

# ESSENTIAL PATENT LAW (IPSP033)

20 OCTOBER 2017

DURATION: 24 HOURS

100 MARKS

## Instructions to all candidates:

- ☐ Answer all the questions
- ☐ **Upload your answers as Assignment 3 on myUnisa by 27 October 2017.**
- ☐ This is an open-book examination.

## PLEASE READ THE FOLLOWING INSTRUCTIONS CAREFULLY BEFORE ANSWERING THIS EXAMINATION.

- (a) Ensure that you give reasons for each answer when instructed to do so.
- (b) We expect a certain amount of detail in your answers.
- (c) When answering the examination, remember that an open-book examination is a test at a higher level than the usual type of test, where memory is tested as much as insight. In an open-book examination, you need not memorise any information, so you are expected to prove that you can use information, rather than merely repeat it. In brief, what is being tested is factual knowledge and understanding, not memory skills.
- (d) For this reason, you do not earn marks by merely detailing a list of all the information that you think might be relevant to a particular question. This gives no indication that you know what statutory or other provisions are applicable in a specific context. You are expected to identify precisely what information applies, and then explain why you think so. Also, because you have the guide available when answering questions, we do not give marks for direct quotations from the guide.

- (e) Problem-type questions.

A number of students lose marks because they do not approach these questions correctly. When answering such questions, it is important to first clarify for yourself the area of work where the answer must be sought. Once you have done this, set out the relevant legal principles. Deal only with those principles that relate to the given facts.

Next, apply these principles to the facts. This is where a number of students lose marks - they set out the law in some detail, but then do not illustrate how it applies to the factual situation they have been asked to solve.

Finally, state your conclusion.

Also remember that the facts are merely there to illustrate the legal issues we want you to address – if you think the facts are insufficient, just say that it is impossible to reach a definite conclusion. Do not waste your time on unnecessarily lengthy speculation on what might be the case in various scenarios.

- (f) Remember to give us adequate information to assess your knowledge.

(g) Finally, although some of you have worked together when doing this module and formed discussion groups or study groups, this does not mean that you may consult each other when formulating and writing the answers to the examination questions. You must work alone as otherwise we are unable to assess your abilities. Students who submit identical or substantially similar answers, or who have obviously copied answers from someone else, will be guilty of infringing the University examination regulations and will be liable to punishment as determined by the University Council.

## ESSENTIAL PATENT LAW (IPSP033)

**Name:**

**Declaration**

I know that plagiarism is to use someone else's work and pass it off as my own.  
I know that plagiarism is wrong.  
I confirm that the answers to the examination questions are my own work.  
I have acknowledged in the bibliography accompanying the answers all the sources that I have used.  
I have not directly copied without acknowledgement anything from the Internet or from any other source.  
I have indicated every quotation and citation in a footnote or bracket linked to that quotation.  
I have not allowed anyone else to copy my work and to pass it off as their own work.  
I understand that if any unacknowledged copying whatsoever appears in my answers I will receive zero per cent for the examination.  
I am aware of the UNISA policy on plagiarism and understand that disciplinary proceedings can be instituted against me by UNISA if I contravene this policy.  
I indicate my understanding and acceptance of this declaration by entering my name hereunder:

Name:

### QUESTION 1

Amos is the inventor of a composition for treating AIDS in humans, in respect of which patent application 161/09 (accompanied by a complete specification) was filed by him in South Africa on 20 January 2009. The patent was granted in due course. The active ingredient of the composition was not new at the time of filing the patent application, since it had been used fairly generally prior to that date as an ingredient in a certain appetite depressant. The use of the ingredient for treating AIDS, however, was not known before 20 January 2009.

During 2015, Amos became aware that Bongani had commenced experimental work with a view to manufacturing a similar composition which falls within the scope of Amos's patent. Amos also found out that Bongani had lodged an application in terms of the Medicines and Related Substances Control Act 101 of 1965 for the registration of his composition, to enable him (Bongani) to commence selling his similar composition once Amos's patent had lapsed. (This Act requires that a registration be effected before a medicinal substance may be sold to the public.)

On being approached by Amos with a request to desist from infringing Amos's patent, Bongani informs Amos that -

- (i) the patent 161/09 is invalid for lack of patentable subject matter and lack of novelty;
- (ii) the experimental work carried out by him (Bongani) does not constitute infringement of the patent in terms of section 45 of the Patents Act 57 of 1978;
- (iii) even if such experimental work did constitute infringement, Amos did not suffer any damage as a result of that; and
- (iv) since he (Bongani) does not intend to commence selling the composition until after Amos's patent has lapsed, Amos has no cause of action against him.

Amos approaches you for advice. He wishes to know whether any of Bongani's arguments have any merit, and whether he will succeed with proceedings against Bongani for -

- (a) an interdict to prohibit Bongani from making and selling the composition;
- (b) an order for delivery up of the experimental material and the registration certificate issued to Bongani in terms of the Medicines and Related Substances Control Act; and
- (c) damages.

Advise Amos fully.

## QUESTION 2

ABC Inc, an American company, is the owner of a South African patent 05/3134 (granted on 2 February 2005) as well as American and British patents in respect of a chemical compound X which is active as a herbicidal agent, and which is particularly effective for controlling the propagation of the plants known as water hyacinths. By reason of the severe infestation of these plants in South African inland waters, there is a great demand in this country for a herbicidal composition containing the compound X. Despite this fact, ABC Inc has not to date commenced manufacturing in South Africa the compound X, nor a herbicidal composition containing that compound as the active ingredient. In order to supply the local market, ABC Inc imports into this country quantities of the formulated herbicidal composition from America and Britain, which it sells at inflated prices.

XYZ (Pty) Ltd, a South African manufacturer, approaches ABC Inc in order to obtain a licence under the South African patent to manufacture and distribute the herbicidal composition in this country. ABC Inc refuses, although it has granted non-exclusive licences to several manufacturers and distributors in America and Britain.

XYZ (Pty) Ltd applies to the Registrar in terms of section 56 of the Patents Act 57 of 1978 for a compulsory licence under the patent 05/3134 on the ground that the patent rights are being abused. ABC Inc, the patentee, opposes the application in terms of section 56(3). While the application for the compulsory licence is pending, XYZ (Pty) Ltd, without the knowledge or consent of ABC Inc, imports quantities of the chemical compound X from licensees of ABC Inc in America and Britain, and proceeds to formulate a herbicidal composition containing this chemical compound, and to market the herbicidal composition in South Africa.

When this comes to the notice of ABC Inc, it directs a letter of demand to XYZ (Pty) Ltd requiring it to cease immediately with the infringement of its (ABC Inc) patent, failing which it intends instituting infringement proceedings against XYZ (Pty) Ltd, seeking an interdict to restrain XYZ (Pty) Ltd from manufacturing or selling in South Africa a herbicidal composition containing the chemical compound X, delivery up of the chemical compound X, as well as the herbicidal composition in the possession of XYZ (Pty) Ltd, and damages.

XYZ (Pty) Ltd approaches you for advice. Advise the company, and deal specifically with the following aspects:

- (a) whether ABC Inc is likely to succeed with such proceedings, and if so, whether ABC Inc will obtain all the relief which it intends claiming; and
- (b) whether XYZ (Pty) Ltd is likely to succeed with its application for a compulsory licence. Set out the grounds on which it may rely in order to obtain such a licence, what allegations it has to make, and what it has to prove.

[50]

**NOTE: Your answer should not exceed seven (7) typed pages.**

**[Total: 100 marks]**