



Tech Tuesdays

With Musa.

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WHO IS AN INVENTOR ACCORDING TO BOTSWANA LAWS?

Last week we discussed the recently decided case of **Thaler v Comptroller General of Patents, Designs and Trademarks [2023] UKSC 49**. In that case, Dr. Thaler, the creator of an Artificial Intelligence machine named DABUS, sought to have patent rights registered to DABUS for some inventions that it had created. Today we bring this case home. Who, according to the laws of Botswana is an inventor for purposes of owning patent rights to an invention?

Insofar as this question is concerned, **Sections 10 to 12 of the Industrial Property Act** are authoritative. In terms of section 10, the right to an invention belongs to its inventor. Where two or more people jointly create an invention, it belongs to both of them jointly. Where two people independently create an invention, the right to same belongs to whoever makes an application for patent registration first. Where an invention is made in execution of a contract of employment, the right to the patent shall, absent any prior agreement, belong to the employer.

In terms of section 10(5), an inventor must be named in a patent unless a special declaration is made in writing to the Registrar. In the Thaler case, instead of naming himself as inventor, Dr. Thaler named DABUS as the inventor. As such, the case ultimately hinged on the definition of an "inventor" in terms of the Patents Act 1977 (Section 7(3) thereof) which defines an inventor as "*the actual deviser of the invention...*".

While in Botswana, the Industrial Property Act doesn't define the word inventor, it defines an invention as "*an idea of an inventor which permits in practice the solution to a specific problem in the field of technology*". It should logically follow that an inventor is anyone who conceives such an idea.

From the foregoing, one can safely say that had the Thaler case been decided in Botswana, the Courts would have ultimately found that DABUS could not be named as an inventor as Artificial Intelligence is, by itself, not capable of conceiving ideas, but rather depends on inputted information. Creativity is an inherently human attribute.

Takeaway

A sober reading of the Botswana Industrial Property Act would show that there is a big gap that ought to be filled by the legislature. Progress in AI technology is leading to the

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emergence of works or inventions primarily created through automated processes. The wording of our Act as it is, might imply that inventions entirely conceived by AI systems in the future cannot receive patent protection in Botswana.

It is now within Parliament's purview to amend the legislation, enabling the protection of AI-generated inventions and positioning Botswana as a favourable jurisdiction for the utilization and advancement of AI in research and development. Already, our neighbour, South Africa has accepted applications from Dr Thaler that identify DABUS as the sole creator of the inventions. However, it should be noted that the patent office in South Africa only checks for basic formal requirements. South Africa's Patent Act of 1978 provides several grounds for patent revocation and it remains to be seen whether Thaler's patent will be challenged.

A conscious step towards amending the Industrial Property Act to extend patent rights to AI created and AI assisted works would position Botswana as an industry leader in light of the mindset change campaign and vision 2036.

Irrespective of the final decision, it is undeniable that AI is significantly impacting various industries. The sooner governments address and respond to this issue, the more effectively they can navigate the challenges and opportunities presented by the rise of AI.

If you have interest in an in-depth discussion on this subject matter or any AI or Intellectual Property issues, feel free to contact us at info@gobhozalegalpractice.co.bw
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