

# Can Food Recipes be Patented in South Africa?

Cookery has become one of the most popular past times of the last few years. This is illustrated by the enormous popularity of TV shows such as "Masterchef" and "Come Dine with Me"; and cookbooks by celebrity chefs such as Jamie Oliver and Nigella Lawson. This leads to an interesting question - Can food recipes be patented in South Africa? To answer this it is necessary, as with any invention, to look into the statutory requirements for patentability.

No matter how delicious the dish, the recipe must still meet the basic conditions of patentability all other inventions must meet: the recipe must be useful, novel and inventive.

**Section 13 of the previous Patents Act No. 37 of 1952 stated that:**

*"if in the case of any application it appears to the registrar that the application claims as an invention a substance capable of being used as food which is a mixture of known ingredients possessing only the aggregate of the known properties of the ingredients, or a process producing such a substance by mere admixture, then he shall refuse the application".*

In the light of this under the previous Act, recipes were not patentable. However, such a provision is not provided for in the Patents Act. Because, there is now no explicit exclusion, one can draw the conclusion that food patents/recipes are allowable in South Africa. Therefore, recipes can certainly be patented if the patent application and claimed subject matter meet the statutory requirements, which can be difficult and impossible in some circumstances.

There are several stumbling blocks that one can encounter. If the recipe is an old family tradition passed down through generations, the primary

hurdle is that the person, who wants to patent it, will not be the inventor. Section 27 of the current South African Patent Act provides that:

*"an application for a patent in respect of an invention may be made by the inventor or by any other person acquiring from him the right to apply or by both such inventor and such other person".*

*In addition, the person who is the actual inventor is probably no longer known. The main stumbling blocks, however, are the novelty and inventive step requirement. The South African Patents Act provides that a patent may be granted for any new invention which involves an inventive step. For an invention to be new, means that it must not have been available to the public anywhere in world – by word of mouth, by use, in any printed publication, or in any other way – before a first application is made for a patent. The problem with recipes is that it is likely that the recipe is an old family recipe and belongs to many families and has been published someplace by someone.*

Since recipes are typically combinations of ingredients that are known for a specific purpose, even if the combination is new, establishing that the combination is inventive can be difficult. The difficulty lies in the fact that there are so many recipes and methods of cooking that it may be difficult to demonstrate novelty and inventive step.

Recipes primarily fall into two categories, namely:

- 1) setting out a list of ingredients and
  - 2) a method of combining the ingredients.
- Merely setting out a list of ingredients is



*Kelane*



unlikely to be patentable unless of course the inventor is using some ingredients that have never been combined before or the order of combining them is new and it's not obvious to do so. So in preparing a patent application, one would ultimately set out a list of ingredients in their proportional ranges. Whilst this certainly may be new unless it has some feature that provides unexpected results, it isn't patentable.

On a more practical note, the more the invention addresses new preparations or cooking methods, as opposed to merely new combinations of ingredients, the better the chances will be to receive valid patent protection. For example, if you merely take food items off the shelf and mix them without doing anything special to the process, then the proposed invention does not reach the level of inventive step required for patentability.

The recipe must therefore have some special feature (an inventive step) for example an achievement of unexpected results such as fat free processes or ingredients, the addition of certain off shelf ingredients like antioxidants, or defining process steps like preservation, fermentation, ageing, etc., to make a strong recipe patent.

In fact, there are several South African patents already directed to one or other types of food compositions. One of the South African patents for example deal with a potato based food product. The invention provides for a method of preparing a potato based food product comprising the steps of: processing potatoes into potato articles having a desired size and shape, blanching the potatoes, dipping the blanched potato articles in a solution to prevent non-enzymic oxidation of the potato articles, drying and coating the potato articles.

As can be seen in the example above, preservation in a recipe could be one of the defining steps to increase the chances of obtaining a valid patent. To reiterate this argument, the patent classification system which is used to classify patents according to the different areas of technology to which they pertain, provides for class A23. Class A23, provides for the preservation of foodstuff in general. Other defining steps can include for example, fermentation, ageing, and addition of food additives like antioxidants. Furthermore, if your food recipe contains some ingredients which in addition to giving nutritional benefits, also gives some therapeutic relief, this can also make for a stronger patent.

Therefore, if your recipe meets the basic patentability requirements and is not just a mere admixture of known ingredients and involves a special feature that achieves an unexpected result, which would not have been obvious for a skilled person to achieve in view of prior publications, then your food recipe could be patentable in South Africa.

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