body of knowledge considering adjudication options for IP matters in South Africa.

1.5 Research Questions

1. How are IP matters litigated in the South African judicial system?
2. What are the advantages and disadvantages of the South African IP dispute resolution system?
3. What are the advantages and disadvantages of specialised courts?
4. Have specialised courts been utilised in South Africa and if so, have they been largely successful?
5. What are the international trends regarding IP litigation?
6. What are the procedures behind the functionality of the “Intellectual Property Enterprise Court?”
7. Is the implementation of a specialised IP court in South Africa a viable option?

1.6 Methodology

Desktop research was undertaken in the completion of this dissertation. Various academic articles were utilised in order to provide an understanding of the topic at hand and provide insight into the various opinions available on the subject. Website articles were also used in order to gain insight as to processes available in foreign jurisdictions in terms of IP litigation. Research based surveys also provided insight into the processes of special courts around the globe. Commission findings, court rolls and government statistics were also utilised in order to grasp the efficiency of specialised

[8] Ibid.

courts locally and internationally. There were limited original published resources available on the topic hence a wide range of internet sources which spoke to specialised intellectual property courts were utilised. More specifically, limited primary and secondary sources which analysed specialised courts in South Africa and special IP courts were available. Internet sources were utilised to supplement the research in these areas. The internet sources referred to throughout the dissertation were reliable and detailed sources of information which were highly relevant to the topic at hand.

1.7 Structure of Dissertation

This dissertation will begin in Chapter two which will provide an overview of how IP rights are protected in South Africa and how IP matters are currently litigated in South Africa. The different processes relating to unfair competition, passing off, trade secrets, copyrights, trademarks and patents will be individually examined as they all follow different procedures if, or when, a dispute arises. The advantages and disadvantages of the present IP litigation procedure in South Africa will be assessed in order to determine which weighs more heavily. This will be done in order to ascertain whether the idea of a specialised IP court should be considered further.

Chapter three will then analyse and discuss the various specialised courts presently in use in South Africa. The chapter will highlight the significant fact that South Africa has embraced the idea of implementing specialised courts. The chapter will also highlight the fact that specialised courts are a workable institution in South Africa and decide high volumes of matters within their niche areas of law. It will also be argued, in chapter three, that quality decisions emanate from these various specialised courts and that the existence of these courts helps in reducing the workload on the overburdened generalist courts in South Africa.

Chapter four will discuss various international trends in relation to the resolution of IP disputes, primarily focusing on the litigation processes adopted in various foreign jurisdictions. This will be done in order to ascertain whether the litigation practices in South Africa are in line with international trends. International trends will also be analysed in order to ascertain whether the implementation of special courts is a popular option and whether any recommendations can be extrapolated which can be adopted as a way forward for South African IP litigation.

Chapter five will analyse the “Intellectual Property Enterprise Court” (IPEC) in the United Kingdom as it is the oldest specialised IP court. The court’s structure and procedures will be discussed in depth in order to gain a proper understanding of the workings of the court. The advantages and disadvantages of the IPEC will also be discussed in order to determine whether the court is a success. The specific reforms that the IPEC underwent when it evolved from the Patents County Court (PCC) will also be discussed in detail in order to understand which of these reforms have proven to be of importance to the proper functioning of the court. The IPEC will be analysed in order to establish whether South Africa can learn from, and adapt some of, its important structures and processes if it decides to institute a specialised IP court.

Chapter six will provide concluding reasons as to whether or not South Africa is in need of a specialised IP court. It will then go on to provide recommendations as to which procedures should be adopted in South Africa when implementing a specialised IP court, should this structure ever be considered in the South African judicial system. The chapter will also consider the concerns advanced as to why a specialised IP court should not be implemented in South Africa at present.

This dissertation will finally conclude that instituting a specialised court in South Africa is a viable option, however, may not be an immediate requirement at present. The main reasons for supporting the institution of a specialised court are: to fast track the adjudication of IP matters in an effort to improve access to justice, to reduce the burden on the generalist courts, to provide accurate decisions in relation to the matters before court and to enhance the development of IP law and the protection thereof. The paper will also conclude that the institution of a specialised IP court will aid immensely in developing IP laws in South Africa by the training of judges who would acquire the skills required to interpret and develop this sector of the law.

2. INTELLECTUAL PROPERTY RIGHTS PROTECTION AND THE SOUTH AFRICAN DISPUTE RESOLUTION PROCESS

2.1 IP Rights Protection and the Court Processes in South Africa

IP in South Africa is currently governed by both common law and by statute. The common law governs passing off, unlawful competition and trade secrets. This is extended and supplemented by the Patent Act[9], Trademarks Act[10], Copyright Act[11], Designs Act[12] and the Registration of Copyright of Cinematograph Films Act[13]. As a result, depending on the specific area of intellectual property that an individual's claim deals with, different procedures will be utilised and various remedies are available to litigants. This chapter will briefly highlight the infringements involved in relation to IP rights, the remedies available for such infringements and the dispute resolution process available to those seeking relief. The chapter will then highlight the advantages and disadvantages of the dispute resolution mechanisms available in South Africa in an effort to analyse whether the system requires improvement and/or change.

2.1.1 The protection of IP rights in terms of the common law

2.1.1.1 passing off

Passing off infringements are delictual in nature and involve the presentation of a business's products or services in such a way as to cause consumers to confuse such products and services as the supplier of the products or services is essentially misrepresenting his goods as being those of the competitor with established goodwill[14]. The misrepresentation occurs due to the products being confusingly similar resulting in a well-established trader losing business due to consumers easily mistaking the product of the competitor with that of the well-

[9] 57 of 1978.
[10] 194 of 93.
[11] 98 of 1978.
[12] 195 of 1993.
[13] 62 of 1977.
[14] Dean and Dyer, (2014), Introduction to Intellectual Property Law, Chapter 2: Trademarks, Oxford University Press, Southern Africa. Page 166.

established trader[15]. The trader whose product has been copied suffers damages in terms of their goodwill. This is the form of infringement that occurs in passing off claims[16].

The first remedy for passing off claims includes a claim for damages as a result of loss of sales, injury to reputation and expenditure involved in order to compete in the industry which the Respondent is also competing in[17]. The second remedy includes an interdict granted by the court in which the Respondent is prohibited from utilising any symbol that does not clearly distinguish the goods from those of the Applicant[18]. Passing off claims are generally instituted in the High Court and utilise application procedures as in most instances a dispute of fact does not arise[19]. If a dispute of fact does arise then action proceedings would follow, and a trial would ensue in the High Court[20]. It is evident that monetary values are attached to such claims and receiving a remedy in a timeous manner is of utmost importance to the Applicant. The longer such claims take to be finalised the greater the loss suffered by Applicant in relation to their intellectual property.

2.1.1.2 unfair competition

Unfair competition in South Africa occurs when a trader commits an unlawful act that causes damage to a competitor by interfering with that competitor's right to attract customers or conduct business[21]. The remedies available in relation to unlawful competition are found in the Acquilian Action which enables the plaintiff to claim damages for pecuniary loss suffered in relation to their intellectual property. The court may in addition grant an interdict in this regard to prohibit the unfair competition occurring in the market place[22]. Such claims are usually instituted in the High Court and the procedures are similar to that of

[15] Alberts, W, (2008), "The Scope of Passing Off", De Rebus: volume 2008, Issue 479, September 2008, page 60-61.
[16] Ibid.
[17] Supra note 14, page 177.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Supra note 14, page 186.
[22] Supra 14, page 210.

passing off claims[23]. Claims instituted in the generalist High Court usually have lengthy turnaround times which have the ability of permanently destroying the business of a trader with an unfair competition claim.

2.1.1.3 trade secrets

A trade secret can be described as secret information pertaining to a specific trade or industry that has an economic value attached to it due to it providing a business with a certain uniqueness in relation to a service offered or product sold in its specific trade or industry[24]. The owner of such a trade secret has the right to keep it a secret due to the economic value attached[25]. A trade secret is regarded as infringed if either its use, enjoyment or disposal by its owner is inhibited[26]. A damages claim due to patrimonial loss can be instituted in the High Court. In addition, the court can grant an interdict to prohibit the defendant from utilising the information pertaining to the trade secret[27]. Such claims are usually litigated in the High Court and the same procedure as that of passing of and unlawful competition claims are followed[28].

2.1.2 The protection of IP rights in terms of statutory law

2.1.2.1 patents

A patent is a right or title granted for a new invention which requires an inventive step, and which can be used and applied in trade, industry or agriculture[29]. The requirements for a patent are as follows: it must be an invention by definition, it must be new/novel, it must involve a non-obvious inventive step, it must be

[23]See 2.1.1.1 above.
[24] WIPO, "What is a Trade Secret". Available at http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm. Last accessed 24/02/2018.
[25]Knobel, J C. "The right to the trade secret". Doctor of laws, University of South Africa. 1996. Pg 236-240.
[26]Ibid.
[27]Ibid.
[28] See 2.1.1.1 above.
[29] Section 25(1) Patent Act 57 of 1978.

useful, and it must be capable of being used or applied in trade, industry or agriculture[30].

2.1.2.2 the procedures involved in obtaining a patent in South Africa

In order to be granted a patent an applicant must lodge a patent application at the patent office, which is the "Companies and Intellectual Property Commission" (CIPC). The procedure is initiated by the filing of a provisional patent application[31] and on the date of filing such an application the invention will be protected by law. The provisional patent application must fairly describe the invention[32]. A provisional patent is effective for twelve months and allows for the patent to be developed and changed in the ensuing twelve months[33]. Should an applicant require the patent to be recognised in a specific country, the provisional patent specification has to meet the legal requirements of that specific country[34].

Inventors are allowed to make patent applications, however in practice they are usually assisted by a patent attorney due to the complex nature of patent applications[35]. After the twelve-month period of the provisional patent application has lapsed a complete patent specification has to be filed in which any additions made to the invention are added to the application[36].

The most common route taken after the provisional patent application is to file an application with the Patent Cooperation Treaty (PCT)[37]. This application allows applicants to receive a patent amongst a wide number of countries party to the Paris Convention by the lodging of a single application to the World Intellectual Property Organization (WIPO)[38]. The application will then be subject

[30] Supra note 14, page 241.
[31] Such an application should include the following details: background of the invention, a description of the objectives of the invention, the field in which the invention could be categorised in, a detailed description of the invention and a detailed illustration of the invention.
[32] Section 32(2) of the Patents Act 57 of 1978.
[33] SAMRC. "Guide for inventors". Available at http://ship.mrc.ac.za/sectioncpatents.htm. Last accessed 18/11/2015.
[34] Supra note 14, page 254.
[35] Supra note 33.
[36] Section 30(1) of the Patents Act 57 of 1978.
[37] Supra note 33.
[38] Supra note 14, page 257.

to international searches in terms of the patentability of the invention which would allow inventors to amend or withdraw the patent should the novelty or inventiveness be problematic[39]. After the filing of a patent application with the PCT, the actual granting of a patent application then occurs in South Africa. The applicant has to pay the same prescribed fee to the South African patent office as they would for a complete application in terms of Section 30 of the Patent Act[40].In South Africa there is no examination of the merits of the patent itself by the patent office and the application will be allowed to proceed if all the procedural formalities are completed. Once the application has then been accepted in is published in a patent journal and this date is the date on which the patent is deemed to be granted[41].

2.1.2.3 infringement of patents and remedies available

Section 45(1) of the Patents Act provides that a patentee has the right to exclude other persons from acts prohibited by the Act such as making, using, exercising, disposing, offering to dispose, or importing the invention so that he or she shall have an enjoy the whole profit and advantage accruing by reason of the invention[42]. Hence a person other than the patentee who commits a prohibited act, as mentioned above, is considered to be infringing the rights of the patentee.

The remedies available to a plaintiff who lodges an action for the infringement of a patent include an interdict restraining the defendant from further acts of infringement, an order for delivery of an infringing product or any article of which the infringing product forms an inseparable part, a damages award, reasonable royalty in lieu of the damages and costs[43]. Such claims are brought before the courts utilising action proceedings[44].

[39] CIPC, "Patent Cooperation Treaty (PCT)", Available at http://www.cipc.co.za/index.php/trade-marks-patents-designs-copyright/patents/. Last accessed 23/02/2019.
[40] 57 of 1978.
[41] Supra note 14, page 259.
[42] Supra note 14, page 280-281.
[43] Ibid.
[44] Supra note 14, page 281.

2.1.2.4 the dispute resolution proceedings available for patent disputes

With regard to patents, the Patent Act[45] provides that the Judge President of the North Gauteng High Court will appoint a judge of that court to act as the Commissioner of Patents. The Commissioner hears matters relating to patents as well as appeals with regards to the decisions of the Registrar of Patents, whose office is situated in Pretoria. The Commissioner is essentially an extension of the North Gauteng High Court and has to abide by the High Court rules when hearing a matter. The Commissioner therefore serves as a court of first instance for patent matters. If a decision of the Commissioner is to be appealed, the appeal lies with the full bench of the North Gauteng High Court and thereafter the Supreme Court of Appeal[46].

2.1.2.5 the dispute resolution proceedings available for trademark, design and copyright matters

A trademark is a mark or symbol used by a manufacturer of goods or supplier of services to make the public aware that the goods or services supplied are provided by that specific company and are to be distinguished from others in the market[47]. The Trademarks Act[48] governs registered trademarks whilst the common law of passing off provides for unregistered trademarks[49]. Trademarks are territorial and thus their registration is only effective in their country of registration.

The CIPC is the Registrar of Trademarks[50]. The Commissioner of the CIPC exercises the powers conferred upon the Registrar by the Trademarks Act[51]. The Trademarks Office is located in Pretoria from which the Registrar manages the trademarks register[52]. The Registrar also appoints a team of examiners in

[45] 58 of 1978.
[46] Supra note 7, page 4.
[47] Section 2(1) of the Trademarks Act 58 of 1978.
[48] 194 of 1993.
[49] As discussed above.
[50] Ramsden, P, (2011) 'A guide to Intellectual Property Law', Juta, Page 102.
[51] Section 6 of the Trademarks Act 58 of 1978.
[52] Supra note 14, page 87.

order to assist with decisions relating to the registration of trademarks[53]. In terms of trademarks, the Minister of Trade and Industry is empowered by legislation to appoint a judge, attorney or advocate to act as the Registrar of Trademarks and preside over trademark issues[54].Assistant Registrars and Deputy Registrars may also be appointed to assist the Registrar in carrying out the duties and powers conferred upon them by the Trademarks Act[55].The Registrar has the power of a single judge in a civil matter before the North Gauteng High Court[56]. The North Gauteng High Court has exclusive jurisdiction in terms of any appeals of the Registrar's decision or any variations, amendments, removals and other relief in terms of an entry in the trademark registry[57].

Trademark infringements generally occur due to two marks or symbols being confusingly similar in their appearance. Such cases are usually lodged in the High Court and application procedures are utilised as disputes of fact are not a common occurrence[58]. However, if a dispute of fact does arise then action proceedings are utilised. The following remedies are available for a proprietor of a registered trademark: an interdict prohibiting the use of the confusingly similar mark, an order for the removal of the infringing mark from the material it is utilised on or the delivery of such material to the proprietor if the mark is inseparable, an award of damages arising from the infringement and, in lieu of damages, at the option of the proprietor, the payment of a royalty for the use of the mark[59].

A copyright is a right given to the author or originator of a creative written or artistic work. It is granted, in terms of statute, for a limited period of time in order for the copyright holder to publish, make copies and sell such work[60]. Copyright thus protects the representation of an idea and prevents others from

[53] Supra note 14, page 87.
[54] Supra note50, page 102.
[55] Section 6(1) of the Trademarks Act 194 of 1993.
[56] Section 45(1) of the Trademarks Act 194 of 1993.
[57]Supra note 7, page 5.
[58] Supra note 14, page 164.
[59] Section 34(3) of the Trademarks Act 194 of 1993.
[60] Publishers Association of South Africa. "Copyright Information Guide" http://www.publishsa.co.za/downloads/copyright_information_guide.pdf. Last accessed 18/11/2015. Last accessed 18/11/2015. Page 8.

commercially gaining from another individual's copyright[61]. In South Africa copyright is governed by the Copyright Act 98 of 1978. Copyright lasts for the author's life plus a further fifty years thus preventing the reproduction of any work subject to copyright by another party, without permission during that period[62]. Copyright comes into existence automatically and there is no need for registration.

A copyright is infringed when any person, other than the owner of the copyright, carries out an act that is reserved for the owner without obtaining the authorisation of the owner[63].Copyright infringements are actionable by the owner of the copyright or an exclusive licensee or sub-licensee. An exclusive license or exclusive sublicense is one that entitles a party to the same rights and remedies as the owner of the copyright[64].The remedies available to plaintiffs in this regard are: interdicts, a damages award, an amount in lieu of damages in the form of royalties at the option of the plaintiff and the delivery of infringing copies or plates intended to be used for the making of other infringing copies, usually litigated out of the High Court[65].

It is evident from the above discussion, how various IP rights are litigated and protected in South African law and it is also evident that IP matters in South Africa follow similar routes to other civil claims instituted in South African courts. It is therefore imperative to analyse the benefits and downfalls of utilising the general civil claims route to litigate IP matters in order to assess its effectiveness in a South African context.

2.2 Advantages and Disadvantages of the Current Process

There have been growing concerns relating to the protection of IP rights in South Africa due to the specialised nature of IP law. The court system currently in place to protect IP rights is therefore an important factor to take into account when considering the protection of IP rights. The efficiency and effectiveness of the system in place are thus

[61] Supra note 60.
[62] Supra note 60, page 9.
[63] South African Institute of Intellectual Property Law. "Copyright", Available at http://www.saiipl.org.za/introip/74-copyright. Last accessed 18/11/2015.
[64] Section 25(1) of the Copyright Act 98 of 1978.
[65] Section 24(1) of the Copyright Act 98 of 1978.

are at the forefront of such an examination. The procedures put in place together with the accessibility of redress available to those whose IP rights might potentially be infringed must be efficient and accessible. However, there are obvious flaws in the South African dispute resolution process that will to be examined below.

2.2.1 *Disadvantages of the current system*

2.2.1.1 time consuming and expensive

A major concern with the current IP dispute resolution procedure is that it is time consuming and expensive[66]. Although this may be the case with the majority of the litigation that takes place in South Africa, the difference with IP matters is that time is of the essence due to the monetary value attached to IP and due to the transient nature of IP itself. IP can have an immense amount of monetary value attached to it, thus the long drawn out time periods that go by before a matter is settled, or a judgment handed down tend to have a negative impact on the value of the IP.

Furthermore, with South Africa having anon-examining patent system, in that the inventiveness or novel merit of the patent application is not investigated and examined[67], it has made room for an increased amount of infringements that come to the fore after the patent has been granted. The lack of cost effective and efficient dispute resolution mechanisms results in such claims either being too expensive to litigate on and/or long waiting periods before such claims are finalised in court.

2.2.1.2 expensive litigation prevents small and medium sized businesses from seeking recourse

Consequent upon the litigation of IP matters being expensive is the impact on medium and small sized businesses, as the cost factor renders such

[66] Gregory, S. (2008), 'Intellectual Property Rights and South Africa's Innovation Future', Trade Policy Report No. 23, South African Institute of International Affairs, Page 12, available at http://www.saiia.org.za/doc_view/294-trade-report-no-23-august-2008, last accessed 30/11/2015.
[67] 'South Africa: Compelling case for patenting in South Africa', Available at http://www.mondaq.com/southafrica/x/758056/Patent/Compelling+Case+for+Patenting+in+South+Africa, last accessed 23/02/2019.

businesses unable to defend and protect their IP[68]. The financial ability of small and medium sized businesses is constrained and their interests with regards to IP litigation are not provided for within the South African justice system[69]. Inadvertently this results in some such businesses abandoning their claims as the cost of litigation far outweighs the value of their claims. This impacts upon the sustenance of small and medium sized businesses[70] as either their IP property cannot be protected (resulting in monetary loss) or, if they do decide to litigate, the costs of litigation have a heavy financial impact. Hence the SA IP dispute resolution system does not provide efficient and effective protection to many IP rights holders and is instead limited mostly to larger enterprises due to the financial constraints experienced in practice.

2.2.1.3 the lack of judges with IP expertise and the complexity of IP cases

Currently in South Africa most IP cases are litigated via the High Court. The North Gauteng Court, more specifically, is the court which houses the Commissioner of Patents and is the direct court of appeal for all decisions by the Commissioner of Patents[71]. Importantly the Commissioner is appointed on an ad hoc basis and does not necessarily have a significant amount of expertise or experience in IP litigation[72]. Justice Southwood was appointed on a regular basis from 2005 to 2010[73].However, Justice Southwood has not since been re-appointed and there has been a lack of consistency in appointing Commissioners to chair patent disputes[74]. Justice Louis Harms, who has specialist knowledge in IP was appointed a justice in the Supreme Court of Appeal. However, the honourable justice retired in 2011[75].

[68] The Economics of Intellectual Property in South Africa. Page 3. Available at http://www.wipo.int/edocs/pubdocs/en/economics/1013/wipo_pub_1013.pdf Last accessed 19/11/2015.
[69]Supra note66, page 13.
[70] Supra note 68.
[71] Kelbrick, R. (2010), 'Civil Procedure in South Africa', Kluwer Law International, page 29.
[72]Richardson, R. 'Alternative dispute resolution in intellectual property law: A growing need for a viable alternative to court litigation'. University of Cape Town (2013), page 23.
[73] Ibid.
[74] Ibid.
[75] Gray's Inn Square Barrister Chambers. "Practice Summary" Available at http://4-5graysinnsquare.co.uk/barristers/louis-harms/. Last accessed 19/11/2015.

The lack of appointment of judges with specialist knowledge therefore presents itself as a major issue in South African courts. Consistency in the appointment of judges increases their experience in dealing with IP matters by affording them the opportunity to develop the required experience. Appointing judges with specialist knowledge in the field of IP helps improve the quality of decisions being made. The lack of such consistency and expertise is a major disadvantage in the South African IP dispute resolution process.

During the course of 2013, Judge Maria Jansen was appointed to the bench of the South Gauteng High Court. Her appointment to the South Gauteng High Court and not to the North Gauteng High Court had come as much of a surprise to those in the field of IP due to the fact that she has immense expertise[76] in IP litigation[77]. It had been argued by academics and practitioners that since there was a single specialist IP judge on the bench, such judge should, without doubt, have been placed in the North Gauteng High Court due to the fact that this court is the heart of patent litigation which requires a high level of expertise by a specialist adjudicator due to the complex nature of the cases[78]. The discontent raised by academics and practitioners as well as the desperate need for a specialist IP judge resulted in Judge Maybel Jansen being appointed to the North Gauteng High Court, however subsequent to her appointment, Judge Maybel Jansen has since resigned as judge during 2017. This is a pertinent example of the lack of expertise required in the IP litigation hub of the North Gauteng High Court. Further it depicts a severe need for South Africa to train and foster more IP experts who preside over matters when they come before a court for adjudication. There is currently no programme in place to train judges who handle IP matters and no list of commissioners to resort when such expertise is required[79]. Such a niche and complex area of law requires expertise in order for the law surrounding IP to develop advantageously.

[76] Judge Maria Jansen practices as a specialist IP counsel at the Pretoria Bar for more than thirty years and also handed down IP judgments whilst performing her duties as acting judge. Adapted from http://blogs.sun.ac.za/iplaw/2013/12/04/judging-ip-law/, last accessed 19/11/2015.

[77] The Anton Mostert Chair of Intellectual Property "Judging IP law" http://blogs.sun.ac.za/iplaw/2013/12/04/judging-ip-law/. Last accessed 19/11/2015.

[78] Ibid.

[79] This evident by the fact that there are no specialist IP judges in the North Gauteng High Court and Commissioners have been appointed on an irregular basis.

2.2.1.4 Case backlogs in general courts resulting in long delays

South African courts are inundated with a large number of matters before them which creates case backlogs in the judicial system[80]. Case backlog programmes have been initiated by the Department of Justice in an effort to reduce the backlog in the High Courts of South Africa, however, the problem still persists[81]. Backlog Courts were also created to relieve the over-burdened general courts[82].However, it is important to note that despite such courts being implemented this still does not resolve the issue of having suitable personnel adjudicate over IP matters. The issue of case backlogs is especially detrimental to IP cases due to the fact that the significant depreciation in IP caused by infringements is accelerated over time. Because IP matters are litigated via the mainstream civil courts, IP matters are subject to the general backlog of matters in South Africa courts.

Due to the fact that IP cases are caught amongst the high volumes of matters before a single court, IP rights holders suffer serious, ongoing infringements even before their matters are presented to court. This has serious implications for the protection on the monopoly of IP. Richardson states that many of the Registrar's decisions end up on the High Court's roll for review which adds to the court's backlog[83]. Furthermore, the North Gauteng High Court is also the court burdened with reviews and appeals in trademark, patent and copyright litigation. It is also arguable that, when dealing with complex specialised areas of law, the high demand to achieve better case roll out times in the general courts might lead to a lack of concise decision making in these specialised areas and thus to increased infringements for IP rights holders.

2.2.1.5 lack of streamlined procedures

[80] South African Government. "Administration of justice" Available at http://www.gov.za/about-government/government-system/justice-system/administration-justice. Last accessed 20/11/2015.
[81]Budget Vote Speech by Mr Andries Nel, MP, Deputy Minister of Justice and Constitutional Development, Friday, 10 June 2011, National Council of Provinces, Parliament. Available at http://www.justice.gov.za/m_speeches/2011/20110610_dmin_budgetvote-ncop.html. Last accessed 1/12/2015.
[82]Ibid.
[83] Supra note72, page 25.

As has been mentioned before, IP cases are unique in nature and need to be dealt with in a speedy fashion. The mainstream civil procedure rules which also apply to IP matters do not fulfil the unique needs of such matters, as the processes are long and drawn out[84]. IP cases require streamlined procedures which would suit the needs of such claims and prevent further infringement caused by long drawn out procedures[85]. The current IP dispute resolution system does not provide for the specific needs of IP claims rendering the enforcement of such claims generally of no value due to the significant loss in value of the effected IP by the time a matter is actually finalised.

2.2.2 *Advantages of the current system*

2.2.2.1 costs

The most pertinent advantage of the current system of IP litigation relates to costs savings in terms of the state's resources. The system in use today does not require the costs associated with new and specialised resources needed to institute a new process for IP litigation. There is, arguably, a greater need to utilise the state's financial resources to alleviate the current case backlogs that South African courts are currently experiencing[86]. This is deemed to be a much more important use of the state's resources, rather than wasting these resources on a new specialised court which may or may not work. Furthermore, the introduction of a specialised court would result in the need for specialist training for its personnel which would necessitate an increase in expenditure[87].

2.2.2.2 a lack of a sufficient amount of IP litigation

It has been argued that there is not a sufficient amount of IP litigation in South Africa to justify an entire specialised court, thus the current dispute resolution

[84] Zuallcobley, W R, (2012), 'Study on specialized Intellectual Property Courts', International Intellectual Property Institute, page 5.
[85] Makoko M, (2014), "Specialised Intellectual Property Courts: Where does South Africa stand on the global map", Without Prejudice, Volume 14, Issue 2, Page 1.
[86] Financial Mail. "Justice Department: Boost in fight against court backlog" (2014). Available at http://www.financialmail.co.za/specialreports/budget2014/2014/02/27/justice-department-boost-in-fight-against-court-backlog . Last accessed 20/11/2015.
[87] Supra note 85, page 2.

process is sufficient[88]. The amount of IP litigation is South Africa is deemed insufficient to keep Judges in specialist courts productively and economically active[89]. There is thus a notion that exists that a specialised court would have an insufficient volume of work before it and it is due to this reason the generalist courts would suffice.

2.2.2.3 specialise procedures are already in place: Commissioner of patents, Trademark Registrar and the Copyright Tribunal

The South African dispute resolution system already provides for specialised forums for IP disputes. Thus there is thus a perception that the implementation of a specialised court would be an unnecessary addition. The Commissioner of Patents, who also adjudicates appeals of decisions by the Trademark Registrar and the Copyright Tribunal, functions effectively and, it is argued, provides sufficient protection of IP rights[90]. From this one might infer that South Africa already has specialised agencies that adjudicate IP matters and carry out their duties sufficiently. Hence there is no need to incur additional cost to implement an accessory specialised court.

2.2.2.4 no need for dedicated personnel

The current dispute resolution system utilises IP practitioners and judges already on the bench. The implementation of a specialised IP court would require an increased amount of specialised personnel to be dedicated to providing their expertise in such a court. Due to the severe lack of specialised IP personnel in the South African judicial system, providing or developing such skilled individuals would require extensive resources which could be better used elsewhere in the South African judicial system[91]. The current dispute resolution system is not unworkable or dissatisfactory and thus should remain in place if it a workable route.

[88] Supra note 7, page 55.
[89] Ibid.
[90] Supra note 7, page 53.
[91] Supra note 7, page 55.

2.3 South Africa's First Attempt to Institute a Specialised IP Court

South Africa first addressed the institution of a specialised court within the South African judicial system in the 1996 Hoexter Commission. However, the Hoexter Commission found that, at the time, there was a severe lack of specialised personnel to employ in such a specialised IP courts[92]. In addition, at the time of the Commission there was a considerably lower number of IP matters requiring recourse to the courts, which resulted in the Commission concluding that IP matters did not require a specialised court[93]. The Commission also found that the instituting of a specialised court would put the government to too great an expense and that it would detract from the resources needed in the generalist courts in the country[94]. In addition due to the lack of specialised IP law personnel in the country it would be difficult to appoint a Judge President for a specialised IP court in South Africa[95]. In 1996 circumstances were such that the option of a specialised IP court was an unworkable idea. However, at present, given the increase in globalisation which leads to an increase in innovation, the need for the efficient protection of IP rights and a reliable avenue for remedies for infringements has become imperative[96]. It is more than twenty years since the decision of the Hoexter Commission, circumstances have inevitably changed and thus the idea of a specialised court needs to be re-examined.

2.4 Conclusion

The disadvantages and advantages of the current IP dispute resolution system appear to be of equal importance. On the one hand there is the idea that there is a lack of specialised IP personnel to allocate to a specialised IP court and on the other there are arguments that the implementation of a specialised IP court would generate training programmes and expose judges to more cases providing them with more experience in the field. Also there are high costs involved in the implementation of such a court. However, it cannot be forgotten that one advantage of implementing a specialised IP court would in fact be that it would lead to reduced costs as it would

[92] Supra note 7, page 55.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Supra note 85, page 2.

help alleviate case backlogs in the generalist courts. An immense amount of finance goes into case backlog reduction projects. Some of this could be utilised towards the provision of a specialised court which could also be a solution in terms of the case backlogs in the generalist courts. However one may also argue that a significant amount of IP matters on court rolls are not the main reason for case backlogs in generalist courts and may hence not diffuse the backlog situation to a large extent.

Intellectual property infringements carry threatening economic consequences not only for the right holders but for the country at large. The efficient handling of IP cases is thus an imperative issue. The current system of IP dispute resolution still requires litigants to follow the usual civil procedure rules and timelines, thus lengthening the period in which disputes are put before a judge. It is imperative to relook at the option of implementing a specialised IP court in order to examine whether, in today's globalised times the idea of such, it is a viable idea or not . However, before doing so, it is imperative to analyse the notion of specialised courts in South Africa in order to determine if specialised courts are a workable idea within the South African judicial system. Chapter three will thus analyse the various special courts in South Africa in an effort to determine if they are successful.

3. SPECIAL COURTS IN SOUTH AFRICA

3.1 Introduction

Courts play an important role in ensuring that justice is equal and open in terms of the principles espoused in the Constitution[97]. Courts carry a great deal of responsibility and are the repositories of a great deal of hope and expectation for litigants attempting to achieve justice in most, if not all, judicial systems around the free world. Courts determine whether laws are in conflict with each other and whether individuals and entities are in conflict with the law. They uphold the rights of citizens and they assist in the interpretation of the law. The structures of courts, of course differ considerably across jurisdictions, but in many jurisdictions, including our own, specialised courts have been created to cater for certain specialised areas of the law. The institution of specialised courts is largely an assistive mechanism to the existing generalist courts. They are usually tasked with the same responsibilities as any other court but they carry out these responsibilities in relation to a specific area of law.

Specialised courts aim to provide justice through specialisation. This requires a specialised division or independent court structure to be created in which matters relating to a specific area of law will be dealt with. Hence each court will have personnel with the requisite skill and expertise in a niche area of law. Specialised courts are a popular structure internationally as well as locally. However, there are various arguments for and against the implementation of specialised courts. In analysing whether specialist courts are a viable route in South Africa, firstly the advantages and disadvantages of such courts will be discussed. Secondly special courts in South Africa will be looked at in order to ascertain whether they have been a successful addition to the South African court structure.

3.2 The Advantages of Specialised Courts

The notion of a specialised entity instils the idea of expertise in a particular subject area and service of a high quality. It would be expectant of a specialised court to have such inherent characteristics so as to differentiate itself from the generalist courts.

[97] Act 108 of 1996.

Specialised courts are formed in order to improve aspects of the functioning of the court systems in various jurisdictions. There are various advantages to the additions of specialised courts in court systems around the world which should be looked at in order to weigh the viability of such specialised courts.

The implementation of specialised courts requires the appointment of judges who are specialists and have the expertise to adjudicate complex matters belonging to niche areas of the law[98]. This helps bring about decisions of a higher quality as specialist judges, in addition to being well versed in their areas of specialisation, are exposed to matters specific to the court's jurisdiction of speciality on a daily basis which advances their wealth of experience in a specific area of law[99]. This, in turn, will increase the efficiency of specialised courts since specialist judges will be able to deal with matters in a more expeditious fashion due to their expertise and experience[100].

Disputes with regards to the interpretation of laws often arise when different judges around the country interpret the law in a different manner from each other. By having a single specialised court interpreting that law and binding itself to its own precedent, more consistent, sound and well-established interpretations of the law are created[101]. Specialised courts thus create uniformity and consistency which assists in developing a specific specialised area of law.

Whilst specialist court judges undertake the responsibility of deciding matters falling within their jurisdiction, judges in the generalist courts are spared having to continuously update their knowledge in terms of niche areas of the law leaving them free to focus on the matters before them in their court's jurisdiction[102]. This helps increase the efficiency of the court system in its entirety and makes the administration of justice more effective.

---

[98] Zimmerman M, (2009), "Overview of Specialized Courts",. International Journal for Court Administration, page 1.
[99] Ibid.
[100] Ibid.
[101] Gramckow H and Walsh B, (2013), 'Developing Specialized Court Services. Justice and Development', Working Paper Series 24/20, Legal vice Presidency: The World Bank, Page 6.
[102]Burke, C, (2017), 'Advantages and disadvantages of specialized courts', available at https://legalbeagle.com/8398649-advantages-disadvantages-specialized-courts.html. Last accessed 24/02/2019.

Specialised courts also allow for judges presiding in such courts to gain more experience in judging matters belonging to a niche area of law[103]. This provides uniformity in the decision making process, as a single court adjudicating over many matters in a specific area of law would give rise to more consistent decisions being made by applying their own precedent[104].This would pave the way for the sound development of specific areas of law by the provision of well-reasoned interpretations of the law.

Specialised court structures often make provision for the appointment of experts with specialised experience. This allows matters before such specialised courts to be decided by personnel who have an in depth understanding of that specific area of the law[105]. Judges in generalist courts adjudicating a specialised matter would not have the technical expertise required to deliver a proper decision. Their decisions are often based on the basic knowledge that they have of the niche area of law that the matter before them relates to[106]. Hence specialised personnel are an important addition to the adjudication of matters belonging to complex areas of the law.

3.3 The Disadvantages of Specialised Courts

It is evident that specialised entities have advantages. However, specialisation can also result in the isolation of such specialised entities resulting in various disadvantages. It is necessary to set out such disadvantages in order to assess which aspects of specialised courts are not viable and need further improvement as specialised courts are not in their entirety a solution to the problems faced by many court systems.

Judges in special courts focus their knowledge on a specific field of law thus it has been argued that such judges develop a narrow and one-sided view of the law which

[103] Supra note 102.
[104]Altbeker, A, (2003), 'Justice through specialisation? The case of the specialised commercial crime court' in 'Chapter 3: Court specialisation in theory'. Available at http://www.issafrica.org/pubs/Monographs/No76/Content.html, last accessed 16 May 2015).

[105]Supra note 101, page 6.
[106]Ibid.

may fail to harmonize itself with the mainstream line of thought[107]. They lose their objective opinion in the law and generate a subjective mind-set, it is argued, which is influenced by the niche area of law they work with on a daily basis[108]. Further, it has been noted that such courts tend to operate in isolation from other courts by developing their own body of principles to the isolation of all other courts[109].Altbeker states that over familiarity with an aspect of law leads to a judge's loss of perspective and the compartmentalization of a judge's knowledge reducing the quality of decisions handed down[110].

A sense of familiarity also develops between the judges and legal representatives which could result in a lack of impartiality or a degree of bias influencing the decision-making process[111].

Generally, with regards to special courts, only a single division of such a court is required. This is due to the specialised nature of the litigation and the obviously limited number cases that are brought to such courts. This leads to special courts being difficult for members of the public to gain access to as the specialist court is located in a single area in the country[112]. This will consequentially lead to increased costs of litigation due to the inaccessibility of the court and will prevent the promotion of access to justice to litigants who live away from the seat of the court.

Establishing a special court comes with its own set of expenses. Countries may lack the financial resources to implement such a court[113]. In addition to the cost factor there is a lack of specialised personnel to constitute the work force in such courts[114]. This requires an increased amount of expenditure to go into the training of specialised personnel. This can be viewed as a wasted expense, especially if the court fails to meet expectations in its future.

It is evident that there are important advantages and disadvantages to consider when deciding whether or not to implement a special court. However, it is necessary to look

[107] Rottman D, B, (2000), "Does effective therapeutic jurisprudence require specialized courts", Court review, page 24.
[108] Ibid.
[109] Ibid.
[110] Supra note 104, page 29.
[111] Ibid.
[112] Supra note 98, page 4.
[113] Ibid.
[114] Supra note 101, page 8.

at such advantages and disadvantages in light of that particular country's resources and circumstances. It can never be fully known at the outset as to whether the implementation of a specialised court will be more advantageous or not. The viability of the implementation of a specialised court can only be determined by assessing a specialised court while it is in operation. It thus becomes important to look at specialised courts within South Africa in order to determine whether the implementation of such courts is favoured in the South African jurisdiction, whether they in fact work or whether they contribute to the inefficiencies of the South African court systems.

3.4 Specialised Courts in South Africa

The notion of specialised courts is not foreign to South Africa. This is evident by the variety of specialised courts present within our judicial system. The department of Justice and Constitutional development "identified court specialisation as one of the key strategies for the provision of an adequate network of accessible and service orientated courts and other judicial and quasi-judicial institutions for all communities"[115].

The courts in South Africa are structured as follows, from lowest to highest in terms of jurisdiction and the setting of precedent: Small Claims Courts, Magistrates' Courts, the High Courts, the Supreme Court of Appeal and the Constitutional Court. Within the realm of the Magistrates' Courts and the High Court's there are Specialised Courts which have the status of either the Magistrates' or the High Courts[116]. Such courts are created by statute and their powers and status are conferred by the enabling statute. Within the South African legal system there are also other specialised assistive bodies that help in resolving and presiding over legal disputes. Such bodies are also created by legislation and provide a less formal, cheaper approach to resolving legal disputes[117]. These specialised bodies are in some instances created in addition to a specialised court. It is important to discuss whether specialised courts are effective or whether they are a waste of state resources in South Africa.

---

[115] Supra note 104, page 23. A

[116] Paralegal Advice. Chapter 5: Courts and Court Cases. Available at http://www.paralegaladvice.org.za/docs/chap05/02.html, last accessed 13/07/2015.

[117] Ibid.

3.4.1 *The Labour Court and the council for conciliation, mediation and arbitration*

The Labour Court is South Africa's largest specialised court and presides over a larger number of cases than the other specialised courts in South Africa. For this reason, the Labour Court will be looked at largely in order to determine if the notion of specialised courts is workable in a South African context. The Council for Conciliation, Mediation and Arbitration (CCMA) will be looked at briefly in order to determine if such an additional body is a viable option for other specialised courts, more specifically an IP court.

3.4.1.1 the formation of the Labour Court and alternative dispute resolution (ADR) mechanisms for labour matters:

The Labour Court[118], the Labour Appeal Court[119], Council for Conciliation, Mediation and Arbitration (CCMA)[120] and the bargaining council[121] were created by statute, namely the Labour Relations Act[122] (LRA), in an effort to make access to redress more accessible in terms of labour matters. Matters are first referred to the CCMA for conciliation thereafter if the matter has not been resolved a certificate of non-resolution is issued[123]. When such a certificate is issued the matter, depending on its nature, will be either referred to arbitration by the CCMA or adjudication by the Labour Court[124]. A matter heard by the Labour Court can then be appealed to the Labour Appeal Court. The LRA also allows for a party to the matter to request that the matter be arbitrated by the CCMA instead of the matter proceeding for adjudication by the Labour Court[125].

[118]Section 151 of the Labour Relations Act 66 of 1995.
[119]Section 167 of the Labour Relations Act of 1995.
[120]Section 112 of the Labour Relations Act 66 of 1995.
[121] Section 20 of the Labour Relations Act 66 of 1995.
[122]66 of 1995.
[123]Mathiba, M G. (2012), 'The jurisdictional conflict between Labour and Civil Courts in labour matters: A critical discussion on the prevention of forum shopping', Masters of Law, University of South Africa, Pg 8.
[124]Ibid.
[125]Section 141(1) of the Labour Relations Act 66 of 1995.

The Labour Court was created due to the troubled workings of the previous Industrial Court which heard all labour law matters[126]. The Labour Court has the same status and power as a High Court in South Africa and has inherent powers relating to matters within in its area of specialisation[127]. A matter that deals with labour issues thus has to be decided either by the CCMA or the Labour Court. The generalist High Courts cannot be approached in such instances. Specialised Labour Courts did not only come to fore following the formation of the Labour Courts as one knows them now, there is a long history of specialisation in the dispute resolution process of labour matters due to the specific expertise required in determining such issues[128].

The Labour Court directs cases away from the generalist courts which often experience severe case backlogs. It thus prevents further case backlogs and provides more efficient remedies to litigants with labour. The Labour Court, as a part of one of its aims, continues to develop labour law and provides strong precedent due to the expertise presiding over labour matters. The Labour Court has seats in Cape Town, Durban, Johannesburg and Port Elizabeth[129]. Hence it is accessible to larger numbers of the public.

Van Eck points out, importantly, that on a global scale specialised bodies and courts are utilised in the resolving of labour disputes[130]. The Labour Court was formed in an effort to provide speedy and cheap remedies to employers and employees involved in legal disputes to avoid any burdens that a looming dispute could have on either of the parties and further to assist dismissed employees who often have no income to fund their legal dispute[131]. In addition, the Labour Court was created in an effort to provide a more accessible institution for litigants wishing to litigate on their labour matter by providing Courts and ADR bodies around the country[132]. Labour law had also developed

[126]Landman, A A.(1996) "The new Labour Court of South Africa", Advocate. Pg 1.
[127]Ibid.
[128] Van Eck S, (2005) 'The constitutionalisation of labour law: No place for a superior labour appeal court in labour matters (part 1): Background to South African Labour Courts and the Constitution', 25 Obiter 549. Page 551.
[129]'The Labour Court in South Africa', (2014), South African History Online. Available at http://www.sahistory.org.za/article/labour-court-south-africa. Last accessed 13 July 2015.
[130]Supra note 128, page 551.
[131] Supra note 128, page 552.
[132] Ibid.

into a niche area requiring experts to interpret and develop the law and to add to the development and strengthening of labour law[133].

Bargaining Councils are councils registered under the LRA which are formed to deal with labour disputes belonging to a specific industry[134]. A Bargain Council's function is similar to that of the CCMA in terms of resolving disputes however, they preside over matters only in the specific industry that they are accredited to deal with[135]. If there is a bargaining council in a specific industry, then the CCMA would not have jurisdiction to resolve a dispute emanating in that specific industry[136].

The Labour Relations Act has instituted a specialised route for the litigation and resolution of labour matters. As the concept of a specialised court with the status of a high court is evidently operational within South Africa it is imperative to consider the pros and cons of such a court and relate those to the possibility of a specialised dispute resolution mechanism for IP matters.

3.4.1.2 the Labour Court as a precedent for the formation of a specialised IP court:

The Labour Court is an example of a workable specialised court in the South African judicial system which may advance the idea that specialised courts in respect of other niche areas of law, such as IP, may be viable. However as much as the Labour Court may be accessible to the public due to its various divisions and provide personnel with specialisation in the field to preside over matters, the court does also have its challenges. The purpose behind the institution of the Labour Court is to provide expeditious resolutions to labour matters[137]. However due to the high volume of cases being referred to the

[133] Supra note 128, page 552.
[134] Section 28 of the Labour Relations Act 66 of 1995.
[135]'Introduction to the Establishment of a Bargaining Council in South Africa' (2015). Bargaining Council, Available at http://www.allardyce.co.za/bargaining-council/. Last accessed 24/02/2019.
[136] "Bargaining Councils- What is it and how does it work?" (2018). Available at http://lwo.co.za/bargaining-councils-work/. Last accessed 21 August 2018.
[137]Naidoo M, (2018), "Hopeless cases to the Labour Court could cause you to forfeit your fees", De Rebus. 1st June 2018, Page 42. Available at http://www.derebus.org.za/employment-law-update-hopeless-cases-to-the-labour-court-could-cause-you-to-forfeit-your-fees/. Last accessed 24/02/2019.

Labour Court a long-standing backlog had ensued which in essence defeats the purpose of the institution of the court[138].

Similar to labour matters, IP matters also require specialised personnel to preside over matters and expeditious turnaround times[139]. However, these reasons alone would not necessitate the institution of a specialised IP court. The Labour Court has presented many challenges within the specialised court structure and has been shown be unable to achieve its main objective which is to decrease the backlog of matters and deal with matters expeditiously[140]. In taking this into consideration as well as considering that the number of IP matters coming to the fore may not be as great in number as labour matters the viability of a specialised court for IP would at first glance not appear to be the most reasonable and cost-effective route to adopt.

Currently IP matters find themselves battling amongst the generalist courts case backlog and the delay this causes negatively impacts on the value of the IP[141]. Due to the rapid pace at which technological advancements are implemented the need for efficient and proper protection of IP becomes more imperative in our modern-day society[142]. Hence a speedy alternative should be considered and should not be negated merely due to the hardships being experienced by the Labour Court.

Currently procedures allow for a Commissioner to preside over IP matters. However, such decisions often fail since they are not decided by trained personnel with a considerable amount of experience in the field of IP litigation. A specialised court would ensure that personnel working and presiding over matters are trained and up to date with developments and changes in the field which would lead to the setting of stronger precedent and a more coherent system of laws relating to IP matters[143].

[138] Supra note 137.
[139] Supra note 7, page 11-12.
[140] Supra note 137.
[141] Supra note 85, page 2.
[142] Ibid.
[143] Supra note 7, page 9.

IP matters are only heard in Pretoria which negatively impacts on the accessibility of the court to the public which in turn increases the costs of litigation. However, the mere introduction of a specialised IP court will not solve all problems, as the small number of IP matters presenting themselves in South Africa may not necessitate the need for various divisions of a specialised IP court spread across the country. The majority of IP disputes are between companies and not between working class individuals as seen with labour matters. Hence the implementation of a specialised IP court would not necessarily bring an influx of IP matters to the courts as did with the Labour Court. Regard has to be given to the fact that IP matters, being civil claims, are often settled out of court as most businesses choose not to incur the costs of protracted litigation.

In addition, small businesses and individuals often are deterred from IP litigation due to the costs incurred in litigation. Hence a cheaper alternative may be required. It is clearly evident that while there is reasoning to support the formation of a specialised IP court however it may not be necessary to implement a structure as large as that created for the resolution and litigation of labour matters. In considering the viability of, and need for, a specialised IP court in South Africa reasons similar to those which justified the formation of the Labour Court could be used to support the institution of a specialised IP court.

Additionally, the CCMA is an immensely helpful assistive mechanism to the Labour Court. It is important to point out that a large part of the success of the Labour Court is due to the assistance provided by the CCMA. The CCMA adopts certain measures in order to improve the efficiency of the handling of Labour Law matters. These measures include the following[144]: The LRA provides that all conciliations must be conducted in a thirty day period unless agreed otherwise by the parties involved, the CCMA sets an annual target of aiming to settle seventy percent of the matters that reach its tables, the CCMA

[144] Adapted from Bhorat, H, Pouw K and Mncube L, (2007) in "Understanding the efficiency and effectiveness of the dispute resolution system in South Africa: An analysis of CCMA data").Available at http://www.labour.gov.za/DOL/downloads/documents/research documents/CCMA%20September%2007%20v7%20-%20FINAL.pdf . Last accessed 1/05/2015. Page 23-25.

provides limits as to the number of cases a Commissioner may postpone and the CCMA provides an internal measure which provides that all arbitrations must be settled in a sixty day period from the time the matter was referred for arbitration.

Such an assistive body is a viable consideration as a step forward in providing a specialised forum for the resolving of IP matters. Similar measures, such as those provided by the CCMA, can also be adopted in order to ensure efficiency and effectiveness in the resolution of IP disputes in South Africa. The Labour Court and CCMA are indicative of the success of such specialised forums in South Africa. However, they do present with challenges of their own.

In totality the dispute resolution process created by the LRA has helped direct complicated matters requiring expertise in the labour law field away from a much larger and more widespread number of generalist courts. Had there not been such a specialised process in place it would have resulted in inconsistent decision making across numerous jurisdictions resulting in the inconsistent development of labour law and a lack of strong precedent. This would have inevitably resulted in an increase in legal expenses for parties concerned and a lack of a clear and strong protection for affected parties. The Labour Courts thus reinforce the idea that the institution of a specialised court is a highly workable idea in a South African context despite its challenges.

3.4.2 The Land Claims Court

The Land Claims Court was established in 1996 and is another example of a specialised court in South Africa. The court is a creature of statute in that it was created by the Land Restitution Act and it handles matters dealing with land restitution and land claims[145]. The court has the same status as a High Court in South Africa and appeals from this specialised court are to the Supreme Court of Appeal[146]. The main office of the Land Claims Court is in Randburg. However, in keeping with Section 34 of the Constitution, which deals with

[145] The Land Claims Court of South Africa. DOJ. Available at http://www.justice.gov.za/lcc/about.html. (Last accessed 13 July 2015).
[146] 'Courts in SA.'DOJ. Available at http://www.justice.gov.za/about/sa-courts.html. (Last accessed 13 July 2015).

ensuring that courts are accessible to litigants, the court is permitted to hold hearings anywhere in the Republic and can do so in an informal setting if the situation only allows for such[147].

More specifically the court decides on matters which are referred to it either by the Land Claims Commissioner, or from individuals approaching the court directly when the issue relates to affected land owners[148]. The court deals with matters relating to the Restitution of Land Rights Act, the Labour Tenants Act and the Extension of Security of Tenure Act[149]. In relation to Extension of Security of Tenure Act the various Magistrates' Courts also have jurisdiction to preside over matters arising from this Act. However, these decisions are subject to automatic review by the Land Claims Court[150].

Giving the large injustices created by apartheid the number of land claims that were brought to the court was significant as almost all South Africans land rights were impacted upon during the apartheid regime. However, despite the large number of claims the court was faced with from 1995 until 2011, the specialised court managed to finalise 95% of the claims that were submitted to it[151]. The remanding 5% dealt with more complex claims relating to rural pieces of land[152]. Such statistics are evidence of the effectiveness of such a specialised court, which still continues to adjudicate on matters many years later.

It is yet again evident that the institutions of a specialised court in niche areas of law prove to be successful in our judicial system. They are able to work efficiently and provide redress in matters which need to be decided as quick as possible, as in this instance in which land is concerned. Importantly the institution of such a court allows for important issues dealing with land to be dealt with in a timeous manner away from the backlogs in the general courts. An important measure to note in the workings of the Land Claims Court is that it allows for informal hearings to be held around the country despite the actual

[147] Supra note 145.
[148] Supra note 145.
[149] Supra note 146.
[150] Supra note 145.
[151] Pienaar, J M. (2011) 'Restitutionary Road: Reflecting on good governance and the role of the land claims court'. PG 32.
[152] Ibid.

court being situated in Randburg. This assists in facilitating access to court and more efficient remedial action for those whose rights are infringed. The Land Claims Court is an example of the viability of specialised mechanism for dispute resolution in South Africa.

3.4.3 Other specialised courts in South Africa

3.4.3.1 Special Income Tax Court

The Special Income Tax Court is another example of a specialised court in South Africa. The court deals with matters concerning disputes between taxpayers and the South African Revenue Services which deals with income tax assessments of more than R100000[153]. The court sits in the provincial division of the High Court and the matters are adjudicated upon by a judge who is assisted by an accountant with no less than 10 years' experience[154]. Appeals from decisions of this specialised court are heard by the Supreme Court of Appeal.

3.4.3.2 Divorce Court

The Regional Courts Amendment Act came into effect in 2010 and allowed for regional divisions of the Magistrates' Courts to deal with divorce matters. This in turn lead to a lessening of the case backlogs in the High Courts[155]. It has also helped provide litigants with easier access to courts making the divorce process easier and quicker for the parties concerned[156].

3.4.3.3 Maintenance Court

The Maintenance Courts are situated in the Magistrates' Courts around the country and assist those parents who are not receiving maintenance for their

[153] 'The South African Judiciary'. "High Court". Available at http://www.judiciary.org.za/high-courts.html Last accessed 13/07/2015.
[154] Supra note 146.
[155]'Divorce Laws'. "A guide to divorce and separation in South Africa" .Available at http://www.divorcelaws.co.za/the-divorce-process-in-south-africa.html. (Last accessed 13 July 2015).
[156] Supra note 146.

children[157]. There is a maintenance officer who is situated in each of these courts who assists those seeking maintenance, hence an attorney is not required in such courts[158]. This helps make the process more accessible to

parents and the provision of such a specialised division helps to provide speedy access to redress in such instances.

3.4.3.4 Equality Courts

The Equality Courts preside over matters dealing with hate speech, harassment and unfair discrimination[159]. A specialised court was created for such matters in order to ensure that affected parties receive quick remedies for their claims[160]. The cases brought to the equality court are dealt with in an informal manner and allow for the participation of the parties involved.

3.4.3.5 Children's Court

The Children's Court is a special court in South Africa which deals with issues relating to children such as making decisions about children who are abandoned or neglected[161]. The court aims to provide for the needs of children and deals with them in a cautious manner. The court deals with all matters except those of a criminal nature and can be approached by any child or interested person who believes that a child is in need of protection from the court[162].

3.4.3.6 Specialised Criminal Courts

[157] Supra note 146.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161]'Family law'. Available at http://www.justice.gov.za/vg/children.html. (Last accessed 13 July 2015).
[162] Ibid.

There are various specialised criminal courts in South Africa. The Child Justice Court deals with minors who are in trouble with the law. The courts were instituted on the 1 April 2010 for children in conflict with the law and aims to create a child justice system in order to provide for the best interests of the child when adjudicating on matters related to them[163].

The Sexual Offences Court was set up to provide an easy process for victims of sexual offences to lay a charge and also to receive the required care and respect due to the sensitive nature of the ordeal they have endured[164]. Sexual Offences Courts were introduced in South Africa in 1993 and by the year 2005 there were 74 sexual offences courts spread across the country. The plan was to implement and upgrade 106 Sexual Offences Courts over a 10 year period and this plan is still ongoing with more Sexual Offences Courts to be established going forward[165]. Such courts were established to aid in improved witness statements, improved case finalisation turnarounds, reduced offences and speedy justice for victims of sexual offences[166].

The Specialised Commercial Court was instituted in November 1999 and is situated in Pretoria. It is mandated to hear matters brought by the Special Commercial Crime Unit. The court deals with statutory offences relating to fraud and theft in business activities as well as common law instances of fraud[167]. The court has its own set of prosecutors who head up matters in the court[168].

These courts provide evidence of the fact that specialised courts are not a pariah to the criminal justice system. The continued implementation of various courts within such a system shows the effectiveness of courts in South Africa in aiding to provide speedy justice for victims.

---

[163] 'Child Justice'. Available at http://www.justice.gov.za/vg/childjustice.html. (Last accessed 13 July 2015).
[164] Supra note 146.
[165]'SA to set up more sexual offences courts'. (2014). Available at http://www.southafrica.info/services/rights/justice-160714.htm#.VaUJjF8ipdg. (Last accessed 13 July 2015).
[166] Ibid.
[167] Chapter 4: The specialised commercial crime court. Available at https://www.iss**africa**.org/pubs/Monographs/No76/Chap4.pdf . Last accessed 13/07/2015.
[168] Ibid.

3.5 Conclusion

It is for the most part evident, from the above illustration of the various specialised courts in South Africa that the idea of specialised courts has proven to be a successful mechanism in achieving speedy and reliable adjudication of matters. The courts largely aid in reducing the generalist court backlogs and are more accessible to litigants seeking redress. A major advantage of such courts has proven to be the expertise that such courts bring forth which helps strengthen and develop laws and the protection of rights in South Africa. It is evident that the specialised courts in South Africa have been long running, with most having over a decade of experience. This shows that the institution of such courts is effective and assists our judicial system in providing efficient and effective access to redress from such courts.

Craig Urquhart[169]speaks specifically about the role of special courts and the immense influence they had on the success of the 2010 soccer world cup. He states that special courts aided in reducing crime to provide a safer environment for tourists as well as an elevated reputation for South Africa as a whole. This thus reinforces the fact that special courts have shown a large amount of promise in terms uplifting the nation as a whole as they provide stringent judicial control over the matters they specialise over. Hence, in a broader spectrum, specialised courts are highly assistive and if a specialised IP court is instituted it would boost the international perspective of South Africa's ability to provide strong protection of IP rights.

South Africa, already having special court structures within its jurisdiction, can adopt procedures utilised in such courts in the formation of a specialised IP court. Useful measures include the procedure utilised in the Land Claims Court which allows for hearings to be carried out anywhere in the country despite the court being located in Randburg. This would assist in providing accessible dispute resolution for IP matters. In addition depending on South Africa's financial restraints, it would also cut costs by not requiring the implementation of various special IP courts around the country.

Measures adopted to ensure efficiency in the Labour Court, and more specifically the CCMA, can be adopted in the formation of a special IP court. Having an accessory

[169] Urquhart, C. (2010). 'Special courts the key to world cup success' 12 June 2010. Available at http://www.southafrica.info/2010/project2010column63.htm#.VaONOl8ipdg. (Last accessed 13 July 2015).

body should be considered in the implementation of a special IP court. However, giving the complexities of IP matters and the need for settled precedent an alternative dispute resolution system alone would be insufficient in the development of expertise in South African IP law.

Specialised courts have only proven to benefit and make justice in specified areas more attainable. Hence, in a niche area such as IP, the idea of such a court would seem to provide concise protection measures in a complex area of law. It important to note that the institution of the various specialised courts discussed above is evidence of the fact that the idea of a specialised court in South Africa is an established and workable idea. Importantly, not only are special courts prominent in South Africa, the retention of such special courts in South Africa is evidence of the fact that they provide cost effective and efficient administration of justice. By adopting the methods and measures utilised by the already established special courts in South Africa, the implementation of a special IP court can be a viable option to consider going forward.

Many foreign jurisdictions have also implemented specialised forums to adjudicate IP disputes. Keeping in line with international trends in law and litigation is important in order to ensure that the best system is in place in an effort to achieve justice. In addition to this, by South Africa aligning itself with trends in the international arena, foreign jurisdictions would have more confidence in the protection of their rights in South Africa. Given the global nature of IP rights, this is a significant consideration for South Africa. The following chapter will, in light of this, discuss international trends in terms of the litigation of IP matters.

4. INTERNATIONAL TRENDS IN INTELLECTUAL PROPERTY RESOLUTION

4.1 Introduction

The technological complexities inherent in IP matters demand a system of litigation that functions well, and the global arena has moved progressively in this regard with the handling of IP matters. Legal systems around the world have adopted various types of specialised forums which deal with IP issues. These forums provide an avenue in which technical IP matters can be resolved with the expertise and efficiency required to safeguard the interests of IP rights holders. Such specialised forums have not only been popular in the world's leading economies but in developing nations as well.

This chapter will focus on selected specialised IP litigation systems around the globe. Although South Africa, as a developing country, may have its challenges in terms of finance and resources the protection of IP rights may contribute to the strengthening of the economy. Further, it would be helpful for South Africa to adopt a system for the protection of IP rights that is consistent with international tried and tested litigation trends.

4.2 Types of Specialised Forums

Various jurisdictions around the globe adopt different types of judicial mechanisms to assist in protecting and enforcing IP rights. The particular system chosen by any one country at any particular time is based on that country's resources, financial constraints, suitability of the chosen mechanism to fit into the country's current legal system, the availability of expertise in the form of legal practitioners and presiding officers and the need for such a specialised forum[170].

Taking into consideration these specific needs and the unique circumstances presented in every jurisdiction globally, a system tailored to the needs of the country is chosen. However, notwithstanding the uniqueness of every jurisdiction, there have

[170] Pinyosinwat, Jumpol.(2010). "A model for a specialised intellectual property court in developing countries".Doctor of Laws, Waseda University. Page (ii)

been a few systems which recur within the various jurisdictions. The most popular systems are the following[171]:

(i) specialised IP divisions within the generalist courts;
(ii) specialised IP courts, which are commonly appellate division courts that preside over IP matters and
(iii) specialised tribunals which preside over different types of IP matters.

These different forums will be separately examined, and the international trends extrapolated from such systems will be described.

4.3 Specialised Divisions within the Generalist Courts[172]

4.3.1 *Japan*

On 1 April 2005 an Intellectual Property High Court was created within the structure of the Tokyo High Court as a specialised division to preside over IP disputes. The court mainly deals with IP appeals from the district courts which fall within its jurisdiction. There are 18 judges available to this division of the High Court. In addition, the court appoints judicial research officials who assist the judges by conducting research relating to the technical aspects of the cases[173]. Expert Commissioners are also often used in the IP High Court[174]. These expert Commissioners are individuals such as university professors, researchers, patent attorneys and the like. They are employed on a part time basis and are selected according to their suitability to the matter before the court[175].

The IP High Court can be utilised as a court of first instance in terms of matters regarding trademark rights, design rights, patent rights and utility model

[171] Supra note 170.
[172] Ibid.
[173] Shinahara, K (2005), "Outline of the Intellectual Property High Court of Japan", AIPPI Journal, Available at http://www.ip.courts.go.jp/vcms_lf/200505.pdf. Last accessed 24/02/2019/ Page 134-137.
[174] Ibid.
[175] Ibid.

rights[176]. The IP High Court is utilised as a court of second instance in terms of cases handled by the District Courts[177].

Specifically, with regards to patent litigation, the court of first instance for patent infringement litigation is the Tokyo or Osaka District Court. Any appeals from there fall within the jurisdiction of the IP High Court[178]. The IP High Court also has jurisdiction over decisions taken by the Japan patent office[179].

4.3.2 Italy

The Specialised Divisions Act in Italy, which came into being in 2003, created 12 divisions which deal specifically with industrial property litigation. These are essentially generalist courts with special divisions at both the trial and appeal level. This piece of legislation provides for cases to be heard before judges who have expertise in the field of IP[180]. Such decisions can be taken on appeal to the IP rights division in which a panel of three judges will preside over the matter[181].

4.4 Specialised IP Courts[182]

4.4.1 *Thailand*

The Thailand Intellectual Property and International Trade Court (IP and IT court) was brought into being by the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court[183]. The court was inaugurated on the 1st of December 1997[184] The court utilises at least two "career judges" and one "associate" or lay judge to preside over all matters. The "career judges" receive specialised training in IP and have expertise of specific

[176]Supra note 84, page 60.
[177] Ibid.
[178]Supra note 84, page 61.
[179] Ibid.
[180] Di Cellere M, S. (2005) "Intellectual Property: The New Italian Industrial property code", Jones Day, available at http://www.jonesday.com/intellectual-property-the-new-italian-industrial-property-code-05-03-2005/. Last accessed 24/02/2019.
[181] Supra note 84, page 24.
[182]Supra note 170, page (ii).
[183]B.E. 2539 (1996).
[184] "The National Intellectual Property and International Trade Court" Available at http://www.ipitc.coj.go.th/info.php?cid=1&pm=1. Last Accessed 23/10/2015.

areas in IP[185], whilst "associate judges" are lay persons and have expertise in IP or IT[186]. It is important to note that the court was not established in order to provide enforcement procedures for IP rights which are distinct from the enforcement of general law[187], but to provide a user-friendly avenue in which expertise within the IP field can serve the needs of the commercial industry[188]. Provision was also made for training programmes for judges presiding over matters in the IP and IT court in order to ensure they are equipped to deal with the complexities of IP matters[189].

In an effort to make the court more efficient the court process calls for a "full day and continuous hearing" procedure to ensure that all hearings are completed without any adjournments in order to provide speedy trial times[190]. The court must deliver its judgment promptly after any hearing. IP cases thus have a quicker case roll out time as the procedures allow for IP trials to be completed within twelve months[191]. Should the matter go on appeal to the Supreme Court, this would take eight to twelve months to complete[192]. A "leap-frog" procedure is utilised in relation to cases that go on appeal. This entails IP matters jumping the general queue in the Supreme Court and being adjudicated by the specialist IP and IT division of the Supreme Court[193].

In the period 2009 to 2011 the IP and IT court heard 3348 civil and 17173 criminal IP cases[194]. This is evidence of the efficiency of the IP and IT court. The court has also been confronted with a vast number of cases since its establishment due, in part to its user-friendly nature. It has thus proven to be a positive improvement to the judicial system in Thailand.

---

[185] "International Survey of Specialised Intellectual Property Courts and Tribunals Survey",(2007), International Bar Association- Intellectual Property and Entertainment Law Committee, Page 30.
[186] Supra note 184.
[187] Aryanuntaka, V, 'Intellectual Property and International Trade Court: A new dimension for IP rights enforcement in Thailand' Available at http://www.thailawforum.com/articles/ipvichai.html (last accessed 24/10/2015).
[188] Ibid.
[189] "The Central Intellectual Property and International Trade Court of Thailand" Available at http://artnet.unescap.org/tid/projects/infringing-goods-thai.pdf. Last accessed 24/10/2015.
[190] Supra note 185, page 30.
[191] Ibid.
[192] Ibid.
[193] Supra note 187.
[194] Supra note 189.

4.4.2 China

China is new to the specialised IP court system. The decision to implement specialised IP courts within the Chinese court structure was due to the inconsistencies experienced in the various tribunals which previously presided over IP matters[195]. Three specialised courts were established in December 2014 and are situated in Beijing, Shanghai and Guangzhou[196]. The Specialist IP courts in Beijing and Shanghai have jurisdiction over cases arising in their respective cities whilst the Guangzhou court has cross regional jurisdiction over the Guangzhou province[197]. These three areas were chosen due to the high volumes of IP litigation in these areas and the prevalence of IP experts within these cities[198].

The specialised IP courts are presided over by Chief Judges who are assisted by technology investigators[199].The courts have jurisdiction over civil and administrative IP matters and all appeals from the decisions of the specialised IP courts are heard in the local People's High Court[200]. The court in Beijing consists of four distinct tribunals and 25 experienced IP judges, the court in Guangzhou is made up of various individuals tribunals each which preside over copyright, patent, trademark or unfair competition cases and the court in Shanghai consists of ten IP judges each with a considerable amount of experience in presiding over IP matters[201].

[195] Benjamin Bai, (2014), "Specialised IP Courts in China: One Giant Step". Available at http://kluwerpatentblog.com/2014/12/10/specialized-ip-courts-in-china-one-giant-step/. Last accessed 25/10/2015.
[196] Li, X and Zhang, H. (2017), "Chinas specialised IP Courts", Kluwer Patent Blog, available at http://patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts/. Last accessed 24/02/2019.
[197] Lam H, (2014), "China's new intellectual property courts: the wait is finally over". DLA Piper. Available at https://www.dlapiper.com/en/global/insights/publications/2014/11/china-new-ip-courts-wait-is-over/. (last accessed 30/11/2015).
[198] Fisher, S and Wong, D,(2015), "Specialised IP courts in China are opened for business". Lime green IP news. Available at http://www.limegreenipnews.com/2015/01/specialized-ip-courts-in-china-are-open-for-business/. Last accessed 30/11/2015.
[199] Binxin Li and He Wengang, (2015), "China Patents: Latest developments on IP specialised courts" Available at http://www.managingip.com/Article/3421120/China-Patents-Latest-developments-on-IP-specialised-courts.html. Last accessed 24/10/2015.
[200] Ibid
[201] Ibid.

An innovative feature utilised by the Chinese judicial system is the use of technology investigators. The technological expertise of these individuals is utilised in the three respective IP courts to assist the judges in deciding the matters before them[202]. This process was adapted from the Korean, Japanese and Taiwanese judicial systems. These investigators are appointed as judicial staff to assist the court in understanding technical issues, to provide their expert opinion, to review documents containing technological issues in dispute, to participate in the hearing process and also to assist in the collection of evidence[203]. Thus, this measure provides additional assistance to the court in complex IP matters and increases the accuracy of the decisions made by these courts.

It is evident that the Chinese legal system provides a comprehensive structure of specialised IP courts. The formation of this structure was predicated by the wealth of IP litigation present in China as well as the development of expertise in IP litigation in order to further economic growth in China. A significant amount of importance has been given to the protection of IP rights in China as it has been recognised as a vital component in the present technologically advanced era. The establishment of such courts is regarded as step towards the improvement of IP decisions and the improved protection of IP rights[204]. Importantly, what is to be noted is that special procedures are provided for IP cases which enhance the process of litigating IP matters. In this regard Chuang Wang, Deputy Chief Judge of the IP tribunal of the Supreme Court, stated that "the IP courts not only indicate a significant reform to China's IP rights judicial protection system, but also are explorers and pioneers of China's judicial reform[205]".

4.4.3 Taiwan

Taiwan's Intellectual Property Court was established in July 2008 and has thus been in operation for approximately eleven years. The court was established in

[202] Xiaojun, G.(2015), "International Litigation". IP Litigator. September/October 2015. Page 33.
[203] Supra note 199.
[204] Supra note 195.
[205] Supra note 202.

an effort to provide efficient and professional adjudication of IP matters[206]. The main goal in providing for a specialised court was to "to keep pace in this era of globalization and to maintain scientific and technological competitiveness"[207]. The specialised IP court has the jurisdiction to hear all first and second instance civil cases, first instance administrative IP cases and criminal IP cases which are taken on appeal from the district court[208]. The specialised court consists of eight judges and one president. Each matter before the court is presided over by one judge, assisted by a technical examiner and two clerks, whilst appeals to the court are presided over by three IP judges[209]. The judges take a hands-on approach in cases by ordering parties to hand in their briefs and attend the hearings promptly, which fosters the efficiency and effectiveness of the court[210].

Prior to the launch of the court, a programme was initiated in which IP judges were trained in IP laws and practices so that they would be well equipped when presiding over matters[211]. A technical advisory division, consisting of technical examiners who have expertise in the fields of science and technology, was also created to provide expert advice on technical matters[212]. The technical advisers act under the orders of the judge and at the end of a trial the advisors and judges collaborate in their findings in an effort to provide sound judgments[213].

Prior to the establishment of the specialised IP court in Taiwan IP matters, such as the validity of patents or trademarks, were subject to adjudication by an administrative tribunal. This process could take several years and only once a tribunal had handed down a decision was a party able to approach a court for the determination of an infringement issue[214]. In addition to this, technical

206 "Taiwan: Latest data from IP court" Managing Intellectual Property, (2015). Available at http://www.managingip.com/Article/3471323/Taiwan-Latest-data-from-IP-Court.html. Last accessed 25/10/2015.
207 Bach, J. (2015) "The Taiwan IP court: Effective and efficient". Law 360. Available at http://www.law360.com/articles/121360/the-taiwan-ip-court-effective-and-efficient. Last accessed 25/10/2015.
208 Kuo, Y and Wang, J. "Taiwan: The IP court is ready to go". Available at http://www.buildingipvalue.com/07ap/p.292-296%20Taiwan.pdf Last accessed 25/10/2015. Page 1.
209 Supra note 207.
210 Ibid.
211 Supra note 208.
212 Ibid.
213 Tsai, T. "Introduction to the new Intellectual Property Court in Taiwan", AIPPI. Available at https://www.aippi.org/enews/2008/edition02/new-ip-court_taiwan.html. Last accessed 25/10/2015.
214 Ibid.

advice on patent matters was outsourced from other professional institutions[215]. Currently, matters relating to the validity of, or the infringement of, patents and trademarks all now fall within the jurisdiction of the newly established specialised IP court[216]. In addition, with the presence of the technical advisers, there is no need to utilise other professional institutions to provide judges with the required technical advice[217].

Taiwan's specialised IP court provides clear procedures for the handling of IP cases. The expertise provided by the judges and technical examiners strengthens the countries IP regime. The provision of trained judges and expert personnel provide an avenue for IP matters to be treated in a manner that gives full respect and consideration to the complexities of each matter.

4.4.4 Turkey

The Turkish legal system has established ten specialised IP courts, some of which deal specifically with civil IP cases whilst others deal specifically with criminal IP cases[218]. There are five civil and five criminal IP courts situated in the Istanbul, Ankara and Izmir areas[219]. In areas where there are no specialised courts the supreme board of judges and public prosecutors can designate IP cases to an ordinary court[220]. Civil IP rights matters are taken on appeal in the Eleventh Civil Chamber of the Supreme Court and Criminal IP matters are taken on appeal in the Seventh Criminal Chamber of the Supreme Court[221]. Judges in the specialised IP courts are trained and have technical expertise in relation to IP[222]. In the adjudication of patent cases the court appoints independent experts to assist the court in terms of the technical aspects of the matter[223].

[215] Supra note 213.
[216] Ibid.
[217] Ibid.
[218] "Guide to protection of intellectual property rights in Turkey: 2014" Available at file:///C:/Users/PC/Downloads/Guide%20to%20protection%20of%20intellectual%20property%20rights%20in%20Turkey.pdf. Last accessed 26/10/2014.
[219] "Screening report Turkey: Chapter 7 Intellectual Property Law" 19 October 2006. Available at http://www.ab.gov.tr/files/tarama/tarama_files/07/screening_report_07_tr_internet_en.pdf. Last accessed 26/10/2015. Page 9.
[220] Ibid.
[221] Supra note 84, page 29.
[222] Ibid.
[223] Ibid.

Turkey is an example of yet another jurisdiction that has opted for the formation of specialised IP courts. This increases the accessibility of the courts to members of the public. Importantly, Turkey has opted to outsource technical experts to assist the courts in technical patent matters. These characteristics add to the efficient handling of IP matters and provide for the unique components of technical IP matters to be dealt with by personnel with the required expertise.

4.4.5 Russia

On the 1 February 2013 a specialised IP court, located in Moscow, was introduced into the Russian Federation's legal system[224]. All IP cases are heard by a panel consisting of three judges[225]. The court also employs fifteen advisors all of whom have technical backgrounds in different arts and technologies[226]. Their role is to assist judges in terms of technical issues that may arise in cases. The court is also given the power to call upon other specialists who have expertise in the science and technology fields to advise the judges in the trials. However, they are restricted to only providing oral recommendations to the court[227].

The court is a court of first and second instance[228] in terms of IP matters and falls within the commercial court system. As a court of second instance it hears appeals from the Russian Patent Office and Chamber for Patent Disputes and appeals in terms of IP infringement actions[229]. The decisions handed down by the IP court may be taken on appeal to the President of the IP court.

---

[224] Kim, D, "Russia established specialised court for intellectual property rights" Available at http://www.ip-watch.org/2013/03/01/russia-establishes-specialised-court-for-intellectual-property-rights/. Last accessed 26/10/2015.

[225] Mueller L, "Establishment of Russia's specialised intellectual property court", 21 May 2013. Available at https://bricwallblog.wordpress.com/2013/05/21/establishment-of-russias-specialized-intellectual-property-court/. Last accessed 26/10/2015.

[226] .Tatiana. V. Petrova. "Russia; Specialised IP court now functioning" ,1 August 2013. Available at http://www.inta.org/INTABulletin/Pages/RUSSIASpecializedIPCourtNowFunctioning-.aspx. Last accessed 26/10/2015

[227] Ibid.

[228] Supra note 225.

[229] Supra note 225.

The specialised IP court in Russia depicts yet again the use of experts with technical expertise assisting in the adjudication of IP cases. It thus gives recognition to the fact that IP disputes are not just disputes of law but also contain technicalities for which the required experts need to be provided. Hence, the evident need for specialised personnel and specialised court structures.

4.4.6 Finland

In September 2013, Finland established a specialised IP court referred to as the 'Market Court'[230]. The court also hears cases relating to competition law, public procurement and market law. The court is a court of first instance for all IP matters except those IP matters regarding criminal offences. Criminal offences in relation to IP are still heard by the generalist district courts[231]. The court has appointed judges with considerably experience in IP litigation[232]. The decisions emanating from the court reflect this with as much as ninety percent of the court's decisions being considered final[233]. The Finnish Supreme Court has only granted leave to appeal in ten percent of matters which are of a precedential nature[234].

The court was established in an effort to create a more centralized procedure for IP litigation in Finland which allows claimants to combine different types of claims in a more efficient manner[235]. At the start of 2014 there were one thousand and one new cases lodged with the court and four hundred and four cases from the previous year, nine hundred and forty-two of these cases had been resolved by the end of the year[236]. There were four hundred and sixty-

[230] "The new intellectual property court in Finland" Available at http://www.lexology.com/library/detail.aspx?g=37f1367a-ad33-407d-be10-86b3cac25bf3. Last accessed 26/10/2015.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Roschier, M T. (2015) "Experiences of the new IP court in Finland" Available at http://whoswholegal.com/news/features/article/32417/experiences-new-ip-court-finland. Last accessed 26/10/2015.

four pending cases at the end of 2014. The court has improved the efficiency of IP dispute resolution due in part to the fact that it has managed to adhere to a case roll out procedure of less than six months[237].

4.5 Appellate Division Courts That Preside Specifically Over IP Matters[238]

4.5.1 Brazil

The Brazilian legal system provides for IP matters to be heard in the generalist courts, which have specialised divisions dealing with such matters[239]. In addition to this, Brazil also has appellate division courts which preside over IP case appeals. The Brazil Federal Court of Appeals for the second region which covers appeals from Rio de Janeiro and Espirito Santo established a specialised panel in February 2005 for matters involving Industrial and Intellectual Property[240]. The court constitutes eight panels of three judges each. The first and second panels are responsible for cases dealing with industrial and intellectual property matters and criminal and social security cases[241]. The Federal Court of Appeals for the first circuit covers appeals from the federal district and thirteen other states[242]. This court has two chambers that are dedicated to IP cases. There is also the Federal Court of Appeal for the third circuit that hears appeals from Sao Paulo and Mato Grosso do Sul. The court thus has three specialised IP chambers[243].

4.5.2 Germany

[237] Supra note 236.

[238] Pinyosinwat, J. "A model for a specialised intellectual property court in developing countries" (2010) Waseda University page (ii).
[239] Supra note 84, page 36.
[240] Caneiro R,B. (2013), "Brazilian federal court of appeals for the second region creates specialised panels and section for IP cases". Available at http://www.mondaq.com/brazil/x/226590/Trademark/Brazilian+Federal+Court+Of+Appeals+For+The+Second+Region+Creates. Last accessed 26/10/2015.
[241] Ibid.
[242] Supra note 84, page 36.
[243] Ibid.

The Federal Patent Court was established in July 1961 and consists of 118 judges who sit on 29 different panels. The court has jurisdiction in terms of cases dealing with the granting, denial and withdrawal of industrial property rights[244]. It is a court of first instance in terms of declaring patents a nullity and a court of second instance with regard to appeals from the German Patent and Trademark Office and decisions by the Federal Office of Plant Varieties[245]. The appeals are heard before a bench of five experienced judges in the appeals court. In terms of the infringement of IP rights, jurisdiction lies with general civil courts[246]. The district courts have specialised patent infringement chambers that deal with patent infringement cases[247]. With regards to the German Patent and Trademark Office, this is an administrative tribunal that hears IP cases. It consists of three technical members and legal personnel if required[248].

4.6 Specialised Tribunals which Preside Over Different Types of IP Matters[249]

4.6.1 *Australia*

The generalist courts are utilised for overall IP litigation, but such matters are presided over by specialist judges with experience in IP cases. There are specific patent panels in the Federal Courts of Victoria, New South Wales, and Queensland as well as a copyright, trademark, and design panel in Queensland; and a general intellectual property rights panel in Victoria[250]. Appeals from such federal courts are heard by the Australian High Court[251].

A copyright tribunal was established in Australia to deal specifically with copyright disputes. It is an independent body established in terms of section 138 of the Copyright Act of 1968. The president of the copyright tribunal is a Federal Court judge and the tribunal also consists of two deputy presidents,

[244]"The Court", Bundes Patent Gericht, available at https://www.bundespatentgericht.de/cms/index.php?lang=en, last accessed 24/02/2019.
[245]Ibid.
[246]Ibid.
[247] Supra note 84, page 24.
[248] Ibid.
[249] Supra note 238, page (ii).
[250] Supra note 84, page 13.
[251] Ibid.

who either are or were state or federal court judges, and three members who are copyright experts, not judicial officers[252]. The procedures adopted in the tribunal are of a less formal nature[253]. The tribunal may, at its own discretion or at the request of a party before it, refer a question of law to the federal court[254].

4.6.2 Kenya

The Industrial Property Tribunal was established in Kenya in 1989. It deals with matters concerning intellectual property and was established to provide specialised dispute resolution for matters relating to IP. The Tribunal's goal is to provide efficient, accessible and cheap dispute resolution options for the public[255]. The Tribunal's jurisdiction is limited by the Industrial Property Act of 2001[256]. The tribunal makes original decisions and also reviews decisions made by other primary decision makers. The Tribunal reviews administrative decisions made by the Kenya Industrial Property Institute. In doing so, the Tribunal bases its decisions on the facts and the law and will either revoke, invalidate, affirm or vary the decision of the Kenyan Industrial Property Institute[257]. The Tribunal is also the first instance adjudication body for various matters dealing with licensing disputes and infringements in IP[258].

4.7 Conclusion

There are a host of specialised forums available for the specialised adjudication of IP matters. The complexities of IP matters have made these specialised forums a common occurrence around the globe. When considering the implementation of a specialised IP court every jurisdiction has its own unique needs accompanied by certain resource related limitations which guide their decisions as to what type of

[252]"IP litigation in Australia", (2008), Available at http://www.claytonutz.com/docs/IPLitigationinAustralia_May%2008.pdf. Last accessed 26/10/2015.
[253]"Ibid.
[254]"About the tribunal", Copyright Tribunal of Australia. Available at http://www.copyrighttribunal.gov.au/about. Last accessed 24/02/2019.
[255]"About KIPI", Kenyan Industrial Property Institute. Available at https://www.kipi.go.ke/index.php/about, last accessed 26/10/2015.
[256]"Jurisdiction", Kenyan Industrial Property Institute, Available at http://www.kipi.go.ke/index.php/about-us/jurisdiction, last accessed 26/10/2015.
[257]"Functions and Powers", Kenyan Industrial Property Institute, Available at http://www.kipi.go.ke/index.php/about-us/functions-and-powers. last accessed 26/10/2015.
[258]Ibid.

specialised forum to adopt. However, there are common trends and methods that have been adopted when formulating special avenues for IP litigation.

The training of personnel such as legal practitioners and judges has been a common strategy and aim in the establishment of specialised IP forums. Internationally it has been done in order to keep up with the rapidly changing advancements in technology. In addition, the goal of instituting specialised IP forums was to expose legal practitioners and judges to IP cases in an effort to gain experience in applying IP laws. This is done in the hope that it would lead to consistent decision making. Keeping in mind that the adjudication of IP matters is often highly technical, the rationale behind most specialised IP forums is to train and increase the expertise available in the legal system in order to provide a stronger IP regime.

Another important trend to be noted is the appointment of in-house technical examiners. These examiners play an advisory role in the judicial system to adjudicate over IP cases. These examiners have proven to be a significant addition as they contribute to the correctness of decisions handed down by courts, especially in technical patent matters. The provision of in-house technical examiners also increases, by a considerable amount, the reliability of the decision being made in relation to highly technical aspects of IP matters. In addition, they assist the judge in understanding the technicalities of the matter at hand whilst the judge helps the experts understand the legal dimension of the case. This international trend has proven to be quite successful. This trend has been popular in specialised IP courts, specialised IP court divisions and in the specific tribunals. Given the uniqueness of IP matters it is a valuable strategy to learn from and adopt.

Streamlined procedures for IP matters have been another significant trend in IP litigation. This allows for IP claims to deviate from the usual civil procedure rules in order to allow for special rules to be adopted which suit the needs of IP matters. Given the transient nature of IP such procedures are important to ensure that the rights of individuals are protected in relation to their IP.

It is also popular for legal systems to have administrative tribunals that deal with different aspects of IP. However, it is also evident that such jurisdictions for the most part also have specialised courts or specialised divisions within the generalist courts which can review decisions by the tribunal or to which tribunal decisions can be taken

on appeal. In addition, there are jurisdictions that have tribunals dealing with one aspect of IP, e.g. copyright, however, all other aspects are adjudicated in specialist courts. It has proven to be insufficient to merely have a tribunal dealing with specific areas of IP. Such decisions are often appealed and jurisdictions without a special court or specialised division within the court find that these cases are lost in the backlog of the generalist courts. Hence specialised forums are utilised in addition to the administrative tribunals.

It is clearly evident that international trends depict that specialised forums are the most efficient and effective manner in which IP disputes are handled. Without such forums decisions are prone to delay and lack cohesiveness since they are not decided by experts within the field. South Africa can learn from such international trends and adopt the common global strategies that would improve the quality of IP judgments.

In keeping with international trends in IP litigation the following chapter will focus on the United Kingdom specifically. The United Kingdom has one of the oldest specialist IP litigation regimes and there is thus a wealth of experience to learn from. Further, the United Kingdom has recently remodelled their IP court structure to eliminate any inefficiencies experienced within their previous specialist IP court system. The Intellectual Property Enterprise Court (IPEC) was formed in this regard. The procedures of the IPEC will be discussed in an effort to determine the viability of the procedures and whether any of the features of the IPEC can be adopted in South Africa.

5. THE INTELLECTUAL PROPERTY ENTERPRISE COURT IN THE UNITED KINGDOM

5.1 Introduction

The newly implemented IPEC in the United Kingdom (UK) provides a cost effective and efficient litigation procedure for IP matters. It is vital to discuss the procedures introduced in the UK as it is the oldest specialised IP court and given the similarities between the judicial system of the UK and that of South Africa mechanisms utilised in the UK can be adopted in South Africa. The procedures in the IPEC will be discussed and the advantages and disadvantages of the IP dispute resolution system will be analysed. Recommendations will be made in order to provide guidance as to the procedures that can be adapted from the IPEC in the South African judicial system should South Africa consider the institution of a specialised IP court in the future.

The Patent County Court (PCC) was the court previously utilised for IP matters and was formed in 1990. The PCC heard matters in terms of their special jurisdiction relating to patents and designs and in terms of their general jurisdiction heard claims in relation to copyright infringement, trademark infringement, passing off claims and other rights in the Copyrights Designs and Patents Act of 1988[259]. The PCC was found to be inefficient as it had several procedural shortfalls. Importantly the court lacked the ability to place limits on the value of the cases brought before it and this caused confusion as to which claims could be heard by the PCC, which fell within the jurisdiction of a county court and which should be heard by the High Court[260].

In a media report The UK's minister for IP stated the following when the IPEC was introduced:

> "Today marks the end of a series of successful reforms, which have completely re-energised this court. The changes make it a viable place for businesses of any size

[259]"Guide to patents county court". Available at https://www.bristows.com/assets/documents/The%20Guide%20to%20the%20Patents%20County%20Court%20-%202012%20final.pdf. Last accessed 27/02/2019. Pages 2-3.
[260]Helmers C, Lefouili Y and Mcdanagh L. (2015) "Evaluations of the reforms of the Intellectual Property Enterprise Court 2010-1013". Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447710/Evaluation_of_the_Reforms_of_the_Intellectual_Property_Enterprise_Court_2010-2013.pdf (Last accessed 3/09/2015).Page 3.

to protect their IP and ensure access to justice at a fair cost for all rights holders and other businesses. These changes will also make it easier and cheaper for businesses in the long run as they will now be better able to understand and navigate the specialist IP courts if a dispute occurs. This will reduce the cost of legal services and level the playing field for smaller business".[261]

This depicts the vast hopes for improvement the creation of the IPEC had brought about, one of the most important being the wealth of IP matters that have been brought to the IPEC. In an article by Helmers (et al) the authors state that the reforms to the PCC (now the IPEC) have helped to achieve a division of IP cases between those that are heard by the generalist High Court and those heard by the IPEC. This division has provided for the more efficient hearing of IP cases and the reforms have led to a success in terms of IP litigation, according to the authors[262].

5.2 Procedures in the IPEC

The PCC underwent a reconstruction in order to form the IPEC[263]. There were three main reasons behind the reform. Firstly, to encourage smaller businesses to bring their IP claims to court, secondly to minimize the cost and turnaround times of matters and thirdly, to ensure fairness and legal certainty by providing the PCC with the status of a High Court to ensure the similar remedies are available for all those facing IP infringements[264]. The IPEC was established on the 1 October 2013with the purpose of providing a more accessible and more efficient IP litigation route. In addition, the restructuring of the court allowed for methods of litigation to be more streamlined which allows for more timeous hearing of matters thus reducing the costs of litigation[265]. The IPEC's main aim is to provide access to justice for parties with smaller and less

[261]"Sweeping reforms to IP court saves businesses time and money". (2015). Available at https://www.gov.uk/government/news/sweeping-reforms-to-ip-court-save-businesses-time-and-money. Last accessed 28/08/2015.
[262]Supra note 260, page 1.
[263] "The Intellectual Property Enterprise Court explained", (2015), *Keystone law* available at http://www.keystonelaw.co.uk/other/keynotes/2015/02/the-intellectual-property-enterprise-court-explained/, last accessed on 19 April 2015.
[264]Supra note 260, page 4.
[265]Supra note 260, page 1.

complex IP claims[266]. These claims are usually brought by private individuals and medium and small sized businesses. Such groups were previously deterred from IP litigation due to the delayed provision of the required remedy and the fact that IP litigation was previously unaffordable[267].

In making provision for cheaper routes to seek redress there has been a drastic increase in the number of claims lodged with the court[268]. The reconstruction also means that the PCC, which previously fell under the county court division, now falls under the jurisdiction of the Chancery Division of the High Court. All remedies and enforcement procedures that are available to the High Court are therefore available to the IPEC[269]. The IPEC now covers a range of IP issues such as copyrights, trademarks, patents, designs as well as any matter relating to IP rights.

The IPEC has two alternate routes which are available to litigants. The first is the multi-track route. This route is available for claims in which damages are capped at to 500 000 pounds and the parties are required to have a qualified legal representative[270]. The second route is the small claims track route for claims up to the value of 10000 pounds and the parties are not required to have a legal practitioner represent them if they are of the opinion that they don't require such assistance[271]. In terms of the multi-track route, the Court of Appeal is utilised for appeals against interim orders of the IPEC. In small track claims, appeals are to the IPEC. The judge that presides over such matters in the IPEC is known as the enterprise judge of the IPEC and is a specialised circuit judge with specialised IP knowledge[272]. Judges from the High Court and Patents Court are able to sit as an enterprise judge in the IPEC and when need

[266] "The Intellectual Property Enterprise Court- What is it?", (2013), *Ashfords* available at http://www.ashfords.co.uk/the-intellectual-property-enterprise-court-what-is-it/, last accessed on 19 April 2015.
[267] "An IP court for the Enterprise in the UK: The patents County Court is renamed, but the benefits remain", (2013) *Eversheds* available at http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Energy/The_Patents_County_Court_renamed_131017, last accessed on 19 April 2015.
[268] "The UK's new Intellectual Property Enterprise Court- A practical and inexpensive option for resolving IP disputes" (12013), *Dorsey* available at http://www.dorsey.com/eu_ip_uk_enterprise_court_disputes/, Last accessed 19 April 2015.
[269]The Intellectual Property Enterprise Court Guide, *Ministry of Justice* available at https://www.justice.gov.uk/downloads/courts/patents-court/intellectual-property-enterprise-court-guide.pdf, Last accessed on 19 April 2015.
[270]"What is the Intellectual property enterprise Court?"(2017). Available at http://mcdanielslaw.com/what-is-the-intellectual-property-enterprise-court/. Last accessed 24/02/2019.
[271]Supra note 269.
[272]Ibid.

arises, a senior member of the Intellectual Property bar will be allowed to sit as an Enterprise judge with regard to multi track claims[273]. In terms of small track claims a district judge presides over such a matter. Judges in the IPEC take an active role in matters before them as they are involved in advising parties in the matter as to what they should be addressing and what evidence should be provided to the court[274].

Parties to the matter can agree to utilise the IPEC for their particular matter, however the court will give regard to the fact that such an agreement does not affect the efficiency of the court, therefore if the matter requires an extensive hearing the matter can be transferred to the High Court[275]. The IPEC can take the decision to transfer cases to the High Court and the High Court can transfer cases to the IPEC. In doing so the courts consider the size/resources of the parties and the value/complexity of the claim[276]. A case can also be transferred from the IPEC to the High Court and vice-versa if a party to the matter believes that the court in which the matter is currently being heard is not appropriate for that specific matter.

The IPEC's main target groups are those entities or individuals whose cases do not require lengthy presentation of evidence and cross examination. It aims to provide for those cases that can be dealt with in a fairly short amount of time. The smaller business enterprises and private individuals are provided with the opportunity to litigate on IP issues at a cost-effective rate[277]. However, larger business enterprises area not prevented from using the IPEC. Previously larger businesses avoided litigating on smaller claims due to the cost of litigation out valuing the value of the actual claim[278]. Such claims can now be brought to the IPEC at a cost-effective rate. The IPEC aims to determine matters before it based on the parties' statements to avoid any delays in the process and keep on track with the two-day time period allocated to each case. Hearings are utilised only if they are absolutely necessary and

[273] Supra note 269.
[274] Supra note 268.
[275] Supra note 269.
[276] Supra note 260, page 3.
[277] Supra note 268.
[278] Supra note 266.

if such is needed, the court will opt for the most cost-efficient means to do so, usually by video conference[279].

5.3 Have the Reforms Of The IPEC Brought about Positive Changes with Regard to IP Litigation?

The IPEC was introduced to bring about various reforms as discussed above and it is thus imperative to consider whether or not the IPEC has achieved such reforms. In doing so the advantages and disadvantages of the reforms envisaged and the procedures of the IPEC will be considered it order to ascertain whether the reforms have brought about positive changes in IP litigation in the UK.

In an interview[280] conducted by Helmer et al they sought to examine whether or not reforms in terms of IP litigation in the UK have been proven to bring about positive elements to the IP litigation process. The study interviewed judges and solicitors whom had experience in terms of litigating in the IPEC.

5.3.1 Advantages of the IPEC

There has been unanimous agreement that the IPEC has improved access to justice for small and medium sized businesses as well as for private individuals as it has been approached by various parties from small scale inventors to medium sized businesses. The interview process provided that solicitors were of the view that 88% of litigants approaching the IPEC had more confidence in the courts ability to hear their matter[281]. The IPEC has been perceived to have brought about significant reform with regard to active case management. It attracts smaller and medium sized businesses as it provides for speedy handling of matters and gives parties a better view of the claim and what's at stake and can often lead to early settlement between parties[282].

[279]"Changes to IP enforcement in the UK", *Williams Powel* available at http://www.williamspowell.com/news-intellectual-property/changes-to-ip-enforcement-in-the-uk/, last accessed on 19 April 2015.
[280]Note that these are the views of a group of judges and lawyers working in the IPEC and thus depict their views.
[281]Supra note 260, page 7.
[282]Supra note 260, page 9.

The small claims track has also proven to be a positive reform as it provides a measure for smaller claims to be heard in an efficient and cost-effective manner[283]. Further, in utilising the small claims track, the losing party is not permitted to pay the costs of the winning party hence curbing costs further.

The process of active case management by a judge of the IPEC has led to parties often settling their claims after such active case management has occurred. This is due to the fact that since IP claims are complex active case management allows for the claimants to understand the claims at such a stage which enables them to make settlements[284]..Because settlements are less likely in IP matters due the complexities of such matters, having a specialist IP court in place which is capable of making a determination, with a case management system which enables litigants to see what the court determination is likely to be encourages settlement.

Another advantage of the IPEC has been the increase in claims that the court has received since it opened its doors. There was a significant increase in cases brought to the court for adjudication in the 2010-2011 period when the IPEC was introduced and an even greater increase in the number of cases in the 2012-2013 period in which the small claims route was introduced[285].There clearly appears to be a causal link between the reforms introduced by the IPEC and the increase in cases. The large number of cases filed at the IPEC since the introduction of the costs cap and the streamlined process shows that these were the most successful reforms of the IPEC[286].

There are several advantages to the IPEC and it has proven to be a court that has brought about significant reform to IP litigation in the UK since its inception. However, the court is not perfect and does not go without its difficulties. It is therefore important to consider the disadvantages that some of the processes of the IPEC pose.

5.3.2 The disadvantages of the IPEC

[283]Supra note 260, page 9.
[284]Supra note 260, page 10.
[285]Supra note 260, page 15-16.
[286]Ibid.

One of the major disadvantages relates to the reform made in terms of creating the small claims track in the IPEC. Claimants utilising the small claims track are unable to bring matters regarding patents or any registered designs. The reason for this is that these claims involve complex facts and the consideration of such complexities increases the costs of the matter which may go beyond the 10000-pound cap of the small track route[287]. For this reason, only matters relating to copyrights, passing off, trademarks and unregistered designs can be heard in the small track route. Further the 10000-pound cap is unrealistic as the loss suffered by claimants is often more. The small claim track, although created to improve access to the court for smaller businesses and individuals, proves at times to be difficult to access. Claimants wishing to use this route must state a request to use the small track claims route in their particulars of claim, their claim must fall below the 10000-pound cap and the defendant must consent to the use of this route[288]. The problem that arises is that larger businesses or individuals who oppose the claim choose not to consent to the small track route simply because they are able to afford expensive litigation costs. In addition, although the small track route does not require parties to be represented by lawyers this at times proves to be unrealistic since the legal processes and principles remain largely the same as in other processes and it proves difficult to lodge claims without the assistance of a legal representative[289].

The IPEC caps its costs at 50000 pounds and a claim for damages is capped at 500 000 pounds. This, while attracting clients to the court due to reduced costs, hampers the ability of certain litigants in terms of the amounts they wish to claim and importantly restricts the counsel they are allowed to utilise, since counsel's fees are restricted. Thus, the use of experienced counsel maybe restricted in the IPEC as their fees and the actual value of the claim may exceed the monetary limitations of the court[290]. Further the cap of 50000 pounds may still deter individuals or small claimants from approaching the court as it is still

[287]"How does the intellectual property enterprise court help the entrepreneurs". Gannons Solicitors. (2013). Available at http://www.gannons.co.uk/intellectual-property/how-does-the-patent-county-court-small-claims-track-help-the-entrepreneur/. Last accessed 3/09/2015.
[288] Ibid.
[289] Ibid.
[290]Supra note 270, page 7.

a large sum that they may be liable for if the court proceedings don't go their way.

5.4 Conclusion

It is evident that the IPEC has been a success overall despite the disadvantages. The streamlined processes and cost caps have increased litigants confidence in approaching the court with their matters. Active case management has also allowed for matters to be handled in a more timeous manner, in most cases decreasing case roll outs to just one day. Further the small track route has been a resounding success providing for the much-needed litigation avenues for small/medium sized businesses and the private individual. The small track route has also drastically improved the number of cases filed with IPEC thus making the court more accessible and resolving the issue of the cost of litigation out valuing a claimant's claim.

The disadvantages although present, has not proven to deter the public at large from approaching the court. The study also suggested that a system such as the small claims route is a usable idea for other jurisdictions in order to make access to justice in terms of IP disputes more accessible to the public[291].

Should South Africa consider implementing a specialised IP court the small track and multi-track routes would be useful procedures for South Africa to adopt. They would assist in encouraging individuals with lower value IP claims to approach court without being fearful that the cost of litigation may outweigh the value of their claim. Further having two such routes provides more structure to the litigation process. The small track route would also assist South Africa in reducing the costs of IP litigation. This is due to the fact that claimants utilising the small track route are not obliged to be represented by a legal practitioner. Further, should South Africa implement a specialised IP court, judges should take a more active role in the adjudication of matters similar to the approach taken in the IPEC. This would provide more efficient and effective case roll outs which would also help reduce the costs of litigation.

[291] Supra note 260, page 36.

6. CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The evolution of IP in modern times calls for efficient IP rights protection. This chapter will seek to provide a brief summary of the procedural recommendations made throughout the dissertation should South Africa consider the implementation of a specialised IP court. In making such recommendations the challenges of the implementation of such a court and its viability will also be discussed.

6.2 The Viability of a Specialised IP Court

It is submitted that it may be a viable option in the near future for South Africa to reconsider instituting a specialised IP court. The circumstances considered in 1997 by the Hoexter Commission, need revisiting in current times. The idea of a specialised court is not foreign to South Africa and has been seen to aid in the proper adjudication of cases falling within niche areas of the law. Further, existing specialised courts in South Africa have proven to reduce case backlogs within the general courts. In addition, there are currently no IP experts presiding over IP matters in South African courts. A special court can foster the development of such expertise and bring about the implementation of training programmes for IP judges, as is the case in many foreign jurisdictions.

Taking into consideration the international trends in IP litigation, it would only be logical for South Africa to progress in the direction of various other foreign jurisdictions in implementing a specialised IP court. Other developing countries have also instituted specialised forums for the adjudication of IP matters. South Africa, although having recently allowed for IP matters commercial in nature to be adjudicated in the specialised Commercial Court, still seems to be lacking in respect of a specialised adjudication route exclusive to IP matters. Financial implications will always be an important factor to consider when implementing a new court. However, internationally, it has been shown that the implementation of special courts with special procedures attracts claimants and gives them confidence in the system. The more claims that come to the court, the more self-sustaining the court will be. Further, finance is being given to various case backlog programmes that are being implemented. By utilising a

part of these funds to form a specialised IP court, the case backlog in the generalist courts would also be reduced. The formation of a specialised court is thus a viable option especially in an era of globalisation in which the economy is impacted by IP.

6.3 Recommendations for South Africa

The South African IP dispute resolution system contains many loopholes resulting in the poor adjudication of IP matters, as has been continuously mentioned. The major challenges to the implementation of a specialised IP court is the lack of specialised personnel to staff such a court, the costs involved in the implementation of a specialised IP court and an insufficient number of IP matters. In this regard the IPEC has shown that the implementation of a specialised court results in a larger volume of cases being brought to court. An increase in case volume will assist in meeting the expenses incurred in the implementation of such a court.

The small claims route and multi-track route are also useful procedural measures that can be utilised in South Africa. They would attract medium to small sized businesses and individuals as the small claims route provides a cheaper avenue for adjudication. This will thus result in an increased number of IP matters coming to the fore. Further, in the IPEC, the fact that judges take an active role in the matters before them assists in the efficiency of the court. Such a measure should be adopted in order to provide efficient case roll out times which would also reduce the costs of litigation.

Many foreign jurisdictions, including the IPEC, provide for streamlined procedures in relation to IP matters. This has proven to be an important measure in the success of various IP courts as the procedures provide for the specific needs of IP matters. It would thus be useful to adopt streamlined procedures in relation to IP cases and not to burden such matters with the usual civil procedure rules due to the transient nature of IP.

Importantly, various jurisdictions have staffed its specialised IP adjudication forums with technology examiners. This has proven to contribute significantly to the accuracy of IP judgements. The employment of such personnel in a specialised IP court in South Africa should be considered to ensure that strong precedent is developed. Further, the implementation of special courts has resulted in training programmes for judges in an effort to ensure that they are equipped to deal with the complexities of IP cases. Should

a special court be implemented in South Africa, such training programmes should also be implemented. This would not only ensure that judges will be well equipped to adjudicate IP matters, but additional personnel will have the opportunity to be trained in such a field.

The above recommendations would aid the implementation of a special IP court in South Africa. It would also aid in ensuring that the correct procedures are utilised given the unique nature of IP claims.

6.4 *Conclusion*

It has been 18 years since South Africa has seriously considered the implementation of a specialised IP court. The generalist courts still experience large volumes of cases and have large case backlogs which has been detrimental to matters involving IP infringements and to litigants awaiting relief. Establishing a specialised IP court will address this as well as providing other advantages. The long-term benefits in terms of developing IP law, consistency in interpreting IP law and in providing accessible redress options for South African people would weigh heavily against the costs of establishing such a court. In fact, the most serious objection the establishment of an IP court is the cost of doing so. It is submitted that the costs of instituting a specialised IP court would be recouped once the court has been instituted and more IP matters come to the fore. As the years move along the court should be able to sustain itself from the funds generated by the claims it adjudicates.

It is evident that specialised courts and specialised IP courts have been of great assistance in developing the law and providing cheap, efficient and reliable redress to claimants. South Africa should consider the implementation of a specialised IP court and utilise the successful processes of foreign jurisdictions to aid its task. Although currently many IP matters are settled prior to them reaching the inside of a court room this will not always be the case giving the rapid growth in globalisation, competition and the need to safeguard IP. Keeping all of the above recommendations in mind, a special IP court would prove to be largely advantageous to the protection of IP rights and the development of IP law in South Africa. The institution of a specialised and streamlined IP litigation system is a viable option globally and would prove to be so

locally, hence it is a consideration that the judiciary should consider assessing once again in the near future.

7. BIBLIOGRAPHY

Primary Sources

Statutes

- Copyright Act 98 of 1978.
- Designs Act 195 of 1993.
- Labour Relations Act 66 of 1995.
- Patent Act 57 of 1978.
- Registration of copyright of Cinematograph Films Act 62 of 1977.
- Trademarks Act 194 of 1993.

Secondary Sources

Books

- Altbeker, A *'Justice through specialisation? The case of the specialised commercial crime court'* in 'Chapter 3: Court specialisation in theory'. Available at http://www.issafrica.org/pubs/Monographs/No76/Content.html (Accessed 16 May 2015).
- Dean and Dyer. *Introduction to Intellectual Property Law*. Edition 1. Oxford University Press Southern Africa. (2014).
- Du Plessis E D. *Adams and Adams Practical Guide to Intellectual Property in Africa*. Edition 1. Pretoria University Law Press. (2012).
- Gibbons, J (1986) *"Intellectual Property Rights in an age of electronics and information",* US Congress Office of Technology, US Government Printing Office, page 297.
- Ramsden P. *A guide to Intellectual Property Law*. Juta and Company LTD. (2011).

Journals and Unpublished Academic work

- De Weraa J, (2016) *"Specialised Intellectual Property Courts- Issues and Challenges",* International Centre for Trade and Sustainable Development, page 24.

- Gramckow H and Walsh B (2013) Developing Specialized Court Services. Justice and Development working paper series 24/2013 - Legal vice Presidency – The World Bank.
- Gregory S. Intellectual Property Rights and South Africa's Innovation Future. Published by the South African Institute of International Affairs. (2008).
- Helmers C, Lefouili Y and Mcdanagh L. 'Evaluations of the reforms of the Intellectual Property Enterprise Court 2010-1013' (2015).
- International Bar Association, (2007), "International Survey of Specialised Intellectual Property Courts and Tribunals Survey".
- Landman, AA."(1996) "The new Labour Court of South Africa". Advocate.
- Pienaar, J M. 'Restitutionary Road: Reflecting on good governance and the role of the land claims court' (2011).
- Ramsden P. "A guide to Intellectual Property Law" (2011). Juta.
- Rottman D B. "Does effective therapeutic jurisprudence require specialized courts'. Court Review. (2000).
- Shinahara, K (2005), "Outline of the Intellectual Property High Court of Japan", AIPPI Journal, Available at http://www.ip.courts.go.jp/vcms_lf/200505.pdf. Last accessed 24/02/2019/.
- Van Eck S, 'The constitutionalisation of labour law: No place for a superior labour appeal court in labour matters (part 1): Background to South African Labour Courts and the Constitution' (2005) 25 Obiter 549.
- Zimmerman M. "Overview of specialized courts" (2009).International Journal for Court Administration.
- Zuallcobley, W R. (2012). "Study on specialised Intellectual Property Courts". International Intellectual Property Institute.

Theses

- Knobel, J C. The right to the trade secret. Doctor of laws, University of South Africa. (1996).
- Mathiba, M G. 'The jurisdictional conflict between Labour and Civil Courts in labour matters: A critical discussion on the prevention of forum shopping' (2012), Masters of Law, University of South Africa, (2012).

- Pinyosinwat, Jumpol. “A model for a specialised intellectual property court in developing countries” (2010) Waseda University page (ii).
- Richardson, R. Alternative dispute resolution in intellectual property law: A growing need for a viable alternative to court litigation. University of Cape Town (2013).

Commission Reports

- The Hoexter Commission’s Recommendations to establish a specialised court in South Africa. (1996) Available at http://www.polity.org.za/polity/govdocs/commissions/r3v1b2.pdf. (Accessed 16/04/2015).

Magazine Articles

- Alberts, W, (2008), “The Scope of Passing Off”, De Rebus: volume 2008, Issue 479, September 2008 , page 60-61.
- Makoko M ‘Specialised intellectual property courts: Where does South Africa stand on the global map’ Without Prejudice. Volume 14, Issue 2 (2014).
- Naidoo M, “Hopeless cases to the Labour Court could cause you to forfeit your fees”, De Rebus. 1st June 2018, Pg 42. Available at http://www.derebus.org.za/employment-law-update-hopeless-cases-to-the-labour-court-could-cause-you-to-forfeit-your-fees/. Last accessed 24/02/2019.
- Xioajun G “International litigation: The formation of specialised IP courts in China”. IP litigator. September/October 2015.

Internet Sources

- “About KIPI”, Kenyan Industrial Property Institute. Available at https://www.kipi.go.ke/index.php/about, last accessed 26/10/2015.
- “About the tribunal”, Copyright Tribunal of Australia. Available at http://www.copyrighttribunal.gov.au/about. Last accessed 24/02/2019.
- An IP court for the Enterprise in the UK: The patents County Court is renamed, but the benefits remain (18 October 2013)*Eversheds* available at http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/En

ergy/The_Patents_County_Court_renamed_131017, accessed on 19 April 2015.

- "Appeals and trials" Korean Intellectual Property Office. Available at http://www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=30300&catmenu=ek30300. 12 August 2014. Last accessed 26/10/2015.
- "Bargaining Councils- what is it and how does it work?" (2018). Available at http://lwo.co.za/bargaining-councils-work/. Last accessed 21 August 2018.
- Benjamin Bai "Specialised IP courts in China: One Giant Step" 10 December 2014. Available at http://kluwerpatentblog.com/2014/12/10/specialized-ip-courts-in-china-one-giant-step/. Last accessed 25/10/2015.
- Binxin Li and He Wengang "China Patents: Latest developments on IP specialised courts" Available at http://www.managingip.com/Article/3421120/China-Patents-Latest-developments-on-IP-specialised-courts.html. Last accessed 24/10/2015.
- Budget Vote Speech by Mr Andries Nel, MP, Deputy Minister of Justice and Constitutional Development, Friday, 10 June 2011, National Council of Provinces, Parliament. Available at http://www.justice.gov.za/m_speeches/2011/20110610_dmin_budgetvote-ncop.html. Last accessed 1/12/2015.
- Burke, C.(2017). Advantages and disadvantages of specialized courts. Available at https://legalbeagle.com/8398649-advantages-disadvantages-specialized-courts.html. Last accessed 24/02/2019.
- Changes to IP enforcement in the UK, *Williams Powel* available at http://www.williamspowell.com/news-intellectual-property/changes-to-ip-enforcement-in-the-uk/, accessed on 19 April 2015.
- Chapter 4: The specialised commercial crime court. Available at https://www.iss**africa**.org/pubs/Monographs/No76/Chap4.pdf . Last accessed 13/07/2015.
- Child Justice. Available at http://www.justice.gov.za/vg/childjustice.html. (Last accessed 13 July 2015).
- CIPC, "Patent Cooperation Treaty (PCT)", Available at http://www.cipc.co.za/index.php/trade-marks-patents-designs-copyright/patents/. Last accessed 23/02/2019.

- ‘Courts in SA.’ Available at http://www.justice.gov.za/about/sa-courts.html. (Last accessed 13 July 2015).
- Craig Urquhart. http://www.southafrica.info/2010/project2010column63.htm#.VaONOl8ipdg. ‘Special courts the key to world cup success’ 12 June 2010. (Last accessed 13 July 2015).
- Daria Kim. “Russia established specialised court for intellectual property rights” Available at http://www.ip-watch.org/2013/03/01/russia-establishes-specialised-court-for-intellectual-property-rights/. Last accessed 26/10/2015.
- Dean, O. “The Supreme Court of Appeal losing its shape”. The Anton Mostert Chair of Intellectual Property. Available at http://blogs.sun.ac.za/iplaw/2015/01/29/supreme-court-of-appeal-losing-its-shape/. Last accessed 16/04/2015.
- Di Cellere M, S. (2005) “Intellectual Property: The New Italian Industrial property code”, Jones Day, available at http://www.jonesday.com/intellectual-property-the-new-italian-industrial-property-code-05-03-2005/. Last accessed 24/02/2019.
- Divorce Laws. “A guide to divorce and separation in South Africa” .Available at http://www.divorcelaws.co.za/the-divorce-process-in-south-africa.html. (Last accessed 13 July 2015).
- Family law. Available at http://www.justice.gov.za/vg/children.html. (Last accessed 13 July 2015).
- Financial Mail. *Justice department: boost in fight against court backlog* (2014). Available at http://www.financialmail.co.za/specialreports/budget2014/2014/02/27/justice-department-boost-in-fight-against-court-backlog. (Accessed 20/11/2015).
- Fisher, S and Wong, D, “Specialised IP courts in China are opened for business”. Lime green IP news. Available at http://www.limegreenipnews.com/2015/01/specialized-ip-courts-in-china-are-open-for-business/. (last accessed 30/11/2015).
- Gray’s Inn Square Barrister Chambers. “Practice Summary” Available at http://4-5graysinnsquare.co.uk/barristers/louis-harms/. Last accessed 19/11/2015.

- “Guide to protection of intellectual property rights in turkey:2014” Available at file:///C:/Users/PC/Downloads/Guide%20to%20protection%20of%20intellectual%20property%20rights%20in%20Turkey.pdf. Last accessed 26/10/2014.
- Guide to patents county court. Available at http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=4&ved=0CCsQFjADahUKEwjFoYLhtdvHAhXFiRoKHaj4CxQ&url=http%3A%2F%2Fwww.cipa.org.uk%2Fdownload_files%2FGuide-to-the-Patents-County-Court-May-2011.pdf%2FE0944EFC-C29C-4A25-8E7B-A354BC9BE43E&usg=AFQjCNHED7YuIvTEipvj64i9kTVovk2s5Q . (Last accessed 3/09/2015).
- Haroon Bhorat, Kalie Pouw and Liberty Mncube in “Understanding the efficiency and effectiveness of the dispute resolution system in South Africa: An analysis of CCMA data” (2007) At pages 23-25. Available at http://www.labour.gov.za/DOL/downloads/documents/research-documents/CCMA%20September%2007%20v7%20-%20FINAL.pdf . Last accessed 1/05/2015.
- How does the intellectual property enterprise court help the entrepreneur’.Gannons solicitors. 9 October 2013. Available at http://www.gannons.co.uk/intellectual-property/how-does-the-patent-county-court-small-claims-track-help-the-entrepreneur/. (Last accessed 3/09/2015).
- Introduction to the Establishment of a Bargaining Council in South Africa” (2015). Bargaining Council, Available at http://www.allardyce.co.za/bargaining-council/. Last accessed 24/02/2019.
- “IP litigation in Australia” (2008), Available at http://www.claytonutz.com/docs/IPLitigationinAustralia_May%2008.pdf. Last accessed 26/10/2015.
- Joseph Bach. “The Taiwan IP court: Effective and efficient”. Law 360. Available at http://www.law360.com/articles/121360/the-taiwan-ip-court-effective-and-efficient. Last accessed 25/10/2015.
- Karjiker S and Kleyn M M. “Commentary: Draft Intellectual Property Policy Phase 1 2017”, The Anton Mostert Chair of Intellectual Property. available at http://blogs.sun.ac.za/iplaw/2017/11/08/commentary-draft-intellectual-property-policy-phase-1-2017/. Last accessed 23/02/2019.

- Labour Court in South Africa. Available at http://www.sahistory.org.za/article/labour-court-south-africa. Last accessed 13 July 2015.
- Lam Horace, “China’s new intellectual property courts: the wait is finally over”. DLA Piper. Available at https://www.dlapiper.com/en/global/insights/publications/2014/11/china-new-ip-courts-wait-is-over/. (last accessed 30/11/2015).
- Li, X and Zhang, H. (2017), “Chinas specialised IP Courts”, Kluwer Patent Blog, available at http://patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts/. Last accessed 24/02/2019.
- Markku Tuominen, Roschier “Experiences of the new IP court in Finland” Available at http://whoswholegal.com/news/features/article/32417/experiences-new-ip-court-finland. Last accessed 26/10/2015.
- Mueller L, “Establishment of Russia’s specialised intellectual property court” 21 May 2013. Available at https://bricwallblog.wordpress.com/2013/05/21/establishment-of-russias-specialized-intellectual-property-court/. Last accessed 26/10/2015.
- Paralegal advice. Chapter 5: Courts and Court Cases. Available at http://www.paralegaladvice.org.za/docs/chap05/02.html. (Accessed 13 July 2015).
- Publishers Association of South Africa. *Copyright Information Guide*. Available at http://www.publishsa.co.za/downloads/copyright_information_guide.pdf. Last accessed 18/11/2015. (Accessed 18/11/2015).
- Rodrigo Borges Caneiro. “Brazilian federal court of appeals for the second region creates specialised panels and section for IP cases” Mondaq.13 March 2013. Available at http://www.mondaq.com/brazil/x/226590/Trademark/Brazilian+Federal+Court+Of+Appeals+For+The+Second+Region+Creates. Last accessed 26/10/2015.
- SA to set up more sexual offences courts.Available at http://www.southafrica.info/services/rights/justice-160714.htm#.VaUJjF8ipdg. 16 July 2014. (Last accessed 13n July 2015).

- SAMRC. *Guide for inventors*. Available at http://ship.mrc.ac.za/sectioncpatents.htm. Last accessed 18/11/2015.
- "Screening report Turkey: Chapter 7 Intellectual Property Law" 19 October 2006. Available at http://www.ab.gov.tr/files/tarama/tarama_files/07/screening_report_07_tr_internet_en.pdf. Page 9. Last accessed 26/10/2015.
- South African Government. *Administration of justice*. Available at http://www.gov.za/about-government/government-system/justice-system/administration-justice. (Accessed 201/11/2015).
- South Africa: Compelling case for patenting in South Africa, Available at http://www.mondaq.com/southafrica/x/758056/Patent/Compelling+Case+for+Patenting+in+South+Africa, last accessed 23/02/2019.
- South African Institute of Intellectual Property Law. *Copyright.* Available at http://www.saiipl.org.za/introip/74-copyright. (Accessed 18/11/2015).
- Sweeping reforms to IP court saves businesses time and money. (2015). Available at https://www.gov.uk/government/news/sweeping-reforms-to-ip-court-save-businesses-time-and-money. Last accessed 28/08/2015.
- "Taiwan: Latest data from IP court" Managing Intellectual Property. 15 July 2015. Available at http://www.managingip.com/Article/3471323/Taiwan-Latest-data-from-IP-Court.html. last accessed 25/10/2015.
- Tatiana. V. Petrova. "Russia; Specialised IP court now functioning" 1 August 2013. Available at http://www.inta.org/INTABulletin/Pages/RUSSIASpecializedIPCourtNowFunctioning-.aspx. Last accessed 26/10/2015.
- The Anton Mostert Chair of Intellectual property. *Judging IP law*.http://blogs.sun.ac.za/iplaw/2013/12/04/judging-ip-law/. Last accessed 19/11/2015).
- "The central Intellectual Property and International Trade Court of Thailand" Available at http://artnet.unescap.org/tid/projects/infringing-goods-thai.pdf. Last accessed 24/10/2015.

- “The Court”, Bundes Patent Gericht, available at https://www.bundespatentgericht.de/cms/index.php?lang=en, last accessed 24/02/2019.
- The Economics of Intellectual Property in South Africa. Page 3. Available at http://www.wipo.int/edocs/pubdocs/en/economics/1013/wipo_pub_1013.pdf Last accessed 19/11/2015.
- The Intellectual Property Enterprise Court Guide, *Ministry of Justice* available at https://www.justice.gov.uk/downloads/courts/patents-court/intellectual-property-enterprise-court-guide.pdf, accessed on 19 April 2015.Supra note 22.
- The Land Claims Court of South Africa. Available at http://www.justice.gov.za/lcc/about.html. (Last accessed 13 July 2015).
- The Intellectual Property Enterprise Court explained (3 February 2015) *Keystone law* available at http://www.keystonelaw.co.uk/other/keynotes/2015/02/the-intellectual-property-enterprise-court-explained/, accessed on 19 April 2015.
- “The National Intellectual Property and International Trade Court” Available at http://www.ipitc.coj.go.th/info.php?cid=1&pm=1. Last Accessed 23/10/2015.
- “The new intellectual property court in Finland” Available at http://www.lexology.com/library/detail.aspx?g=37f1367a-ad33-407d-be10-86b3cac25bf3. Last accessed 26/10/2015.
- The South African Judiciary. “High Court”. http://www.judiciary.org.za/high-courts.html . Last accessed 13/07/2015.
- The UK’s new Intellectual Property Enterprise Court- A practical and inexpensive option for resolving IP disputes (12 November 2013). *Dorsey* available at http://www.dorsey.com/eu_ip_uk_enterprise_court_disputes/, Last accessed 19 April 2015.
- Thomas Tsai. “Introduction to the new Intellectual Property Court in Taiwan” Available at https://www.aippi.org/enews/2008/edition02/new-ip-court_taiwan.html. last accessed 25/10/2015. AIPPI.
- Vichai Aryanuntaka ‘Intellectual Property and International Trade Court: A new dimension for IP rights enforcement in Thailand’ Available at http://www.thailawforum.com/articles/ipvichai.html (last accessed 24/10/2015).

- What is the Intellectual property enterprise Court?"(2017). Available at http://mcdanielslaw.com/what-is-the-intellectual-property-enterprise-court/. Last accessed 24/02/2019.
- WIPO, "What is a Trade Secret". Available at http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm. Last accessed 24/02/2018.
- World Intellectual Property Organization. *The economics of Intellectual Property in South Africa.* Available at http://www.wipo.int/edocs/pubdocs/en/economics/1013/wipo_pub_1013.pdf. (Accessed 18/11/2015).
- World Intellectual Property Organisation. *What is Intellectual property?* (2015) Available at http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf. (Accessed 16/04/2015).
- Yu-Lan Kuo and Jane Wang. "Taiwan: The IP court is ready to go" Available at http://www.buildingipvalue.com/07ap/p.292-296%20Taiwan.pdf Last accessed 25/10/2015.

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

08 June 2015

Ms Yashmeka Parbhoo (211551471)
School of Law
Howard College Campus

Dear Ms Parbhoo,

Protocol reference number: HSS/0659/015M
Project title: A step in the right direction: An analysis of the viability of a specialised Intellectual Property Court in South Africa

Full Approval – No Risk / Exempt Application

In response to your application received on 27 May 2015 the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....

Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Ms Devarasi Maduramuthu
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee
Dr Shenuka Singh (Chair)
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Telephone: +27 (0) 31 260 3587/8350/4557 **Facsimile:** +27 (0) 31 260 4609 **Email:** ximbap@ukzn.ac.za / snymanm@ukzn.ac.za / mohunp@ukzn.ac.za
Website: www.ukzn.ac.za