

**CONTRIBUTION BY**

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**ON**

**THE BUSINESS AND INTELLECTUAL PROPERTY AUTHORITY BILL AS  
INTRODUCED BY THE MINISTR OF INDUSTRIALISATION, TRADE AND  
(SMALL AND MEDIUM ENTERPRISE) DEVELOPMENT**

*SME*

**12 JULY 2016**

**Honourable Speaker, Honourable Members,**

I rise today to contribute to the Business and Intellectual Property Authority (BIPA) Bill as tabled in this August House by the Deputy Minister of Industrialisation, Trade and Small and Medium Enterprise Development, Hon. Pieter van der Walt. The introduction of this Bill marks an important step towards addressing a significant legislative shortcoming, and as such is long overdue. The protection of business and intellectual property, and the extension of these rights to the people of Namibia, has the potential to significantly contribute to the socio-economic advancement of some of Namibia's most marginalised communities.

This is so not only because the BIPA Bill aims to create a central authority for the registration and administration of business and intellectual property in our country, but also to simplify related processes and facilitate the flow of information between such an authority and relevant stakeholders. An equally significant objective of the BIPA Bill is the promotion of education and awareness of relating to business and intellectual property and related matters. I make specific mention of this here, considering the historical context of our country, and the fact that under Apartheid formal property rights, both movable and immovable, were not extended to the majority of Namibians. As such this proposed legislation aims to ensure the equality of property rights extended to all Namibians.

**Honourable Speaker, Honourable Members,**

By 1989, when the Constitution of our country was drafted, white Namibians owned virtually all legally recognised property rights. In contrast, an entirely separate system of black property rights existed, namely “communal rights’ held by black communities. Article 16 of the Constitution failed to take sufficient account of the property rights of the majority black population of the country, and there is lack of clarity on property held “in association with others”, as there is a lack of clarity on whether protection is extended to tribal or communal or traditional associations with others as much as protection is extended to partnerships or corporations or any other

Eurocentric references that have historically enjoyed legal recognition.

The absence of clarity in the above regard has significance for intellectual property rights. While white inventors enjoyed full access to the system of intellectual property rights protection under the South African system, black inventors, with their own unique and specific experience concerning the land did not have access to such a system. The problem is now that modern medicine and agriculture have turned their gaze to indigenous knowledge, this indigenous knowledge does not enjoy the same level of legal protection as does other forms of intellectual property.

The complexity of the matter deepens further when one considers that patent and copyright law exists to provide protection at the individual level, and where a collective or group of individuals develop ideas and choose to employ these for collective benefit, no such registration occurs. As a result, not only were black Namibians unable to access and enjoy the statutory protection extended by the copyright and patent law, but more importantly they *held* property in a different way, conceptualised it differently which made it impossible to employ the law for protection of their property rights.

Within the context of the modern globalised world in which the rapid development of Western scientific institutions with enormous research capacity, whose focus on the development of new

medicines and agricultural methods and/or techniques, leads them towards the experiences of various peoples in developing and underdeveloped countries as a source of knowledge about such techniques and/or methods, the abovementioned failure gain particular significance. To state the matter frankly, these research institutions are essentially stealing and patenting the knowledge of indigenous people.

In our own country, the San have raised the issue of *biopiracy*, which refers to the theft of biological knowledge and materials from the San, and other people from the developing world by Western corporations. One needs only to refer to the Hoodia plant, a succulent that the San have eaten for generations as a means to stave off hunger and thirst. However, under the Apartheid regime a South African scientific organisation undertook a substantial research project in 1963 to document the uses of wild plants in the southern African region, including the Hoodia plant. Five years after Namibia gained independence, the organisation in question patented the active elements found in the Hoodia plant that are responsible for appetite suppression, in the absence of any consent from the San, and a total lack of recognition of any property rights of the San in the patent. Although the company which bought the patent has since agreed to pay a comparatively miniscule royalty to the San, it should

be borne in mind that a royalty is a form of property interest, and not the legal equivalent of copyright or patent.

It is therefore essential that every effort be taken to ensure that the Business and Intellectual Property Authority, to be created through the BIPA Bill, not only undertakes as seriously as all others its stated objective to promote education and awareness of laws relating to business and intellectual properties, but also that a concerted programme be implemented to ensure that indigenous knowledge is appropriately registered, and that the protection envisaged in this Bill be extended to local communities who are the keepers of such knowledge.

#### **Honourable Speaker, Honourable Members**

In applying my mind to the BIPA Bill as tabled by Hon. Van der Walt, I have nonetheless come across a number of issues which I wish to raise. In the first instance, Section 17 Subsection One Clause (b) bestows upon the Chief Executive Officer (CEO) of the BIPA the authority to appoint staff for the organisation. Furthermore, Clause (c) empowers the BIPA CEO to determine the remuneration and other terms and conditions of service of staff members albeit with the approval of the BIPA Board. Considering that the BIPA is a public entity, entrusted with public funds, I find it highly irregular that one individual, namely the CEO of such an institution would be vested with such power as mentioned above. As a public entity,

appointment and remuneration of staff should be done in accordance with the Public Service Act.

Secondly, Section 23 deals with the disclosure of interests by BIPA Board members, where Subsection One prohibits such a member from deliberating or voting on any matter under consideration where he or she may have a direct or indirect interest. Subsection Two states that prior to or during a meeting of the BIPA Board should a Board member “think” that he or she has or may have an interest which could cause a conflict of interest, that Board member must inform the Board and then leave the meeting to allow the remaining members to discuss this interest and determine whether such a member is precluded from participation in such a meeting by reason of a conflict of interests.

I am convinced that one of the primary reasons why conflict of interest presents itself as such a significant problem in Namibia is the absolute lack of mandatory interest declaration. In the absence of a legal requirement compelling Board members, or any individual working in the public service for that matter, to declare their interests, this is essentially left to the discretion of each individual. And as history has shown, if one does effectively employ regulatory tools to close the space where conflict of interest can exist, corruption will thrive. Therefore, it is my firm conviction that the declaration of interests by staff and Board members of the BIPA

must be inserted into this Bill that will seek to establish a proactive declaration of interests.

**Honourable Speaker, Honourable Members,**

As mentioned, the BIPA Bill marks a significant step towards overhauling and streamlining the registration and administration of business and intellectual property. In their totality, the objects of the Bill are commendable and are deserving of the support of this August House. However, a divergence between systems of property rights for white and black people under Apartheid, and the different conceptualisation of property rights by each of these groups means that one group has historically enjoyed the protection extended by such rights while the other has not. In essence then, the BIPA Bill should also aim to level the playing field and ensure equality of property rights for all Namibians. It is therefore essential that every effort be made to ensure that those who have been unable to access these rights in the past, are not only made aware of their new rights, but are also assisted in ensuring that indigenous knowledge is protected in this way.

In conclusion, subject to the issues raised above with respect to Sections 17 and 23 of the BIPA Bill, I wish to support the Bill.

I so move.