

## SMEs — A South African Perspective

By Madelein Kleyn

### Introduction

South Africa does not invest in procuring accurate statistics on small businesses in South Africa, making it difficult to find the exact number of companies that operate in the country. SEDA (Small Enterprise Development Agency) issued a broad statistical overview of the SMEs of South Africa<sup>1</sup> in January 2016

KEY INDICATORS	Q2 2015
Number of SMEs	2,251,821
Number of formal SMEs	667,433
Number of informal SMEs	1,497,860
SME owners as % of total employment	14%
% operating in trade & accommodation	43%
% operating in community services	14%
% operating in construction	13%
% operating in financial & business services	12%
% contribution to GVA*	21%
% black owned formal SMEs	34%
% operated by income group < R30k pa	7%

Source: BER, StatsSA \*GDP before taxes and subsidies

and presented the following indicators.

According to the Banking Association of South Africa<sup>2</sup> in South Africa, small and medium-sized enterprises make up 91 percent of formalised businesses, provide employment to about 60 percent of the labour force and total economic output accounts for roughly 34 percent of GDP.

Although there is no exact definition for SMEs, the *National Small Business Act (102 of 1996)* defined small business as medium, small, very small and micro enterprises based on certain characteristics. The Act aims to provide for the “establishment of the Advisory Body and the Enterprise Promotion Agency; to provide guidelines for organs of State to promote small business in the Republic; and to provide for matters incidental thereto.” *The National Small Business Amendment Act (26 of 2003)* aims to update and further define business according to five categories established by the original act,

1. <http://www.seda.org.za/Publications/Publications/The%20Small,%20Medium%20and%20Micro%20Enterprise%20Sector%20of%20South%20Africa%20Commissioned%20by%20Seda.pdf>.

2. <http://www.banking.org.za/what-we-do/sme>.

namely; standard industrial sector and subsector classification, size of class, equivalent of paid employees, turnover and asset value—excluding fixed property.

### Government Support of SME Initiatives

Government raised the status of its small business initiatives with the creation, in 2014, of a department dedicated to this cause, i.e. the *Department of Small Business Development (DSBD)*. Public entities that report to the Minister of DSBD are the *Small Enterprise Development Agency (SEDA)* established in terms of the *National Small Enterprise Act, 1996 (No.102 of 1996)*, as amended in 2004 and the *Small Enterprise Finance Agency (SEFA)* established in terms of *Section 3(d) of the Industrial Development Corporation Act, 1940 (No. 22 of 1940) (IDC Act)*.

SEDA provides non-financial business development and support services to small enterprises in partnership with other role players in the small business development environment. SEDA's mission is to develop, support and promote small enterprises to ensure their growth and sustainability. SEFA provides access to developmental finance to survivalist, micro, small and medium businesses throughout South Africa.

Further Government initiatives are provided through *Act No 102 of 1996* in the establishment of the National Small Business Council, the *Ntsika Enterprise Promotion Agency (Ntsika)*, as well as *Khula Enterprise Finance* which is charged with helping small and medium-sized enterprises secure finance. This is primarily through the provision of security on behalf of small businesses to commercial banks, retail financial institutions, specialist funds and joint ventures, as well as offering loans through partner intermediaries.

### Main Supporting Entities

There are many agencies and corporate entities that provide guidance and financial grants to SMEs and entrepreneurs, for the relevance of technology protection and commercialisation of intellectual property. Specific mention is to be made of THRIP and TIA.

### Technology and Human Resources for Industry Programme (THRIP)

THRIP is a project between DTI<sup>3</sup> (Department of

3. <http://www.thedti.gov.za>.

Trade and Industry) and the NRF (National Research Foundation). This scheme was implemented to increase the high level technical skills for the industry and improve South Africa's competitive edge through the development of technology. This grant is primarily aimed at engineering graduates. The THRIP fund capacity is R150 million. THRIP aims to develop these SMEs into large companies, expanding the networks and allowing these SMEs access to scientific expertise, equipment and facilities at partner research entities.

### **The Technology Innovation Agency (TIA)<sup>4</sup>**

TIA is a national public entity related to the DTI. It serves as the key institutional intervention to bridge the innovation chasm between research and development from higher education institutions, science councils, public entities, and private sector, and commercialisation. In terms of the *Technology Innovation Act (Act 26 of 2008)*. The object of TIA is to support the State in stimulating and intensifying technological innovation to improve economic growth and the quality of life of all South Africans by developing and exploiting technological innovations. TIA has available a Patent Support Fund<sup>5</sup> which is intended to provide the support mechanisms to assist entrepreneurs and SMEs with the protection of their IP. The Patent Support Fund is intended to support the filing, prosecution and maintenance of patents and/or patent applications in respect to technological innovations emanating from entrepreneurs and SMEs. The support is specifically intended for funding new or improved technologies which TIA can progress from the applied research stage to commercial deployment.

Other industrial and financial sectors that support SMEs through grants, free advice, infrastructure or networks include the Banking Association of South Africa. Apart from financial and financial risk assistance, it also facilitates stakeholder engagement of among others the Gauteng Dept. of Economic Development, Industrial Development Corporation, Khula, Small Enterprise Development Agency, South African Micro-Finance Apex Fund, Development Finance Institutions, Department of Trade and Industry, and provides Research and Knowledge Management.

*SME South Africa*<sup>6</sup> is a daily online news portal that provides strategic business content to enable SMMEs to unlock their growth potential. They offer a one-stop shop for SMME-related issues in Africa, providing business owners with practical insights, advice and tools that are essential to running a profitable business. Our editorial content focuses on key aspects of running a

business, such as Business Finance, SMME Laws & Regulations, Marketing, Technology, Leadership and Human Capital. They have an online audience reach in South Africa, Kenya, United States, India and United Kingdom. SME Toolkit<sup>7</sup> aids SMEs to start-up businesses, advise on funding and include information on IP protection mechanisms and means for SMEs.<sup>8</sup>

### **The National Intellectual Property Management Office (NIPMO)**

NIPMO<sup>9</sup> is an initiative of the Department of Science and Technology, responsible for implementing the *Intellectual Property Rights from Publicly Financed Research and Development Act (No. 51 of 2008)*. NIPMO ensures that intellectual property emanating from publicly financed research and development is identified, protected, utilized and commercialized. NIPMO operates through three directorates: Regulatory and Compliance (registering IP created from use of public funds, approving certain IP transactions, and enforcing the Government's IP rights), Advisory and Support (providing legal advice, and capacity building support in technology transfer), and Fund Management (providing funds for IP protection).

The *IPR Act* provided a new basis for the management and commercialization of IP created through universities and research institutions. It also allowed access to SMEs and Black Economic Empowered entities, previously not enabled to exploit IP opportunities. Between 2010 and 2016, over 1,000 invention disclosures were filed under the new system by South African institutions, of which seven percent had been commercialized by the end of this period. Examples include systems to calibrate TB testing equipment, improving the accuracy of diagnosis to tens of thousands of individuals, and 3D printing/rapid prototyping methods, for the creation of replacement facial features for individuals who not have access to medical funds and who are undergoing reconstructive facial surgery.

NIPMO provided support to 30 institutions and regional offices, offering R 106 M of support (which led to the creation of over 100 specialised technology

■ Dr. Madelein Kleyn,  
Oro Agri International Ltd;  
University of Stellenbosch,  
Director; Legal and Intellectual Property & Research  
Fellow of the Anton Mostert  
Chair of Intellectual Property,  
University of Stellenbosch,  
South Africa,  
Cape Town, South Africa  
E-mail: [mkleyn@oroagri.com](mailto:mkleyn@oroagri.com)

4. <http://www.tia.org.za>.

5. [http://www.tia.org.za/Funding-Procedure/intellectual-property-\(ip\)-fund](http://www.tia.org.za/Funding-Procedure/intellectual-property-(ip)-fund).

6. <http://www.smesouthafrica.co.za>.

7. <http://southafrica.smetoolkit.org/sa/en>.

8. <http://southafrica.smetoolkit.org/sa/en/category/2964/Intellectual-Property>.

9. <http://nipmo.org.za>.



Source: <http://www.theinnovationhub.com>

transfer posts), and provided 24 institutions with R 83 M of fund management support for IP protection.<sup>10</sup>

## The Innovation Hub

The Innovation Hub was established by the Gauteng Provincial Government in 2001 and creates initiatives that support innovation and enterprise development. It is in Tshwane, South Africa's executive capital, and has become a regional centre of innovation and knowledge creation.

## Legislative Framework

*The Patents Act 57 of 1978* as amended, governs the protection of inventions, the *Companies and Intellectual Property Commission* (CIPC) is the custodian of all new patent applications that are filed within the Republic of South Africa. Other than that an individual can privately file a provisional patent application (only a patent attorney can file a non-provisional patent application and assist in drafting the patent specification), no specific mention is made of any form of SME and there is no differentiation in filing or filing fee status that is derived from entity status. For quite some time there has been international criticism on the South African patent system and specifically on the access to medicine protected by patents. In answer to this, the *South African National Draft IP Policy* was published in 2013. It included specific reference to BEE and SME enterprises in the context of the trademarks system with focus on licensing of franchising activities. The Draft Policy was severely and widely criticised and in 2016 the DTI issued the National IP Consultative Framework which replaced the IP Poli-

cy. There was no specific mention made of preferential treatment of SMEs, the focus was mainly on the pharmaceutical industry and the introduction of patent examination and pre- and post-grant oppositions. The public submissions process into the IP Consultative Framework has created a platform for IP stakeholders to once again call for IP law reform in South Africa. The DTI has not released a list of submitters nor the submissions themselves. After considering substantial comments received<sup>11</sup> from various sectors in industry, IP professionals and institutions such as the SAIPL and LES, the new IP policy based on the IP Consultative Framework has been submitted to Cabinet in the first quarter of 2017. No further announcement has been made to-date.

## SME and Patenting

The securing of Intellectual Property (IP) is an important aspect in the economic growth strategy for the knowledge economy. According to a study done by SAICA<sup>12</sup>, patent propensity is lower in SMEs than in large organisations (or companies) and patenting as means for appropriation is of less importance among SMEs. There are, however, numerous examples of small businesses that have sufficient talent to produce significant and bankable innovations and this is confirmed by the patent statistics for South African inventions as shown below. SAICA's research shows that a substantial portion of technology innovations and inventions emanating from the South African public, and in particular, entrepreneurs and SMEs have not made their way to the marketplace because of a lack of support mechanisms, largely financial, for patent protection.

10. Kerry Faul, "Innovation Insights: Entrepreneurial Ecosystems from Around the World—A South African Perspective," 6th International Conference on Managing Intellectual Property Rights in Universities, (2016) [https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.ipconference.boun.edu.tr%2Fipconference-2016%2Fpresentation%2FP6%2Fkerry\\_faul.pptx](https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.ipconference.boun.edu.tr%2Fipconference-2016%2Fpresentation%2FP6%2Fkerry_faul.pptx); accessed April 2017.

11. <https://www.ip-watch.org/2016/10/20/south-african-ip-framework-comments-action-seen-early-2017>.

12. See SAICA (*South African Institute of Chartered Accountants –2014/5/6 SMME INSIGHT REPORTS*) and BER "The Small Medium and Micro Enterprise Sector of South Africa," commissioned by SEDA Note 1 of 2016.

South African research group, World Wide Worx has released its 2016 State of South African Small Business report, showing what small business leaders in the country are facing in the country. On the question on whether SMEs embrace technology, two-thirds of small business owners said that technology was very important or essential for their business operations, with smart devices and apps making their lives and the running of their businesses easier.

It is evident from the statistics that since the implementation of the *IP Rights Act* in 2010 the patenting activity of individuals, research institutions and universities has increased significantly.

The data<sup>13</sup> presented below covers a period of five years' patent application activity of the top 100 applicants in South Africa which is determined based on 10 or more patent applications per year. There appears to be a higher number of patents being filed by SMEs on total number of patents. On average per year per entity type, SMEs file less patents than corporations per entity. The data sample in Figure 1 reflects the activity of 17 Research institutions, 60 SMEs or individual inventors and 27 large corporations of the top 100 patent applicants in South Africa. This indicates that SMEs are aware of the importance of protecting intellectual property.

### SME and IP Litigation

Legal advice and litigation is expensive. Entrepreneurs and start-ups are generally unable to afford legal services. Most of the IP litigation of SMEs focus on trademarks rather than patents. Figure 3 is a summary of judgements<sup>14</sup> for the period 2010 to 2016. The scope of this article does not allow for further investigation if the data and the graph below is merely an indicator that SMEs do participate in litigation but due to budget constraints the activity is lower than for larger corporations.

### In Conclusion

SMEs in South Africa play an important role in the growth of the South African economy. Government is supporting SME initiatives and their innovation through various organisations and agencies that fund start-ups and facilitate filing, prosecuting and commercialization of inventions. SMEs are generally informed about IP and the importance of protecting intellectual property but do not always have the funds to ensure freedom to operate, protect and enforce their IP rights.

The enactment of the *IPR Act* in 2010 brought about a significant change in the South African IP landscape and it is foreseen that the newly awaited IP Policy will promote patenting by SMEs and freedom to operate although the initial focus appears to be on the pharmaceutical industry. ■

13. Patent statistics provided courtesy of Adams & Adams Attorneys <http://www.adamsadams.com>.

14. Extracted from BIP and Juta Law reports <https://juta.co.za>.

Figure 1. Total Patents Per Entity Type

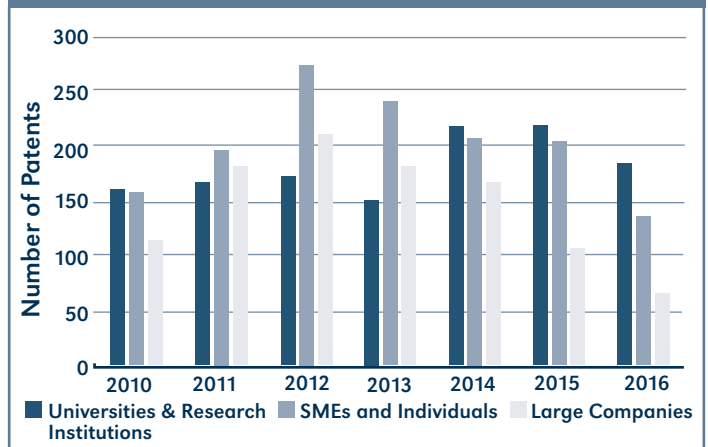


Figure 2. Average Patent Activity Per Entity

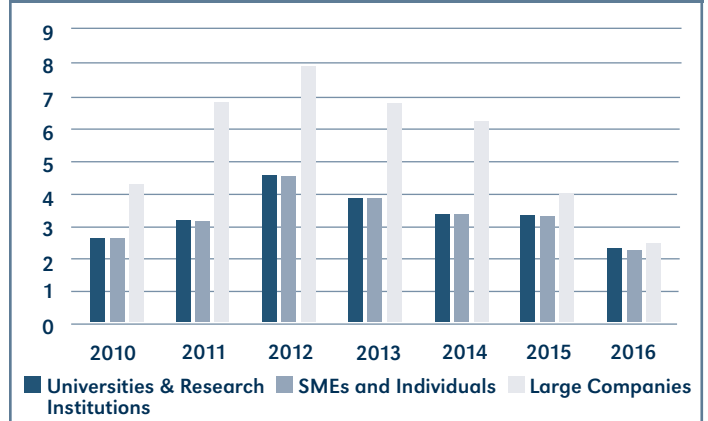
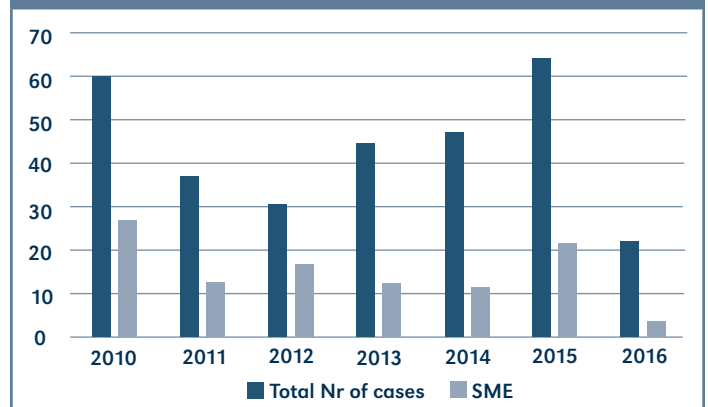


Figure 3. IP Litigation Year of Judgement 2010-2016



Available at Social Science Research Network (SSRN): <https://ssrn.com/abstract=3009379>