
THE KHOIKHOI PEOPLES' ROOIBOS BIOCULTURAL COMMUNITY PROTOCOL

REPRESENTED BY THE NATIONAL KHOISAN COUNCIL AND
INCLUDING THE CEDERBERG BELT REGION'S
ROOIBOS INDIGENOUS FARMING COMMUNITIES

DIE KHOIKHOIVOLKE SE ROOIBOS BOKULTURELE GEMEENSKAPSPROTOKOL

VERTEENWOORDIG DEUR DIE NASIONALE KHOISAN RAAD
INSLUITEND DIE SEDERBERG STROOK SE GEBIED VAN
ROOIBOS INHEEMSE BOERDERYGEMEENSKAPPE



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REPRESENTED BY THE NATIONAL KHOISAN COUNCIL AND
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INDIGENOUS FARMING COMMUNITIES*

*Cederberg indigenous farming communities:
Wupperthal, Nieuwoudtville and Suid Bokkeveld.

Main Khoikhoi groupings:
Griqua, Koranna, Nama and Cape Khoi.

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ROOIBOS INHEEMSE BOERDERYGEMEENSAPPE

*Sederberg inheemse boerderygemeenskappe:
Wupperthal, Nieuwoudtville en Suid Bokkeveld.

Hoof Khoi-khoigroeperinge:
Griekwa, Koranna, Nama en Kaapse Khoi.

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Abbreviations

Access and Benefit-sharing (ABS)
Bioprospecting, Access and Benefit-sharing (BABS)
Biocultural Community Protocol (BCP)
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission)
Community Protocol (CP)
Convention on Biological Diversity (CBD)
Council for Scientific and Industrial Research (CSIR)
Department of Cooperative Governance and Traditional Affairs (COGTA)
Department of Science and Technology (DST)
Department of Environmental Affairs (DEA)
Department of Environment, Forestry and Fisheries (DEFF) (DST)
Food and Agricultural Organisation (FAO)
Free, Prior and Informed Consent (FPIC)
Indigenous and Local Communities (ILCs)
Intellectual Property (IP)
Intellectual Property Rights (IPR)
International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)
Khoi Cultural Heritage Development Council (KCHDC)
Material Transfer Agreements (MTAs)
National Khoisan Council (NKC)
National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) (NKC)
Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol)
Prior and Informed Consent (PIC)
Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2018 (Indigenous Knowledge Act)
South African San Council (SASC)
Traditional Knowledge (TK)
United Nations (UN)
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
The World Intellectual Property Organization (WIPO)

Afkortings

Biokulturele Gemeenskapsprotokol (BGP/BCP)
Bioprospektering, Toegang en Voordeelverdeling (BTV/BABS)
Departement van Omgewingsake (DOS/DEA)
Departement van Omgewing, Bosbou en Visserye (DOBV/DEFF)
Departement van Wetenskap en Tegnologie (DWT/DST)
Gemeenskapsprotokol (GP/CP)
Intellektuele Eiendom (IE/IP)
Intellektuele Eiendomsregte (IER/IPR)
Inheemse en Plaaslike Gemeenskappe (IPGs/ILCs)
Internasionale Verdrag oor Plant Genetiese Bronne vir Voedsel en Landbou (IVPGBVL/ITPGRFA)
Konvensie oor Biologiese Diversiteit (KBD/CBD)
Kommissie vir die Bevordering en Beskerming van die Regte van Kultuur-, Godsdiens- en Taalgemeenskappe (KGT Kommissie)
Khoi Kulturele Erfenis Ontwikkelingsraad (KKEOR/KCHDC)
Materiële Oordragsooreenkomste (MOOs/MTAs)
Nagoya Protokol oor Toegang tot Genetiese Bronne en die Billike en Regverdige Verdeling van Voordele wat spruit uit hulle Gebruikmaking van die Konvensie oor Biologiese Diversiteit (Nagoya Protokol)
Nasionale Khoisan Raad (NKR/NKC)
Nasionale Omgewingsbestuur: Wet op Biodiversiteit, 10 van 2004 (NOWBD/NEMBA)
Raad vir Wetenskaplike en Industriële Navorsing (RWIN/CSIR)
Samewerkende Regering en Tradisionele Sake (SaRTS/CoGTA)
Suid-Afrikaanse San Raad (SASR/SASC)
Toegang en Voordeelverdeling (TVV/ABS)
Tradisionele Kennis (TK)
Vooraf, Ingeligte Toestemming (VIT/PIC)
Voedsel en Landbou Organisasie (VLO/FAO)
Verenigde Nasies (VN/UN)
Verenigde Nasies Deklarasie oor die Regte van Inheemse Volkere (VNDRIV/UNDRIP)
Vrye, Voorafgaande, Ingeligte Toestemming (VVIT/FPIC)
Beskerming, Bevordering, Ontwikkeling en Bestuur van Inheemse Kennis, Wet 6 van 2018 (Wet op Inheemse Kennis)
Die Wêreld Intellektuele Eiendomsorganisasie (WIEO/WIPO)

CHAPTER 1 | CHAPTER 1

1.1 What is a Biocultural Community Protocol?

1.1 Wat is 'n Biokulturele Gemeenskapsprotokol?

1.2 The Rooibos Restitution Journey

1.2 Die Rooibos Pad van Restitusie

1.3 Why do we need a Biocultural Community Protocol?

1.3 Waarom benodig ons 'n Biokulturele Gemeenskapsprotokol?

ENGLISH

AFRIKAANS

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THE BIOCULTURAL COMMUNITY PROTOCOL

DIE BIOKULTURELE GEMEENSKAPS -PROTOKOL

1.1 | What is a Biocultural Community Protocol?

“Community protocols is a term that covers a broad array of expressions, articulations, rules and practices generated by communities to set out how they expect other stakeholders to engage with them. They may reference customary as well as national or international laws to affirm their rights to be approached according to a certain set of standards.

Articulating community priorities and challenges, their relationship to their customary resources, guiding external actors on their internal governance and how to obtain free, prior, informed consent.

Community protocols provide communities with an opportunity to focus on their development aspirations vis-à-vis their rights, and to articulate, for themselves and for users, their understanding of their bio-cultural heritage and therefore on ‘how’ they will engage with a variety of stakeholders.

By considering the interconnections of their land rights, current socio-economic situation, environmental concerns, customary laws and traditional knowledge, communities are better placed to determine for themselves how to negotiate with a variety of actors.”

- The Mo'otz Kuxtal Voluntary Guidelines, adopted by the 13th Conference of the Parties of the Convention on Biological Diversity (CBD)

1.1 | Wat Is 'n Biokulturele Gemeenskapsprotokol?

“Gemeenskapsprotokolle is 'n term wat 'n breë omvang van uitdrukkings, bewoordinge, reëls en praktyke dek, geskep deur gemeenskappe om uit te spel wat hulle van ander aandeelhouers verwag wanneer hulle in gesprek tree. Hulle mag gewoontereg asook nasionale of internasionale wette gebruik en staan op hul reg om genader te word in terme van 'n bepaalde stel standarde.

Dis die verwoording van die gemeenskap se prioriteite en uitdagings, hulle verhouding tot hul gebruiklike bronne, die aanwending van eksterne deelnemers aan hul interne bestuurstelsel en hoe om vrye, voorafgaande, ingeligte toestemming te bekom.

Gemeenskapsprotokolle gee aan gemeenskappe 'n geleentheid om op hulle ontwikkelingstewe te fokus; om aangaande hulle regte vir hulleself en gebruikers hul verstaan van hulle biokulturele erfenis te verduidelik; 'n fokus dus op 'hoe' hulle met 'n verskeidenheid van aandeelhouers in gesprek sal tree.

Wanneer gemeenskappe die verbande lê tussen hulle grondregte, die huidige sosio-ekonomiese situasie, omgewingsfaktore, hul gewoontereg en tradisionele kennis, is hulle beter geplaas om vir hulleself te bepaal hoe om met verskeie deelnemers te onderhandel.”

- Die mo'otz kuxtal vrywilligersriglyne, soos aanvaar by die 13de konferensie van deelnemers aan die konvensie oor biologiese diversiteit (kdb/cbd).



Anthony Andrews, Nicolas Booyen, Johannes Links in Lambert's Bay Harbour

Anthony Andrews, Nicolas Booyen, Johannes Links in Lambert's Bay Hawe

DIFFERENT NAMES THAT ARE USED INTERCHANGEABLY:

- Biocultural Community Protocol (BCP)
- Community protocols (CP)
- Biocultural protocols

VERSKILLENDE WISSELTARME WAT GEBRUIK WORD:

- Biokulturele Gemeenskapsprotokol (BGP/BCP)
- Gemeenskapsprotokolle
- Biokulturele Protokolle



Rooibos plant

Rooibos plant

For more information on BCPs please visit:

<https://www.cbd.int/traditional/Protocol.shtml>

<https://naturaljustice.org/community-protocols/>

Communities have always had a set of written, but mostly unwritten, rules about how to interact with outsiders and how they want outsiders to interact with them. Using the process of drafting a community protocol, communities are able to set out these rules in an organised and structured way to support their current or preferred way of life and show how they are organised for purposes of consent.

Sometimes known as a “Biocultural Community Protocol” (BCP), a community protocol also contains information on the community’s customary way of life, knowledge of resources and use of biodiversity. They support communities to assert their rights and duties in respect of how they govern their territories, as well as conserve and sustainably use their natural resources.

The term “community protocols” (CP) is referenced in international law. *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization*, a protocol to the UN Convention on Biological Diversity, is the first legally binding international framework that establishes a set of rights for indigenous peoples and local

communities over their genetic resources and traditional knowledge. Specifically, it requires external parties to obtain prior, informed consent (PIC) and to take into consideration customary laws and local procedures for interacting with the communities and their resources.

In South Africa, CPs are referenced in the *South African National Environmental Management: Biodiversity Act 2004*, *Bioprospecting, Access and Benefit-Sharing Regulations 2008*, *Indigenous Knowledge Systems Act 2018*, and the *Intellectual Property Laws Amendment Act 2013*.

While the process holds potential for the protection of traditional knowledge and the generation of local benefits, the success of it depends on local implementation of Access and Benefit-sharing (ABS) frameworks and consent processes. CPs were introduced into the *Nagoya Protocol* to address these implementation challenges and are subsequently legally recognised. International recognition of the approach provides a unique opportunity for communities to use community protocols to regulate access to their genetic resources and traditional knowledge according to locally-determined terms and conditions.

Gemeenskappe het nog altyd ‘n stel geskrewe, maar meestal ongeskrewe reëls gehad oor hoe hulle in gesprek met buitelanders wil tree en hoe hulle wil hê buitelanders met hulle moet onderhandel. Deur die proses van die opstel van ‘n gemeenskapsprotokol te gebruik is gemeenskappe in staat om hierdie reëls op ‘n georganiseerde en gestruktureerde manier aan te wend om hul huidige, of die lewenswyse wat hulle verkies, te verduidelik en hul georganiseerdheid te toon vir doeleindes van toestemming.

Soms bekend as ‘n “Biokulturele Gemeenskapsprotokol”, sal ‘n gemeenskapsprotokol ook inligting bevat oor die gemeenskap se lewenswyse gebaseer op gewoonereg, kennis van bronne en die gebruik van biodiversiteit. Dit spoor gemeenskappe aan om hulle regte en verantwoordelikhede uit te oefen betreffende die manier waarop hulle hul gebiede bestuur en ook hoe hulle hul natuurlike bronne volhoubaar gebruik en bewaar.

Die term “gemeenskapsprotokolle” is aangewend in die internasionale *Nagoya Protokol*, en ook in die Suid-Afrikaanse *Nasionale Omgewingsbestuur: Wet op Biodiversiteit 2004*, *Bioprospektering, Toegang en Voordeelverdelingsregulasies 2008*, *Wet op Inheemse Kennisstelsels*

2018, en die *Wet op Intellektuele Eiendomswetgewing Amendement 2013*. Die *Nagoya Protokol oor Toegang tot Genetiese Bronne en die Billike en Regverdigte Verdeling van Voordele Voortspruitend uit hul Verbruik (TVV/ABS)* tot die Konvensie oor Biologiese Diversiteit is die eerste wetlik-bindende internasionale raamwerk wat ‘n stel regte vir inheemse volkere en plaaslike gemeenskappe vestig oor hul genetiese bronne en tradisionele kennis. Dit vereis spesifiek van eksterne partye om voorafgaande, ingeligte toestemming (VIT/PIC) te verkry met inagneming van hulle gewoonereg en plaaslike prosedures.

Terwyl die proses moontlikhede inhou vir die beskerming van tradisionele kennis en die generering van plaaslike voordele, hang die sukses af van die plaaslike toepassing van TVV-raamwerke (Toegang en Voordeelverdeling) en toestemmingsprosesse. Gemeenskapsprotokolle was in die *Nagoya Protokol* ingelyf om hierdie uitdagings van implementering aan te spreek, wat dan ook later wetlik erken was. Internasionale erkenning van daardie benadering verskaf ‘n unieke geleentheid vir gemeenskappe om gemeenskapsprotokolle te gebruik, om so toegang tot hul genetiese bronne en tradisionele kennis te reguleer volgens die terme en voorwaardes soos plaaslik bepaal.

For more information on BCPs please visit:

<https://www.cbd.int/traditional/Protocol.shtml>

<https://naturaljustice.org/community-protocols/>



NKC meeting with lawyer & negotiating team discussing final stages of Rooibos negotiations

NKR Vergadering met Prokureurs & Onderhandelings span bespreek finale stappe van Rooibos Onderhandelings

Stanley Peterson, Jan Pietersen, Petrus Vaalbooi, Cecil LeFleur gathered together at the Rooibos Community Consultation

Stanley Peterson, Jan Pietersen, Petrus Vaalbooi, Cecil LeFleur versamel saam by die Rooibos Gemeenskaps Konsultasies



1.2 | The Rooibos Restitution Journey

We, the Khoikhoi, come from a strong oral tradition, thereby passing on our wealth of knowledge about the plants and wildlife of Southern Africa from one generation to the next. This includes our knowledge of the uses of Rooibos (*Aspalathus linearis*), an indigenous South African plant which is the foundation of today's multi-million rand Rooibos industry. The "Rooibos" name is also registered as a Geographical Indicator with The World Intellectual Property Organization (WIPO).

Rooibos is endemic to South Africa and grows in the Cederberg mountains in the Western Cape province, as well as in some parts of the Northern and Eastern Cape provinces. It is also known by us as "die arm man se tee" (the poor man's tea) or "bossie tee" (bush tea).

As an antioxidant, the plant has numerous health benefits and uses. A national and international industry has formed around rooibos tea, cosmetics and other rooibos products. However, the industry did not acknowledge us as its traditional knowledge holders and engaged in the commercialisation of Rooibos without our consent, nor were any benefits shared with us. Our knowledge was misappropriated over 200 years ago.

We only became aware of our right to benefit from the use of our knowledge in 2010 because of a biopiracy case which Natural Justice advocated against. This was sparked when multinational company Nestlé attempted to register five Rooibos (and Honeybush) patents for the development of hair and skin products without the consent of the provider country (South Africa) and the knowledge holders. Natural Justice and a Swiss organisation, Berne Declaration, launched an international campaign against Nestlé

for contravening South African law and the UN Convention on Biological Diversity/*Nagoya Protocol*. The patents were ultimately unsuccessful and Nestlé subsequently approached South Africa and the knowledge holders for consent in the development of a rooibos beverage product. This was the first Access and Benefit Sharing Agreement on Rooibos.

In 2010, the South African San Council initiated the process of advocating for the recognition of their indigenous knowledge to the uses of Rooibos and other plants found in South Africa. In 2012, we, the Khoikhoi, as represented by the National Khoisan Council, joined the San community in fighting for our recognition as traditional knowledge holders to the uses of Rooibos, with the support of Natural Justice. Natural Justice approached the San lawyer, Roger Chennells, to discuss how the Khoikhoi could also be accommodated in the struggle for recognition. At the time the then Department of Environmental Affairs and the Council for Scientific and Industrial Research also started to recognise the Khoikhoi as shared traditional knowledge holders. This allowed the Khoikhoi, in 2012, to also secure their rights as knowledge holders to key plant species, including Rooibos.

Hereby, in 2012, the National Khoisan Council and the South African San Council entered into a 50/50 benefit-sharing partnership as shared knowledge holders to three key plant species.

That same year, we, the National Khoisan Council, decided to develop a Community Protocol (CP) with the objective of articulating who the Khoisan communities are as non-recognised African indigenous communities in South Africa. By 2013, we had identified the priority issues of our CP as non-recognised indigenous

1.2 | Die Rooibos Pad van Restitusie

Ons, die Khoi-Khoi, kom van 'n sterk mondelinge tradisie, en dra so ons skatte van kennis aangaande die plante en diere van Suid-Afrika oor van een geslag tot die daaropvolgende. Hierdie sluit ons kennis in oor die gebruike van Rooibos (*Aspalathus linearis*), wat bygedra het tot die stewige basis van vandag se multi-miljoen rand Rooibos-industrie. Die "Rooibos" naam is ook geregistreer as 'n Geografiese Indikator by Die Wêreld Intellektuele Eiendomsorganisasie (WIEO).

Rooibos is eie aan Suid-Afrika en groei slegs in die Sederbergreeks in die Weskaapse provinsie sowel as sekere dele van die Noord- en Oos-Kaap Provinsies. Dit is ook bekend deur ons as "die arm man se tee" of "bossie tee". As 'n antioksidant het die plant talryke gesondheidsvoordele. 'n Nasionale en internasionale industrie het rondom rooibostee ontstaan, kosmetiek en ander produkte. Meer as 200 jaar gelede is ons kennis deur die Koloniale voorgeslag wanaangewend. Hulle het nie ons erken as die tradisionele kennishouers nie en aan die kommersialisering van Rooibos deelgeneem sonder ons toestemming of enige voordele wat met ons gedeel was.

Ons het eers in 2010 van onse reg tot voordele uit die gebruik van ons kennis bewus geword toe ons. Natural Justice 'n bioplagiaat saak aangemeld het. Dit was aangedryf deur multi-nasionale Nestlé se poging om vyf Rooibos- (en Heuningbos-) patente te registreer vir die ontwikkeling van haar- en velprodukte. Natural Justice en 'n Switserse organisasie, Berne Erklärung, het 'n wêreldwye veldtog teen Nestlé geloods vir oortreding van Suid-Afrikaanse wetgewing en die Konvensie oor Biologiese Diversiteit/*Nagoya Protokol*. Die patente was uiteindelik onsuksesvol en Nestlé het South Africa gevolglik genader en die kennishouers vir die toestemming

in die ontwikkeling van 'n rooibos drankieprodukt. Dit was die eerste Toegang en Voordeelverdelingsooreenkoms oor Rooibos.

Gevolglik het die Suid-Afrikaanse San Raad in 2010 die proses van voorspraak geïnisieer vir die erkenning van hul inheemse kennis oor die gebruike van Rooibos en ander plante wat in Suid-Afrika gevind word. Natural Justice het die San regsvertegenwoordiger genader om te bespreek hoe die Khoi-Khoi ook in die stryd op erkenning geakkommodeer kan word. In daardie tyd het die toe Departement van Omgewingsake en die Raad vir Wetenskaplike en Industriële Navorsing ook begin om die Khoi-Khoi te erken as mede-houers van tradisionele kennis. Dit het die deur in 2012 geopen vir die Khoi-Khoi om ook hulle regte te verseker as kennishouers van sleutel plantspesies, insluitend Rooibos.

Daardeur het die Nasionale Khoisan Raad en die Suid-Afrikaanse San Raad 'n 50/50% voordeelverdeling deelgenootskap gesluit as mede-kennishouers.

In daardie selfde jaar het ons besluit om 'n gemeenskapsprotokol te ontwikkel (GP) met die doel om uit te spel wie die Khoi- en Sangemeenskappe is as nie-erkende Afrika-inheemse gemeenskappe in Suid-Afrika. Teen 2013 het ons die kwessies wat prioriteit in ons GP moet geniet, geïdentifiseer. Onder meer sluit dit in:

- **Grondwetlike erkenning;**
- **Erkenning van ons tale;**
- **Grondregte;**
- **Intellektuele eiendom & Toegang en Voordeelverdeling;**
- **Vroue en jeug; en**
- **Genesing & ekonomiese ontwikkeling**

communities in South Africa. These included, amongst others:

- **Constitutional recognition;**
- **Recognition of our languages;**
- **Land rights;**
- **Intellectual property & Access and Benefit-sharing;**
- **Women & youth; and**
- **Healing & economic development.**

But, as the struggle for recognition as knowledge holders to the uses of Rooibos intensified, we decided to put the broader CP process on hold. We had entered into ABS negotiations for Rooibos and decided to focus on this process. We tried to get the South African Rooibos Council (industry) to negotiate benefits at our first meeting at !Khwa ttu in 2012. However, several key issues remained for the industry; these affected the negotiations. The issues revolved around our recognition as traditional knowledge holders; who the legitimate community representatives are; understanding how the community is organised; and the then absence of the representation of Cederberg indigenous farmers in the negotiations.

The main contention was whether the Khoikhoi and San were, in fact, the knowledge holders to the uses of Rooibos. This led to the South African government commissioning the Traditional Knowledge study on Rooibos and Honeybush in 2014. It confirmed our rights as traditional knowledge holders to the uses of Rooibos (see below). The Rooibos industry put in an official notice to the Traditional Knowledge Study, explaining they wanted to commission their own research on the issues. They did commission their own report but it was never made public.

Subsequently, a benefit-sharing agreement was developed between Nestlé, the South African San Council and the National Khoisan Council. This was the first agreement concluded around the uses of Rooibos. But it was also the catalyst to influence the start of a Rooibos industry-wide benefit-sharing agreement. This agreement with Nestlé was also strategically used to insert a clause stating that all Rooibos sourced should be ethically done in compliance with the law. This was a key moment in the struggle for recognition.

Maar, soos die stryd om erkenning as kennishouers tot die gebruike van Rooibos verhewig het, het ons besluit om vireers die breër GP-proses oor te hou. Ons het TVV-onderhandelinge vir Rooibos begin en besluit om op hierdie proses te fokus. Ons het probeer om die Suid-Afrikaanse Rooibos Raad by die onderhandelingsstaf te kry oor voordele by ons eerste vergadering te !Khwa ttu in 2012. Verskeie sleutelkwessies het egter vir die industrie bly staan wat die onderhandelinge geaffekteer het: Die kwessies rakende ons erkenning as tradisionele kennishouers; wie die legitieme gemeenskapsverteenvoerders is; 'n deeglike begrip van hoe die gemeenskap georganiseer is; en die verteenwoordiger van Sederberg inheemse boere in die onderhandelinge.

Die belangrikste strydpunt: of die Khoikhoi en San inderdaad die kennishouers tot die gebruike van Rooibos was. Dit het daartoe gelei dat die Suid-Afrikaanse

regering die Tradisionele Kennis-studie oor Rooibos en Heuningbos in 2014 aangevra het. Daarin word onse regte as tradisionele kennishouers tot die gebruike van Rooibos bevestig (sien onder). Die Rooibos-industrie het amptelik kennis gegee rakende die Tradisionele Kennis-studie en dat hulle self navorsing oor hierdie kwessies sou gaan doen. Dit het hulle gedoen maar hulle eie bevinding was nooit openbaar gemaak nie. Gevolglik was 'n voordeelverdelingsooreenkoms ontwikkel tussen Nestlé, die Suid-Afrikaanse San Raad en die Nasionale Khoisan Raad. Dit was die eerste ooreenkoms wat bereik was oor die gebruike van Rooibos. Terselfdertyd was dit die katalisator wat 'n sterk invloed uitgeoefen het vir die begin van 'n industriële voordeelverdelings-ooreenkoms. Hierdie ooreenkoms met Nestlé was ook strategies gebruik om 'n klousule in te sit wat stateer dat alle Rooibos wat ontgin word, eties gedoen moes word ingevolge die wet. Dit was 'n sleutelmoment in die stryd om erkenning.



Stream in the Cederberg

Water stroom in die Sederberg



Amelia Koopman stands to address one of the first joint Rooibos negotiation meetings

Amelia Koopman staan om die vergadering te adresseer by een van die eerste gesamentlike Rooibos onderhandelingsvergaderings.

Diagram 1

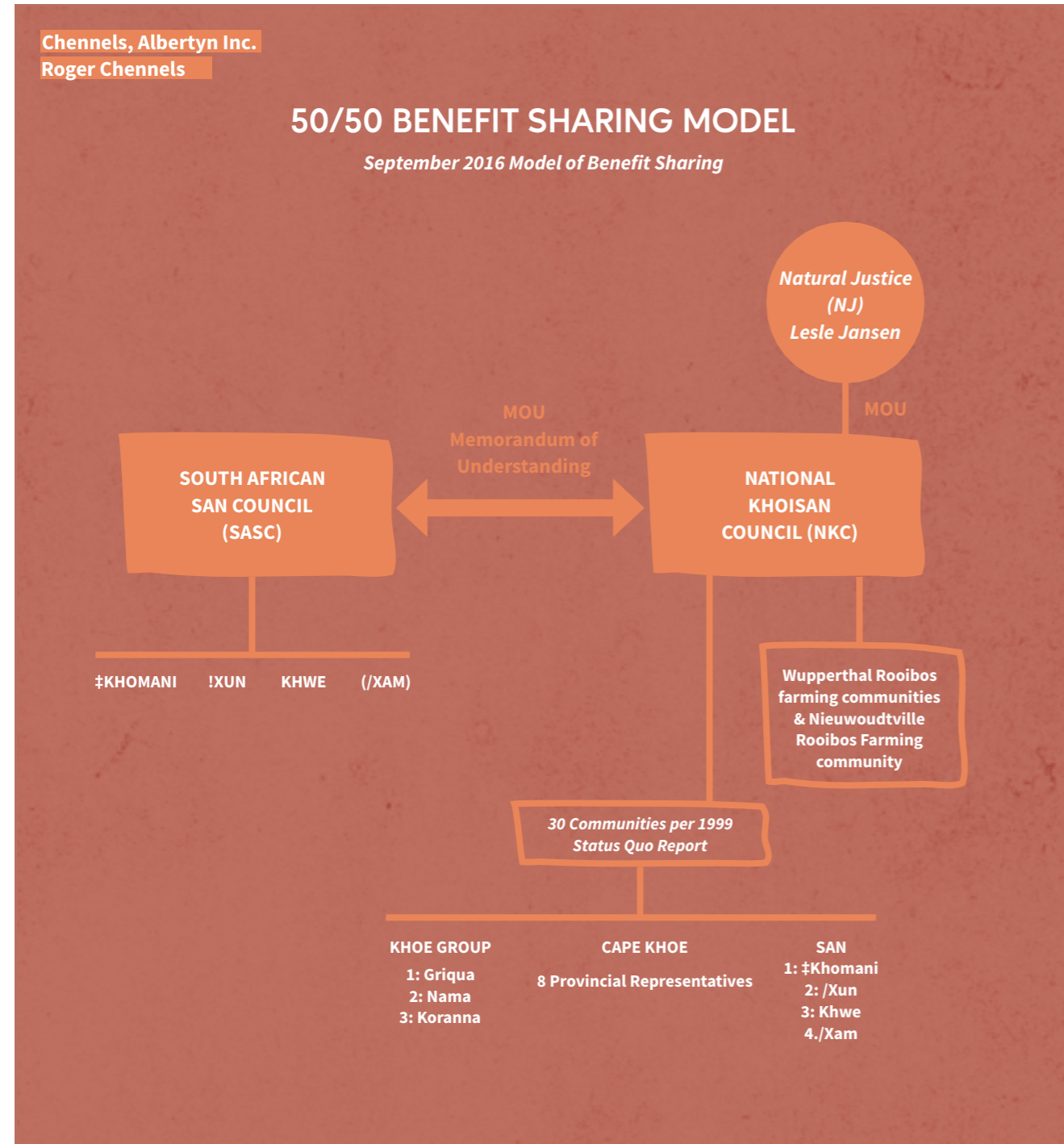
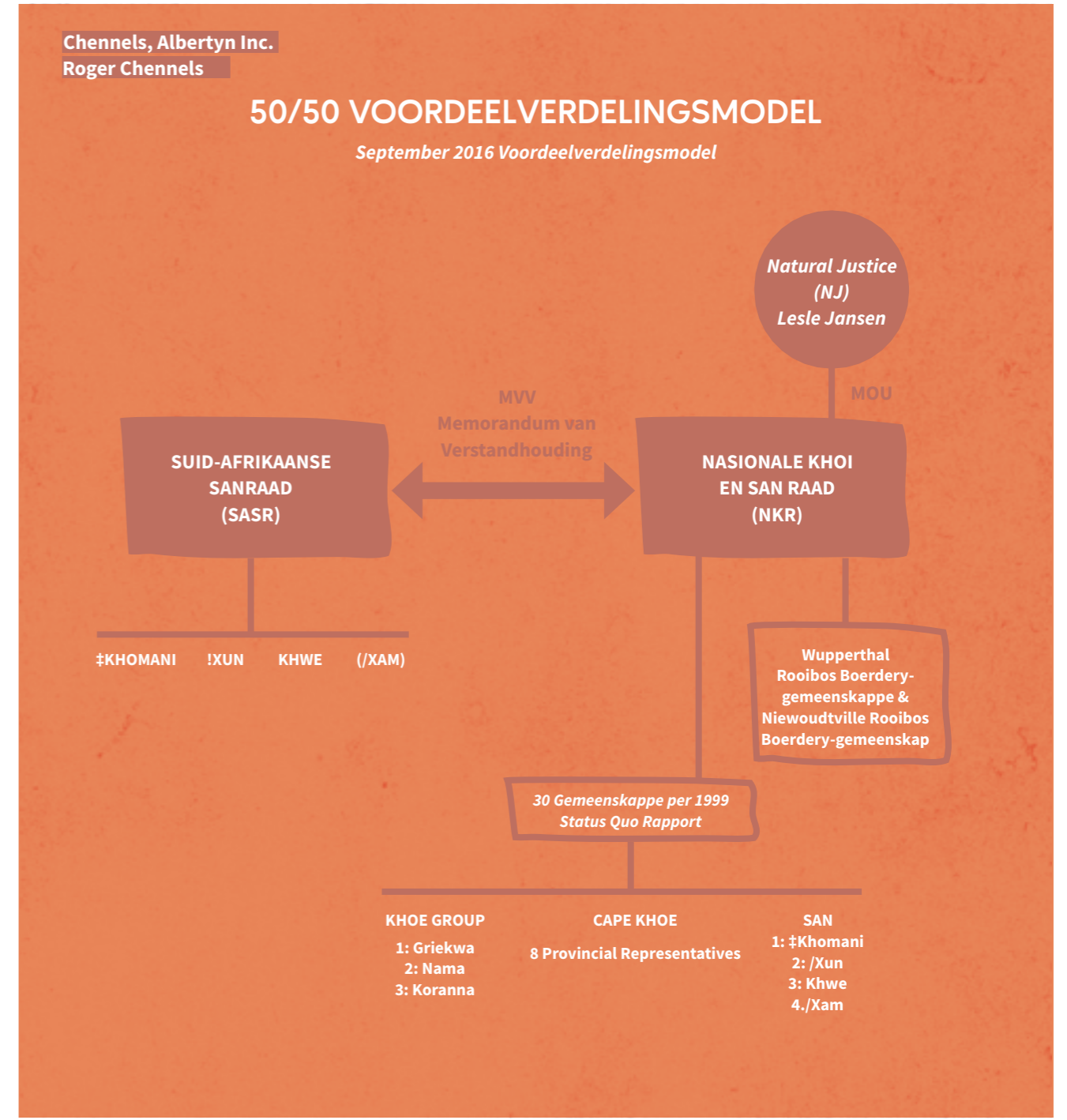


Diagram 1



TRADITIONAL KNOWLEDGE

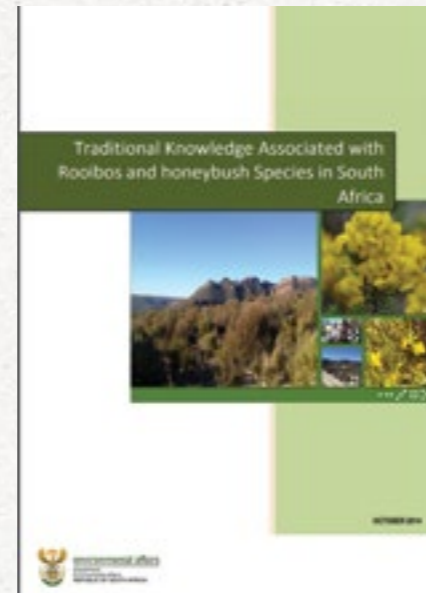
“Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.

While there is not yet an accepted definition of TK at the international level, it can be said that:

TK in a general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with TK.

TK in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations.

Traditional knowledge can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge” - The World Intellectual Property Organization (WIPO)



THE GOVERNMENT-COMMISSIONED STUDY ON ROOIBOS KNOWLEDGE HOLDERS

In 2014, the South African government commissioned and published a study to confirm whether the Khoikhoi and San were, in fact, the knowledge holders to the uses of Rooibos. The study, called “Traditional Knowledge Associated with Rooibos and Honeybush Species in South Africa”, found no reason to dispute the Khoikhoi and San communities’ claim.

“The fact that these species are endemic in areas where the species are in abundance, combined with the fact that the San and Khoikhoi populations were resident in these areas for centuries before the arrival of the settlers and that the industry has evolved and expanded in these particular areas does largely support the communities' perception that the [traditional knowledge] TK for Rooibos and Honeybush rests with the communities who originate in these areas. There is no evidence that disputes the Khoi and San as holders of TK for these species.”

TRADISIONELE KENNIS

“Tradisionele Kennis (TK) is kennis, handigheid, vaardighede en praktyke wat ontwikkel en volgehou word en oorgedra word van geslag tot geslag binne ‘n gemeenskap, wat dikwels deel vorm van hulle kulturele of spirituele identiteit.”

Terwyl daar nog nie op internasionale vlak ‘n aanvaarde definisie van TK bestaan nie, kan dit gesê word dat:

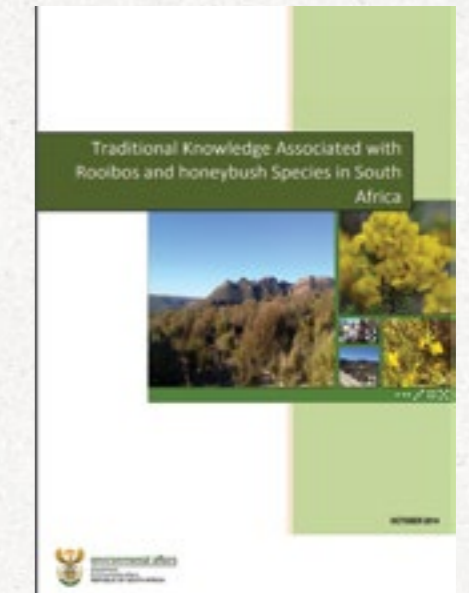
TK in ‘n algemene sin omarm die inhoud van kennis as sodanig sowel as tradisionele kulturele uitdrukkings, insluitend uitsonderlike tekens en simbole wat geassosieer word met TK.

TK in die beperkte sin verwys na kennis as sodanig, in besonder die kennis wat volg uit intellektuele aktiwiteit in ‘n tradisionele konteks, en sluit in kennis, handigheid, vaardighede, praktyke en innovasies.

Tradisionele kennis kan gevind word in ‘n wye verskeidenheid van kontekste insluitend: landbou, wetenskaplike, tegniese, ekologiese en medisinale kennis sowel as biodiversiteit-gerelateerde kennis” - Die Wêreld Intellektuele Eiendoms-organisasie (WIEO).

Opposite page: Alida Afrika standing alongside Rooibos in Nieuwoudtville

Teenoorgestelde bladsy: Alida Afrika staan langs Rooibos in Nieuwoudtville



DIE STUDIE WAT DIE REGERING AANGEVRA HET OOR ROOIBOS KENNISHOUERS

Die Suid-Afrikaanse regering het in 2014 ‘n studie aangevra en gepubliseer om vas te stel of die Khoi-Khoi en San inderdaad die kennishouers is tot die gebruike van Rooibos. Die studie, getitel “Tradisionele Kennis wat met Rooibos en Heuningbos-spesies in Suid-Afrika verband hou”, het geen rede gevind om die aannames van Khoikhoi- en Sangemeenskappe te betwyfel nie.

“Die feit dat hierdie spesies inheems is in gebiede waar die spesies wydverspreid voorkom, tesaam met die feit dat die San- en Khoikhoivolke eeue lank daar gewoon het lank voor die aankoms van die setlaars en dat die industrie in daardie gebiede begin en uitgebrei was, bevestig die gemeenskappe se waarneming dat die [tradisionele kennis] TK vir Rooibos en Heuningbos by die gemeenskappe hoort wie oorspronklik van daardie gebiede is. Daar is geen bewyse nie wat betwis dat die Khoi-Khoi en San die houers van TK van hierdie spesies is.”

“

[If] the people are being recognised as traditional knowledge holders of Rooibos that has been commercialised...that means, for me, that it brings something back. Something that I lost because nobody takes note of the knowledge that I have. They own it as if it is their own knowledge. So if they recognise it, it brings back some dignity to the people.”

Barend Salomo,

community representative from the Wupperthal Farming Community in the Cederberg

The Cederberg indigenous farming communities form part of the Khoikhoi community.

The National Khoisan Council (NKC) team was initially assigned to work on intellectual property and access and benefit-sharing (ABS) in the original community protocol in 2012. They then became the ABS negotiating team for the Rooibos benefit-sharing agreement and negotiations related to other plant species.

In 2015, the Khoikhoi and San negotiating teams then mobilised indigenous Rooibos farming communities of the Cederberg belt region. As the traditional custodians of the resource, these communities played a distinct role in the negotiations as Khoikhoi communities stewarding this resource. Them joining made the negotiating team stronger as both the cultural leaders (Khoikhoi and San) were now joined by the farming communities stewarding the resource.

Once the Cederberg belt community representatives joined the NKC ABS negotiating team, negotiations for a benefit-sharing agreement with the South

African Rooibos industry started in earnest. The goal was an industry-wide agreement, including a traditional knowledge levy on the use of traditional knowledge associated with Rooibos.

In 2016, the South African Rooibos industry, represented by the South African Rooibos Council, came to the negotiating table. These negotiations were overseen by the Department of Environmental Affairs, as it was known then. Through this process, a specific Rooibos BCP documenting the Khoikhoi as traditional knowledge holders to Rooibos emerged as a priority. Negotiations were concluded in 2019. A traditional knowledge levy will be paid during March 2020 as the first benefit shared (other than the benefits flowing from the Nestlé agreement signed in 2014).

To us, these benefits represent a form of restitution, as redress for past injustices. It is the symbolic restoration of our beloved Rooibos.

“

“[A]s die mense erken word as die tradisionele kennishouers van Rooibos wat gekommersialiseer was...vir my beteken dit dat iets teruggebring word. Iets wat ek verloor het want niemand neem die kennis in ag wat ek besit nie. Hulle besit dit asof dit hul eie kennis is. So, as hulle dit erken, bring dit 'n mate van waardigheid vir die mense.”

Barend Salomo,

Gemeenskapsverteenvoorder van die Wupperthal Boerderygemeenskap in die Sederberg

Die Sederberg inheemse boerderygemeenskappe vorm deel van die Khoikhoi gemeenskap.

Die Nasionale Khoisan Raad (NKR) span wat oorspronklik gedurende 2012 aangestel was om oor intellektuele eiendom en toegang en voordeelverdeling in die oorspronklike gemeenskapsprotokol te werk, het toe die TVV onderhandelingspan vir die Rooibos voordeelverdelingsooreenkoms geword asook onderhandelinge wat met ander plantspesies verband hou. Die Khoikhoi- en San onderhandelingspanne het daarna die inheemse Rooibos boerderygemeenskappe van die Sederberg strook gemobiliseer. As die tradisionele rentmeesters van die bron, speel hierdie gemeenskappe 'n beslissende rol in die onderhandelinge as Khoikhoigemeenskappe wat hierdie bron bewaar.

Nadat die Sederberg strook se gemeenskapsverteenvoorders hul by die NKR TVV onderhandelingspan gevoeg het, het onderhandelings vir 'n voordeelverdelingsooreenkoms in alle erns met die Suid-Afrikaanse Rooibos- industrie

begin. Die doel was om 'n industriewye ooreenkoms te bereik, insluitend 'n tradisioneel-kennisheffing op die gebruik van tradisionele kennis geassosieer met rooibos. In 2016 het die Suid-Afrikaanse Rooibos-industrie, verteenwoordig deur die Suid-Afrikaanse Rooibos Raad, by die onderhandelingspan aangesluit. Hierdie onderhandelings was deur die departement van Omgewingsake gehanteer, soos laasgenoemde toe bekend gestaan het. Deur hierdie proses het 'n spesifiek Rooibos BGP ontstaan as 'n prioriteit om die Khoi-Khoi te gedokumenteer as tradisionele kennishouers tot Rooibos. Onderhandelinge is in 2019 gefinaliseer. 'n Tradisioneel-kennisheffing sal gedurende Maart 2020 uitbetaal word as die eerste voordeel wat gedeel word (vergelyk die Nestlé ooreenkoms onderteken in 2014).

Vir ons verteenwoordig hierdie voordele 'n vorm van restituisie, as regstelling van die onregverdigheede van die verlede. Dit is die simboliese herstel van ons geliefde Rooibos.

THE ROOIBOS ACCESS AND BENEFIT-SHARING NEGOTIATING TEAM/DIE ROOIBOS TOEGANG EN VOORDEELVERDELINGSPAN

1. Cecil le Fleur

2. Stanley Peterson

3. Poem Mooney

4. William Langeveldt

5. Barend Salomo (Wupperthal representative/verteenvoorder)

6. Kenneth Maarman (Nieuwoudtville representative/verteenvoorder)

7. Alida Afrika (Suid Bokkeveld representative/verteenvoorder)

8. Leslie Jansen (Lawyer/Regseleerde, Natural Justice)

9. Ivan Vaalbooi (Administrative support/Administratiewe steun, Natural Justice)

10. Pooven Moodley (Executive Director/Uitvoerende Direkteur, Natural Justice)

Khoikhoi Peoples Rooibos & Biodiversity Trust

Khoikhoi Mense Rooibos & Biodiversiteit Trust



Diagram 2

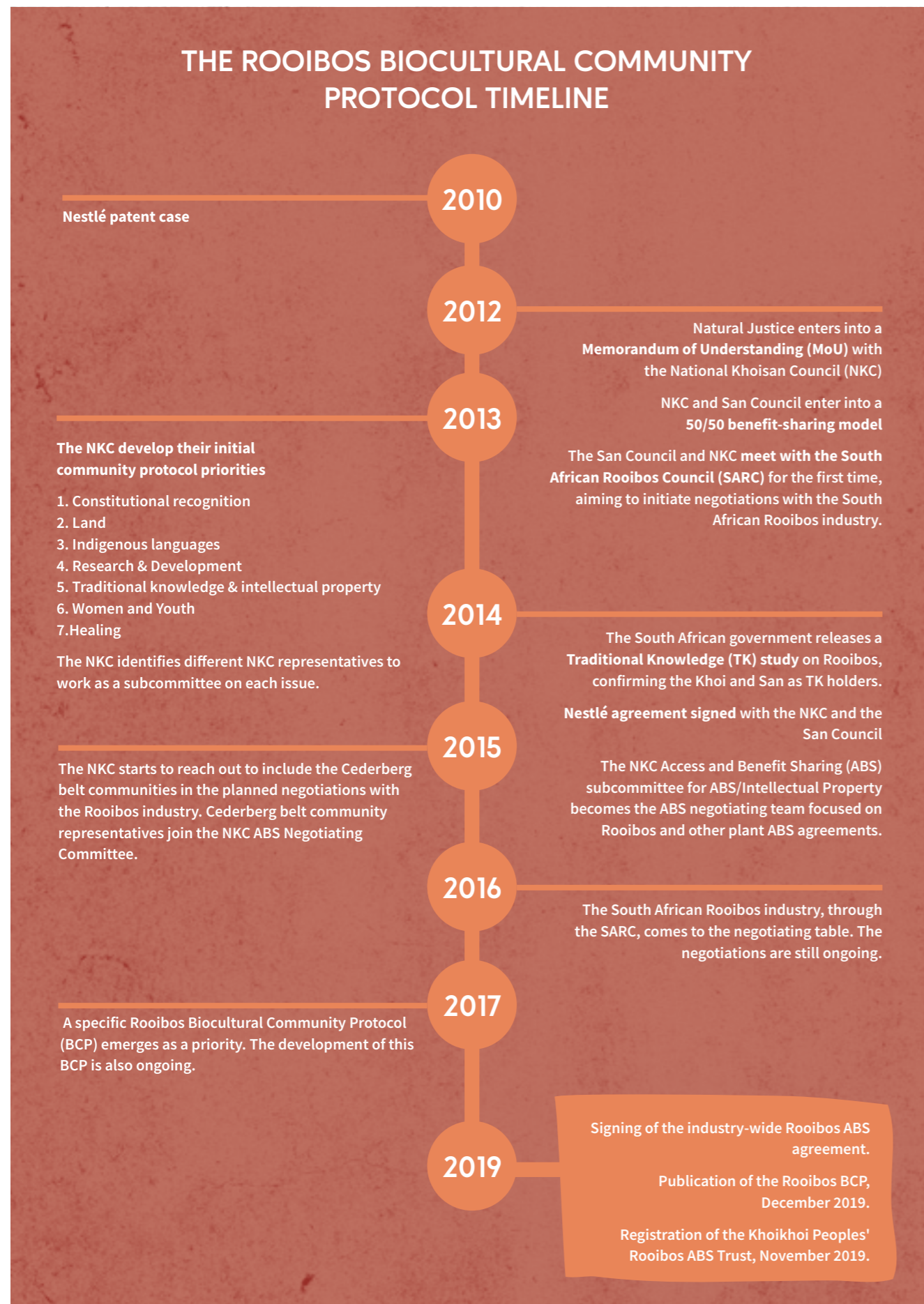
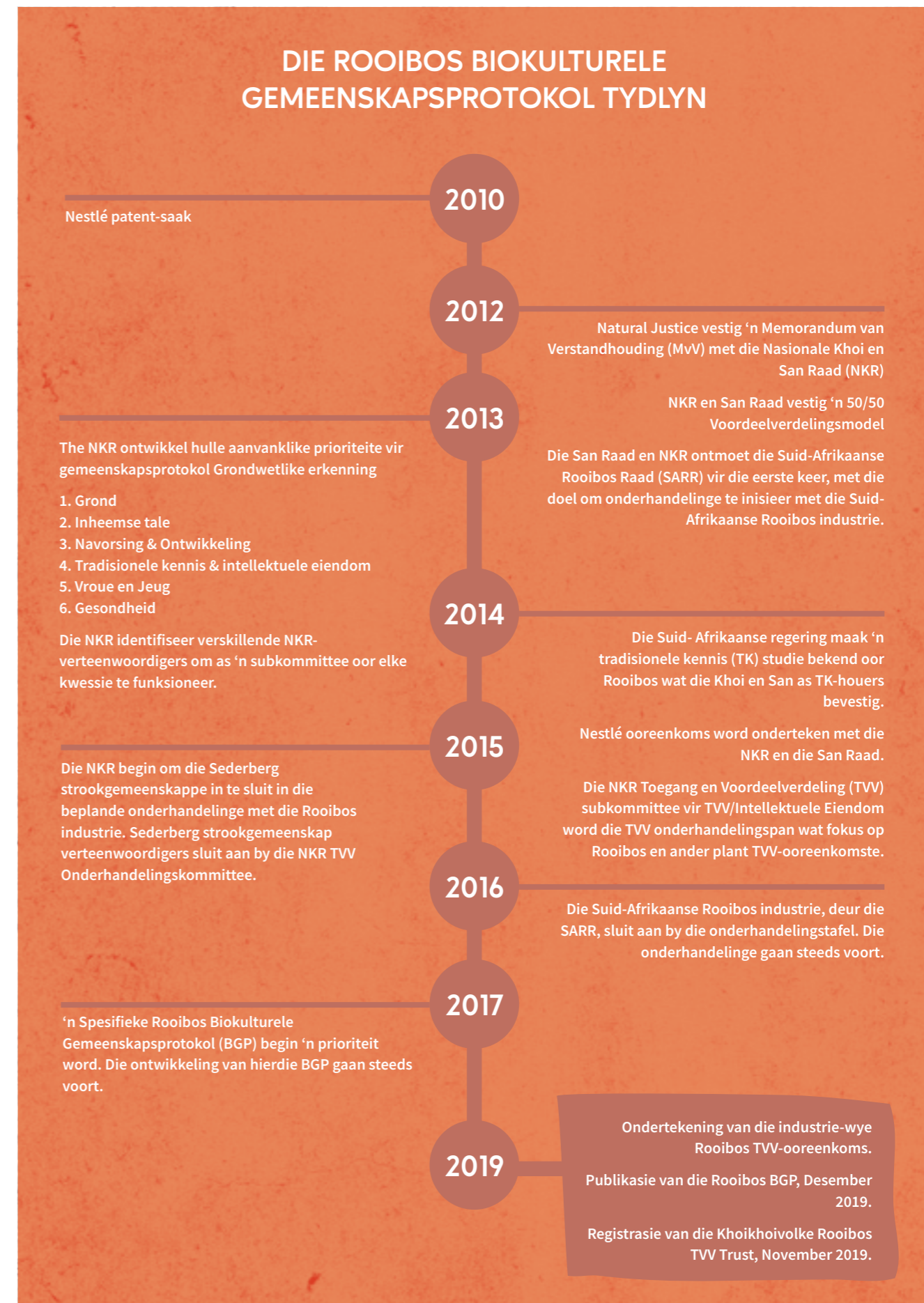


Diagram 2



1.3 Why do we need a Biocultural Community Protocol?

More information regarding the impact of the commercialisation of Rooibos on indigenous communities and their traditional knowledge can be found in a Rooibos documentary produced by the Heinrich Böll Stiftung Foundation and Natural Justice, found at this link:

<https://naturaljustice.org/video/rooibos-restitution/>

The Khoikhoi constitute about 40 historical communities, excluding the Cederberg indigenous farming communities. Furthermore, the Khoikhoi and San communities are in a struggle for recognition in South Africa. There is not a formal record of our existence as such, on a par with other cultural communities. It is unclear to external actors, who we are, who our communities are, how we are organised in post-Apartheid South Africa, how we give consent, and what our aims and priorities are. We needed to find a way of showing what grew from the last eight years of negotiations. Where Rooibos commercialisation was said to be “only biotrade” by some experts and the plant treated as an “agricultural commodity”, we had to document how we brought justice to **our cultural resource, what we call “onse moedersmelk” (our mother’s breast milk)**.

In 2017, we, the Khoikhoi component of the National Khoisan Council (NKC), and as knowledge holders to the uses of Rooibos, decided to document and assert our traditional knowledge to the uses of Rooibos through this BCP.

This BCP provides a platform for us, the Khoikhoi, to safeguard our resources and associated TK from being misappropriated. The collective documentation of knowledge on traditional uses of plants, animals and other resources is vital to maintaining our heritage for future generations.

This BCP articulates how the Khoikhoi are organised for purposes of Free, Prior and Informed Consent (FPIC) and Access and Benefit-sharing (ABS) in relation to Rooibos. These customary indigenous resources are clearly set out in our Cultural

Biodiversity Register (to be published soon). This can be obtained from the NKC.

The BCP will ensure that any external stakeholder or party is informed about our customary resources as indigenous biological resources, in this case Rooibos. They will understand how to engage us through FPIC, as well as any intellectual property related to Rooibos and its commercialisation. All researchers, Rooibos commercial companies, governments, academics, writers, students, film makers or persons interested in our traditional knowledge and intellectual property-related matters, must consult the NKC as our leadership. Therefore, this BCP provides an interface between our communities that want to engage in ABS (including current and future intellectual property rights), and the ethical users of our traditional knowledge.

THE SAN AND THE RECORDAL SYSTEM

The San people chose to document and assert their traditional knowledge through the South African National Recordal System, which is the largest South African initiative that records, documents, preserves and protects indigenous knowledge for the benefit of the communities of South Africa. In 2017, they officially recorded their uses of Rooibos.

1.3 Waarom benodig ons ‘n Biokulturele Gemeenskapsprotokol?

Terwyl die Sanvolke uit drie-vier gemeenskappe bestaan, bestaan die Khoi-Khooin uit sowat 40 historiese gemeenskappe, uitsluitend die Sederberg inheemse boerderygemeenskappe. Verder, die Khoi- en Sangemeenskappe is in ‘n stryd gewikkel vir erkenning in Suid-Afrika. Daar is nie ‘n formele rekord van onse bestaan as sodanig, op ‘n soortgelyke vlak as met ander kulturele gemeenskappe nie. Dit is onduidelik aan buitestaanders wie ons is, wie onse gemeenskappe is, hoe ons georganiseer is in post-Apartheid Suid-Afrika, hoe ons toestemming verleen, en wat ons doeleindes en prioriteite is. Ons het dus ‘n manier benodig wat kon toon waaroor die afgelope agt jaar se onderhandelinge beteken het. Waar eens Rooibos-kommersialisering aangedui was as “slegs biohandel” deur sommige kenners, en die plant beskou was as ‘n “landbou- kommoditeit”, moes ons dokumenteer hoe **ons geregtigheid gebring het vir die kulturele bron wat ons noem: “onse moedersmelk”**.

Die Khoikhoi komponent van die inheemse kennishouers het in 2017 besluit om hulle tradisionele kennis te boekstaaf en te handhaaf ten opsigte van die gebruike van Rooibos deur middel van ‘n BGP. Die eindproduk van daardie proses is hierdie BGP.

Hierdie BGP verskaf aan ons, die Khoi-Khooin, ‘n platform om onse bronne en aanverwante TK te beskerm teen wantoepassings. Die kollektiewe dokumentasie van kennis oor tradisionele gebruike van plante, diere, en ander bronne is uiters belangrik om ons erfenis vir die toekomstige geslagte te bewaar.

Hierdie BGP verduidelik hoe die Khoi-Khooin georganiseer is vir die doeleindes van vrye, voorafgaande en ingeligte toestemming en voordeelverdeling betreffende Rooibos

en ander gebruiklike inheemse bronne.

Hierdie gebruiklike inheemse bronne word duidelik uiteengesit in onse Kulturele Biodiversiteitsregister (gaan binnekort gepubliseer word). Die BGP sal verseker dat enige eksterne aandeelhouer of party ingelig is omtrent onse gebruiklike bronne as inheemse biologiese bronne. Hulle sal dus weet hoe om in gesprek met ons te tree deur Vrye, Voorafgaande en Ingeligte Toestemming (VVIT), asook enige intellektuele eiendom aangaande Rooibos en die kommersialisering daarvan. Alle navorsers, Rooibos kommersiële maatskappye, regerings, akademië, skrywers, studente, filmvervaardigers of belangstellendes in ons tradisionele kennis en intellektuele eiendomsverwante sake, moet ons leierskap raadpleeg. Hierdie BGP verskaf dus ‘n skakel tussen ons gemeenskappe, wat betrokke wil wees in Toegang en Voordeelverdeling (insluitend huidige en toekomstige intellektuele eiendomsregte), en die etiese gebruikers van ons tradisionele kennis.

DIE SAN EN DIE REKORDERINGSISTEEM

Die Sanmense het verkies om hulle tradisionele kennis deur gebruikmaking van die Suid-Afrikaanse Nasionale Rekorderingsstelsel - die grootste Suid-Afrikaanse inisiatief wat rekords en dokumente oor inheemse kennis bewaar en beskerm tot voordeel van die gemeenskappe van Suid-Afrika. Die San het amptelik hul gebruike van Rooibos in 2017 geboekstaaf.

Meer inligting aangaande die impak van die kommersialisering van genetiese bronne van inheemse gemeenskappe en hul tradisionele kennis kan nageslaan word in ‘n Rooibos-dokumentêr, vervaardig deur die Heinrich Böll Stiftung (Stigting) en Natural Justice, by hierdie skakel:

<https://naturaljustice.org/video/rooibos-restitution/>

CHAPTER 2 | CHAPTER 2

2.1 Who we are

2.1 Wie ons is

2.2 Dispossession under Colonialism and Apartheid

2.2 Onteining onder Kolonialisme en Apartheid

2.3 Rebuilding the Khoikhoi in a post-Apartheid South Africa

2.3 Heropbou van die Khoi-Khoi in 'n post-apartheid Suid-Afrika

2.4 What We Stand For

2.4 Waarvoor ons staan

ENGLISH

AFRIKAANS

2

THE KHOIKHOI

DIE KHOI-KHOIN

2.1 | Who we are

We are the Khoikhoi people. We have occupied and moved around Southern Africa as nomadic herders for thousands of years. Along with the San, we are the first inhabitants of this land. The earliest evidence of our existence can be found in traces of rock art found around various parts of Southern Africa. The Khoikhoi people are made up of four historical groupings: the (i) Griqua, (ii) Nama, (iii) Koranna and (iv) Cape Khoi, which have further subgroupings.

The Khoikhoi is our original name and an umbrella term, referring to the different Khoikhoi tribes mentioned above. Variations of spelling include “Khoi”, “Khoisan” or “Khoe” (singular), as well as “Khoi-khoi”. **It is noticeable that all our tribe names end in -qua (for example the Namaqua or Griqua) because -qua means “people”.** The prefix refers to a historical leader and the name would therefore mean “people of the leader”.

Previously, we were also referred to as the “Hottentotte”. This name represents cultural and linguistic patterns among our people. Dutch Colonialists abbreviated Hottentot to “Hot Not,” but this variation of the name carries a derogatory connotation that was carried into the painful Apartheid history.

We are not formally recorded in South Africa as an indigenous cultural community. The United Nations Special Rapporteur, Prof. Rodolfo Stavenhagen documented our existence as South Africa’s indigenous peoples as the following communities listed on page 7 of the 2005 report:²

“There are six large groups who identify themselves as indigenous and who claim this status. Under each of these groups there can be various sub-groups which differ from each other, either for their striking difference

in demography or in the institutions they have adopted or again for differences in their subsistence economy. These ethnic groups include the three main San peoples (!Xun, Khwe and !Khomani), the various Nama communities (Khoekhoen), the major Griqua associations and representatives of the Koranna descendants, as well as several constituencies of so-called “revivalist Khoisan”, people reclaiming their historical heritage.

According to the documentation provided to the Special Rapporteur during his visit, the various indigenous groups, known collectively as Khoi-San, are estimated to include approximately 1,000 !Khomani San, 1,100 Khwe San, 4,500 !Xun San and 10,000 Nama people, who are mostly resident in the sparsely populated Northern Cape Province. There are a further 300,000 Griquas, mostly located in the Northern and Western Cape Provinces, but with significant communities in the Eastern Cape, Free State and KwaZulu-Natal. There is furthermore an unspecified number of “revivalists” Khoisan people associated with the Cape Cultural Heritage Development Council (CCHDC). Most of the indigenous peoples in the western part of the country were forced to adopt Afrikaans as their primary language. The use of Khoe-San languages was strongly discouraged under Apartheid.”

These historical outlines of the broad historical communities are confirmed as such in both the Status Quo reports of 1999³ and the 2018 South African Human Rights Commission report on the human rights situation of the Khoisan.⁴

The Khoikhoi peoples are known as great nomadic pastoralists and this was our form of land economy. We were known to possess a great amount of wealth in the form of cattle, sheep, indigenous knowledge, customary resources, as well as a rich

²United Nations Commission on Human Rights (2005) “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen”. Accessed from: <https://undocs.org/E/CN.4/2006/78/Add.2> Retrieved July 2019

³These reports are not available for general public access.

⁴United Nations Commission on Human Rights (2005) “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen”. Accessed from: <https://undocs.org/E/CN.4/2006/78/Add.2> Retrieved July 2019

2.1 | Wie ons is

Ons is die Khoi-Khoi - een volk. Ons, die Khoi-Khoi, het vir derduisende jare Suider-Afrika bewoon en rondbeweeg as nomadiese vee-eienaars. Saam met die San is ons die eerste inwoners van hierdie land. Die vroegste bewys van ons bestaan kan gesien word in afbeeldinge van rotskuns, oral te vinde in verskillende dele van Suider-Afrika. Die Khoi-Khoivolk bestaan uit vier historiese groeperinge: die Griekwa, Nama, Koranna en Kaapse Khoi - wat almal subgroepe het.

Khoi-Khoi is onse oorspronklike naam en is ‘n sambreelterm, verwysend na die verskillende Khoi-Khoistamme soos bo vermeld. Spelvariasies sluit in “Khoi” of “Khoe” (enkelvoud), asook “Khoikhoi” en Khoisan. **Dis opmerklik dat al onse name in -kwa eindig (byvoorbeeld die Namakwa of Griekwa) omdat -kwa “mense” beteken.** Die voorvoegsel verwys na ‘n historiese leier en die naam sou dus die “mense van” die leier aandui.

Daar is voorheen ook na ons verwys as die “Hottentotte”. Daardie naam verteenwoordig die kultuur- en taalpatrone van ons mense. Hollandse kolonialisme het Hottentot verkort tot “hotnot,” maar hierdie variasie het ‘n beledigende konnotasie.

Ons is nie formeel in Suid-Afrika as ‘n inheemse kulturele gemeenskap opgeteken nie. Die Verenigde Nasies Spesiale Rapporteur, Prof. Rodolfo Stavenhagen, het ons bestaan gedokumenteer as Suid-Afrika se inheemse volkere en die volgende gemeenskappe gelys op bladsy 7 van die 2005 verslag⁵:

“Daar is ses groot groepe wat hulself identifiseer as inheems en aanspraak maak op hierdie status. Onder elk van hierdie groepe kan daar verskeie sub-groepe, wat

van mekaar verskil, of vir hulle opvallende verskille in demografie of in die institusies wat hulle aangeneem het of weer vir verskille in hul bestaansekonomie. Hierdie etniese groepe sluit in die drie hoof-Sanvolke (!Xun, Khwe en !Khomani), die verskillende Nama gemeenskappe (Khoekhoen), die groot Griekwa assosiasies en verteenwoordigers van die Koranna-afstammeling, sowel as verskeie groeperinge of sogenaamde “herlewings-Khoisan”, mense wat hul historiese erfenis heropneem.”

Volgens die dokumentasie verskaf aan die Spesiale Rapporteur gedurende sy besoek, tel die verskillende inheemse groepe, kollektief bekend as Khoi-San, insluitend ongeveer 1,000 !Khomani San, 1,100 Khwe San, 4,500 !Xun San en 10,000 Namamense, wie meestal in die dunbevolkte Noord-Kaap Provinsie woon. Daar is ‘n verdere 300,000 Griekwas, meestal in the Noord- en Wes-Kaap Provinsies, maar met beduidende gemeenskappe in die Oos-Kaap, Vrystaat en KwaZulu-Natal. Daar is verder ‘n onbepaalde getal van “herlewing” Khoisanmense geassosieer met die Kaapse Khoi Erfenis Ontwikkeling Raad (KKEOR). Meeste van die inheemse volke in die westelike deel van die land was gedwing om Afrikaans as hulle primêre taal aan te neem. Die gebruik van Khoe-San tale was sterk ontmoedig onder Apartheid.”

Hierdie historiese raamwerk van die breë historiese gemeenskappe word as sodanig in beide die Status Quo verslae van 1999⁷ en die 2018 Suid-Afrikaanse Menseregte Kommissie rapport oor die menseregte situasie van die Khoi-Khoi en San.⁸

Die Khoi-Khoivolke was bekend as besondere nomadiese veeboere wat onse vorm van grond-ekonomie was. Dis geboekstaaf dat ons welgestel was in die vorm van beeste, skape, inheemse kennis, gebruiklike bronne,

⁵Verenigde Nasies Kommissie oor Menseregte (2005) “Rapport van die Spesiale Rapporteur oor die situasie van menseregte en fundamentele vryhede van inheemse mense, Rodolfo Stavenhagen”. Verkry by <https://undocs.org/E/CN.4/2006/78/Add.2> Bekom Julie 2019.

⁷Hierdie verslae is nie vir openbare toegang beskikbaar nie.

⁸Verenigde Nasies Kommissie oor Menseregte (2005) “Rapport van die Spesiale Rapporteur oor die situasie van menseregte en fundamentele vryhede van inheemse mense, Rodolfo Stavenhagen”. Verkry van: <https://undocs.org/E/CN.4/2006/78/Add.2> Bekom Julie 2019.

“

“We are the traditional knowledge (TK) holders to all of the uses of Rooibos. Any Intellectual Property Rights (IPR) derived from the use of our TK should duly be accredited to us as the rightful holders of the TK.”

“Khoikhoi Rock Art is comparatively rare. Nonetheless, these sites remain sacred to us and form an important part of Khoikhoi heritage today. It is regarded as the “title deeds” to our lands, resources and territories.”

heritage. Our wealth was documented several times in colonial British, Dutch, German and Portuguese archival records. The wealth of one of the Cape Khoi tribes, the Cocoqua, is documented in one colonial record summarised from different writings as follows:

*“The Kochoquas are called Saldanhars by our countrymen, because they have always dwelt mostly near and in the valleys of Saldanha Bay. They settled in fifteen or sixteen different villages, about a quarter of an hour’s distance from one another. Each village consisted of thirty, thirty-six, forty or fifty huts, all placed in a circle a little distance apart. The Saldanhars for safety kept their cattle in the centre of the village at night. They also owned a large collection of cattle, well over a hundred thousand in number and about two hundred thousand sheep, which instead of wool have longish coloured hair on the body”.*⁵

Geographically, the Khoikhoi are spread over much of the Northern, Western and Eastern Cape and the Free State, as the provinces in South Africa are known today. Prior to colonisation, all the western, southern, central and south-eastern regions of present-day South Africa were occupied only by the Khoisan peoples. As the Rooibos plant is only found in the Western Cape, the knowledge of its uses can only come from us, the original inhabitants.

Khoikhoi peoples are known for their spiritual connectedness to land. We did not regard land as an economic commodity, individually owned but rather as a gift from nature to be cared for. Therefore, we never claimed individual rights to land, but lived with the deep-rooted belief that land belongs to all the living creatures that live on it. This connectedness to land coincides with the early practices and beliefs of indigenous peoples world-wide.

The art of painting on rocky surfaces in caves and in open lands is a unique and defining characteristic of our distinct identity and heritage. Our paintings date back thousands of years and serve as a testimony to our right to land and its resources in South Africa. Khoikhoi rock art is made up of different designs, finger dots and handprints common amongst the Khoikhoi people. The designs were applied with fingers, making a striking contrast to the work of the San.

Barend Salomo with Khoikhoi rock art

Barend Salomo met Khoi-rotskuns



“

Khoi-Khoimense is bekend vir hulle spirituele verbondenheid aan grond. Ons het dit nie as ‘n ekonomiese kommoditeit beskou nie, maar eerder as ‘n geskenk van die natuur.

Khoi-rotskuns is egter raar in vergelyking daarmee. Daar is huidige min kennis oor wat die kuns verbeeld en waarom dit gemaak was. Nietemin bly hierdie terreine heilig vir ons as ‘n belangrike deel van Khoikhoi-erfenis vandag.

asook ‘n ryke erfenis. Onse rykdom is heelwat keer gedokumenteer in koloniale Britse, Hollandse, Duitse and Portugese argiewe. Die rykdom van een van die Kaapse Khoistamme, die Cochokwa, is gedokumenteer in koloniale rekords van Olfert Dappert [1688], Willem Ten Rhyne [1686] en Johannes Guilielmusde Grevenbroek [1695]: Vertaald lui dit so:

Die Kochokwas word Saldanhars deur onse landgenote genoem, omdat hulle altyd naby en in die valleie van Saldanhaabaai gewoon het. Hulle nedersetting was in vyftien of sestien verskillende dorpe, ongeveer ‘n kwartier se afstand van mekaar. Elke dorp het uit dertig, ses-en-dertig, veertig of vyftig hutte bestaan, almal in ‘n sirkel, ‘n klein endjie van mekaar, geplaas. Die Saldanhars het vir veiligheid snags hulle vee in die middel van die dorp aangehou. Hulle het ook ‘n groot kudde besit, maklik ‘n honderdduisend in getal en omtrent twee honderdduisend skape met, in plaas van wol, langerige kleurhare op die lywe.

Geografies is die Khoi-Khoi oor groot dele van die Noord-, Wes- en Oos-Kaap asook die Vrystaat versprei, soos wat die provinsies in Suid-Afrika vandag bekend is. Voor kolonisasie was alle wes-, suid-, sentraal- en suid-oos streke van die huidige Suid-Afrika bewoon deur slegs die Khoi- en Sanvolkere. Omdat die Rooibosplant net in die Wes-Kaap gevind word, kan die kennis aangaande sy gebruike net by ons bekom word. Ons is die Tradisionele Kennishouers (TK) van al die gebruike van Rooibos. Enige Eiendomsregte (EDR/IPR) verkry uit die gebruik van onse TK moet na behore aan ons, as die regmatige houers van die TK, geakkrediteer word.

Daarom sou ons nooit individuele grondregte opeis nie, maar gelewe met die diepgewortelde geloof dat grond behoort aan al die lewende wesens wat daarop woon. Hierdie verbondenheid met grond val saam met die antieke geloofsopvattinge van inheemse volkere wêreldwyd.

Net soos die San, is die kuns om te skep op rotsagtige oppervlaktes in grotte en in oop ruimtes uniek, en karakteriseer ons uitsonderlike identiteit en erfgoed. Ons tekeninge dateer duisende jare terug en dien as getuienisse van onse reg tot grond en sy bronne in Suid-Afrika. Khoi-rotskuns bestaan uit geometriese ontwerpe, vingerkolle en handafdrukke. Die ontwerpe was met vingers aangewend, opvallend anders as die kunswerke van die San.

San rock art

San Rotskuns





San rock art

San Rotskuns



Cederberg mountain range en route to Wupperthal

Sederberg bergreeks op pad na Wupperthal

2.2 | Dispossession under Colonialism and Apartheid

Our land occupation was so dramatically altered that only mere remnants of our land connection remains.

Our Khoikhoi ancestors continued to live as nomadic pastoralists until they experienced the dispossession of their lands and resources due to Colonialism and Apartheid, totalling over 300 years of systematic oppression. Since 1652, the Khoikhoi have been dispossessed of land by colonists. We were the first defenders of our land in South Africa. We, as a people, lived through three Dutch wars and genocide, slavery, indentured labour and the extreme violence that was legalised through Colonialism and Apartheid against our men, women and children. These atrocities are still largely undocumented and untold, and the Khoikhoi experience intergenerational trauma up until today. This can be evidenced through the cases of foetal alcohol syndrome our people experience on farms as informal labourers, drug abuse, general landlessness and many other social ills.

During and after colonisation, Christian missionaries came to South Africa to “civilise” the “uncivilised” indigenous people. In the Cederberg region, the missionaries destroyed our traditional and indigenous governance systems by establishing mission stations and persuading our people to unite under the auspices of the Church, and to serve God rather than continuing to live as “savages”. Our beliefs, ways of life and indigenous systems developed over thousands of years were relegated to that of mere savagery.

The relegation of our indigenous “beingness”, and its replacement with Christianity, totally undermined our indigenous cosmologies and worldviews. In order to sustain the mission stations, the missionaries required colonial governments to register Khoikhoi land in the name of the Church, thus furthering our land dispossession. Instead of striving towards fairness, justice and equality for

Khoikhoi people, the Church only believed that they should baptize us and convert us into Christians. We believe that they did not convert us into Christians but, rather, into Christian slaves and thereby, totally disrupted and destroyed our customary systems and practices.

“The Catholic faith and the Christian religion be exalted and be everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself. Any land not inhabited by Christians is available to be “discovered,” claimed, and exploited by Christian rulers.” - Doctrine of Discovery in Europe, 1493

We were also systematically oppressed by multiple colonial governmental Codes. The *Hottentots Code* of 1809 (also known as the *Caledon Code*), as well as the *Masters and Servants Act* of 1856 were introduced after the abolishment of slavery to ensure the supply of labour on the commercial farms. The *Hottentots Code* made it illegal for the Khoikhoi to own land and forced them to have a fixed ‘place of abode’ on either a farm or a mission station. It also stated that if a Khoikhoi wished to move, he had to obtain a pass from his master or from a local official.

The *Hottentots Code* was one in a series of pass laws used to empower the Afrikaner farmers to control the Khoikhoi peoples’ movements. If we were caught without such a pass, we would be arrested. This became the systemised recruitment for the prison system we still find today. This prison system served to dehumanise our men and youth. These prisons systems, especially in the Western Cape, served as free labour for Afrikaner commercial farmers. Both the farmers and the prison resources were legally used to support the Afrikaner farms under apartheid. These are lived stories our people still carry.

2.2 | Onteiening onder Kolonialisme en Apartheid

Ons Khoivrouers het voortgegaan om as nomadiese veeboere te leef tot hulle van hul gronde en bronne onteien was vanweë Kolonialisme en Apartheid - altesaam oor die 300 jaar van sistematiese verdrukking. Die Khoi-Khoi het sedert 1652 grondonteiening deur kolonialiste ervaar. Ons as inheemse mense het drie Hollandse oorloë, volksmoord, slawerny, ingeboekte arbeid en uiterste geweld teen onse mans, vroue en kinders, wat gewettig was, oorleef. Hierdie wreedhede is steeds nie volledig gedokumenteer nie en grootliks onverteld, met intergenerasionele trauma ten gevolge.

Gedurende en na kolonisasie het Christen-sendelinge na Suid-Afrika gekom om “onbeskaafde” inheemse mense “beskaaf te maak”. In die Sederberggebied het sendelinge onse tradisionele en inheemse regeringstelsel opgebreek deur die vestiging van sendingstasies en ons mense oortuig om onder die vaandel van die Kerk God te dien, eerder as om voort te leef as “barbare.”

Die afbreek van onse inheemse “wesentlikheid”, met die vervanging daarvan deur die Christendom, het totaal ons inheemse kosmologieë en wêreldbeelde ondergrawe. Ten einde die sendingstasies aan die gang te hou, het die sendelinge die koloniale regerings versoek om Khoikhoigronde in die naam van die Kerk te registreer en so ons grondonteiening te bespoedig. In plaas daarvan om te streef na billikheid, geregtigheid en gelykheid van die Khoi-Khoi, het die Kerk slegs geglo dat hulle ons moes bekeer en doop tot Christene. Ons glo egter dat hulle ons nie tot Christene bekeer het nie, maar eerder tot Christelike slawe en so ons gebruiklike stelsels en

praktyke totaal ontwig en vernietig het. Vertaald word dit so gestel:

Die Katolieke geloof en die Christelike godsdiens moet verhoog word en oral toeneem en versprei word, sodat die heil van siele versorg kan word en dat barbaarse nasies tot ‘n val en tot die geloof gebring word. Enige beskikbare land wat nie deur Christene bewoon word nie, moet “ontdek word,” opgeëis en geëksploiteer word deur Christelike regeerders. - Leerstelling oor Ontdekking in Europa, 1493

Ons was stelselmatig onderdruk deur vele koloniale regeringskodes: die *Hottentotskode* van 1809, (ook bekend as die *Caledon Kode*), asook die *Meesters- en Diensknegte Wet* van 1856 wat ingestel was na die afskaffing van slawerny, om die aanbod van arbeid op kommersiële plase te verseker. Intussen het die *Hottentotskode* dit onwettig vir die Khoi-Khoi gemaak om grond te besit, hulle gedwing om ‘n vaste ‘woonplek’ te hê, op ‘n plaas of ‘n sendingstasie.

Dit was die eerste van ‘n reeks paswette wat ingespan was om Afrikaner-plaasboere te bemagtig om die bewegings van die Khoi-Khoi te kontroleer. Dit was verder gestel dat as Khoikhoipersone wou beweeg, hulle ‘n pas van hulle baas of ‘n plaaslike amptenaar moes kry. As ons gevang was sonder so ‘n ‘vaste adres’ was ons gearrester. Hierdie het gelei tot stelselmatige opsluiting in tronke – ‘n sisteem wat ons tot vandag toe vind.

In die Wes-Kaap is daar 18 gevangenis, en die Khoi-Khoi maak die meerderheid van die totale tronkbevolking uit. Hierdie maatskaplike samestelling het dieselfde gebly vir oor die 200 jaar. Die Kode was dus gebruik as wetlike en

Ons grondonteiening was so radikaal dat slegs restante van ons grondverbondenheid vandag oorbly.

The Khoikhoi were then forcibly classified as “Coloured”, a label which further dispossessed us from our African beingness by severing the last connections to our customary resources and knowledge.

In the Western Cape, there are 18 prisons, and the Khoikhoi form the majority of all the prisons' populations. This social composition of the incarcerated population has been consistent for over 200 years. The different Codes were, therefore, used as a legal and moral justification for the colonial dispossession of our sovereign indigenous people from their lands and resources.

Nowadays, many of our Khoikhoi descendants continue to find themselves as farm labourers on commercial farms that they hold deep ancestral claims to. They hold no real land and resource rights on these farms, other than some residential rights and informal employment. The post-Apartheid Land Restitution Programme in South Africa did not benefit our communities meaningfully. The government reopened the restitution opportunities in 2014 through the passing of an Amendment to the *Land Restitution Act*. Unfortunately, a constitutional court judgment⁹ was handed down in 2016 which put an end to the Khoisan's second potential opportunity to land restitution by ruling the *Amendment Act* unconstitutional. Until the legislature can pass new restitution legislation, the Khoikhoi and San cannot institute land claims.

The Apprentice Act (1812) made it legal for a farm owner to remove a Khoikhoi child from its parents and transfer the child to any farm where labour was needed. Between the ages of six and twenty-seven, that child was then required to be under the employment of the farm owner. Some reports to the Magistrates Courts at the time shows there was little regard to allowing these children out of this servitude even upon reaching the age to be freed. Some publications estimate that well over 2000 Khoisan children were removed from their parents over that period.

A further key social legacy the Khoikhoi community continues to face is that of the “*dop system*” (drink system). It was a system prevalent on the wine farms in

the Western Cape, where the commercial farmer would, alongside daily wages, pay the farm workers with cheap wine as a fringe benefit. This system exacerbated and dramatically increased the alcoholism among farm workers, which caused deep social damage which is felt up to today. Foetal alcohol syndrome amongst these communities is seven times higher than the world average. In post-Apartheid South Africa, former president Nelson Mandela's administration ended this practice by outlawing it.

With the Apartheid system arriving, our indigenous identity was further disrupted through the *Race Classification Act* and the *Populations Registration Act*, whereby South Africa created race categories of (i) White (ii) African (iii) Indian and (iv) Coloured. The Khoisan were then forcibly classified as “Coloured”, a label which further dispossessed us from our African beingness by severing the last connections to our customary resources and knowledge (as confirmed by the United Nations Mission Report to South Africa in 2005¹⁰). Everyone who did not fall into one of the other categories was then sub-classed under the term Coloured, thereby destroying any notion of common African heritage.

The forced removals under the *Group Areas Act* of 1950 marked yet another era of forced removals from areas we occupied, this time in town areas. The spatial disruption was thereafter clearly marked along racial lines. For instance, in Cape Town, the Coloured community was removed from what constituted 16 magisterial districts along Table Mountain range.¹¹ All these areas were found along the foothills of the Hoerikwaggo mountain, today called Table Mountain, a world heritage site. These communities were removed to what is today the Cape Flats: a crime ridden, impoverished wetland area with extreme social and economic challenges, neglected in terms of government development priorities.

morele regverdiging vir die koloniale onteiening van ons soewereine inheemse mense. Deesdae bevind baie van ons Khoikhoi-afstammeling steeds hulself as plaaswerkers op kommersiële plase waar hulle die diepgaande voorouerlike reg tot eise het. Inderwaarheid besit hulle nie werklik grond- en bronregte op daardie plase nie, behalwe sekere woonregte en informele arbeid. Die post-Apartheid Grondhervormingsprogram in Suid-Afrika het nie onse gemeenskappe betekenis-vol bevoordeel nie. Die regering het die geleentheid vir restituisie in 2014 heropen deur 'n Amendement op die *Grondrestitusie Wet* te bekragtig. Ongelukkig het die Grondwetlike Hof in 2016 'n uitspraak gelewer wat 'n einde gebring het aan die Khoi-Khoi en San se tweede potensiële geleentheid tot grondrestitusie, deur die *Amendment Wet* as ongrondwetlik te verklaar. Tot wanneer die wetgewers nuwe restituisie-wetgewing bekragtig, kan die Khoi-Khoi en San nie grondeise instel nie.

Die Wet op Vakleerlingskap (1812) het terselfdertyd vir 'n plaaseienaar wettig gemaak om 'n Khoikhoi-kind van sy of haar ouers te verwyder en oor te sit na enige plaas waar die kind as arbeider nodig was. Van daardie kind was dan verwag om in diens van die plaaseienaar te bly tussen ouderdomme van twee en sewen-twentig. Sommige bronne bereken dat meer as oor die 2000 Khoikhoi-kinders uit hulle ouers se sorg in daardie tydperk verwyder was.

'n Verdere maatskaplike erflating wat die Khoikhoigemeenskap treiter, is die *dopstelsel*. Dit was ingeburgerd op wynplase in die Wes-Kaap waar die plaaseienaar, naas die daaglikse lone, gereeld goedkoopwyn aan werkers gegee het as 'n meevallertjie. Hierdie stelsel het

alcoholisme aangewakker wat dramaties onder plaaswerkers toegeneem het. Dit het verskriklike maatskaplike skade veroorsaak – iets wat tot vandag ervaar word. Fetale alkohol sindroom (FAS) is onder hierdie gemeenskappe sewe keer hoër as die wêreldgemiddelde. Voormalige president Nelson Mandela se administrasie in post-apartheid Suid-Afrika, het hierdie praktyk beëindig deur dit as onwettig te verklaar.

Die apartheidsbeleid het onse inheemse identiteit verwyder deur die *Wet op Rasseklassifikasie* en die *Wet op Bevolkingsregistrasie*, waardeur Suid-Afrika rassekategorieë geskep het: (i) Blank (ii) Afrikaan (iii) Indiër en (iv) Kleurling. Die Khoi-Khoi is toe onder dwang geklassifiseer as Kleurling, 'n etiket wat ons nog verder onteien het van ons gebruiklike bronne en kennis (soos deur die Verenigde Nasies se Missieverslag aan Suid-Afrika in 2005 bevestig). Elkeen wat nie binne een of ander kategorie geval het nie, is in 'n subklas onder die term 'Kleurling' geplaas – 'n stelsel wat enige begrip van gemeenskaplike erfgoed vernietig het.

Die Wet op Groepsgebiede het nog 'n era ingelui van gedwonge verskuiwings vanaf gebiede waar ons gewoon het – hierdie keer dorpsgebiede. Ontwrigting in terme van ruimte was duidelik volgens rasselyne. In Kaapstad, byvoorbeeld, is die bruin gemeenskap verwyder uit 16 magistraats-distrikte langs die Tafelbergreeks. Al hierdie gebiede was al langs die kosbare voetheuwels van Hoeri-kwaggo ('Berg by die see') wat vandag Tafelberg genoem word – 'n wêreld erfenisterrein. Daardie gemeenskappe is almal verskuif na wat huidiglik die Kaapse Vlakte uitmaak: 'n misdaadgeteisterde, verarmde gebied met uiterste maatskaplike en ekonomiese uitdagings, agtergelaat in terme van die regering se ontwikkelingsprioriteite.

Die Khoi-Khoi is toe onder dwang geklassifiseer as Kleurling, 'n etiket wat ons nog verder onteien het van ons gebruiklike bronne en kennis

⁹Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (CCT 40/15) [2016] ZACC 22

¹⁰Ibid

¹¹Thomas, A. 2001 "It changed everybody's lives: the Simon's Town Group Areas Removals" in Field, S. Lost Communities, Living Memories: Remembering Forced Removals in Cape Town. 1st Edition. Cape Town: David Philip Publishers. Group Areas Act of No. 41 of 1950 Groepsgebiede wet van 41 van 1950

2.3 Rebuilding the Khoikhoi in a post-Apartheid South Africa

Today, we are a landless proletariat and de-Africanised, with no access to our resources, no communal land, stripped of our cultural and collective identity, having to re-navigate our road back to a moment of collective hope.

In large part, our story of land dispossession is lost in the skewed land property system and our ancestral territories are still in the hands of others. With post-Apartheid land restitution effectively put on halt indefinitely due to the Constitutional Court judgement, the Khoikhoi and San communities' only hope remains their ancestral and treaty rights, if land reform does not meaningfully address our land restoration soon.

The extremely skewed land patterns that still remain today in post-Apartheid South

Africa make access to our customary resources such as Rooibos and other plants near impossible, with some extreme exceptions such as in Wupperthal and Suid Bokkeveld. Mostly, we find ourselves having to pay expensive rentals to commercial farmers and municipalities to harvest these species that we consider our ancestral resources. Some of these are, amongst others: Aloe Ferox, Buchu and Honeybush. It has also made our claims of being traditional knowledge holders very complicated.



Indigenous farmers with Rooibos in the Cederberg

Inheemse Boerdery
gemeenskap met Rooibos in
die Sederberg

2.2 Heropbou van die Khoi-Khoi in 'n post-apartheid Suid-Afrika

In groot dele van ons land is onse storie van grondonteiening verlore in die oneweredige grondeiedomstelsel, en ons voorouerlike gebiede steeds in die hande van ander.

Die uiters onregverdige grondpatrone wat steeds in plek is in post-apartheid Suid-Afrika, maak toegang tot ons gebruiklike bronne soos Rooibos en ander plante byna onmoontlik, met uitsonderings soos

Wupperthal en Suid-Bokkeveld. Meestal moet ons hoë huur aan kommersiële plaasboere en munisipaliteite betaal om hierdie spesies te oes, wat ons beskou as onse voorouerlike bronne. Ons noem, onder meer, Aalwyn Ferox, Boegoe en Heuningbos. Bogenoemde omstandighede maak onse aanspraak dat ons tradisionele kennishouers is, baie gekompliseerd.

Ons is vandag 'n grondlose proletariaat, gede-Afrikaneer, met geen toegang tot onse bronne nie, geen gemeenskapsgronde nie, gestroop van onse kulturele en kollektiewe identiteit, wat ons weg na 'n oomblik van hoop moet herontdek.



Riel dancers

Riel dancers



Since democracy in South Africa, we have worked tirelessly toward our recognition. This is best shown by the following writing of our Khoikhoi academic Dr Willa Boezak:

1990s

“After the release of Nelson Mandela, the Convention for a Democratic South Africa, CODESA 1 in 1992 and CODESA 2 in 1993, took place. From this came the first democratic elections in 1994 and later the South African Constitution in 1996. The Constitution ensured the promotion of Khoi and San languages through the Pan South African Language Board (PanSALB). When A.A.S Le Fleur II was denied from participating in CODESA, he hired Advocate Mansell Upham in 1995. He was to represent their issues on behalf of the Griekwa National Conference (GNK) at the United Nations (UN) Working Group on Indigenous Populations in Genève, Switzerland. This was the first time the GNK advocated for the return of the remains of Sarah Baartman. From this developed talks with President Nelson Mandela in 1997. In 1997, and again in 1999, the government handed over six farms to the #ǀKhomani-San outside of the Kgalagadi-Gemsbok National Park and inside the park (via former president Thabo Mbeki).

Professor Henry Jattie Bredenkamp organised an academic conference on Khoisan identities and Cultural Heritage in 1998 through the Department of History at the University of the Western Cape (UWC). This inspired a Cape Khoi activist, Mr. Joseph Little, to talk to paramount chief Biskop Daniel J. Kanyiles in Richie, Northern Cape,

about the idea of reestablishing the original tribes of the Eastern and Western Cape along traditional areas. He finds many inspiring Khoi leaders and, one-by-one, all the paramount chiefs, chiefs and chief women are initiated by the ancient !nau ceremony.

1998

Former president Mandela formed the National Griekwa Forum in 1998 as a governmental body for negotiations. But the GNK felt it was non-representative and it was replaced by the National Khoisan Forum in 1999 (which later becomes the National Khoi and San Council (NKSC) and, on the demands of the San, then becomes the National Khoisan Council). Their main mandate was to ensure the constitutional inclusion of the Khoisan leaders and their communities. The NKC represents the five main groupings: the San, Griekwa, Koranna, Cape Khoi and the Nama. The first chairperson was Paramount Chief Little and, later, Chief Cecil Le Fleur.

1999

Former president Nelson Mandela's administration commissioned the official *Status Quo* reports to verify the leadership claims by the Khoikhoi and San leaders. A research team was compiled. They were led by Prof. Nic Olivers and Prof. Bredenkamp and each researcher was responsible for researching one subgroup: Professor Pippa Skotnes (San), Chief Magistrate Andrew Le Fleur (Griekwa), Mr. Raymond Beddy (Koranna), Dr. George Brink (Cape Khoi) and Dr. Willa Boesak (Nama). Their mission was to research the historical leadership and traditional community structure of each subgroup.

Continues on page 36

Ons het nogtans sedert die aanvang van demokrasie in Suid-Afrika, onvermoeid gewerk aan erkenning. Hierdie word die beste aangetoon deur die volgende skrywe van dr. Willa Boezak.

1990's:

Na die vrylating van mnr. Nelson Mandela in 1990 volg die Konvensie vir 'n demokratiese Suid-Afrika, Kodesa 1 en 2 in 1992 en 1993 onderskeidelik, waaruit die eerste demokratiese verkiesing in 1994 volg en later die Suid-Afrikaanse Grondwet in 1996. Die Grondwet verseker die uitbouing van Khoi- en Santale deur die Pan Suid-Afrikaanse Taalkommissie (PanSAT), maar in Hoofstuk 12 word slegs die erkenning van tradisionele leiers en hul gemeenskappe genoem (soos bv. koning Zwelintini). A. A. S. le Fleur II is toestemming tot deelname aan Kodesa geweier en in 1995 huur hy Advokaat Mansell Upham om namens die Nasionale Griekwa Konferensie (GNK) hulle saak by die Verenigde Nasies se Werkgroep vir Inheemse Volkere te Genève, in Switserland te stel. Vir die eerste keer maak die GNK voorspraak vir die terugbring van Sara Baartman se oorskot. Daaruit volg gesprekke met pres. Mandela in 1997. In dieselfde jaar oorhandig die regering ses plase aan die ǀKhomani-San buite die Kgalagadi-Gemsbok Nasionale Park en grond binne die Park (deur voormalige president Thabo Mbeki).

1997:

Prof. Henry 'Jatti' Bredenkamp reël in 1997 'n akademiese konferensie oor Khoi-

San identiteite deur die Universiteit Wes-Kaapland (UWK) se Instituut vir Historiese Navorsing. 'n Kaapse Khoi-aktivis, mnr. Joseph Little, word daardeur geïnspireer om die Griekwa-opperhoof, Biskop Daniel J. Kanyiles in Richie, Noord-Kaap, te nader met die idee om die oorspronklike stamme in die Oos- en Wes-Kaap volgens tradisionele gebiede te herstel. Heelwat begaafde Khoi-leiers is gevind, en een vir een word stamhoofde, hoofmanne en hoofvroue op die oeroue wyse van die spesiale !nâu- seremonie onder leiding van die opperhoof ingeseën (hoofsaaklik by Schoonspruit buitekant Oudtshoorn).

1999:

Destydse president Nelson Mandela stig in 1998 die Nasionale Griekwa Forum as 'n amptelike onderhandelingsvoertuig vir hul erkenning. Die GNK voel egter dit is onvertegenwoordigend en dit word in 1999 die Nasionale Khoisan Forum (later die Nasionale Khoi-San Raad (NKR) en nog later die Nasionale Khoi en San Raad (NKSAR)). Hulle hoofmandaat was om vir die grondwetlike inskakeling van Khoi-Sanleiers en hulle gemeenskappe te onderhandel. Die NKR verteenwoordig al vyf hoofgroepe, naamlik, die Boesmans/San, Griekwa, Koranna, Kaapse Khoi en Nama. Die eerste voorsitter was stamhoof Little en daarna hoof Cecil le Fleur tot die hede. Die regering wou eers weet hoe en wat die historiese, tradisionele Khoi-San leierskapstrukture was en wie hulle vandag verteenwoordig. In 1999 is vyf navorsers onder leiding van prof. Nic Oliver en prof. Bredenkamp benoem vir navorsing oor die bovermelde groepe: prof. Pippa Skotnes, hooflanddros Andrew le Fleur, mnr. Raymond Beddy, dr. George Brink

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2000

The former Department of Provincial and Local Government, under the leadership of Minister Sydney Mufamadi, undertakes its own research about the existing leaders and released a Report. Dr. Zam Titus was in charge of the report affairs. Meanwhile, Paramount Chief Kanyiles organised the tribal chiefs under his leadership into the National Council of Khoikhoi chiefs. This later developed into the Cape Khoi Cultural Heritage Development Council (CKCHDC). These are the vetted leaders that underwent the Status Quo Report process and which were the first representatives of the Khoisan revival.

This history is also where the ancestral and collective rights of the Khoikhoi and San communities are vested.

2001

From 29 March to 1 April, 600 delegates of 32 Khoi and San groups came together in Oudtshoorn, under the leadership of Prof. Bredenkamp. The topic was "Khoisan diversity in national unity". The National Khoisan Consultative Conference thereafter chose Mr Cecil Le Fleur to be their chairperson and Prof. Bredenkamp as their patron. However, due to a lack of sufficient funds, the Conference could not continue any further.

2002

The state funeral of Sarah Baartman, whose remains were returned by the French government, is held. She is buried on the 9 August at Hankey in the Eastern Cape. Many parties were involved in the return of her remains, but it was initiated by the emotional poem of our beloved Diana Ferrus.

2003

On Heritage Day, 24 September, Minister Mufamadi announces the Commissioners of the new Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission). Two commissioners, Dr William Langeveldt and Dr Willa Boezak, are descendants of the Khoisan. They started their task the next year. The CRL Rights Commission seeks to promote nation building and cannot recognise Khoisan leaders.

2004

Legislation for the recognition of traditional leaders, by way of the *Traditional Leadership and Governance Framework Act*, is approved.

2005

Different Khoikhoi and San leaders have gone to the United Nations (UN) in Genève and New York every year to build up pressure on the South African government. The United Nations subsequently decide to send their High Commissioner for Indigenous Rights, Professor Rodolfo Stavenhagen, to South Africa to establish the state of affairs there. He hands over his report to the South African government, as South Africa is a member state of the UN.

In his recommendations to the South Africa government, Stavenhagen states that, "Indigenous communities should be recognized as such constitutionally in parity with the speakers of the 11 officially recognised languages. This refers specifically to the various Khoi and San groups, the Nama and also the Griqua who are not named as such in the Constitution."¹²

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en dr. Willa Boezak.

2000:

Die eertydse Departement van Provinsiale en Plaaslike Regering (DPLG) het onder leiding van Minister Sydney Mufamadi self navraag oor die bestaande leiers gedoen en stel toe 'n "Status Quo Verslag" vry, met dr. Zam Titus as direkteur aan die stuur van sake. Intussen organiseer opperhoof Kanyiles die leiers onder sy leiding tot die Nasionale Raad van Khoistamhoofde wat later tot die Kaapse Khoi Kulturele Erfenis Ontwikkelingsraad (KKEOR) ontwikkel het. Hierdie is die gevestigde leiers wat deur die Status Quo verslag en proses gegaan het, en was die eerste verteenwoordigers van die Khoi-San herlewing.

Hierdie geskiedenis is ook waar die voorouerlike en kollektiewe regte van die Khoi- en Sangemeenskappe ingebed lê.

2001:

Vanaf 29 Maart tot 1 April 2001 het omtrent 600 afgevaardigdes van 32 Khoi-Sangroepe te Oudtshoorn byeengekom. Die tema was "Khoi-San diversiteit in nasionale eenheid". Die Nasionale Khoi-San Oorlegplegende Konferensie (NKOK) het mnr Cecil le Fleur daarna tot voorsitter verkies en prof. Bredenkamp as beskermheer. Dit was prof. Bredenkamp se inisiatief en hy kan die Vader van die Khoi-San Herlewing genoem word. Weens gebrek aan voldoende fondse kon NKOK later nie meer funksioneer nie.

2002:

'n Staatsbegrafnis is vir Sara Baartman gehou, wie se oorskot deur die Franse regering terugbesorg is. Sy is op 9 Augustus te Hankey in die Oos-Kaap begrawe. Vele

partye, insluitend die regering en Khoi-Sanleiers was daarby betrokke, maar dit was eintlik die roerende gedig van Diana Ferrus wat die deurslag gegee het. Hierdie het die nasionale identiteitsgevoel van die Khoi-San versterk asook hul oproepe tot erkenning.

2003:

Op Erfenisdag 24 September maak Minister Mufamadi bekend wie die eerste lede op die nuwe kommissie vir die bevordering en beskerming van Kultuur-, Godsdiens- en Taalregte (KGT) sou wees. Twee kommissarisse, drr. William Langeveldt en Willa Boezak, was uit Khoi-Sangeledere benoem. Hulle het die volgende jaar met hulle taak begin. Die KGT is egter daar om nasiebou te bevorder en kan nie Khoi-Sanleiers erken nie. Daarvoor moes spesiale wetgewing geskryf word.

2004:

Wetgewing vir die erkenning van tradisionele (swart) leiers en hul gemeenskappe word met 'n leierskapsraamwerk goedgekeur.

2005:

Intussen het verskeie Khoi-Sanleiers elke jaar na die Verenigde Nasies (VN) in Genève en New York gegaan om daar die Suid-Afrikaanse regering op hulle tone te hou. Die VN besluit om hulle Hoë Kommissaris vir inheemse regte, prof. Rodolfo Stavenhagen, na Suid-Afrika te stuur om te sien wat aangaan. Hy oorhandig daarna sy verslag aan ons regering omdat die RSA 'n lidstaat is, onder meer dat die Khoi-San se status as eerste inheemse nasie erken moes word en dat die Internasionale Arbeidsorganisaie (International Labour Organisation, ILO) se konvensie 169 onderteken moet

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He also recommends that, “The Government and the Parliament should take all the necessary steps, in consultation with indigenous peoples in the country, to ensure a prompt ratification of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989).” (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen.)

After 10 years, not one of the demands of the High Commissioner have been met. Especially the issue of self-determination is a stumbling block for the government, even though the NKC has time and again explained that the Khoikhoi and San do not want to be a “state within a state” like Orania, for example. They just want to be treated equally.

2009

The Department of Rural Development and Land Reform, under Minister Gugile Nkwinti, starts integrating Khoikhoi and San land rights. The Constitution only allows for claims after 1913 and the *Restitution of Land Rights Act 2014* is passed but still states that only people who have lost their land due to racial discrimination after 1913 and before 1994 can claim. This is a setback, as the Khoikhoi and San’s land dispossession occurred in the 1400s, 1600s, 1700s and 1800s and onwards. This bars them from their historical land claims.

Two national Land Summits are held in 2013 and 2014 in Kimberley. Here, issues such as restitution of historical sites, agriparks, food security through sustainable agriculture, the recognition of heritage terrain and historical

sites were discussed. During the land summits, leaders were arguing that the recognition of communities without land rights does not make sense. A National Khoisan reference group, under the leadership of Kaptein John Witbooi, was then created to help with Khoikhoi and San land cases. In some provinces, trust councils were founded to manage claimed land. It is unclear the status of this process.

2015 - 2019

The Human Rights Commission held a national public hearing about the rights of the Khoikhoi and San. Again, frustration and concerns about the lack of recognition were raised.

The White paper for the recognition of the Khoikhoi and San was drafted in 2009, as well as legislation developed in 2011, 2013 and 2015. The Cabinet has approved it. The latest legislation has now been signed by the current President Ramaphosa (2019), the *Traditional and Khoisan Leadership Act 2018*. The idea is to let Khoikhoi and San leaders cooperate under one law, within existing national, provincial and traditional houses. Because of the dissolution of these houses in mid-2020, there are strong expectations to promulgate the Bill as soon as possible.¹²

The struggle for recognition by the NKC included, in large part, securing their rights and recognition as traditional knowledge holders to their customary resources which happen to be South Africa’s high-value plant species. In the absence of their official recognition, Access and Benefit Sharing has helped open a beginning on their long walk to freedom.

¹²United Nations Commission on Human Rights (2005) “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen”. Accessed from: <https://undocs.org/E/CN.4/2006/78/Add.2> Retrieved July 2019

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word. Na veertien jaar was nog geen een van sy aanbevelings in plek nie. Dis veral selfbeskikking wat vir die regering ‘n tamentele is asook die status as eerste nasie, hoewel die NKR hulle al soveel male probeer oortuig het dat die Khoi-San nie ‘n “staat binne ‘n staat” soos Orania soek nie. Dit wil net gelyk behandel wees.

In sy aanbevelings aan die Suid-Afrikaanse regering, meld Stavenhagen dat, “Inheemse gemeenskappe behoort erken te word as sodanig en grondwetlik gelyk met die sprekers van die 11 amptelik erkende tale. Hierdie verwys spesifiek na die verskillende Khoi-en Sangroepe, die Nama en ook die Griekwa wat nie as sodanig in die Grondwet genoem word nie.”¹³

Hy bevel verder aan, “Die Regering en die Parlement behoort al die nodige stappe, in samespreking met die inheemse volke in die land, doen om ‘n spoedige ratifikasie van IAO Konvensie No. 169 rakende Inheemse en Stamvolke te verseker in Onafhanklike Lande (1989).” (Rapport van die Spesiale Rapporteur oor die situasie van menseregte en fundamentele vryhede van inheemse mense, Rodolfo Stavenhagen.)

2009:

In 2009 het die Departement van Landelike Ontwikkeling en Grondhervorming onder leiding van minister Gugile Nkwinti begin kyk hoe die Khoi-Khoi en San by bestaande grondregte kan inskakel. Die Grondwet maak egter net voorsiening vir eise na 1913 (die *Wet op Naturelgrond*).

In 2013 en 2014 is twee Nasionale grondberade (“land summits”) te Kimberley deur min. Nkwinti belê. Hier was kwessies soos die grondherstel van geskiedkundige gebiede, Agriparke, voedselsekerheid deur volhoubare landbou, die erkenning van erfenisterreine en geskiedkundige bakens ter sprake. ‘n Nasionale Khoi-San Verwysingsgroep onder leiding van Kaptein John Witbooi, is in die lewe geroep om te help met die Khoi-Khoi en San se grondsake. In sommige provinsies, soos die Wes-Kaap, is trustrade gestig om toegewese grond te bestuur. Op die Kimberley-grondberade het leiers telkens besware geopper dat erkenning van gemeenskappe onder wetsontwerpe sonder grond (TKLB), nie veel beteken nie. Die status van hierdie proses is onduidelik.

2015 - 2019

In 2015-16 het die SA Menseregtekommissie ‘n openbare verhoor landswyd oor die Khoi-Sanregte onder leiding van kommissaris dr. Danny Titus, gehou. Ook daar het hulle hul kommer en frustrasies oor die traie, jarelange vordering met erkenning uitgespreek.

Die Witskrif vir erkenning van die Khoi-San verskyn in 2009, asook wetsontwerpe daarna in 2011, 2013 en 2015. Die Kabinet het dit goedgekeur. Die huidige wetgewing is nou onderteken deur die huidige president Ramaphosa (2019), die *Wet op Tradisionele en Khoisan Leierskap 2018*. Die idee is om erkende Khoi-Sanleiers onder een wet te laat saamwerk in die bestaande nasionale, provinsiale en plaaslike huise vir tradisionele leiers. Omdat die ontbinding van laasgenoemde huise middel-2022 gaan plaasvind, is die verwagting sterk dat promulgering gou sou gebeur.

¹³Verenigde Nasies Kommissie oor Menseregte (2005) “Rapport van die Spesiale Rapporteur oor die situasie van menseregte en fundamentele vryhede van inheemse mense, Rodolfo Stavenhagen”. Verkry van: <https://undocs.org/E/CN.4/2006/78/Add.2> Bekom Julie 2019.

2.4 | What We Stand for - Indigenous Values



The Water Snake

A very strong myth is that each water source, like a river or stream, is the home of a water snake. Koranna rock art is abundant in the Harts River Valley and the eastern Free State where water snakes are depicted. Children, especially young girls, were warned to be afraid of /Aub, the water snake. The *hokmeisie* (hut maiden) would be taken to the river to pacify it after her initiation as a young woman. Because our ancestors were totally dependent on water as a source of life, the myth was meant to prevent children from making the water filthy, and also keeping them away from the danger of drowning, when without supervision. The myth was also prevalent among the Griqua. Its value lay in instilling obedience toward parents and also featured as a symbol in rites of passage (the !Nâu).



The Mantis

The colonisers came to our country with ugly prejudices: that our ancestors were uncivilised barbarians, cannibals - heathens without any values or religion. That is why they ridiculed our myths which actually contained spiritual truths. Of course, it was then easier to justify and participate in the genocide of "wild people who had no soul". One of the /Xam Bushmen's names for God was /Kággen. Simultaneously /kággen - with a small letter - was also their name for the mantis. The deceitfulness of a female mantis, who would gobble up the male, amazed them and they associated that trickiness with the devilish //Gaub. However, God - /Kággen - was the Creator who provides for all our needs. The ignorant Dutch were confused and thought the /Xam worshipped the mantis and then called it 'the hottentots god.' The value undergirding this myth was respect for nature and intimate knowledge of Mother Earth.

This hottentots god continues to have deep sacred value to the Khoikhoi peoples up to today.

2.4 | Waarvoor ons staan - Inheemse Waardes



Die Waterslang

'n Baie sterk mite was dat in elke waterbron soos 'n rivier of stroom lewe 'n waterslang. Tussen die rotskuns van die Hartsrivier- en Oos-Vrystaatse Koranna, is daar 'n tekening van 'n waterslang. Veral jong meisies moet bang wees vir /Aub die waterslang, veral na haar seremonie as hokmeisie. Omdat ons voorouers geheel en al afhanklik was van water as bron van lewe het hierdie mite hul nie daarin moes mors nie. Verdrinking is ook so gekeer wanneer daar geen toesig was nie. Onder die Griekwa was dit ook sterk lewend. Die waarde daaragter was gehoorsaamheid aan ouers en veral as simbool in oorgangsrites (die !Nâu).



Die Mantis

Die koloniseerders het na onse land gekom met allerlei lelike vooroordele: dat ons voorouers onbeskaafde barbare was, mensvreeters - heidene met geen waardes of godsdiens nie. Daarom het hulle altyd ons mites wat geloofswaarhede bevat, belaglik gemaak. So het dit dan vir hulle makliker gemaak om ons te jag en dood te maak as "wilde mense sonder siel" en vooraf die menseslagting te regverdig. Een van die name wat die /Xam-Boesmans vir God gegee het, was /Kággen. Terselfdertyd was /kággen - met 'n klein letter - ook hul naam vir die mantis. Hulle het hulle verkyk aan die bedrieglikheid van 'n wyfie-mantis wat die mannetjie onverwags sou opvreet en dit toegepas op die bose //Gaub. God - /Kággen - was egter die Ewige Helper van die gemeenskap. Die onkundige Hollanders was verward en gedink die /Xam aanbid die mantis en noem dit toe 'die hottentots god.' Die waarde daaragter was respek vir die natuur en intieme kennis van Moeder Aarde.

Die mantis het steeds diepe geestelike waarde vir die Khoi-Khoi vandag.

Southern Africa's Khoikhoi have always realised the importance of their values. Values such as sharing, close family ties, helpfulness, integrity, obedience, true friendship, neighbourly love, discipline, self-discipline, truthfulness, compassion, contentment, respect for others, self-respect, good manners, cleanliness, respect for your environment and respect for nature, were taught to our children by their parents and elders. The vehicles for this ongoing education were in the form of myths, symbols and stories. This custom was widely spread among all Khoikhoi communities, but we are choosing only four typical examples within the five main groupings.

Suider-Afrika se Khoi-Khoi en San het nog altyd die belangrikheid van hulle waardes besef. Waardes soos medemenslikheid, hegte familie-bande, hulpvaardigheid, integriteit, gehoorsaamheid, opregte vriendskap, naasteliefde, dissipline, self-dissipline, waarheid, ordentlikheid, vergenoegdheid, respek vir ander, self-respek, goeie maniere, netheid, respek vir jou omgewing en respek vir die natuur is deur ouers in hul kinders se koppe ingeprent. Meestal is mites, simbole en stories gebruik as middels om dit oor te dra. Hierdie was wyd verspreid onder alle San- en Khoigemeenskappe, maar weens gebrek aan spasie gaan ons slegs vier voorbeelde kies wat tipies was binne die vyf hoofgroepe.



The Moon

Khoikhoi fishing communities had built fish traps all along the coasts of the Western and Eastern Cape. Many fish would be caught in the tidal traps during springtide, at full and new moon. The same night, the clan then thanked God with outstretched hands and the riel dance. European observers thought that we were worshipping the moon. The value displayed here is that we should always praise the Supreme Being for his goodness.



The Ash-loaf

After Nama people baked an ash-loaf, they would always share it with everyone present – even strangers. That is why their name is derived from na-i-ma: “bite-and-give”. Here the ash-loaf is the symbol for neighbourly love and charitableness: *khoi-/namxa-sib*.



Die Maan

Khoi-vissersgemeenskappe het al langs die elletlange kuste van die Wes- en Oos-Kaap viskrale gebou. Met springgety tydens vol- en nuwemaan was die watervlak baie hoog en heelwat visse was gevang in die viskrale. Dieselfde aand daarna sou die clan God dank met uitgestrekte hande en die riel. Europese waarnemers het gedink ons aanbid die maan. Die waarde daaragter was om altyd die Skepper te dank vir sy voorsienigheid.



Die Asbrood

As die Nama-mense ‘n asbrood bak was dit altyd met almal teenwoordig gedeel. Selfs vreemdelinge sou ‘n stukkie kry. Daarom is hul naam afgelei van na-i-ma: “byt-en-gee”. Hier is asbrood die simbool vir medemenslikheid: *khoi-/namxa-sib*.



The Khoikhoi community at the signing of the Rooibos Agreement

Die Khoikhoi-gemeenskap by die ondertekening van die Rooibos-ooreenkoms



Barend Salomo in the Cederberg

Barend Salomo in die Cederberg

CHAPTER 3 | CHAPTER 3

3.1 National Khoisan Council representing the Khoikhoi peoples for the purposes of Benefit-Sharing
3.1 Nasionale Khoisan Raad (NKR) wat die Khoikhoigemeenskappe verteenwoordig vir doeleindes van Voordeelverdeling

3.2 Cederberg Belt Indigenous Rooibos Farming Communities
3.2 Sederberg Strook Inheemse Rooibos Boerderygemeenskappe

ENGLISH
AFRIKAANS

3

**STAKEHOLDERS
INVOLVED IN
THE BCP**

**AANDEELHOUERS
BETROKKE BY
DIE BGP**

3.1 National Khoisan Council representing the Khoikhoi peoples for the purposes of Benefit-sharing

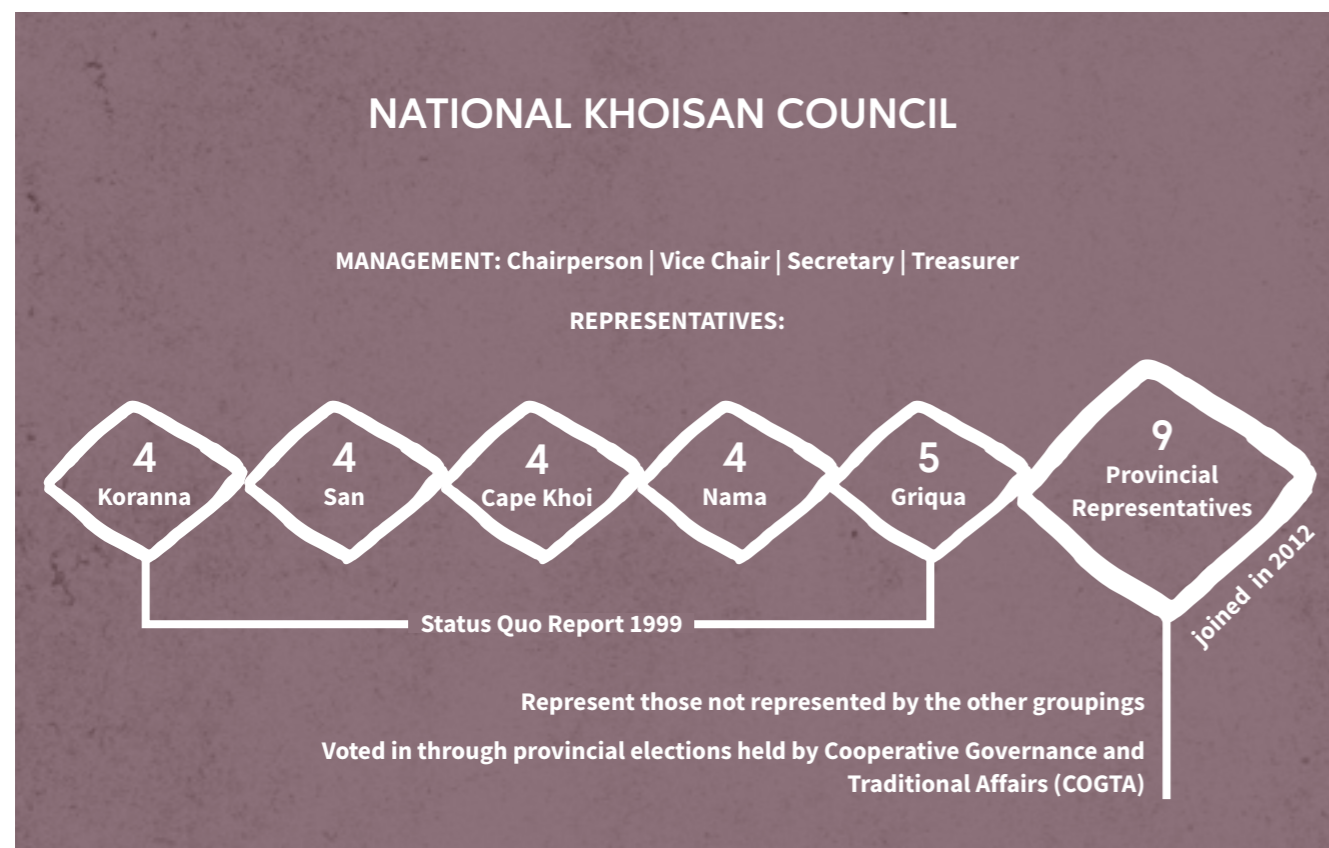
The National Khoisan Council (NKC) was established in 1999 by South Africa's former president Nelson Mandela. It is currently a national, non-statutory and voluntary association with its own legal personality, set up as a negotiating body for the Khoikhoi and San peoples of South Africa to represent their constitutional interests and to accommodate the Khoikhoi and San mandates within government departments.

The NKC membership comprises thirty Khoikhoi and San leaders representing five historical Khoikhoi and San groups across South Africa. These are the San, Griqua, Nama, Cape Khoi and the Koranna.

The Status Quo Reports of 1999, which came out of The South African government's research into leadership claims by the Khoikhoi and San, recommended the establishment of the NKC. Up until 2015, there was no other recognised national institution that was representing Khoikhoi and San interests at the national level.

It was originally made up of twenty-two members. However, the Status Quo Reports had also made the recommendation to include Khoikhoi communities that were not initially part of the early research process. Following years of critique in terms of the perceived lack of representation of

Diagram 3



3.1 Nasionale Khoisan Raad (NKR) wat die Khoikhoigemeenskappe verteenwoordig vir doeleindes van Voordeelverdeling

Die Nasionale Khoisan Raad (NKR) is in 1999 deur Suid-Afrika se voormalige President Nelson Mandela in die lewe geroep. Dis tans 'n nasionale, nie-statutêre en vrywillige verteenwoordigende liggaam, en bedoel as 'n onderhandelingsliggaam vir die Khoi- en Sanvolke van Suid-Afrika om hul grondwetlike belange te bevorder en om Khoi- en Sanmandate binne die regering se departemente te akkommodeer. Die NKR-lidmaatskap bestaan uit 30 Khoi- en Sanleiers wat die vyf historiese Khoi- and Sangroepe regoor Suid-Afrika verteenwoordig, naamlik, die San/

Boesmans, Griekwa, Nama, Kaapse Khoi en Koranna.

Die Status Quo Verslag van 1999, wat die resultaat was van die Suid-Afrikaanse regering se navorsing oor aansprake op leierskap deur die Khoi-Khoi en San, het die daarstelling van 'n NKR aanbeveel. Tot en met 2015 was daar geen ander erkende nasionale liggaam wat die Khoi-Khoi en San se belange kon verteenwoordig op nasionale vlak nie.

Oorspronklik het die NKR bestaan uit twee-en-twintig lede. Die Status Quo Verslag

Diagram 3



The National Khoisan Council can be contacted via the secretary of the NKC and the Khoikhoi trustees.

The NKC is the body responsible for representing Khoikhoi and San interests in the process towards the formal constitutional recognition of their communities and of their customary leadership structures. This role is confirmed by the South African Human Rights Commission report of 2018.

the NKC, the Department of Cooperative Governance and Traditional Affairs (COGTA) held provincial elections so that communities not originally represented by the NKC could vote in further members. Country-wide elections were facilitated in each province overseen by COGTA and the NKC. The NKC membership now comprises both the independently researched members and communities of 1999, as well as the elected members (2012), amounting to thirty members in total including those who do not feel represented on the National Khoisan Council.

The NKC is also responsible for negotiating, in partnership with the South African San Council, Access and Benefit-Sharing (ABS) agreements for the Khoikhoi communities around key plant species. This flows from the 2014 South African national government-commissioned study on Rooibos and Honeybush, confirming the Khoikhoi and San as the traditional knowledge holders to the uses of Rooibos and Honeybush.

In that same year, the ABS negotiating team was also tasked with determining how the communities they represent will share in the benefits as knowledge holders to the uses of Rooibos and other indigenous plants.

For the purposes of negotiating towards the Rooibos industry-wide agreement, the NKC represented the Khoikhoi

communities of the Griqua, Nama, Cape Khoi and the Koranna. In the interests of being as inclusive and representative as possible in the negotiating process, the NKC also included representatives from three indigenous Cederberg farming communities. They formed part of the Rooibos negotiations as specific Khoikhoi beneficiaries within the Rooibos benefit-sharing model. They also serve on the *Khoikhoi Peoples Rooibos and Biodiversity Trust* for benefit distribution purposes.

For the purposes of the Rooibos ABS negotiations, the San communities were represented by the South African San Council. This is due to the fact that the San Council initiated the conversation and has been concluding benefit-sharing contracts on behalf of the San communities over the last decade since the first Hoodia case broke¹⁴. Regarding the Rooibos ABS agreement, the Khoikhoi communities joined this struggle a year later as shared knowledge holders. This was made possible with the support of Natural Justice in solidarity with the Khoikhoi and San communities' struggle.

The NKC is also the body responsible for the development of the Rooibos Bio-Cultural Community Protocol. With regard to other matters, the NKC takes their mandate from the communities it represents.

het egter ook 'n aanbeveling gemaak dat Khoikhoigemeenskappe, wat aanvanklik nie deel van die ondersoek was nie, ingesluit moes word. Na jare van kritiek, gebaseer op persepsies dat die NKR se verteenwoordiging onvoldoende is, het die Departement van Samewerkende Regering en Tradisionele Sake provinsiale verkiesings gereël sodat gemeenskappe, wat oorspronklik nie by die NKR verteenwoordig was nie, nog lede kon instem. Die NKR-lidmaatskap bestaan dus nou uit beide die lede wat in 1999 onafhanklik nagevors is, so wel as die verkose lede, wat die totaal op dertig te staan bring.

Die NKR is ook verantwoordelik vir onderhandeling, in deelgenootskap met die Suid-Afrikaanse San Raad, oor Toegang en Voordeelverdeling (TVV/ABS) ooreenkomste vir Khoi-Khoi- en Sangemeenskappe oor sleutel plantspesies. In 2014 het die Suid-Afrikaanse nasionale regering 'n studie oor Rooibos en Heuningbos aangevra, en bevestig dat die Khoi-Khoi en San die tradisionele kennishouers is van die gebruike van Rooibos en Heuningbos.

In dieselfde jaar het die Nasionale Khoisan Raad 'n span saamgestel en getaak om te onderhandel met die Suid-Afrikaanse Rooibos Industrie oor die voordele vir tradisionele kennishouers. Die TVV/ABS-span vir onderhandeling moes ook vasstel hoe die gemeenskappe wat hul verteenwoordig, die voordele as kennishouers sal ontvang, as die kennishouers van die gebruike van Rooibos en ander inheemse plante.

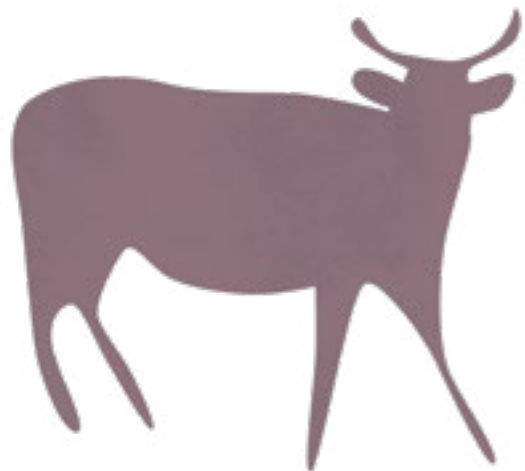
Vir die doeleindes van onderhandelinge rakende die Rooibos industrie-wye verdrag, het die NKR die Khoigemeenskappe van die Griekwa, Nama, Kaapse Khoi en die Koranna betrek. Ten einde al die belange so inklusief as moontlik in die onderhandelingsproses te dien, het die NKR ook verteenwoordigers van die drie inheemse boerdery-gemeenskappe te Sederberg ingesluit. Hulle het deel gevorm van die Rooibos-onderhandelinge as spesifieke Khoikhoi voordeeltrekkers binne die Rooibosmodel van voordeelverdeling. Hulle dien ook op die *Khoi-Khoi Volke Rooibos Toegang en Voordeelverdelingstrust* vir die doeleindes van voordeelsverspreiding.

Vir die doeleindes van die Rooibos TVV/ABS-onderhandelinge, was die Sangemeenskappe deur die Suid-Afrikaanse Sanraad verteenwoordig. Hierdie was as gevolg van die feit dat die SA San Raad die gesprek aangaande die Rooibos TVV-ooreenkoms in 2011 geïnisieer het en die Khoigemeenskappe 'n jaar later by daardie stryd aangesluit het as deelgenote en houers van inheemse kennis. Dit was moontlik gemaak deur die ondersteuning van Natural Justice wat hulle solidariteit met die Khoi- en Sangemeenskappe se stryd verklaar het. Die NKR is die liggaam wat verantwoordelikheid aanvaar het vir die ontwikkeling van die Rooibos Bio-kulturele Gemeenskapsprotokol. Met betrekking tot ander sake, kry die NKR hulle mandaat van die gemeenskappe wat hulle verteenwoordig.

Die Nasionale Khoisan Raad kan bereik word deur hul sekretaris.

Die NKR is die liggaam wat getaak is met 'n mandaat om Khoi-Khoi- en San-belange te bevorder in aanloop tot die formele grondwetlike erkenning van hul gemeenskappe en gebruike leierskapstrukture.

¹⁴Public Eye (2001) "Stolen Knowledge: The Hoodia Case" <https://www.publiceye.ch/de/news/detail/stolen-knowledge-the-hoodia-case> Accessed November 2019.



Cederberg belt Indigenous farmers engaging in primary processing of Rooibos

Sederberg Strook Inheemse Rooibos Boerderygemeenskappe primêre prosesering van Rooibos



3.2 Cederberg Belt Indigenous Rooibos Farming Communities

For the purposes of this BCP, the National Khoisan Council (NKC) represents both the Cederberg indigenous Rooibos farming communities, as well as the Khoikhoi communities, as per the 1999 Status Quo report¹⁵. The NKC formally acknowledged the Cederberg belt farming communities of Wupperthal, Nieuwoudtville and Suid Bokkeveld as deserving of recognition, specific benefits and exemption deriving from Rooibos. In 2015, three representatives from the Cederberg Rooibos farming communities joined the NKC ABS negotiating committee in the benefit-sharing negotiations.

The rural farming communities in the Cederberg Mountains consist of those from Wupperthal, Nieuwoudtville and Suid Bokkeveld, as well as other surrounding farming areas that are not specifically mentioned, but where significant numbers of original Khoikhoi descendents live, and are intended to be included respectively as time continues. We are specifically indigenous farming communities.

We, the indigenous people composing these communities, were forcibly labelled “Coloured” under Apartheid race classification laws, as officially confirmed by the UN Special Rapporteur in 2005. Without any effort to receive consent

prior to the imposition of this label, the Apartheid regime furthered the erasure of our cultural identity. Therefore, our unique identity as distinct indigenous people was deliberately unrecognised and so an emphasis must be placed on noting how the farming communities in the Cederberg Mountains are indigenous.

The Cederberg Rooibos indigenous farming communities are important stakeholders in this process, as they steward Rooibos through sustainable wild harvesting and some limited cultivation. We formed part of the Rooibos negotiations as specific beneficiaries within the Rooibos benefit-sharing model. We also serve on the **Khoikhoi Peoples Rooibos Biodiversity Trust** for benefit distribution purposes.

The NKC agrees that the indigenous farmers from these Cederberg communities are exempt from paying any levies as per bioprospecting permit obligations. This exemption is on the understanding that only the Wupperthal, Nieuwoudtville and Suid Bokkeveld community members remain the farmers. However this was still being investigated further by DEFF during 2019. A final determination will be made once DEFF have finalised their research into this issue.



¹⁵These reports are not available for general public access.



Rooibos Indigenous farmers

Rooibos Inheemse Boere

3.2 Sederberg Strooksverteenwoordiging

Vir die doeleindes van hierdie BGP, verteenwoordig die Nasionale Khoisan Raad (NKR) beide die Sederberg inheemse rooibos boerderygemeenskappe sowel as die Khoigemeenskappe soos deur die 1999 Status Quo rapport aangedui. Die Nasionale Khoisan Raad het die Sederbergstrook boerderygemeenskappe formeel erken, naamlik Wupperthal, Nieuwoudtville en Suid-Bokkeveld as verdienstelike kandidate vir erkenning, spesifieke voordele en vrystellings wat te make het met Rooibos. Drie verteenwoordigers van die Sederberg Rooibos boerderygemeenskappe het in 2015 by die NKR TVV onderhandelingskomitee aangesluit vir die voordeelverdelingsonderhandelinge.

Die plattelandse plaasgemeenskappe in die Sederbergstrook bestaan uit hulle wat woon in Wupperthal, Nieuwoudtville en Suid-Bokkeveld, asook ander omringende boerderygebiede wat nie hier spesifiek genoem word nie, maar word nogtans respektiewelik ingesluit waar daar 'n beduidende aantal persone oorspronklik van Khoi-afstamming is. Hierdie is spesifieke inheemse boerderygemeenskappe.

Die inheemse mense wat hierdie gemeenskappe uitmaak, was onder dwang geëtiketeer as “Kleurlinge” onder Apartheid se rasseklassifikasie-wette, soos amptelik bevestig deur die VN Spesiale Rapporteur in 2005¹⁶. Sonder enige poging om vooraf toestemming te verkry in terme van TVV/

ABS vir die op afdwing van daardie etiket, het die Apartheidsregime die uitwissing van ons kulturele identiteit verhaas.

Dus, ons unieke identiteit as uitsonderlike inheemse mense, was opsetlik geïgnoreer en daarom moet ons benadruk dat opgelet moet word dat die boerderygemeenskappe van die Sederbergstrook inderdaad inheems is. Hierdie gemeenskappe is belangrike aandeelhouers in hierdie proses as bewerkers van Rooibos deur volhoubare wilde tee oes-insameling en beperkte verbouing. Hulle vorm deel van die Rooibosonderhandelinge as spesifieke ontvangers van voordele binne die Rooibos voordeelverdelingsmodel. Hulle dien ook op die **Khoi-Khoi Volke Rooibos Biodiversiteitstrust** vir doeleindes van voordeel-verspreiding.

Beide die NKR en die SA San Raad stem saam dat die plaaslike boere van hierdie Sederberg-gemeenskappe vrygestel moet word van die betaling van enige heffing soos wat vereis word deur bio-prospekterende verpligtinge. Hierdie vrystelling is gebaseer op die verstandhouding dat dit slegs van toepassing is op gemeenskapslede van Wupperthal, Nieuwoudtville en Suid-Bokkeveld, wat betrokke is by die boerdery. Dit word egter verder in 2019 deur die Departement van Omgewing, Bosbou en Visserye (DOBV) ondersoek. 'n Finale besluit sal geneem word sodra die DOBV hulle navorsing oor hierdie kwessie afsluit het.

¹⁶Gorelik, B. (2017). Rooibos: an ethnographic perspective. Retrieved from <https://sarooibos.co.za/wp/wp-content/uploads/2018/10/20180723-SARC-format-TK-Paper-SU-1.pdf>

3.2.1 Wupperthal Indigenous Farming Community

Wupperthal is a historical missionary station situated in the Cederberg (Western Cape). We possess a long history of landlessness and discrimination. All three regions of the Cederberg experienced colonial dispossession; however, Wupperthal differed in that the mission stations and Church uniquely added another layer of dispossession to the Khoikhoi. Prior to colonisation, our ancestral land was called *Rietmond* and belonged to the *Gouri-Grikwa* (Griqua in English) people. Colonists recognised the church as the owners of our land. Instead of persuading the missionaries to return the land to our people, they dispossessed us further by registering the land in the name of the Moravian Church from whom we rented our land. Currently, the Moravian Church owns approximately 36 000ha of our ancestral land around Wupperthal.

Adam Kok and his people were among the first to oppose processes of colonial land dispossession. His house remains today. Kok decided to leave the area and trek northwest to today's southern *Namaqualand* (*Boesmanland*). He then continued onwards to Griqualand West, into the Free State and then east Griqualand, located hundreds of kilometres north of the Cederberg region.

This is where the Griqua tribe adopted the new name. Instead of being *Gouri-Grikwa*, they changed to the name "Griqua" due to the fact that they became mixed with other Khoikhoi groups, including some white settlers and slaves. The Khoikhoi people living in the northern part of the colony were not all originally from that area. Most were from areas in the South, including Wupperthal where Rooibos grows. However, during colonisation, they were driven from these southern areas to the very north-western part of current South Africa. Though they no longer live in the Rooibos growing region of Wupperthal, they still claim knowledge to the uses of Rooibos as they originated from the Cederberg mountain area prior to being moved inland.¹⁷

Under Apartheid, we have endured political and social discrimination due to being forcibly labelled "Coloured" as per the 1950 *Population Registration Act*.¹⁸ Though the codified system of racism was done via Apartheid, the institutionalisation of being labelled "Coloured" began during colonialism. The lasting impact of this label on the broader Khoikhoi people exists today and we continue to face ongoing stigmatisation because of it.

The United Nations Special Rapporteur (Rodolfo Stavenhagen) 2005 report to the South African government addresses this in saying that:

"Actions should be undertaken towards the removal from all legitimate claimants

The Cederberg

Die Cederberg



3.2.1 Wupperthal Inheemse Boerderygemeenskap

Wupperthal is 'n historiese sendingstasie-gemeenskap, geleë in die Sederberg (Wes-Kaap). Ons het 'n lang geskiedenis van grondverlies en diskriminasie. Al drie streke van die Sederberg het koloniale verdrukking ervaar, maar Wupperthal verskil in die opsig dat die sendingstasies en Kerk op 'n unieke manier nóg 'n laag van onteiening tot die Khoi-Khoi se lot bygevoeg het. Voor kolonisasie was onse voorouerlike grond *Rietmond* genoem en het aan die *Gouri-Grikwa* volk behoort. Die koloniste het die eienaarskap van ons grond aan die Kerk erken. In plaas van om die sendelinge te oortuig om die grond aan ons mense terug te gee, het hulle ons verder onteien deur dit te registreer in naam van die Morawiese Kerk, van wie toe ons onse grond moes huur. Huidiglik besit die Morawiese Kerk ongeveer 36 000ha van die gronde rondom Wupperthal.

Adam Kok en sy volgelinge was van die eerstes wat die koloniale prosesse van grondonteiening teengestaan het. Kok het toe besluit om die gebied te verlaat en in 'n noordwestelike rigting het hy getrek na vandag se suidelike Namakwaland (*Boesmanland*) waarna hy voortbeweeg het na Griekwaland-Wes, die Vrystaat, en sy nasate daarna na

Oos-Griekwaland, honderde kilometers noord van die Sederbergstreek. Dit is waar die Griekwastam 'n nuwe naam aangeneem het: in plaas van *Gouri-Grikwa* het hulle hul naam na *Griekwa* verander vanweë die feit dat hulle so vermeng geraak het met ander Khoi-Khoigroepe, insluitend selfs sommige wit setlaars en slawe. Die Khoi-Khoi wat in die Noordelike dele van die kolonie geleef het, was nie almal oorspronklik van daardie gebied nie. Die meeste was afkomstig van areas in die suide, insluitend Wupperthal waar Rooibos groei, maar wat gedurende kolonisasie uit hierdie suidelike gebiede verdryf was na die verre Noord-Westelike deel van huidige Suid-Afrika. Hoewel hulle nie meer woon in die Rooibos groeiende gebied van Wupperthal nie, maak hulle steeds aanspraak op kennis van die gebruike van Rooibos omdat hulle oorspronklik kom van die Sederbergstreek voor hulle verskuif was na die binneland.

Onder apartheid het ons politieke en maatskaplike diskriminasie ervaar as gevolg van die gedwonge etikettering as "Kleurling" soos volgens die 1950 *Wet op Bevolkingsregister*.²² Deur die gekodifiseerde stelsel van rassisme soos vervat was in apartheid, het die daarstelling van etikettering tot "Kleurling" egter reeds gedurende kolonialisme 'n aanvang geneem. Die blywende impak van hierdie etiket op die breër Khoi-Khoibevolking bestaan vandag nog en ons moet steeds voortgaande stigmasering verdra juis as gevolg daarvan.

Wupperthal

Wupperthal

¹⁷Lotter, J. (2015) "Potential implications of climate change for Rooibos (*A. linearis*) production and distribution in the greater Cederberg region, South Africa". University of Cape Town. Retrieved from: <https://open.uct.ac.za/handle/11427/15585>. Bekom Augustus 2019

¹⁸Population Registration Act no 30 of 1950. Accessed from: <https://www.sahistory.org.za/sites/default/files/DC/leg19500707.028.020.030/leg19500707.028.020.030.pdf> Retrieved August 2019

²²Population Registration Act no. 30 of 1950. Retrieved from <https://www.sahistory.org.za/sites/default/files/DC/leg19500707.028.020.030/leg19500707.028.020.030.pdf>

This legacy and demeaning stigma continues to affect the image of the Rooibos indigenous farming community as being poor "Coloured" labourers, as opposed to traditional knowledge holders central to the growth and development of the Rooibos industry.

to indigenous identity of the stigma attached to having been classified as "Coloured" during the apartheid regime."¹⁹

All of these years, we were research subjects of academics and prominent universities. Many publications were done on Rooibos and about our communities without environmental and social justice being restored or being acknowledged.

This awareness of our rights as knowledge holders is a fundamental restoration for our community.

It is this context of land dispossession and ongoing systemic discrimination that forms the backdrop to the importance of joining the struggle to reaffirm our indigenous heritage and to be recognised as traditional knowledge holders to Rooibos.

Although Rooibos grows wild in the whole of the Cederberg region, Wupperthal has the most densely populated wild Rooibos concentrations²⁰. Farming with Rooibos has been ongoing for several generations, but this activity was based on harvesting leaves from plants growing in the wild. We are a small group of local Rooibos farmers who lease land from the church to do Rooibos harvesting and farming. About 7% of the land is suitable for farming (other crops) and about 4% is being used for Rooibos.²¹ Being historical descendants of the Khoikhoi community, we are represented by the National Khoisan Council (NKC). We joined the struggle of the NKC and the South African San Council to ensure we are recognised as the traditional knowledge holders to Rooibos. We were three representatives from the region participating in the Rooibos negotiations.



3.2.2 Nieuwoudtville Indigenous Farming Community

Many years ago, before the settlers arrived here, the Khoikhoi were the inhabitants of the area. Previously, the area was a farm. The Khoikhoi lived off "veldkos" (wild food): plants and animals. Whilst the Khoikhoi were driven from the land by settlers, they left a history behind that is still remembered up until today. Over the years, discoveries have been made of rock art in the Oorlogskloof Nature Reserve, and on various farms in the vicinity, that depict the lifestyle and hunting methods of the Khoikhoi.

Nieuwoudtville is rich in Fynbos plants and 300 indigenous plant species occur in this area. The Khoikhoi used the plants for medicinal use and *Aspalathus linearis*, better known today as Rooibos, was also served as a drink. This plant has grown wild and today it is known as the "veld tea". In the old days, the Khoikhoi used stones to press the juice out of the tea. Then it was put in the sun to get a red colour. Then it was boiled and drunk. In 1897, the area was established as a town, known today as Nieuwoudtville. It is a small town located on the R27 Bokkeveld plateau in the Northern Cape. The town's area is 26.26km² (10.1vkm). The population is approximately 4000 inhabitants, of which 85% are descendants of the Khoikhoi.

In the early years, the equipment was not as advanced as it is today, but our ancestors made use of oxen, donkeys and handmade ploughs to work the earth. When it was harvest time, they used stones and axes to hack the tea into small pieces. After that, it was thrown into the sun and "sweated" until it got the red colour. Once it was dry, it was picked up and put into great bags and this tea was called *stokkiestee* (stick tea).

Die VN Spesiale Rapporteur (Rodolfo Stavenhagen) se 2005-verslag, aanbeveling nr. 83 aan die Suid-Afrikaanse regering, spreek dit aan as volg: (ons vertaling):

"Optredes moet onderneem word om die stigma te verwyder wat kleef aan alle wettige aanspraakmakers op inheemse identiteit, naamlik die klassifikasie as "Kleurling" gedurende die apartheidregime."²³

Dit is hierdie konteks van grondonteiening en voortgaande sistemiese verontregting wat die agtergrond vorm tot die belangrikheid om aan te sluit by die stryd om onse inheemse erfgoed te herbevestig en om erken te word as tradisionele kennishouers van Rooibos. Alhoewel Rooibos wild groei in die hele Sederbergstrook, verteenwoordig Wupperthal die mees digbegroeide wilde Rooibosarea²⁴.

Boerdery met Rooibos is al aan die gang vir talle generasies, maar hierdie aktiwiteit was gebaseer op die oes van blare van plante wat wild groei. Ons is 'n klein groepie plaaslike Rooibosboere wat grond huur van die kerk om ons Rooibos oes-insameling en boerdery te behartig. Omtrent 7% van die grond is geskik vir die boerdery (en ander gewasse) en ongeveer 4% word vir Rooibos gebruik.²⁵ As historiese afstammeling van die Khoikhoigemeenskap, word ons deur die Nasionale Khoisan Raad verteenwoordig. Ons sluit aan by die stryd van die NKR en die Suid-Afrikaanse San Raad om te verseker dat ons erken word as die tradisionele kennishouers van Rooibos. Ons was drie verteenwoordigers van hierdie streek wat deelgeneem het aan die Rooibos-onderhandelinge.



3.2.2 Nieuwoudtville Inheemse Boerderygemeenskap

Baie jare gelede, lank voordat die setlaars hierheen getrek het, was die Khoi-Khoi die inwoners van die gebied. Die are was voorheen 'n plaas. Die Khoi-Khoi het van veldkos, plante en diere geëet. Ondanks die feit dat die Khoi-Khoi weggedryf was van hulle grond deur daardie inkomers, het hulle 'n geskiedenis agtergelaat wat tot vandag onthou word. Oor die jare heen is ontdekkings van rotskuns gemaak in die Oorlogskloof Natuurreservaat en op verskeie plase in die omgewing, wat die lewenswyse en jagmetodes van die Khoi-Khoi uitbeeld.

Nieuwoudtville is ryk aan sy Fynbosplante en daar is 300 inheemse plantspesies wat in hierdie area voorkom. Die Khoi-Khoi het die plante vir medisinale gebruik ontgin en *Aspalathus linearis*, vandag beter bekend as Rooibos, het ook gedien as 'n kruie-drinkie. Hierdie plant het wild gegroei en is vandag bekend as die veldtee. In die ou dae het die Khoi-Khoi klippe gebruik om sap uit die plant te druk vir tee, dan is dit in die son gesit om 'n rooi kleur te kry. Dan was dit gekook en gedrink. In die jaar 1897 was die gebied 'ontdek' en gestig as 'n dorp, wat vandag bekend staan as Nieuwoudtville. Dit is 'n klein dorpie, geleë op die R27 Bokkeveldplato in die Noord-Kaap. Die dorp se area is 26.26 km² (10.1 vkm). Die bevolking tel ongeveer 4000 inwoners van wie 85% afstammeling is van die Khoi-Khoi.

In die vroeë jare was die gereedskap nie so gevorderd soos vandag nie, maar ons voorouers het van osse gebruik gemaak, asook donkies en handgemaakte ploë om die aarde te bewerk. Wanneer die tyd aanbreek om te oes, het hulle klippe en byle gebruik om die tee in klein deeltjies te kap. Daarna was dit ook in die son gelaat en gesweet totdat dit daardie rooi kleur kry. Wanneer dit eers droog is, is dit opgetel en in groot sakke gesit en daardie tee was *stokkiestee* genoem.

Hierdie negatiewe erflating hou steeds aan om die beeld van die Rooibos inheemse boerderygemeenskap te skaad as 'arm kleurlingplaasboere', wat teenstrydig is met hulle status as tradisionele kennishouers - sentraal tot die groei en ontwikkeling van die Rooibos-industrie.

¹⁹Ibid

²⁰Denene Erasmus (9 July 2013) "Wupperthal Rooibos farmers co-operate for a better future", Farmers Weekly. Accessed from:

<https://www.farmersweekly.co.za/agri-business/empowerment/wupperthal-Rooibos-farmers-co-operate-for-a-better-future/> Retrieved 6 February 2018

²¹Ibid

²³Verenigde Nasies Kommissie oor Menseregte (2005) "Rapport van die Spesiale Rapporteur oor die situasie van menseregte en fundamentele vryhede van inheemse mense, Rodolfo Stavenhagen 2005

²⁴Denene Erasmus (9 July 2013) "Wupperthal Rooibos farmers co-operate for a better future", Farmers Weekly. Verkry van:

<https://www.farmersweekly.co.za/agri-business/empowerment/wupperthal-Rooibos-farmers-co-operate-for-a-better-future/> Bekom 6 Februarie 2018

²⁵Ibid

“

“We are, however, still challenged by a lack of ownership of our land. We have very poor access to land. For Khoikhoi descendants, the playing field is never level and we remain the forgotten people. There is little sympathy for, or support to address, the challenges we face. Our own government has not supported our efforts. Instead, we have faced unfair competition from a government-owned business that has actively undermined the organic status of our members. Our farmers farm in a dry and drought-prone area, and climate change impacts include higher temperatures, more frequent and severe droughts and extreme rainfall events. Through our cooperative, we try to develop systems to help our members to expand their existing traditional knowledge to improve their organic practices, but it remains a challenge without sufficient funds available.”

Alida Afrika,

female Khoikhoi indigenous farmer

Tea from the Bokkeveld in the Cederberg

Tee uit die Bokkeveld in die Sederberge

²⁴“History of the Suid Bokkeveld” Accessed from:<http://heiveld3fountains.org/about/history-of-the-suid-bokkeveld/>²⁵Ibid²⁶South African National Biodiversity Institute, (2006) “Poor man’s cup of tea no longer”. Accessed from: http://pza.sanbi.org/sites/default/files/info_library/Poor_tea.pdf Retrieved August 2019

Today, this Rooibos tea is planted and sown on a large scale on farms in Nieuwoudtville. Emerging farmers in the community provide approximately 10-20% of the Rooibos tea in the area. In 2009, the national government, together with the departments of Agriculture and Land Reform, erected the largest tea factory in Nieuwoudtville. This factory was built to help local farmers (commercial and emerging) to facilitate their work, because the farmers now sell their tea to the local factory and do not have to transport their tea to Clanwilliam. The factory also helps emerging farmers with tea seeds, diesel and tools to work their soil. The community members are foremen on tea farms, and many are workers. Many are also employed at the local tea factory, where the tea is processed.

Nieuwoudtville is a town with great potential, especially in agriculture. Rooibos is one of the largest industries in our community. But, after all these years, only the white, commercial farmers have benefited.

The current and emerging indigenous farmers and community members do not own land, but rent small pieces of land. This is a difficult existence. Currently the white farmers deliver about 90% and the emerging farmers only 10% of Rooibos tea. In order to fundamentally change the Rooibos tea process, land reform is necessary.

3.2.3 Suid Bokkeveld Indigenous Farming Community

The Suid Bokkeveld is the area south of the village of Nieuwoudtville, and north of the Doring River. Much of the area is arid Fynbos and is home to a community of Khoikhoi descendants who have been using Rooibos sustainably since time immemorial. The area is home to a re-sprouting variety of wild rooibos that is harvested on a sustainable basis by members of the community and marketed by the Heiveld Cooperative.

The area was the home of San hunter-gatherers and Khoikhoi pastoralists²⁶ whose pasture and hunting grounds were taken from them by colonists after the frontier war of 1739. In the late 1800s, some members of the community were able to secure access to land in the drier parts of the Suid Bokkeveld, and their descendants still farm there today. By the early 20th century, Rooibos and other products were harvested for domestic use²⁷, but for all of the 20th century, the Khoikhoi descendants were excluded from the benefits of commercialising Rooibos. Wild Rooibos growing here is more resistant to drought, pests and diseases.²⁸ Working together in the Heiveld Cooperative has provided us with local and international commercial success.



Vandag word hierdie Rooibostee geplant en gesaai op ‘n groot skaal op plase in Nieuwoudtville. Opkomende plaasboere verskaf omtrent 20% van Rooibostee. In 2009 het die nasionale regering saam met die Department van Landbou en Grondhervorming die grootste teefabriek hier in Nieuwoudtville opgerig. Daardie fabriek was gebou om die plaaslike kommersiële en opkomende boere te help en om hulle werk te fasiliteer, omdat die boere nou hulle tee aan die plaaslike fabriek verkoop en nie meer hoef Clanwilliam te gaan of te vervoer nie. Die fabriek help ook die opkomende boere met teesade, diesel en gereedskap om die grond te bewerk. Sommige van die gemeenskap se lede is voormanne op tee plase en baie is arbeiders. Baie is ook werkers by die plaaslike teefabriek, waar die tee verwerk word as die laaste stap.

Nieuwoudtville is ‘n dorp met baie potensiaal, veral in landbou. Rooibos is een van die grootste industrieë in onse gemeenskap, maar al hierdie jare was dit net wit kommersiële boere wat daarby gebaat het.

Die huidige, inheemse opkomende boere en lede van ons gemeenskap besit nie grond nie maar huur klein stukkie grond, wat ‘n bitter moeilike manier is om ‘n bestaan te voer. Die grootste uitdaging in Nieuwoudtville is dat ons grond verkies omdat die tee onse lewens kan verander. Tans ontgin die wit boere 90% van die tee en opkomende boere net 10%.



3.2.3 Suid-Bokkeveld Inheemse Boerderygemeenskap

Die Suid-Bokkeveld is die gebied suid van die dorp van Nieuwoudtville, en noord van die Doringrivier. ‘n Groot deel van die area is bedek met droë Fynbos en is die woonplek vir ‘n gemeenskap van Khoi-afstammeling, wat rooibos ontgin het op ‘n volhoubare manier vanaf die oertyd. Die gebied is die tuiste vir ‘n verskeidenheid van wilde rooibos wat weer uitspruit, en wat op ‘n volhoubare basis ontgin word deur lede van die gemeenskap en bemark word deur die Heiveld Ko-operatief.

Die area was die woongebied van San jagter-versamelaars en Khoi-Khoi veeboere²⁹ wie se weiding- en jaggebiede van hulle afgevat is deur die koloniseerders na die grensoorlog van 1739. In die laat 1800’s was sommige lede van die gemeenskap in staat om toegang tot die grond in die droër dele van die Suid- Bokkeveld te bewerkstellig, en hulle afstammeling boer nog steeds vandag daar. Teen die vroeë 20^{ste} Eeu was Rooibos en ander produkte ontgin vir huishoudelike gebruik³⁰, maar vir die volle duur van die 20^{ste} Eeu was die Khoi-afstammeling uitgesluit van die voordele van die kommersialisering van Rooibos. Wilde Rooibos is hier meer bestand teen droogtes, peste en siektes³¹. Deur saam te werk in die Heiveld Ko-operatief het vir ons tot plaaslike en internasionale sukses gelei.

“

Die gebrek aan eienaarskap van ons grond bly egter ‘n groot uitdaging. Ons het baie swak toegang tot grond. Vir Khoi-Khoi- en San-afstammeling is die speelveld nooit gelyk nie en ons bly ‘n vergete volk. Daar is min meegevoel of ondersteuning om ons met ons uitdagings te help. Ons eie regering het nie onse pogings ondersteun nie en ons moes eerder onregverdige kompetisie hanteer deur ‘n besigheid wat deur die regering self besit word, wat aktief die organiese status van ons lede ondergrawe. Onse boere moet in ‘n onvrugbare en droogte-geteisterde area ontgin, terwyl die impak van klimaatsverandering hoë temperature meebring, meer dikwels ook droogtes wat afgewissel word met uiterste reënvalle. Ons probeer deur ons Ko-operatief stelsels ontwikkel wat ons lede sal help om hul opwindende tradisionele kennis uit te brei en so hulle organiese praktyke te verbeter. Nogtans bly dit ‘n probleem weens die gebrek aan voldoende befondsing.

Alida Afrika,

vroulike Khoikhoi inheemse boer

Tea from the Heiveld Cooperative in the Suid Bokkeveld

Die tee wat kom van die Heiveld Koöperatiewe in die Suid Bokkeveld af

²⁹<http://heiveld3fountains.org/about/history-of-the-suid-bokkeveld/>³⁰Ibid³¹http://pza.sanbi.org/sites/default/files/info_library/Poor_tea.pdf

CHAPTER 4 | CHAPTER 4

4.1 Ancestral knowledge of Rooibos

4.1 Voorouerlike kennis van Rooibos

4.2 Defining the claim to Rooibos

4.2 Definiëring van die aanspraak op Rooibos

4.3 The Traditional Knowledge Holder Communities as Beneficiaries

4.3 Die Tradisionele Kennishouer-Gemeenskappe as
Voordeeltrekkers

ENGLISH

AFRIKAANS

4

OUR TRADITIONAL KNOWLEDGE TO THE USES OF ROOIBOS

ONS TRADISIONELE KENNIS TOT DIE GEBRUIKE VAN ROOIBOS

4.1 Ancestral knowledge of Rooibos

“

"Rooibos started from this area and I believe that because I learnt the knowledge of rooibos processing [...] from my mother and she learnt it from her mother who learnt it from her mother who learnt it from her mother."

Barend Salomo,

Wupperthal indigenous
Rooibos farmer

The San and Khoikhoi people are the original knowledge holders to the uses of Rooibos. The use of Rooibos is linked to our ancestors who roamed Southern Africa for many centuries. Our knowledge was passed down from one generation to another generation. We desire that this knowledge continues to be passed down to our future generations. We, therefore, believe that we have a transgenerational link to the transmission of the traditional knowledge and that this is evident in the knowledge that we hold and share.

Our ancestors taught us the aspects related to the knowledge through largely an oral tradition, storytelling and teaching-by-doing.

In some communities, after spending hours walking through the Cederberg mountains

to find optimal plants, we would harvest and chop them into small pieces with axes. After crushing them with stones and, later, hammers, the plants would be fermented in heaps and then finally dried in the sun. Harvesting and processing wild Rooibos is a time-consuming and difficult task. The Rooibos cultivation was small-scale, and the popularity of the tea was historically limited to our communities.

Rooibos remained unknown to the rest of the world until 1772, when our knowledge of the uses of the plant was appropriated by a Swedish botanist. Although he took some Rooibos to Europe and wrote about it, the real potential for the plant was not recognised until 1904. That year, a Russian immigrant to South Africa became interested in Rooibos tea and started trading with us.

TRYNTJIE SWARTS

We also want to acknowledge the story and role of Tryntjie Swarts, a Khoikhoi woman who lived in the Cederberg. She shared the ecological-cultural knowledge of the Khoikhoi about how to locate the “golden nests” of Rooibos seeds in the 1920s. This knowledge too, was a key propeller to the expansion of today’s Rooibos industry.

Rooibos tea thereafter quickly became popular throughout South Africa and the

world over, generating a range of other Rooibos health and cosmetic products. Our original knowledge was, therefore, key in leading to the development of the Rooibos industry and commercialisation today. However, over the last 150-200 years, we as the original knowledge holders never benefited from sharing our knowledge, we never received intellectual property rights, nor was our free, prior and informed consent given.

4.1 Voorouerlike kennis van Rooibos

“

"Rooibos het in hierdie gebied begin en ek glo dit omdat ek die kennis oor rooibosbewerking van die tee by my ma geleer het en sy het dit van haar ma geleer, wie dit van haar ma geleer het, en sy het dit weer van háár ma geleer."

Barend Salomo,

Wupperthal inheemse
Rooibosboer

Die San- en Khoivolke is die oorspronklike kennishouers van die gebruike van Rooibos. Die gebruike van Rooibos is verbind aan ons voorouers wat deur die hele Suider-Afrika nomadies geleef het vir talle eeue. Ons kennis is oorgedra van die een geslag tot die volgende geslag. Ons begeerte is dat hierdie kennis sal voortgaan om oorgedra te word aan ons toekomstige generasies. Ons glo dus dat ons ‘n transgenerasionele band besit vir die oordrag van die tradisionele kennis, wat duidelik te sien is in die kennis wat ons het en deel. Ons voorouers het ons daardie aspekte geleer wat verband hou met die kennis, hoofsaaklik deur ‘n mondelinge oorleweringstradisie, storievertelling en praktiese lering.

In sommige gemeenskappe, na ure van stap in die Sederberggebied om optimale

plante te kry, sou ons dit oes en dit kap in fyn stukkie met byle. Nadat ons dit fyngedruk het met klippe en dan later fyn kap met hamers, is die plante in hope laat gis en laastens in die son gedroog. Die oes en bewerking van wilde Rooibos is ‘n tydrowende en moeilike taak. Die ontginning van Rooibos was op ‘n klein skaal, en daarom was die gewildheid van die tee histories beperk tot ons gemeenskappe.

Rooibos het onbekend vir die wêreld gebly tot 1772, waarna ons ons kennis oor die gebruike van die plant met ‘n Sweedse botanis gedeel het. Hoewel hy daardie kennis Europa toe geneem het en daarvoor geskryf het, was die ware potensiaal van die plant nog nie besef tot 1904 nie, toe ‘n Russiese immigrant na Suid-Afrika geïntereeserd in Rooibostee geraak het, en begin het om met ons handel te dryf.

TRYNTJIE SWARTS

Ons wil graag erkenning gee aan die verhaal en rol van Tryntjie Swarts, ‘n Khoikhoivrou wat in die Sederberg gewoon het. Sy het in die 1920s die ekologies-kulturele kennis van die Khoi-Khoi gedeel oor hoe om die “goue neste” van Rooibos-sade te ontdek. Hierdie kennis was ook ‘n belangrike aanspoorder vir die uitbreiding van vandag se Rooibos-industrie.

Deur die immigrant se bemarking daarvan het Rooibostee vinnig regoor Suid-Afrika

en die hele wêreld gewild geword, met ‘n reeks van ander Rooibos gesondheids- en kosmetiese produkte ten gevolge. Ons oorspronklike kennis was die sleutel tot die ontsluiting van die ontwikkeling van die Rooibos-industrie en kommersialisering daarvan vandag. Vir die afgelope 150-200 jaar, het ons as oorspronklike kennishouers nooit enige intellektuele eiendomsregte ontvang nie, en ook het ons nie ons vrye, voorafgaande en ingeligte toestemming daarvoor gegee nie.

It is a proud moment for the Khoikhoi communities' contribution and rights as they are now recognised traditional knowledge holders. This is a right that did not exist for them until now.

³²Rooibos Industry Fact sheet 2019: <https://sarooibos.co.za/wp/wp-content/uploads/2019/03/20190222-SARC-2019-Fact-Sheet.pdf> Accessed November 2019

Known scientifically as *Aspalathus linearis*, Rooibos has been used by us for generations as a remedy for a wide range of ailments. The fine, needle-like Rooibos leaves are high in antioxidants and are caffeine-free. Rooibos also has other benefits. Some of these include relieving allergic symptoms, providing an energy boost and helping heal damaged skin. Rooibos is used for relaxation, as well as medicinal purposes, and has been found to be an appetite stimulant as well as an immune booster. Rooibos is used to treat various medical maladies and is used in the treatment of the following³²:

- **Hypertension and cardiovascular health**
- **Hypotension**

- **Stomach-related ailments**
- **Blood circulation**
- **Kidney ailments**
- **Stress relief**
- **Healthy skin**
- **To boost polyphenol/micro-nutrient levels**

When used in conjunction with other herbs, Rooibos is used to treat diabetes and to improve oral health. Skin care products containing Rooibos are used to treat eczema and minor skin injuries.

Not only does Rooibos have health benefits, its uses have been extended to agricultural purposes. It is included in soil mixtures to assist with mulching and soil fertilisation.

Wetenskaplik staan dit bekend as *Aspalathus linearis* maar word "Rooibos" genoem, en hierdie plant is deur ons vir geslagte lank gebruik as 'n geneesmiddel vir 'n wye reeks van kwale. Die fyn, naaldagtige rooibosblare is ryk aan antioksidante en is kaffeïnevry. Rooibos, wat vir baie generasies al in ons gemeenskappe gebruik word, het ook ander voordele. Sommige daarvan sluit in die verligting van allergiese simptome, is 'n energie-opkikker en help met die heling van beskadigde vel. Rooibos laat jou ontspan en dit het ook medisinale waarde. Boonop is bevind dat dit die aptyt opwek en versterk en bou jou weerstand op teen siektes. Rooibos word ook aangewend vir die behandeling van verskeie kwale en word veral gebruik vir die volgende siektes:

- **Hipertensie**
- **hipotensie**
- **maagkwale**

- **bloed sirkulasie**
- **nierkwale**
- **verligting van stres**

As dit saam met ander kruie gebruik word, word Rooibos aangewend om diabetes te behandel asook die verbetering van mondhygiëne. In produkte vir velversorging word dikwels Rooibos gevind, wat gebruik word om veluitslag en kleiner velwonde te behandel.

Rooibos is nie net voordelig vir gesondheidsdoelindes nie. Die gebruik daarvan is uitgebrei na die landbou-sektor, want dit kan gemeng word in verskeie grondsoorte om te help met bemesting en om grond meer vrugbaar te maak.

Dit is 'n trotse oomblik vir die Khoikhoigemeenskappe se bydrae en regte dat hulle nou gereken word as die erkende tradisionele kennishouers. Hierdie is 'n reg wat nie voorheen vir hulle tot nou bestaan het nie.

Omdat ons meer as 200 jaar gelede ons voorouerlike kennis gedeel het met ander, en ook verduidelik het hoe om dit te gebruik, glo ons daarom dat ons die oorspronklike kennishouers is van die gebruike van Rooibos.

Processing facility for Rooibos; The Rooibos plant; The road into Cederberg

Verwerkingsfasiliteit vir Rooibos; Die Rooibos-plant; Die pad na Sederberg



4.2 Defining the claim to Rooibos

This BCP further confirms our claim to Rooibos. We have a traditional knowledge claim to uses of Rooibos as shown by our ancestral knowledge and our history. Additionally, our claim is officially recognised by the 2014

government study carried out by the Department of Environment, Forestry and Fisheries: "Traditional Knowledge Associated with Rooibos and Honeybush Species in South Africa".

4.3 The Traditional Knowledge Holder Communities as Beneficiaries

South African Bioprospecting, ABS Regulatory Framework defines:

Traditional knowledge and uses: As referring to the customary/traditional use or knowledge of indigenous biological resources by an indigenous community in accordance with unwritten or written rules, usages, customs or practices traditionally observed, accepted and recognised by them and includes discoveries about the relevant indigenous biological resources by that community.

Indigenous community: Any community of people living or having rights or interests

in a distinct geographical area within the Republic of South Africa with a leadership structure and:

- Whose traditional use of the indigenous biological resources to which an application for a permit relates, have initiated or will contribute to or form part of the proposed bioprospecting, or
- Whose knowledge of or discoveries about the indigenous biological resources to which a permit relates are to be used for the proposed bioprospecting.

4.2 Definiëring van die aanspraak op Rooibos

Hierdie BGP definieer onse aanspraak op Rooibos. Ons het 'n tradisionele kennis- aanspraak op die gebruike van rooibos soos gesien kan word deur onse voorouerlike kennis, ons geskiedenis. Onse aanspraak is ook amptelik erken

deur die Tradisionele Kennis Verwant aan Rooibos- en Heuningbos-spesies in Suid-Afrika se studie, uitgevoer deur die Departement van Omgewing, Bosbou en Visserye.

4.3 Die Tradisionele Kennishouer-Gemeenskappe as Voordeeltrekkers

Suid-Afrikaanse Bioprospekterende, TVV Reguleringsraamwerk definieer:

Tradisionele kennis en gebruike: as verwysend na die gewoonte/tradisionele gebruik of kennis van inheemse biologiese bronne deur 'n inheemse gemeenskap volgens ongeskrewe of geskrewe reëls, gebruike, gewoontes of praktyke soos dit tradisioneel waargeneem en aanvaar deur hulle erken word; en sluit in ontdekkings oor die relevante inheemse biologiese bronne deur daardie gemeenskap.

Inheemse gemeenskap: Enige gemeenskap van mense wat leef en regte of belange het

in 'n besondere geografiese area binne die Republiek van Suid-Afrika met 'n leierskap-struktuur en:

- Wie se tradisionele gebruik van inheemse biologiese bronne waaraan 'n aansoek vir 'n permit gekoppel is, geïnisieer is of sal bydra tot of deel vorm van die voorgestelde bioprospektering,
- Of wie se kennis of ontdekkings oor die inheemse biologiese bronne waaraan 'n aansoek vir 'n permit gekoppel is, gebruik gaan word vir die voorgestelde bioprospektering.

CHAPTER 5 | CHAPTER 5

5.1 Customary Law

5.1 Gewoontereg

5.2 International Law

5.2 Internasionale Wetgewing

5.3 South African Law

5.3 Suid-Afrikaanse Wetgewing

5.4 Intellectual Property Rights

5.4 Intellektuele Eiendomsregte

5.5 How is Free, Prior, Informed Consent Given?

5.5 Hoe Word Vrye, Voorafgaande en Ingeligte Toestemming Verleen?

ENGLISH

AFRIKAANS

5

**LEGAL
FRAMEWORK**

**WETLIKE
RAAMWERK**

Diagram 4



Diagram 4



5.1 | Customary Law

Generations of Khoikhoi before us stewarded land, forests and other resources in terms of our customary laws. Due to our occupation, we previously held the rights to the resources on our land. With the onset of colonialism and the imposition of Western forms of law, in particular, property law, we were systematically deprived of our land. This dispossession occurred before and even after the onset of the 1913 Native Land Act. The idea was that for ownership to be proved, we needed to show title in the form of formal title deeds. Later, Apartheid legislation cemented the colonial idea that land could be privately owned. Our separation from the land meant that we could not practise our culture and, by extension, our customary laws.

Customary law is viewed as the local law of communities who own and/or use resources on a communal basis. Within Africa, many rural communities live and work on communal land, and use customary law as a governance system. Customary law provides us with rules that self-regulate our relationships, on the one hand, and regulate how we engage with role players outside our community, on the other.

We believe that it is our right to practise our customary law. This right was cemented in the constitutional law case in *Shilubana and Others v Nwamitwa*³³, in which the Court found that 'customary law' is recognised by the South African

Constitution as an independent source of law, and is 'living customary law'. As living customary law, it is our communities' right to develop the law.

Customary law pertains to resource conservation, protection and use. Rooibos is our cultural resource used, first, by our ancestors and now by ourselves for many years. The TK has been orally passed down. We believe that, being the recognised holders of TK, we have a right to benefits, be they commercial or non-commercial. The knowledge of the benefits of using Rooibos have been shared with the outside world. In so doing, the sharing of knowledge has resulted in the commercialisation of Rooibos.

The Rooibos case is one of collective rights of the Khoikhoi communities. In so far as it does not conflict with human rights violations of the individual, an individual cannot make this claim as one person. It is a community's collective claim in the context of the Khoikhoi community's customary laws. So individuals coming forth with claims on the basis of being Khoikhoi have to be part of a community in order to enjoy its benefits. All communities comprising Khoikhoi (Griqua, Nama, Koranna and Cape Khoi) participated in the negotiations of the Rooibos agreement. The benefits that accrue to the Khoikhoi community, inclusive of the Cederberg farming communities, are shared on a historical communal basis as opposed to being shared individually.

³³Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC)

5.1 | Gewoontereg

Baie geslagte voor ons het onse grond, woude en ander bronne ontgin in terme van onse gewoontereg. Te danke aan ons verbondenheid aan die aarde en natuur, het ons voorheen die reg gehad tot die bronne op onse gronde. Met die aanvang van kolonialisme en die neerlê van Westerse vorme van wetgewing, in besonder betreffende eiendomsregte, was ons stelselmatig beroof van ons gronde. Hierdie onteiening het voor die 1913 Wet op Naturelgrond gebeur en selfs daarna. Die gedagte was om aanspraak te maak op bewese eienaarskap, maar ons moes daardie titel toon in die vorm van kaart en transport. Later het apartheidswette die koloniale idee vasgelê dat grond ook in private besit kon wees. Die afgedwonge skeiding van ons gronde het beteken dat ons nie onse kultuur kon beoefen nie, en wat nog meer is, onse gewoontereg.

Gewoontereg word beskou as die plaaslike wette van gemeenskappe wat bronne op 'n gemeenskapsbasis besit en/of gebruik. In Afrika leef en werk baie plattelandse kommunes op gemeenskaplike grond, en gebruik gewoontereg as 'n manier van regering. Gewoontereg verskaf reëls aan ons wat ons verhoudinge aan die een kant self-reguleer, maar ook hoe ons in gesprek wil tree met rolspelers buite ons gemeenskap.

Ons glo dat dit ons reg is om gewoontereg toe te pas. Hierdie reg is in die grondwetlike regspraak vasgelê van *Shilubana and Others v Nwamitwa*³⁴, toe die Hof bevind het dat 'gewoontereg' erken word deur die Suid-Afrikaanse Konstitusie as 'n onafhanklike

regsbron, en wel as 'lewende gewoontereg'. As lewende gewoontereg is dit onse gemeenskappe se reg om daardie wette en reëls te ontwikkel.

Gewoontereg verwys na die bewaring van bronne, beskerming en die gebruik daarvan. Rooibos is onse kulturele bron, eers gebruik deur ons voorouers en tans deur onself vir baie jare al. Die TK is mondelings oorgedra. Ons glo, as die erkende houers van TK, dat ons dus die reg het tot voordele, of dit kommersieel is of nie-komersieel. Die kennis aangaande voordele van Rooibosgebruik was gedeel met die buitewêreld. Die deel van kennis op grond van mededeelsaamheid, het tot die kommersialisering van Rooibos gelei.

Die Rooibos-saak is een van die kollektiewe regte van die Khoikhoi-gemeenskappe. In soverre as wat dit nie konflik veroorsaak met die individu se menseregte nie, kan 'n individu nie hierop aanspraak maak as 'n individu nie. Dit is 'n gemeenskap se kollektiewe aanspraak in die konteks van die Khoi-Khoi se gewoontereg. Dus moet individue, wat aanspraak maak op grond van hulle identifikasie as Khoikhoi, dit doen as deel van 'n gemeenskap om daardie regte te kan geniet. Alle gemeenskappe wat die Khoi-Khoi uitmaak (Griekwa, Nama, Koranna en Kaapse Khoi) het deelgeneem aan die onderhandelinge aangaande die Rooibosooreenkoms. Alle Khoikhoi gemeenskappe insluitend die Sederberg se boerderygemeenskapsvoordele word verdeel op 'n histories-gemeenskaplike basis, en nie aan individue per se nie.

³⁴Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC)

COLLECTIVE RIGHTS VS INDIVIDUAL RIGHTS

In a report launched by the International Fund for Agricultural Development (IFAD), it is noted that, "The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes that "indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples", creating an inextricable link between indigenous identities and their rights as peoples. The collective rights of indigenous peoples include recognition of their distinctive histories, languages, identities and cultures

and the collective right to lands, territories and natural resources they have traditionally occupied and used, as well as the right to their collectively held traditional knowledge. In establishing and fulfilling collective rights for indigenous peoples, the international community has affirmed that such rights should not conflict with existing international human rights norms but complement them. For instance, the implementation of collective human rights should not adversely affect the implementation of individual rights.³⁵"

KOLLEKTIEWE REGTE VS INDIVIDUELE REGTE

In 'n verslag geloods deur die Internasionale Fonds vir Landbouontwikkeling (IFLO) word opgemerk dat, "Die Verenigde Nasies Deklarasie oor die Regte van Inheemse Volkere (VNDRIV) erken dat "inheemse volkere besit kollektiewe regte wat noodsaaklik is vir hulle bestaan, welstand en integrale ontwikkeling as volkere", wat 'n onverbreekbare band skep tussen inheemse identiteite en hul regte as volke. Die kollektiewe regte van inheemse volkere sluit in erkenning van hul besondere geskiedenis, tale, identiteite en kulture en die kollektiewe reg tot die

grond, gebiede en natuurlike bronne wat hul tradisioneel bewoon en gebruik het, sowel as die reg tot hul kollektiewe besit van tradisionele kennis. In die vasstelling en vervulling van kollektiewe regte vir inheemse volkere, het die internasionale gemeenskap bevestig dat sodanige regte nie in konflik met bestaande internasionale menseregte is nie, maar dit komplimenteer. Byvoorbeeld, die implimentering van kollektiewe regte behoort nie die implimentering van individuele regte negatief te affekteer nie.³⁶"



Negotiations with Rooibos Council in Clanwilliam.

Onderhandelings met Rooibos Raad in Clanwilliam.



San-Khoi Panel Discussion at Pan African Workshop 2018

San-Khoi Paneel Bespreking by die Pan Afrika Werkswinkel 2018

³⁵IFAD (unknown) "Indigenous peoples collective rights to lands, territories and natural resources" https://www.ifad.org/documents/38714170/40272519/IPs_Land.pdf/ea85011b-7f67-4b02-9399-aaea99c414ba Accessed November 2019

³⁶IFAD (onbekend) "Indigenous peoples collective rights to lands, territories and natural resources" https://www.ifad.org/documents/38714170/40272519/IPs_Land.pdf/ea85011b-7f67-4b02-9399-aaea99c414ba Bekom November 2019

5.2 International Law

5.2.1 The Convention on Biological Diversity

The Convention on Biological Diversity (CBD), an international agreement, came into being in 1992. The CBD has three objectives:

- Conservation of biological diversity;
- Sustainable use of its components; and
- Fair and equitable sharing of benefits arising from genetic resources.

This protocol was clear and, according to article 8(j) requires States, “*subject to their national legislation, to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity, and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practice*”.

With reference to our case, when matters pertain to the use of Rooibos Traditional Knowledge, there needs to be fair and equitable sharing of benefits.

5.2.2 The Nagoya Protocol

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity states that States shall:

- Take measures to ensure that benefits arising from natural

resources and traditional knowledge held by communities is shared in a fair and equitable way with communities, on mutually agreed terms.

- Provide for legal clarity and transparent rules on access and benefit-sharing mechanisms.
- Provide information on how rules and procedures for obtaining prior, informed consent and mutual agreements can be obtained.
- Create conditions to promote and encourage research contributing to biodiversity conservation and sustainable use of biodiversity.
- Support the development of community protocols for access and benefit-sharing regarding traditional knowledge associated with natural resources.

South Africa is a signatory to the Nagoya Protocol and has provided a mechanism in its domestic legislation (see below) to give effect to this Protocol.

5.2.3 The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)³⁷ recognises and affirms the rights of Indigenous People. It states in the preamble that, “*respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment*”.

Article 23 of the Declaration states that we have the right to determine and develop our

5.2 Internasionale Wetgewing

5.2.1 Die Konvensie oor Biologiese Diversiteit

Die Konvensie oor Biologiese Diversiteit (KBD/CBD), ‘n internasionale ooreenkoms, is totstand gebring in 1992. Die KBD het drie doelwitte:

- bewaring van biologiese diversiteit
- volhoubare gebruik van sy komponente
- vrye en billike verdeling van voordele wat spruit uit genetiese bronne.

Hierdie protokol is klinkklaar en volgens artikel 8(j) vereis dit van State:

...onderhawig aan hul nasionale wetgewing, om ‘kennis, innovasies en praktyke van inheemse en plaaslike gemeenskappe te respekteer, te bewaar en te handhaaf, wat die tradisionele leefstyle ter saaklik vir die bewaring en volhoubare gebruik van biologiese diversiteit beliggaam, en die wyer aanwending bevorder met die toestemming en betrokkenheid van sodanige houer van kennis, innovasies en praktyke, en om die billike verdeling van voordele wat spruit uit die gebruik van sodanige kennis, innovasies en praktyke, aan te moedig.

Met verwysing na ons saak: ten opsigte van kwessies met betrekking tot die gebruik van Rooibos TK, moet daar billike en regverdige voordeelverdeling wees.

5.2.2 Die Nagoya Protokol

Die Nagoya Protokol wys daarop dat State sal:

- Stappe doen om te verseker dat voordele, voortspruitend uit

natuurlike bronne en tradisionele kennis gehou deur gemeenskappe, gedeel word met daardie gemeenskappe op ‘n billike en regverdige wyse, op wedersyds-aanvaarbare terme.

- Verskaffing van reëls oor toegang en ‘n voordeelverdelingsmeganisme vir wetlike duidelikheid en deursigtigheid.
- Verskaffing van inligting oor die reëls en prosedures vir verkryging van voorafgaande ingeligte toestemming en wedersydse ooreenkomste sal so bekom kan word.
- Daarstelling van voorwaardes vir navorsing, wat sal bydra tot die bewaring van biodiversiteit en die volhoubare gebruik van biodiversiteit, dit te bevorder en aan te moedig.
- Ondersteuning van die ontwikkeling van gemeenskapsprotokolle vir toegang en voordeelverdeling rakende tradisionele kennis verwant aan natuurlike bronne.

Suid-Afrika is ‘n ondertekenaar van die Nagoya Protokol en het ‘n meganisme in sy huishoudelike wetgewing verwoord om hierdie Protokol in plek te stel.

5.2.3 Die Verenigde Nasies se Deklarasie oor die Regte van Inheemse Volkere

Hierdie Charter erken en bevestig die regte van Inheemse Volkere. Dit verklaar in die inleiding dat, “*respek vir inheemse kennis, kulture en tradisionele praktyke sal bydra tot volhoubare en billike ontwikkeling, en behoorlike bestuur van die omgewing.*”

³⁷United Nations (2007) The United Nations Declaration on the Rights of Indigenous Peoples <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>, Retrieved August 2019

priorities. We also have the right to exercise our development. With this BCP and by practising FPIC, we have the opportunity to be actively engaged in developing our communities. Our voices can be heard and we can fulfil our responsibilities to our communities.

Article 26 asserts our right to the lands, territories and resources which have been traditionally owned by us. It is with this in mind that we believe our rights as TK holders need to be respected and affirmed by those who wish to engage with us in the development of Rooibos.

5.2.4 African Commission on Human and Peoples Rights

In 2010, the African Commission on Human and Peoples Rights released a ground-breaking decision³⁸ encouraging the protection of customary rights of

communities. The African Commission adopted a Resolution on a Human Rights-Based approach to Natural Resource Governance in 2012 that reads as follows:

"Mindful of the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights to access and control of various resources, including land, minerals, forestry and fishing..."

"Calls upon State Parties to [...] confirm that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision-making related to natural resource governance".

This resolution reinforces provisions of other international instruments that call for States to take an active role in providing those parties interested in engaging with us, guidelines on how to seek free prior and informed consent.

³⁸Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, 27th ACHPR AAR Annex (Jun 2009 - Nov 2009)



NKC Rooibos Discussion

NKR Rooibos Bespreking

Artikel 23 van die Deklarasie verklaar dat ons die reg het om self onse eie prioriteite te bepaal en te ontwikkel. Ons het verder die reg om ons ontwikkeling uit te oefen. Met hierdie BGP/BCP en VVIT/FPIC, het ons nou die geleentheid om aktief betrokke te wees by ons ontwikkeling in ons gemeenskappe. Onse stemme kan gehoor word en deur dit te doen, vervul ons onse verantwoordelikhede teenoor ons gemeenskappe.

Artikel 26 bevestig onse reg tot die historiese gronde, areas en bronne wat tradisioneel aan ons behoort het. Met dit in gedagte, glo ons dat onse regte as TK-houers gerespekteer en bevestig moet word deur hulle wat in geprek met ons wil tree oor die ontwikkeling van Rooibos.

5.2.4 Afrika Kommissie

In 2010, het die Afrika Kommissie oor Mense- en Volkeregte 'n beslissende besluit geformuleer oor die beskerming van gemeenskappe se gewoontereg. Die Afrika Kommissie het 'n Resolusie oor

Menseregte-gebaseerde Benaderings tot Natuurlike Bronnebestuur in 2012 aanvaar, wat as volg lui:

"Met die oneweredige impak van die misbruik van menseregte op plattelandse gemeenskappe in Afrika, wat nog steeds 'n stryd voer om hul gewoontereg uit te oefen vir toegang en beheer van verskillende bronne insluitend grond, minerale, bosbou en vissery in gedagte..."

maak ons 'n beroep op Staatspartye om [...] te bevestig dat alle nodige maatstawwe aangewend sal word deur die Staat om deelname, insluitend die vrye, voorafgaande en ingeligte toestemming van gemeenskappe te verseker, in besluite wat verband hou met natuurlike bronnebestuur."

Hierdie resolusie herbevestig bepalings van ander internasionale liggame wat 'n beroep maak op State om 'n aktiewe rol te speel om aan daardie partye, wat belangstel om met ons in gesprek te tree, riglyne te verskaf oor hoe om vrye, voorafgaande en ingeligte toestemming te verkry.



NKC Rooibos Discussion

NKR Rooibos Bespreking

5.3 | South African Law

5.3.1 National Environmental Management: Biodiversity Act

South Africa is a signatory to the Convention on Biological Diversity. At the domestic level, the *National Environmental Management Biodiversity Act 2004* translates South Africa's commitment under the CBD and the *Nagoya Protocol*. In accordance with the three goals of the CBD, it provides a framework for biodiversity conservation, sustainable use and access and benefit sharing, and community involvement in biodiversity conservation. Section 82 of the Act sets out that before a permit can be issued for bioprospecting purposes, the issuing authority must ensure that the interests of the indigenous community are protected.

5.3.2 Bioprospecting, Access and Benefit-sharing Regulations

The 2008 Bioprospecting, Access and Benefit Sharing Regulations guidelines³⁹ endeavour to assist different stakeholders who engage with us to understand what legalities to comply with. In complying

with the legal requirements set out in these regulations, we hope that there will be fair and equitable sharing of benefits arising from bioprospecting projects which utilise our indigenous biological resources, such as Rooibos, and our associated traditional knowledge.

5.3.3 Department of Environmental Affairs Traditional Knowledge Study

In 2014, the Department of Environmental Affairs, now Department of Environment, Forestry and Fisheries, commissioned a study⁴⁰ on the traditional knowledge associated with two key species in the bioprospecting sector of South Africa, namely Rooibos (*Aspalathus linearis*) and Honeybush (*Cyclopia spp.*) Our claim was that we had inadequate acknowledgement, recognition and protection of our interest in relation to the ownership of traditional knowledge associated with the Rooibos species, which is and has been commercially used.

The Department embarked on a stakeholder consultative study. In concluding its findings, the Department confirmed our claim and found no reason to dispute that we are the original knowledge holders to the uses of Rooibos.

³⁹https://www.environment.gov.za/sites/default/files/legislations/bioprospecting_regulatory_framework_guideline.pdf
Accessed 12 February 2018

⁴⁰Department of Environmental Affairs (2014) "Traditional Knowledge Associated with Rooibos and honeybush Species in South Africa" https://www.environment.gov.za/sites/default/files/reports/traditionalknowledge_rooibosandhoneybushspecies_report.pdf
Accessed 12 February 2018



5.3 | Nasionale Suid-Afrikaanse Wetgewing

5.3.1 Nasionale Omgewingsbestuur: Wet op Biodiversiteit

Suid-Afrika is 'n ondertekenaar van die Konvensie oor Biologiese Diversiteit. Die *Nasionale Omgewingsbestuur van Biodiversiteit* verklaar op huishoudelike vlak Suid-Afrika se toegewydheid onder die KBD en *Nagoya Protokol*. Ooreenkomstig die drie doelwitte van die KBD verskaf dit 'n raamwerk vir biodiversiteitsbewaring, volhoubare gebruik en voordeelverdeling, en gemeenskapsbetrokkenheid in biodiversiteitsbewaring. Seksie 82 maak duidelik dat voor 'n permit uitgereik kan word vir bioprospekteringsdoeleindes, die instansie wat dit uitreik seker moet maak dat die belange van die inheemse gemeenskap beskerm is.

5.3.2 Bioprospektering, Toegang en Voordeelverdeling Regulasies

Die BTVV/BABS-riglyne onderneem om verskillende aandeelhouers by te staan, wat in gesprek met ons wil tree oor die voldoening aan wetlike vereistes. Deur te voldoen aan die wetlike vereistes soos uitgespel in hierdie regulasies, hoop ons

dat billike en regverdige voordeelverdeling sal geskied, wat voortspruit uit bioprospekterende projekte, en wat ons inheemse biologiese bronne ontgin soos Rooibos, sowel as onse verwante tradisionele kennis.

5.3.3 Departement van Omgewingsake studie van Tradisionele Kennis-studie

In 2014, het die Departement van Omgewingsake 'n studie gemagtig oor tradisionele kennis wat verwant is aan twee sleutelspesies in die bioprospekterende sektor van Suid-Afrika, naamlik Rooibos (*Aspalathus linearis*) en Heuningbos (*Cyclopia spp.*) Ons het daarop gewys dat ons onvoldoende erkenning, erkentlikheid vir, en beskerming van ons belange ontvang het rakende die eienaarskap van tradisionele kennis verwant aan die Rooibos-spesies wat kommersieel ontgin word, net soos in die verlede.

Die DOS/DEA het 'n aandeelhouer-oorlegplegende studie geloods. Na die finalisering van hul bevindinge het die Departement onse eis bevestig en het geen rede gevind wat sou betwis dat ons die oorspronklike kennishouers van die gebruike tot Rooibos is.

5.4 Intellectual Property Rights

*For more detailed information on Intellectual Property Rights, please see the Annexure of this BCP.

This Biocultural Community Protocol, as a principle, proposes that the Khoikhoi communities be entitled to co-ownership or benefit-sharing (royalties) of any Intellectual Property Rights using their Traditional Knowledge in accordance with the required law. It is anticipated that, with the development and documentation of a BCP, the Khoikhoi communities will become aware of their customary rights over the use of biological resources and traditional knowledge. The BCP identifies and considers a set of principles for the development of Guided Contractual Practices in dealing with TK of the Khoikhoi communities over their genetic resources. The guiding principles are set out below:

- **Principle 1:** *The IP-related rights and obligations should recognise, promote and protect all forms of formal and informal human creativity and innovation of the Khoikhoi communities, based on, or related to, the transferred genetic resources or indigenous biological resources (IBR).*

- **Principle 2:** *The IP-related rights and obligations should take into account sectoral characteristics of genetic resources/IBR and genetic resource/IBR policy objectives and frameworks.*
- **Principle 3:** *The IP-related rights and obligations should ensure the full and effective participation of the Khoikhoi communities and address process issues related to contract negotiation and the development of IP clauses for access and benefit-sharing agreements.*
- **Principle 4:** *The IP-related rights and obligations should distinguish between different kinds of uses of genetic resources, including commercial, non-commercial and customary uses.*

This BCP provides the San and Khoikhoi communities with an opportunity to focus on their IP development aspirations *vis-a-vis* their rights. Further, to articulate for themselves, and for users, their understanding of their biocultural heritage and, therefore, on what basis they will engage with a variety of stakeholders in dealing with their biocultural heritage.



5.4 Intellektuele Eiendomsregte

Die BGP behoort in beginsel voor te stel dat die Khoi-Khoigemeenskappe geregtig is op mede-eienaarskap van enige IER/IPR wat hulle TK gebruik.

Dit word voorsien dat, met die ontwikkeling en dokumentering van 'n BGP, die San en Khoi-Khoigemeenskappe bewus sal word van hulle gewoonteregten opsigte van die gebruik van biologiese bronne en tradisionele kennis. Die BGP identifiseer en neem 'n stel van beginsels in ag vir die ontwikkeling van die Gids vir Kontraktuele Praktyke in die hantering met die TK van die San en Khoi-gemeenskappe oor hulle genetiese bronne. Daardie beginsels word hier onder uiteengesit:

- **Beginsel 1:** *Die IE-verwante regte en verpligtinge behoort alle vorms van formele en informele menslike kreatiwiteit en innovasie van die San- en Khoigemeenskappe te erken, bevorder en beskerm, gebaseer op, of verwant aan, die oorgedraagde genetiese bronne.*
- **Beginsel 2:** *Die IE-verwante regte en verpligtinge behoort die sektoriese karaktertrekke van genetiese*

bronne en beleid met doelwitte en raamwerke in ag te neem.

- **Beginsel 3:** *Die IE-verwante regte en verpligtinge behoort die volle en effektiewe deelname van die Khoigemeenskappe te verseker en kwessies rakende die proses, wat verwant is aan kontrakonderhandeling en die ontwikkeling van IE-klausules vir toegang en voordeelverdeling, in die ooreenkoms aan te spreek.*
- **Beginsel 4:** *Die IE-verwante regte en verpligtinge behoort te onderskei tussen verskillende soorte gebruike van genetiese bronne, insluitend kommersiële, nie-komersiële en gebruike aanwendings.*

Hierdie BGP gee aan Khoi-Khoigemeenskappe 'n geleentheid om op hulle IP ontwikkeling en aspirasies te fokus ten opsigte van hulle regte en vir hulself uit te maak, en vir gebruikers, hulle begrip van hul biokulturele erfenis, en op watter basis hulle in gesprek wil tree met 'n verskeidenheid van aandeelhouers wanneer daar sake gedoen word.

*Vir meer gedetailleerde inligting oor Intellektuele Eiendomsregte, sien asseblief die Bylae van hierdie BGP.

Opposite Page: Community banner of Khoikhoi communities to reclaim the term "Hottentots" as the banner reads, "Hottentotte is die Khoikhoi," meaning, "The Hottentots are the Khoikhoi"

Teenoorgestelde bladsy: Gemeenskaps banier van Khoikhoi gemeenskappe om die term "Hottentotte terug tee is, soos die banier lees, "Hottentotte is die Khoikhoi"



5.5 How is Free, Prior, Informed Consent Given?

Consent to use our knowledge is based on our living customary laws in modern day post-Apartheid South Africa, national legislation and policies. The process of providing Free, Prior and Informed Consent (FPIC) and deciding on the conditions for transfer of knowledge will depend on the type of user, the nature of the research and the specific traditional knowledge-holding community.

FPIC is not just a result of a process to obtain consent to a particular project; it is also a process in itself, and one by which the Khoikhoi are able to conduct their own independent and collective discussions and decision-making. They do so in an environment where they do not feel intimidated, and where they have sufficient time to discuss in their own language, and in a culturally appropriate way. They may discuss matters affecting their rights, lands, natural resources, livelihoods, knowledge, social fabric, traditions, governance systems, and culture or heritage (tangible and intangible).

Lastly, it is also important to underline that engaging an FPIC process does not guarantee consent as a result. The result of an FPIC process can be any of the following outcomes: consent from the Khoikhoi community on the proposed activity; consent after negotiation and changing of the conditions under which the project will be planned, implemented, monitored and evaluated; or the withholding of consent. It is also important to bear in mind that consent, once given, can also be withdrawn at any stage.

- **Free** refers to consent given voluntarily and without coercion, intimidation or manipulation. It also refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion,

expectations or timelines that are externally imposed.

- **Prior** means that consent is sought sufficiently in advance of any authorisation or commencement of activities, at the early stages of a development or investment plan, and not only when the need arises to obtain approval from the community.
- **Informed** refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and as part of the ongoing consent process.
- **Consent** refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected communities.

Given the historical negative impact of research with indigenous communities, there is an urgent need for an ethical research approach based on consultation, strong community participation, and methods that acknowledge indigenous ways of knowing. Ensuring that the research used by researchers who work in Khoikhoi communities is both culturally appropriate and rigorous in design is essential for:

- (1) Obtaining new knowledge; and
- (2) Evaluating interventions to eliminate these disparities.

To date, much of the non-indigenous response to calls for appropriate indigenous research has been at the level of process and methodology. The participation of indigenous people has often been mere token inclusion. Furthermore, there has been an assumption that in applying qualitative research methods, researchers will address cultural insensitivity by using methods of data

5.5 Hoe Word Vrye, Voorafgaande En Ingeligte Toestemming Verleen?

Die verlening van toestemming tot onse kennis en toegang tot onse inheemse biologiese bronne, is gebaseer op ons lewende gewoontereg, nasionale wetgewing en beleide. Die proses vir verskaffing van VVIT/FPIC en besluite oor die voorwaardes vir oordrag, sal van die soort gebruiker afhang, die aard van die navorsing en die spesifieke TK-houdende gemeenskap.

VVIT is nie slegs 'n resultaat van 'n proses om toestemming te verkry met betrekking tot 'n spesifieke projek nie; dit is ook 'n proses opsig self, en een waardeur die Khoi-Khoi instaat gestel word vir hul eie onafhanklike en gesamentlike besprekings en besluitneming. Hulle doen dit in 'n omgewing waar hulle nie geïntimideerd voel nie, en waar hulle genoegsaam tyd sal hê om in hul eie taal gesprekke te voer, en op 'n kultureel-gepaste wyse oor sake wat hulle regte, gronde, natuurlike bronne, lewensbestaan, kennis, maatskaplike leefwyse, tradisies, regeringsisteme, asook kultuur of erfenis (tasbaar en ontasbaar).

Laastens is dit ook belangrik om te beklemtoon dat die VVIT-proses nie toestemming as resultaat waarborg nie. Die resultaat van 'n VVIT-proses kan enige van die volgende uitkomstes wees: toestemming van die San- en Khoigemeenskap oor die voorgestelde aktiwiteit; toestemming na onderhandelinge en verandering van die kondisies waaronder die projek beplan, geïmplementeer, gemonitor en geëvalueer sal word; of die weerhouding van toestemming. Dit is verder belangrik om in gedagte te hou dat toestemming reeds verleen, op enige stadium teruggetrek kan word.

- **Vrye** verwys na toestemming wat vrywilliglik verleen word en sonder dwang, intimidasie of manipulasie.

Dit verwys ook na 'n proses wat self deur die gemeenskap, van wie toestemming versoek word, bestuur word, ongehinderd deur dwang, verwagtinge of tydskedules wat van buite af afgeforseer word.

- **Voorafgaande** beteken dat voldoende toestemming vóór enige magtiging of aanvang van aktiwiteite, by die vroeë fases van 'n ontwikkeling of investeringsplan, en nie net wanneer die behoefte ontstaan om goedkeuring by die gemeenskap te kry nie.
- **Ingeligte** verwys hoofsaaklik na die aard van die samespreking en die soort inligting wat voorsien moet word voor toestemming versoek word en as deel van die voortgaande toestemmingsproses.
- **Toestemming** verwys na die gesamentlike besluit deur houers van die regte en bereik deur besluitnemingsprosesse wat gebaseer is op die gebruike van die betrokke gemeenskappe.

Oor die jare heen was die Khoi- en Sangemeenskappe se ervaring aangaande navorsing meestal negatief, beide in terme van die prosesse en uitkomstes wat ons bereidwilligheid om mee te doen aangetas het. Gegee die negatiewe impak van onvanpaste navorsing op inheemse gemeenskappe, is daar 'n dringende noodsaaklikheid van 'n etiese benadering tot navorsing gebaseer op konsultasie, ordentlike gemeenskapsdeelname en metodes wat inheemse wyses van kennis in berekening bring.

Om te verseker dat die navorsing van navorsers wat in Khoi- en Sangemeenskappe werk, beide kultureel paslik en deeglik is in terme van ontwerp, is nodig:

collection that are in line with traditional cultures. However, questions about appropriate research methods amongst the Khoikhoi communities go beyond the “quantitative versus qualitative” debate and focus on the root issue of how we, “go about knowing”.

Partnerships between academic researchers and Khoikhoi communities must be clear regarding what the benefits are, and for whom. For many who work in Khoikhoi communities, there is the sense of contributing to the social good, community well-being, and social justice through their research. Yet, there is also the conflicting sense that knowledge that has been uncovered, revealed, or shared must be protected and that the different purposes and values of community research participants must be both acknowledged and accommodated to the largest extent possible.

A key issue that continues to damage the concept of research in the minds of many Khoikhoi communities is the area of intellectual and cultural property rights.

A process to obtain the free, prior and informed consent from the NKC, the community affected and its individual participants should be undertaken sufficiently in advance of commencement or authorisation of research activities. Further, this process should consider the community's own legitimate decision-making processes regarding all phases of planning, implementation, monitoring, assessment, evaluation and wind-up of a research project. It is now recognised that consent is an ongoing process and should be reaffirmed periodically, as appropriate to the research project.

5.5.1 Commercial bioprospectors

Commercial bioprospectors must first apply to the NKC for access to our traditional knowledge. If the application is considered, the NKC will enter into a benefit-sharing agreement with the bioprospectors, after having satisfied itself

that a concise explanation of the material facts of the bioprospecting process has been fully disclosed and we have given consent as provided for by NEMBA and BABS Regulations. This process was now concluded through the Rooibos industry-wide benefit sharing contract.

5.5.2 Academic researchers

In accordance with our living customary laws, academic researchers must apply to the NKC for any access to our traditional knowledge or indigenous biological resources. According to the South African Bioprospecting, Access and Benefit Regulations (BABS Regulations), and BABS Amendment Regulations, we request that we are provided with a letter from the Department of Environment, Forestry and Fisheries and Department of Science and Technology, in terms of the Indigenous Knowledge Act 2018⁴¹, stating that the research can be conducted.

Researchers will be required to enter into a FPIC agreement. The FPIC agreement must explain:

- The project;
- The risks and benefits associated with the research; and
- What the research will be used for.

Other required documents may be an information/knowledge transfer agreement. If researchers plan to publicly disclose information that we wish not to have disclosed, then a non-disclosure agreement is to be completed.

Researchers need to adhere to the Indigenous Knowledge Systems Research Ethics Policy and the Indigenous Knowledge Act 2018 endorsed by the Department of Science and Technology. When the NKC has more information on what the research entails, they will conduct a process of community engagement and deliberation to decide whether the Khoikhoi TK and/or resources should be shared, and to what degree.

1. Verkryging van nuwe kennis en begrip van ongelykhede wat gesondheid aanbetref en;
2. Evaluering van intervensies wat hierdie ongelykhede sal uitkakel.

Tot vandag toe gebeur die meeste nie-inheemse response op beroepe gedoen vir paslike inheemse navorsing, op die vlak van proses en metodologie. Die deelname van inheemse mense was dikwels oppervlakkige insluiting. Verder was daar 'n aanname dat met die toepassing van kwalitatiewe navorsingsmetodes, navorsers die kulturele onsensitiwiteit aanspreek deur metodes van data-insameling te gebruik wat in lyn is met tradisionele kulture. Vrae in verband met paslike navorsingsmetodes tussen Khoi-en Sangemeenskappe gaan egter oor meer as die “kwantitatiewe versus kwalitatiewe” debat en fokus op die eintlike kwessie oor hoe ons oor kennis dink.

Deelgenootskappe tussen akademiese navorsers en Khoi- en Sangemeenskappe moet duidelik uit spel wat, en vir wie, die verwagte voordele sal wees. Vir baie wat werk in Khoi- en Sangemeenskappe, is daar 'n gevoel van bydrae tot die welstand, heil vir die gemeenskap en sosiale geregtigheid deur hulle navorsing. Tog is daar ook 'n wete van konflik dat kennis wat ontgin, geopenbaar of gedeel word moet beskerm word en dat die verskillende doeleindes en waardes van deelnemers aan gemeenskapsnavorsing moet beide erken en sover moontlik geakkommodeer word. 'n Sleutelkwessie wat steeds die konsep van navorsing in die gemeedere van baie Khoi- en Sangemeenskappe skaad, is die gebied van intellektuele en kulturele eiendomsregte. Wie ontvang krediet vir die kennis wat ge-oes word deur navorsing oor Khoi- en Sangemeenskappe?

'n Proses om die vrye, voorafgaande en ingeligte toestemming van die NKR, die betrokke gemeenskap en sy individuele deelnemers behoort voldoende verkry te word voor die aanvang of magtiging van navorsingsaktiwiteite en die gemeenskap se eie legitieme besluitnemingsprosesse behoort in ag geneem te word rakende alle fases van beplanning, implementering, monitering, berekening, evaluering en die finalisering van 'n navorsingsprojek. Dit word nou ingesien dat toestemming

'n voortgaande proses is en behoort periodiek herevestig te word, soos van toepassing op die navorsingsprojek.

5.5.1 Kommerciële bioprospekteerders

Kommerciële bioprospekteerders moet eerstens by die NKR aansoek doen vir toegang tot onse tradisionele kennis. As die aansoek gunstiglik oorweeg word, sal die NKR 'n voordeelverdelingsooreenkoms met die bioprospekteerders aangaan, nadat hulle 'n bevredigende beknopte dog volledige verduideliking ontvang het aangaande die materiële feite van die bioprospekterende proses, en dat ons toestemming verleen het soos verskaf deur die NEMBA Wet en Regulasies.

5.5.2 Akademiese navorsers

Akademiese navorsers moet aansoek doen by die NKR vir enige toegang tot onse tradisionele kennis of inheemse biologiese bronne. Volgens die Bio-prospekterende Toegang en Voordeel (BTVV/BABS) Regulasies, en BTVV-BABS Amendement Regulasies, versoek ons om insae te hê in 'n brief van die Departement van Omgewing Sake (DOS/DEA) en die Departement van Wetenskap en Tegnologie (DWT) in terme van hulle Wet op Inheemse Kennis 2018, wat aandui dat die navorsing gedoen mag word.

Van navorsers sal verwag word om 'n WIT/FPIC-ooreenkoms aan te gaan. Die WIT/FPIC-ooreenkoms moet:

- die projek verduidelik
- asook risiko's en voordele verwant aan die navorsing.

Ander dokumente wat benodig word kan 'n inligtings- of materiële ooreenkoms van oordrag wees. As navorsers beplan om in die openbaar inligting bloot te lê, aan die publiek, moet 'n nie-openbaarmakingsooreenkoms voltooi word.

Navorsers moet hulle hou by die Inheemse Kennisstelsels Navorsingsetiek Beleid en die Wet op Inheemse Kennis 2018, soos

⁴¹ The Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019. Accessed from: <https://www.gov.za/documents/protection-promotion-development-and-management-indigenous-knowledge-act-6-2019-19-aug>

5.5.3 Writers, students, media, filmmakers and other interested parties

If any persons are interested in accessing our TK, similarly to researchers, for general research purposes, they must apply to the NKC for access. Upon receipt of notification from the NKC stating that, in terms of the purpose for which such application for access was made, permission has been granted, the said project can commence.

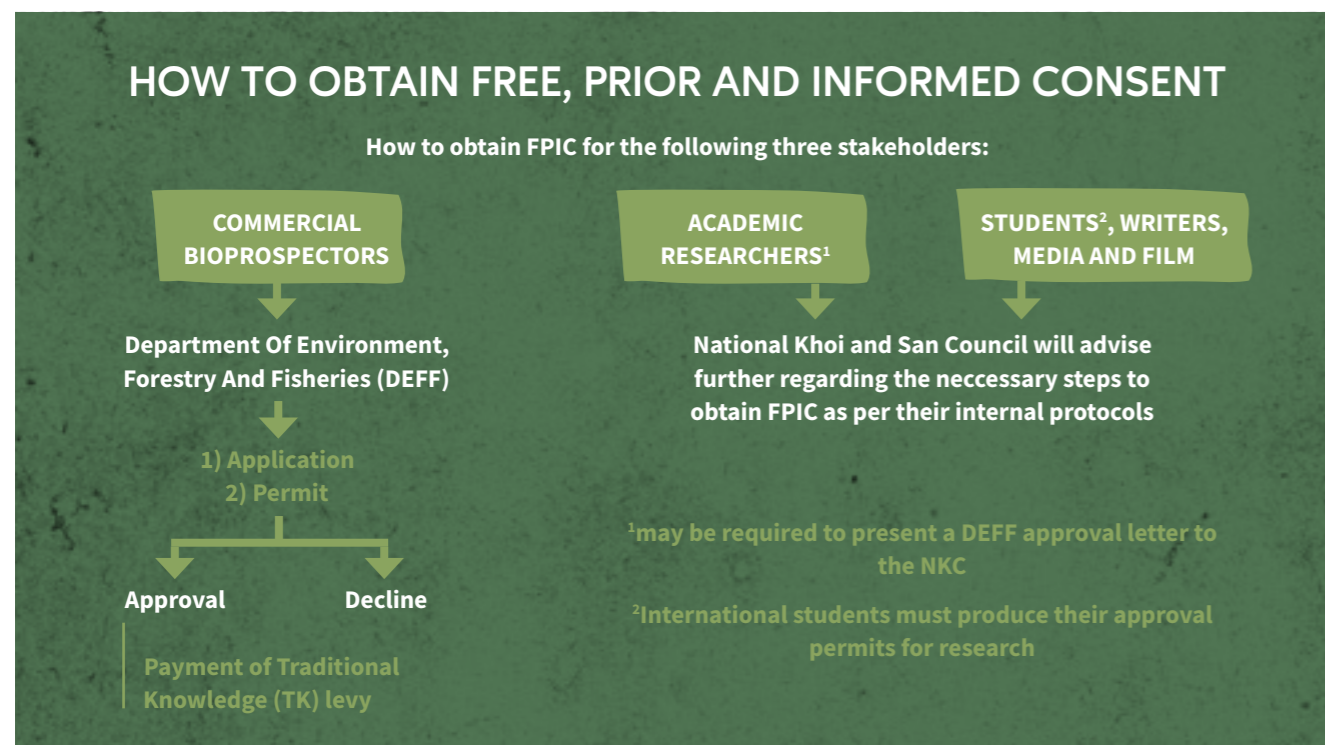
In the application for FPIC, such persons are required to enter into a FPIC research agreement. The FPIC agreement must explain:

- The project; and
- The risks and benefits associated with the activity.

This BCP does not cover the instance of direct access to the physical resources. Any user wishing to access the wild harvested Rooibos would need to get consent directly through the Rooibos indigenous farming communities, namely the Wupperthal, Nieuwoudtville and Suid Bokkeveld communities, and their representative structures. This BCP is only referring to the traditional knowledge use of the resource.

If any user wishes to use our associated traditional knowledge, they should contact both the (i) National Khoisan Council and the (ii) SA San Council. Further details will be provided below.

Diagram 5



onderskryf deur die Departement van Wetenskap en Tegnologie. Wanneer die NKR kennis geneem het van wat die navorsing behels, sal hulle die gemeenskap raadpleeg en 'n proses van gemeenskapsbetrokkenheid en oorweging inisieer om te besluit of die kennis en/of bronne gedeel mag word en tot watter mate.

5.5.3 Skrywers, studente, media, filmvervaardigers en ander belangstellende partye

As persone belangstel om toegang te hê tot ons TK, dieselfde soos navorsers, moet hierdie persone aansoek doen by die NKR vir enige toegang. Na kennisgewing ontvang is van die NKR, wat sal aandui dat die doel waarom sodanige aansoek vir toegang gemaak is, goedgekeur is, mag die vermeldde projek 'n aanvang neem.

Van persone wat aansoek doen sal verwag word om 'n VVIT/FPIC-ooreenkoms aan te gaan. Die VVIT/FPIC ooreenkoms moet:

- die projek verduidelik
- asook risiko's en voordele verwant aan die aktiwiteit.

Hierdie BGP dek nie die geval van direkte toegang tot die fisiese bron nie. Enige verbruiker wat graag toegang tot die ingesamelde wilde Rooibos wil bekom, sal die nodige toegang direk van die Rooibos inheemse boerdery-gemeenskappe moet kry, naamlik die Wupperthal, Nieuwoudtville en Suid- Bokkeveld, en hul verteenwoordigende strukture. Hierdie BGP dek verwys slegs na die tradisionele gebruik van kennis oor die bron.

As enige gebruiker graag van ons aanverwante tradisionele kennis gebruik wil maak, sal hulle beide die (i) Nasionale Khoisan Raad en die (ii) SA San Raad moet kontak. Verdere besonderhede word hier onder verskaf.

Diagram 5



CHAPTER 6 | CHAPTER 6

6.1 'The Khoikhoi Peoples Rooibos & Biodiversity Trust'

6.1 'The Khoikhoivolke Rooibos & Biodiversiteit Trust'

6.2 How Benefit-sharing Works in the case of Rooibos

6.2 Hoe Voordeelverdeling Werk in die geval van Rooibos

6.3 How Do I Get My Benefits?

6.3 Hoe Ek My Voordele Bekom?

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6

**BENEFIT
-SHARING**

**VOORDEEL
-VERDELING**

6.1 'The Khoikhoi Peoples Rooibos & Biodiversity Trust'

The Khoikhoi indigenous communities of South Africa have a community trust set up for the advancement and upliftment of its Access and Benefit Sharing beneficiaries. The purpose of the Trust shall be to utilise the capital and income paid into the Trust Fund to support and benefit the Beneficiaries (Khoikhoi peoples inclusive of the Cederberg indigenous farming communities). The Trust is a non-profit organisation (NPO) and in the public interest. It shall provide the means for the Khoikhoi communities to receive a form of restitution in respect of their traditional knowledge that contributed to the Rooibos industry and all other industries their traditional knowledge contributed to.

The Board of Trustees shall be gender-balanced and consist of no fewer than ten and no more than fifteen members who shall hold office for a term of five years. The trustees shall comprise of one representative each from the Department of Environment, Forestry and Fisheries, Department of Cooperative Governance and Traditional Affairs, Department of Science & Technology, Wupperthal, Nieuwoudtville/Suid Bokkeveld, five representatives of the NKC of which one shall be the Chairperson ex officio, the administrator and one legal practitioner.

The trustees shall hold an Annual General Meeting (AGM) open to all beneficiary communities and institutions every year on or before 15 December of each year.

At the AGM, the Chairperson will report on the activities of the past year and the auditor's report will be submitted by the treasurer.

Distribution of the funds to beneficiaries: The trustees shall be guided by the aims and objectives of the trust as well as the policies and policies which will be further developed to further guide benefit distribution.

No distribution of funds shall be made to a Khoikhoi Beneficiary community or an approved institution unless:

- A detailed request, budget and coherent plan is received for the allocation of the funds and such request has been recorded and approved by the Trust overseen by government.
- A properly constituted Trust resolution is taken or standing policy exists, authorising the allocation of such funds.

The Trust will publish annually the procedure for distribution of funds and the names of the Trust representatives in at least two newspapers in both Afrikaans and English.

Further detail is given in the Khoikhoi Peoples Rooibos and Biodiversity Trust Deed, duly registered at the Master of the Western Cape High Court on 27 September 2019.

6.1 'The Khoikhoi Peoples Rooibos & Biodiversity Trust'

Die Khoikhoi inheemse gemeenskappe van Suid-Afrika besit 'n gemeenskaps-trust gered vir die bevordering en opheffing van sy Toegang en Voordeelverdeling begunstigdes. Die doel van die Trust sal wees om die kapitaal en inkomste aan te wend wat in die Trust Fonds inbetaal word om die Voordeeltrekkers te ondersteun en te help (Khoikhoivolke insluitend die Sederberg inheemse boerderygemeenskappe). Die Trust is nie vir profyt nie en is vir die publiek se belange. Dit sal die middele verskaf vir die Khoikhoi gemeenskappe om 'n vorm van restitusie te ontvang met betrekking tot hul tradisionele kennis wat bygedra het tot die Rooibos-industrie en al die ander industrieë waartoe hul TK bygedra het.

Die Trustee Raad sal 'n regverdigde gender-balans handhaaf bestaande uit nie minder as tien en nie meer dan vyftien lede en sal dien vir 'n termyn van 5 jaar. Die trustees sal bestaan uit een verteenwoordiger elk van die Departement van Omgewing, Bosbou en Visserye, Departement van Samewerkende Regering en Tradisionele Sake, Departement van Wetenskap & Tegnologie, Wupperthal, Nieuwoudtville / Suid bokkeveld, vyf verteenwoordigers van die NKR van wie een ampshalwe die Voorsitter sal wees, Administrateur en boekhouer albei ex officio, en een regs persoon.

Die trustees sal 'n Algemene Jaarvergadering hou (AJV) wat oop is vir alle

begunstigde gemeenskappe en institusies elke jaar op of voor 15 Desember van elke jaar. By die AJV, rapporteer die Voorsitter oor die akiwiteit van die afgelope jaar, en die tesourier lê die ouditeursverslag voor.

Distribusie van voordele aan die Voordeeltrekkers: Die trustees sal gelei word deur die beginsels en doelwitte van die trust sowel as die beleide en beginsels wat verder ontwikkel sal word as riglyne vir die distribusie.

Geen distribusie van fondse sal bemaak word aan 'n Khoikhoi Voordeeltrekker of 'n goedgekeurde institusie tensy:

- 'n gedetailleerde versoek, begroting en goed beredeneerde plan ontvang is vir die toewysing van die fonds en sodanige versoek geboekstaaf en goedgekeur is deur die Trust onder toesig van die regering.
- 'n behoorlik gekonstitueerde Trust resoluție geneem is; staande beleid in plek, wat die toewysing van sodanige fonds wettig.

Die Trust sal jaarliks die prosedure oor die distribusie van fondse in ten minste twee koerante in beide Afrikaans en Engels publiseer asook aan hul verteenwoordigers beskikbaar stel.

Verdere besonderhede word in die Khoikhoivolke Rooibos en Biodiversiteit Trust Titel gegee soos na behore geregistreer by die Meester van die Wes-Kaapse Hooggeregshof op 27 September 2019.

6.2 How Benefit-sharing Works in the Case of Rooibos

The following diagram shows how benefit sharing in the case of Rooibos will work. It explains three crucial steps to the flow of the money and clarifies key information.

Diagram 6

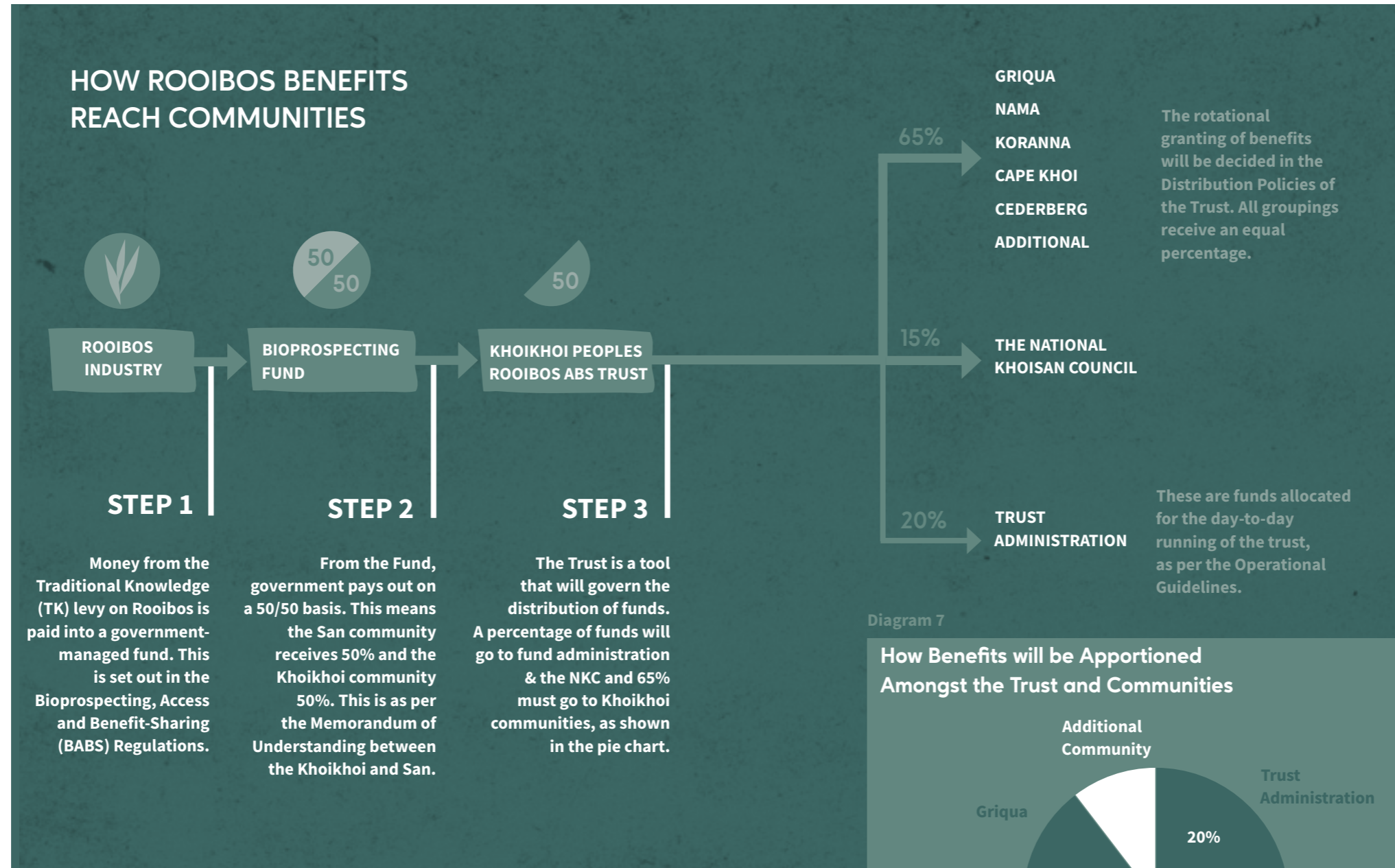
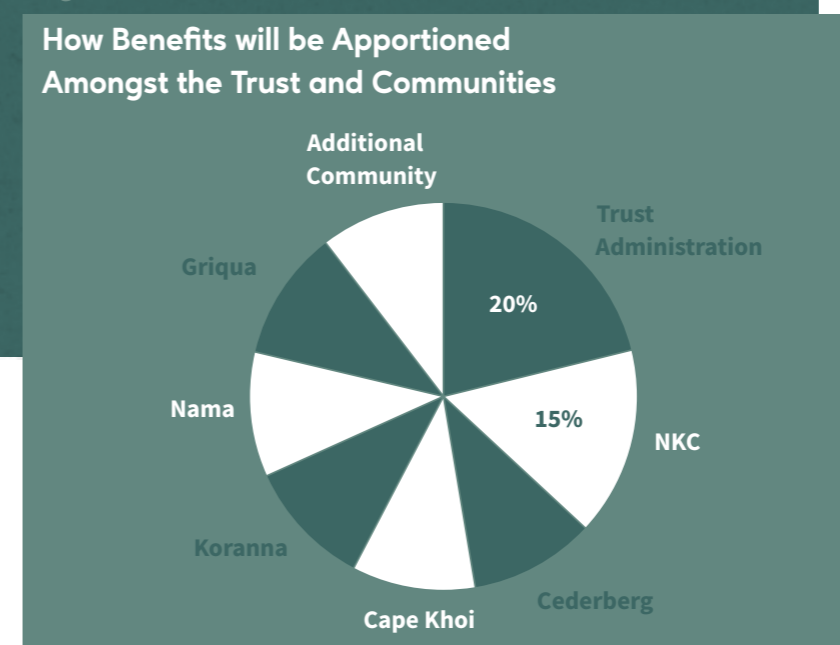


Diagram 7



Annual Levy and Benefits

“The agreement entails a one-year pilot through which the Khoisan communities will receive 1.5 percent of the farm gate price from the processors of rooibos in the form of an annual levy, excluding VAT. This is an estimated R12 million per year that will be paid into Trust Accounts opened by the Khoisan communities. Benefits include the creation of jobs, and the upliftment of some 160 small-scale farmers who belong to the Wupperthal cooperative in the Western Cape and the Heiveld co-op in the Northern Cape.”- Department of Environmental Affairs

6.2 Hoe voordeelverdeling Werk

Die onderstaande diagram wys hoe voordeelverdeling in die geval van Rooibos sal werk. Dit verduidelik drie uiters belangrike stappe tot die vloei van die geld en verklaar sleutelinsligting.

Diagram 6

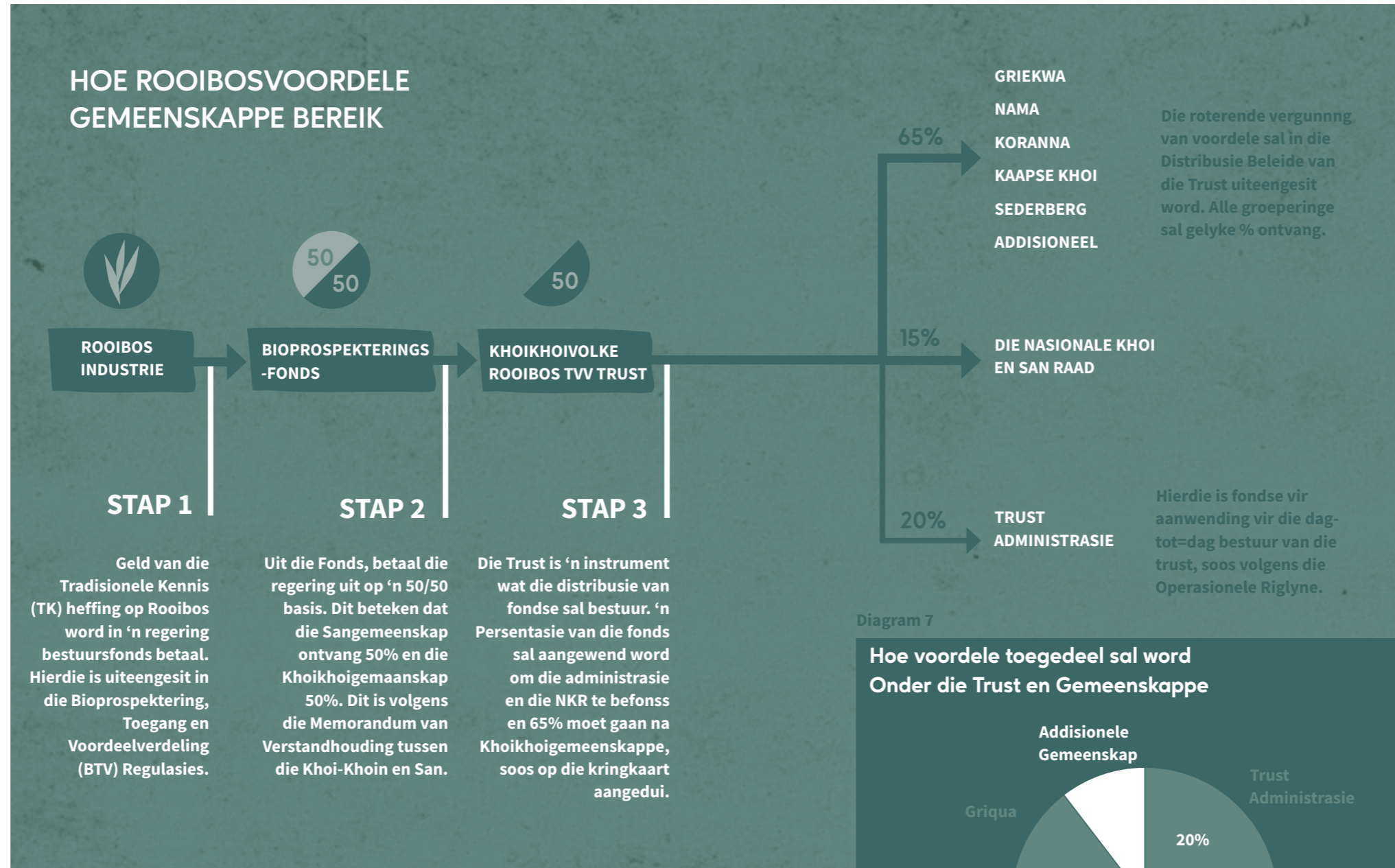
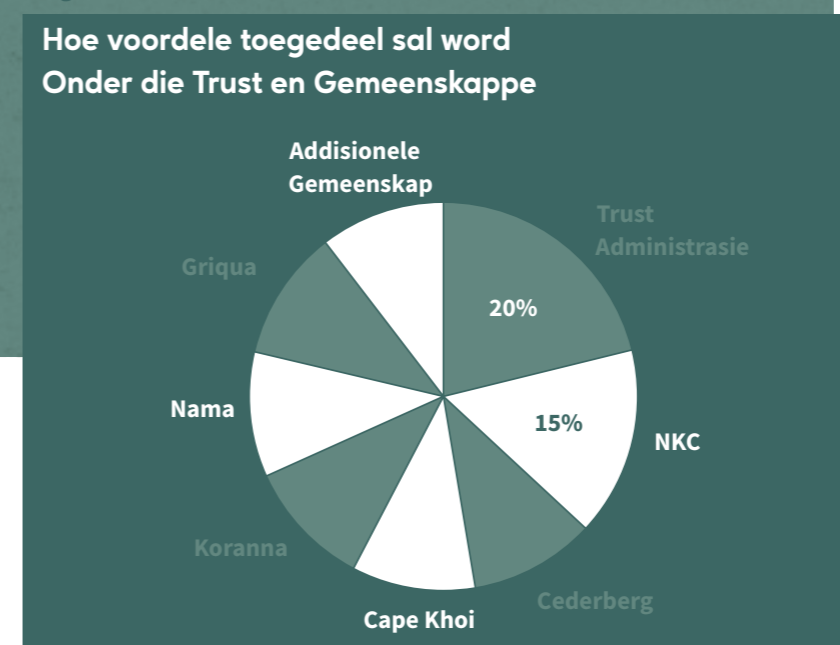


Diagram 7

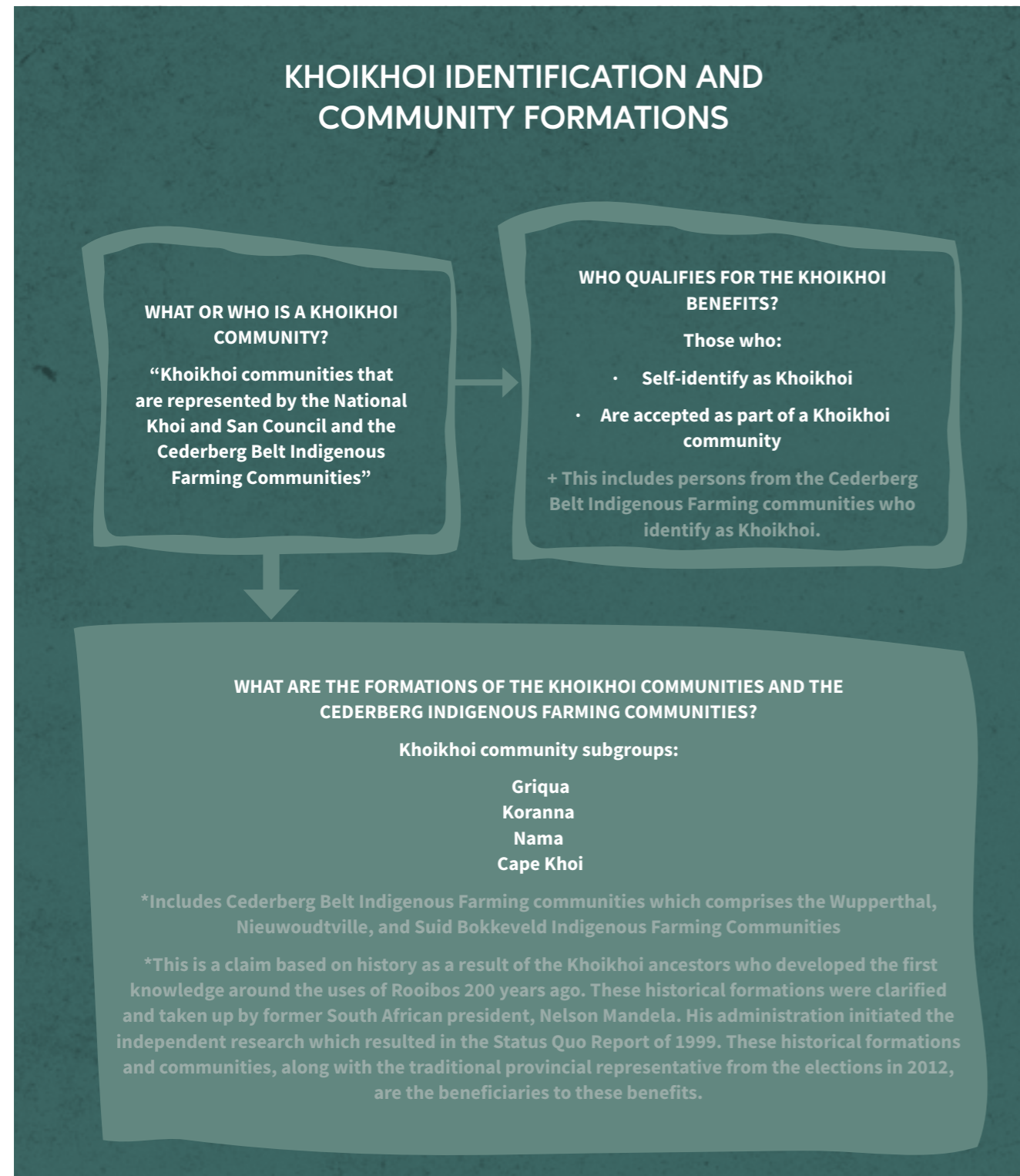


Jaarlikse Heffing en Voordele

“Die ooreenkoms behels 'n een-jaar loodsprojek whereby die Khoi and Sangemeenskappe 1.5 persent ontvang van die “plaashek” prys van die produsente van rooibos in die vorm van ' jaarlikse heffing, uitsluitend BTW. Hierdie is 'n geskatte R12 miljoen per jaar wat in die Trust Rekeninge betaal word geopen deur die San en Khoigemeenskappe. Voordele sluit in werkskepping, en die opheffing van omtrent 160 kleinskaalboere wat aan die Wupperthal ko-operatief behoort in die Wes-Kaap en die Heiveld ko-op in die Noord-Kaap.” - Departement van Omgewingsake

6.3 How Do I Get My Benefits?

Diagram 8



6.3 Hoe ek my Voordele Bekom?

Diagram 8

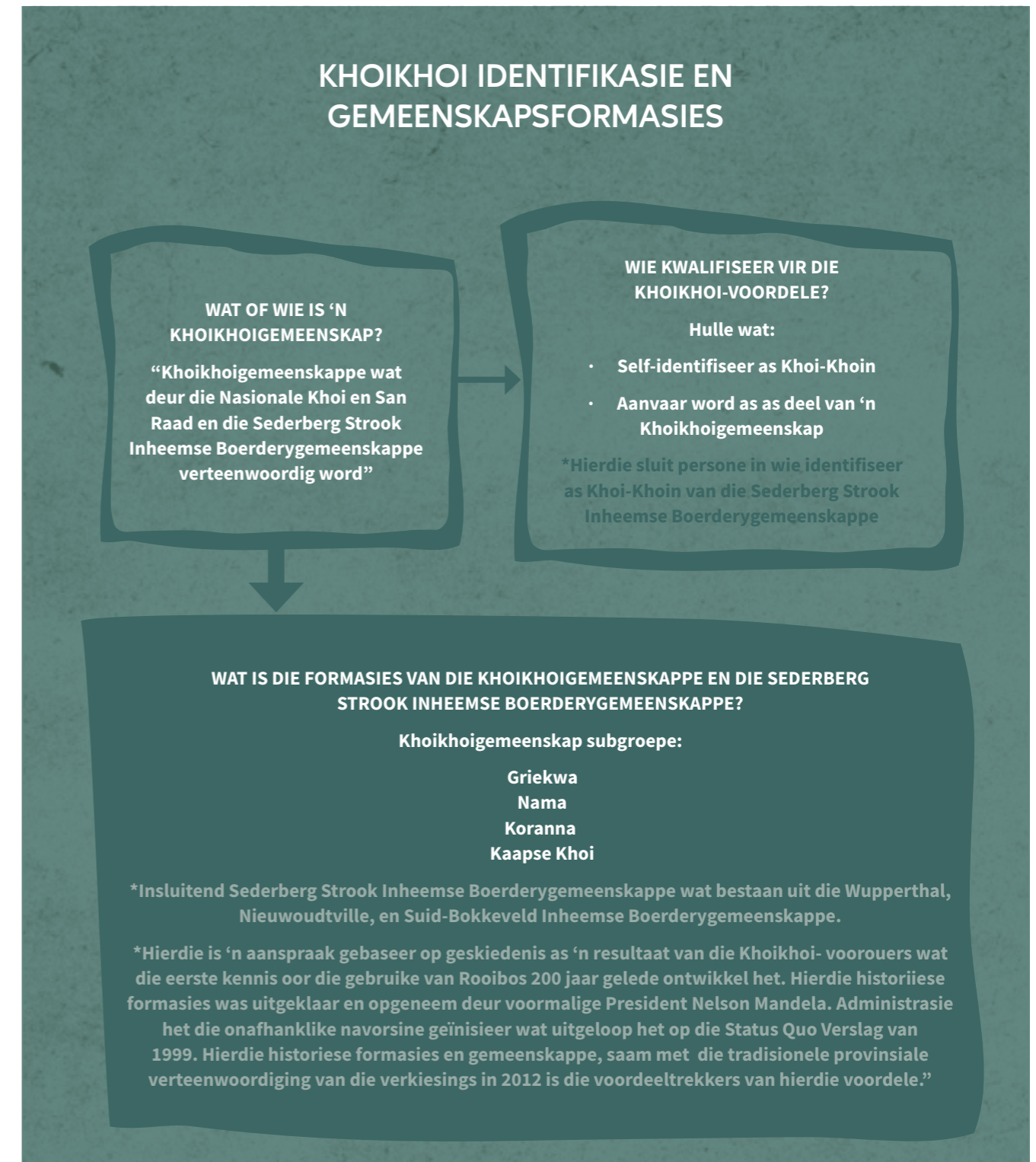
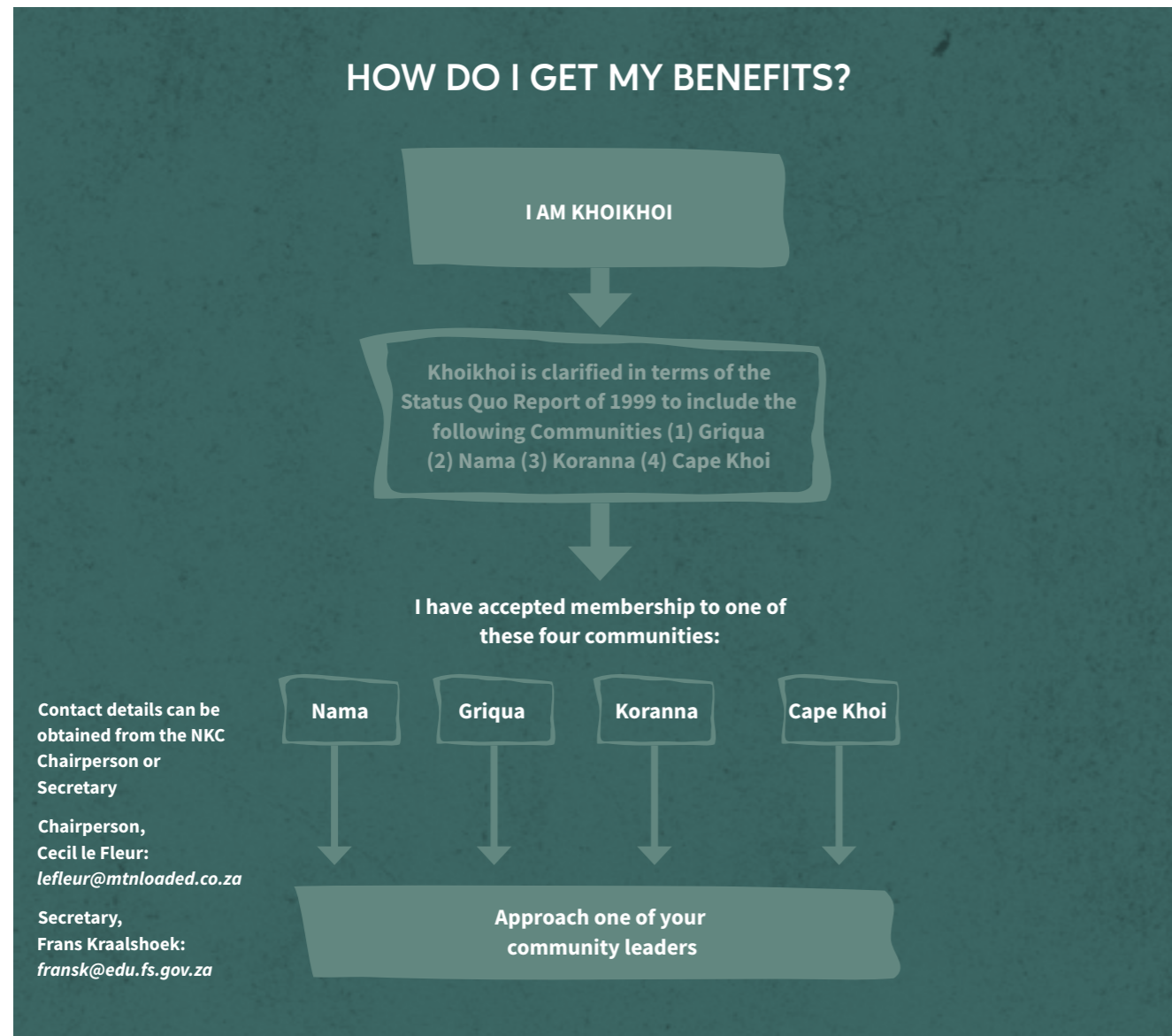


Diagram 9



For those persons self-identifying as Coloured, you would only qualify upon:

- (i) Self-identifying as Khoikhoi, and
- (ii) Are accepted by a Khoikhoi community as set out in this BCP.

If you are a member of the greater Khoikhoi community or the Cederberg Belt Rooibos Indigenous community, you have a right to benefit from the traditional knowledge levy. Your claim will, however, be assessed according to these guidelines. The following steps outline how to access that right:

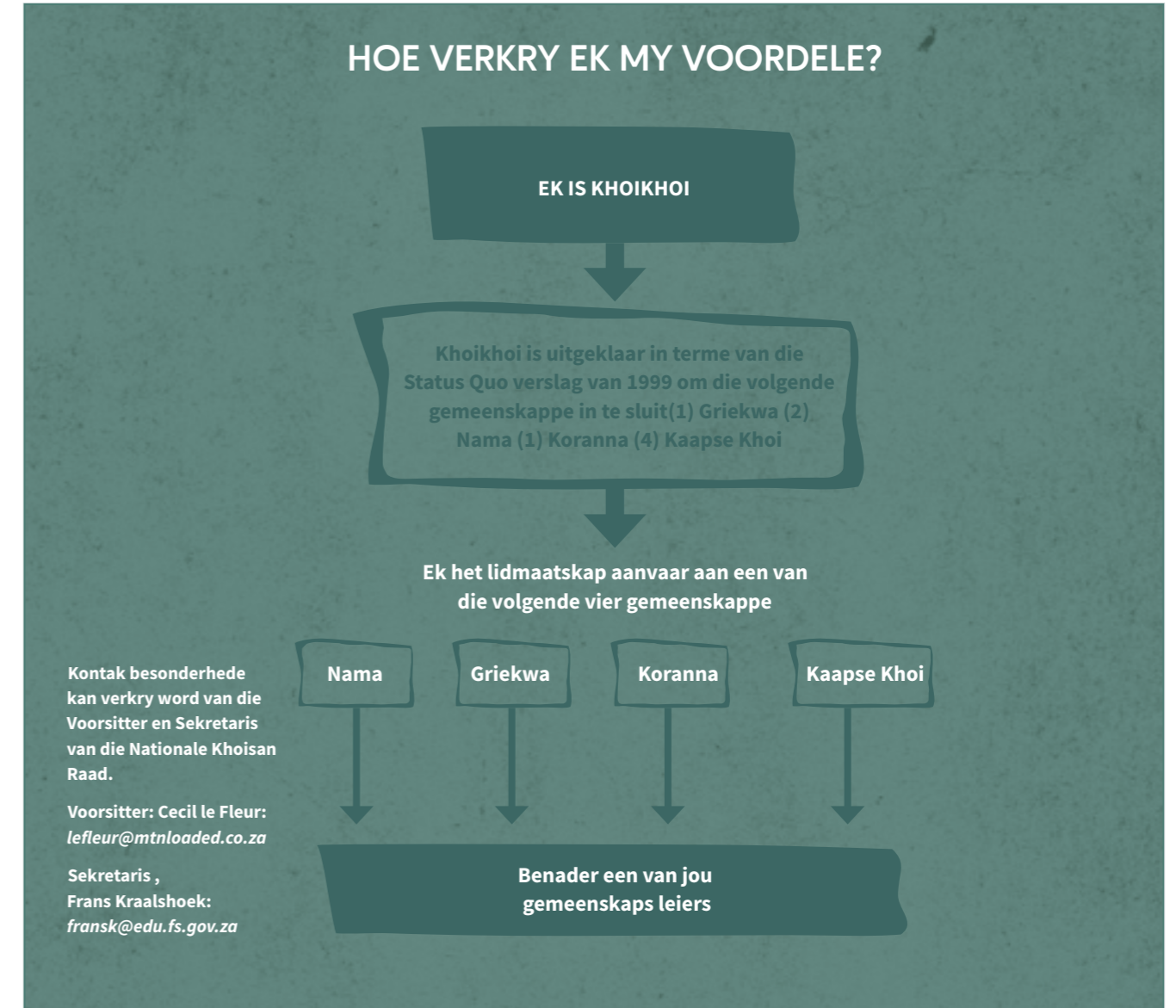
Step 1: Identify which Khoikhoi group you are a part of (Cape Khoi, Koranna, Griqua or Nama). If you are not yet a part of the community you identify with, you need to be accepted into your local community subgroup. Different groups have different conditions and initiations.

Step 2: Once you are an accepted member of your Khoikhoi community, you need to identify your local Khoikhoi leader. You can contact the NKC to find out who your local community leader is.

Step 3: Next, through your community representative serving on the NKC, you can ask for the Operational Guidelines & Distribution Policies from the Khoikhoi Peoples Rooibos Benefit-Sharing Trust. These will outline how to apply for benefits.

Note: Cederberg indigenous Khoikhoi need to contact their Cederberg representatives on this Trust.

Diagram 9



As u 'n lid is van die breër Khoi-Khoigemeenskap of die Sederbergstrook Rooibos Boerderygemeenskap, het u 'n reg om voordeel te trek uit die tradisionele kennis-invoering. Die volgende stappe dui aan hoe daardie reg uitgeoefen kan word:

Stap 1: Identifiseer aan welke Khoi-Khoigroep u behoort (Kaapse Khoi, Koranna, Griekwa of Nama). As u nog nie deel is van die groep waarmee u identifiseer nie, moet u deur en binne die plaaslike gemeenskap se subgroep aanvaar word. Die onderskeie groepe het verskillende voorwaardes en inisiasie-reëlins.

Stap 2: Sodra u 'n aanvaarde lid van die Khoi-Khoigemeenskap is, moet u u plaaslike

Khoi-Khoikhoi-leier identifiseer. U kan die NKR kontak om uit te vind wie u plaaslike gemeenskapsleier is.

Stap 3: Volgende, vra vir die Operasionele Riglyne & Verspreidingsbeleide van die Khoi-Khoi Volke Rooibos Voordeelverdelingstrust. Hierdie sal u lei hoe om vir voordele aansoek te doen.

Let wel: Sederberg inheemse Khoi-Khoi moet hulle Sederberg verteenwoordigers op die Trust kontak.

Daardie persone wat hulself as Kleurlinge identifiseer kan kwalifiseer slegs nadat:

- (i) hulle hulself geïdentifiseer het as Khoi-Khoi en
- (ii) aanvaar word by 'n Khoigemeenskap soos uiteengesit in hierdie BCP.

CHAPTER 7 | CHAPTER 7

Conclusion

Konklusie

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CONCLUSION

KONKLUSIE

“What I have learnt from this process, is that customary law is as strong as any other law in the court of law. And that anybody who wants to have access to your natural resources needs to have the consent of the community (not an individual) to protect the interest of the community’s biocultural resources and avoid exploitation of their knowledge in this regard.

”Regarding the way forward, we need the approval of the communities for this BCP and every traditional Khoikhoi community needs to develop its own BCP.”

Barend Salomo,

Wupperthal indigenous Rooibos farmer

“My experience of this process was that we, as indigenous Khoi and San peoples, we’re here for decades and even for more than a century, unaware that our Traditional Knowledge has a monetary value. It was also not known to us that commercial companies need our Free, Prior and Informed Consent before they can use our Traditional Knowledge on certain plants.

“Furthermore, I have learned that our country has got excellent laws in place to protect these basic human rights.

“The way forward for us is to make sure that we disseminate this information to all our communities and that we work together with them to find the best ways in which we can share the benefits that will arise from the ABS agreement.”

Cecil le Fleur,

Chairperson, The National Khoi and San Council



Signing the Rooibos Agreement

Signing the Rooibos Agreement

“Wat ek uit hierdie proses geleer het is dat gewoontereg net so sterk is as enige ander wet voor die regbank van die hof. En dat enigeen wat toegang wil hê tot jou natuurlike bronne moet eers die toestemming van die gemeenskap kry, sodat die belang van die gemeenskap se biokulturele bronne beskerm kan word en om die uitbuiting van hulle kennis in hierdie verband te voorkom.

Wat betref die pad vorentoe, moet ons die goedkeuring van die gemeenskappe vir hierdie BGP kry en elke tradisionele Khoikhoigemeenskap moet sy eie BGP ontwikkel.”

Barend Salomo,

Wupperthal Inheemse Boer

“My ervaring uit hierdie proses was dat ons as inheemse Khoi- en Sanvolke al hier is vir dekades en selfs meer as ‘n eeu, maar was tog onbewus dat onse Tradisionele Kennis monetêre waarde het. Dit was ook onbekend aan ons dat kommersiële maatskappye ons VVIT benodig voordat hulle ons TK op sekere plante kan gebruik.

Verder het ek geleer dat onse land uitstekende wette in plek het om hierdie basiese menseregte te beskerm.

Die pad vorentoe vir ons is om seker te maak dat ons hierdie inligting versprei aan al ons gemeenskappe en dat ons saamwerk met hulle om die beste maniere te vind hoe ons die voordele kan verdeel wat uit die TVV-ooreenkoms gaan spruit.”

Cecil le Fleur,

Voorsitter van die Nasionale Khoisan Raad



Caption

Caption

ANNEXURE

BYLAE

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Rooibos Robbery: Nestlé accused of biopirating South African genetic resources <https://naturaljustice.org/rooibos-robbery-nestle-accused-of-biopirating-south-african-genetic-resources/>

Rooibos Restitution (VIDEO) <https://naturaljustice.org/video/rooibos-restitution/>

San, Khoi & Rooibos Factsheet <https://naturaljustice.org/publication/san-khoi-rooibos-factsheet/>

Annexure: Intellectual Property Rights

Contextual Background

Rooibos tea (sometimes referred to as Mountain Tea, because it is a plant that grows in an unusual terrain of the mountainous area of Cederberg) brought South Africa into the limelight despite its Apartheid policies. *Forever Young Company* in the USA started to produce skin-care products using Rooibos extracts which further popularised Rooibos and led to increase in demand for it. In 1994, a trademark application for Rooibos was filed and registered with the United States Patent and Trademark Office (USPTO). Rooibos Limited, a South African company, challenged the trademark registration. The company received support from the South African government.

Intellectual Property Rights

The use of Rooibos by third parties can result in inventions that lead to intellectual property (IP) rights such as patents. How the IP is managed can influence how benefits are created and shared with the San and Khoikhoi communities. Access and benefit sharing (ABS) agreements are one means of managing how to govern IP rights by containing explicit provisions as to how such IP rights are obtained and used. Issues that can be dealt with under ABS agreements include:

- The entitlement to seek IP in inventions and other results of research using the resources;
- Ownership and licensing of any such derivative IP;
- Responsibility for maintaining and exercising IP rights; and,
- The arrangements for distributing any financial or other benefits resulting from this derivative IP.

ABS agreements can also require that the recipient of the “resource” report back to the TK holders on any IP right that is applied for, and similar developments. Some ABS agreements make access conditional on not seeking IP rights on the “resource”. How such IP management issues are dealt with in terms of accessing customary rights and benefit sharing agreements can greatly influence the degree to which the access provider and the resource recipient can achieve their goals and serve their mutual interests. Indigenous people and local community customary rights often emphasise collective rather than individual rights and stewardship rather than outright ownership. Hence, customary laws and customary rights form the bedrock of this biocultural community protocol (BCP). It is within this context that the IP needs of the San and Khoikhoi communities are shaped by their interaction with the formal IP systems, as well as by the informal IP regimes that prevail within their communities.

Exclusive rights and monopoly powers over informal innovations are not uncommon within indigenous peoples and local communities. The San and Khoikhoi communities have evolved diverse but stable societal structures that regulate the flow of its TK and innovations. Such customary or “informal” systems may be remarkably similar to the formal IP system which can be just as effective in protecting the local innovator in their local context.

Bylae: Besonderhede van Intellektuele Eiendomsregte

Kontekstuele Agtergrond

Die Rooibostee (soms Bergtee genoem omdat dit in die ongewoon-bergagtige terrein van die Sederberggebied groei) het Suid-Afrika wêreldwyd baie gewild gemaak ondanks sy ongewilde apartheidsbeleid. *Forever Young Company* het in die VSA begin om velversorgingsprodukte te vervaardig en deur Rooibos-ekstrakte te gebruik, die Rooibos verder gepopulariseer wat tot 'n groter aanvraag gelei het. In 1994 was 'n handelsmerk-aansoek vir Rooibos ingedien en geregistreer by die US Patent and Trademark Office (USPTO). Rooibos Limited, 'n Suid-Afrikaanse maatskappy, het daardie handelsmerk se registrasie teengestaan. Laasgenoemde maatskappy is deur die Suid-Afrikaanse regering ondersteun.

Intellektuele Eiendomsregte

Die gebruik van Rooibos deur derde partye kan lei tot uitvindings wat intellektuele eiendomsregte (IE-regte soos patente) ten gevolg het. Hoe behoorlik die bestuur van IE sal wees, sal die skep en verdeling van voordele met die San- en Khoi-gemeenskappe beïnvloed. Toegang en Voordeelverdeling (TVV) ooreenkomste is een manier van die behoorlike bestuur van IE-regte, deur duidelike vereistes in te sluit hoe IE-regte bekom en gebruik kan word. Sake wat onder TVV-ooreenkomste behandel word, kan insluit:

- die aanspraak op IE vir uitvindings en ander resultate van navorsing met gebruikmaking van die bronne;
- eienaarskap en lisensiering van enige afgeleide IE;
- verantwoording vir handhawing en uitoefening van IE-regte; en,
- die reëling van verspreiding van enige finansiële of ander voordele wat van hierdie IE afgelei word.

TVV/ABS-ooreenkomste kan ook vereis dat die ontvanger van die “bron” terug rapporteer aan die TK-houers oor enige IP-reg waarvoor aansoek gedoen is, en soortgelyke ontwikkelinge. Sommige TVV/ABS-ooreenkomste verleen toegang, maar met die voorwaarde dat geen IE-regte op die “bron” versoek word nie. Hoe sulke IE-bestuurskwessies gehanteer word, kan die mate waartoe die toegangsverskaffer en die bron-ontvanger hulle doelwitte bereik en gemeenskaplike belange dien, grootliks beïnvloed. Inheemse mense en plaaslike gemeenskap se gewoontereg beklemtoon dikwels kollektiewe eerder as individuele regte en verkies ‘rentmeesterskap’ (stewardship) eerder as volle eienaarskap. Daarom vorm gewoontereg en -wette die fondasie van hierdie biokulturele gemeenskapsprotokol (BGP/BCP). Dis binne hierdie konteks dat die IE-behoeftes van die San- en Khoigemeenskappe beïnvloed en gevorm word, naamlik, deur hulle interaksie met die formele IE-stelsel asook deur die informele IE-regimes wat binne hulle gemeenskappe opereer.

Eksklusiewe regte en monopoliserende magte oor informele uitvindings is glad nie ongewoon in inheemse en ons plaaslike gemeenskappe nie. Die San- en Khoi-Khoigemeenskappe het verskillende maar stabiele maatskaplike strukture gevestig, wat

San and Khoi Intellectual Property over Rooibos

The Convention on Biological Diversity (CBD) recognises the sovereign rights of States over their natural resources. “State sovereignty” differs from government ownership in that it means shared ownership amongst state actors. Therefore, in addition to state sovereignty over genetic resources, the customary rights of the San and Khoikhoi over the genetic resources, that form part of their heritage, should also be recognised under the CBD. This notion is embedded in the CBD article 10 (c) which would require the State to protect and encourage customary use of Rooibos by its Indigenous and Local Communities (ILCs).

It is also evident in the Food and Agricultural Organization's (FAO) International Treaty on Plant Genetic Resources on Food and Agriculture (ITPGRFA) provisions on farmers' rights, which recognise the enormous contribution of ILCs to the conservation and development of plant genetic resources and require Parties to take measures to protect TK and equitably share benefits from the use thereof. Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognises the rights of indigenous people over their bio-genetic resources, such as seeds and medicinal plants.

Principles for IP in engagement with the San and Khoikhoi

It is anticipated that, with the development and documentation of a BCP, the San and Khoikhoi communities will become aware of their customary rights over the use of biological resources and traditional knowledge. The BCP identifies and considers a set of principles for the development of Guided Contractual Practices in dealing with TK of the San and Khoikhoi communities over their genetic resources. The principles are set out below:

- *Principle 1: The IP-related rights and obligations should recognise, promote and protect all forms of formal and informal human creativity and innovation of the San and Khoikhoi communities, based on, or related to, the transferred genetic resources.*
- *Principle 2: The IP-related rights and obligations should take into account sectoral characteristics of genetic resources and genetic resource policy objectives and frameworks.*
- *Principle 3: The IP-related rights and obligations should ensure the full and effective participation of the San and Khoikhoi communities and address process issues related to contract negotiation and the development of IP clauses for access and benefit-sharing agreements.*
- *Principle 4: The IP-related rights and obligations should distinguish between different kinds of uses of genetic resources, including commercial, non-commercial and customary uses.*

This BCP provides the San and Khoikhoi communities with an opportunity to focus on their IP development aspirations *vis-a-vis* their rights. Further, to articulate for themselves, and for users, their understanding of their biocultural heritage and, therefore, on what basis they will engage with a variety of stakeholders in dealing with their biocultural heritage.

die vloei van hul IE beheer en opmerklik dieselfde is as die formele IP-stelsel, en wat dus net so deeglik die plaaslike uitvinder kan beskerm in hul plaaslike konteks.

San en Khoi-Khoi IE oor die Rooibos

Die Konvensie oor Biologiese Diversiteit (KBD/CBD) erken die soewereine regte van State oor hulle natuurlike bronne. “Staatsoewereiniteit” verskil egter van regeringseienaarskap in die sin dat dit die gedeelde eienaarskap tussen staatsdeelgenote waarborg. Dus, toevoegend tot staatsoewereiniteit oor genetiese bronne, behoort die gewoontereg van die San en Khoi-Khoi oor hul genetiese bronne, wat ‘n integrale deel vorm van hulle erfgoed, erken te word onder die KBD/CBD. Hierdie opvatting word gestel in KBD/CBD Artikel 10 (c) wat van die Staat vereis om gebruiklike toepassings van Rooibos te beskerm en by sy ILC's aan te moedig.

Dis ook duidelik in die FAO Internasionale Verdrag oor Plant Genetiese Bronne oor Voedsel en Landbou se Voorsiening vir Plaasboere se Regte (IVPGBVL/ ITPGRFA), wat die enorme bydrae van ILC's tot die bewaring en ontwikkeling van plant genetiese bronne erken, en van Partye vereis om maatreëls in te stel om TK te beskerm en regverdige voordeelverdeling uit die gebruik daarvan te verseker. Meer nog, die Verenigde Nasies se Deklarasie oor die Regte van Inheemse Volke (VNDRIV/UNDRIP) erken die regte van inheemse volke met betrekking tot hulle bio-genetiese bronne soos sade en medisinale plante.

Beginsels vir IE in gesprekke met die San en Khoi-Khoi

Dit word voorsien dat, met die ontwikkeling en formulering van ‘n BGP, die San- en Khoi-Khoigemeenskappe bewus sal word van hulle gewoontereg met betrekking tot die gebruik van biologiese bronne en tradisionele kennis. Die BGP identifiseer en oorweeg ‘n stel van beginsels vir die ontwikkeling van Riglyn Kontraktuele Praktyke in die hantering van TK van die San- en Khoi- gemeenskappe met betrekking tot hul genetiese bronne. Die beginsels word hier onder uiteengesit:

- *Beginsel 1: Die IE-verwante regte en verpligtinge behoort alle vorme van formele en informele menslike kreatiwiteit en innovasies van die San en Khoigemeenskappe te erken, bevorder en beskerm, gebaseer op, of verwant aan oorgedraagde genetiese bronne.*
- *Beginsel 2: Die IE-verwante regte en verpligtinge behoort sektorale karaktertrekke van genetiese bronnebeleid se doelwitte en raamwerke in berekening te bring.*
- *Beginsel 3: Die IE-verwante regte en verpligtinge behoort die volle en effektiewe deelname van die San- en Khoigemeenskappe te verseker en kwessies oor proses aanspreek, verwant aan kontrakonderhandeling, en die ontwikkeling van IE-klousules vir toegang en voordeelverdelingsooreenkomste.*
- *Beginsel 4: Die IE-verwante regte en verpligtinge behoort tussen die verskillende soorte gebruike van genetiese bronne te onderskei, insluitend kommersiële, nie-kommersiële en gebruiklike toepassings.*

Hierdie BGP verskaf aan die San- en Khoigemeenskappe ‘n geleentheid om op hulle IE-ontwikkeling en aspirasies te fokus in die lig van hul regte, en vir hulleself én vir potensiële gebruikers, hulle verstaan uit te spel van hul biokulturele erfgoed en dus op watter basis hulle met ‘n verskeidenheid van aandeelhouders in gesprek sal tree.

Memorandum of Understanding

Prior to entering into any detailed contract, ABS agreement or licence negotiations, the BCP should, at an early stage in any collaboration, propose prospective partners draw up a “memorandum of understanding” or “agreement in principle”. The purpose of such a document is to provide a preliminary agreement on the overall framework of a proposed collaboration, including any commercial arrangements that may apply. It is also to ensure that future negotiations on the details of a contract or licence (which may be expensive and time-consuming) have a solid basis of understanding.

In relation to IP, the memorandum of understanding can allow for the prospective partners with the San and Khoikhoi communities to carry out, in effect, an IP audit of their potential collaboration. This will ensure that, right from the outset, the IP implications of their relationship are identified and that, subsequently, any IP rights can be properly managed. Consideration of IP in the context of a “letter of intent” can also help prospective users of Rooibos, as well as the San and Khoikhoi communities, to consider key issues such as ownership of subsequent IP, whether ownership covers future developments, and how benefits will be shared arising from the exploitation of that IP.

Confidentiality or Non-Disclosure Agreements

In order to decide whether or not to enter into a legally binding contract or licence, it is reasonable to assume that prospective partners will wish to exchange information relevant to the proposed agreement. Some of this information may have commercial, cultural or spiritual value (e.g. the San and Khoikhoi communities may begin by seeking from a licensor a non-confidential summary of a technology). In order to evaluate a technology properly, access to additional confidential information may be required. This information will be regarded as a trade secret if it can be characterised as information which attracts the obligation of confidence. A confidentiality or non-disclosure agreement can be a vital tool for ensuring that the obligation of confidence is established.

Material Transfer Agreements

In a standard Material Transfer Agreement (MTA), the San and Khoikhoi communities agree to give identified physical material to a user, and the recipient agrees to restrict the uses of the Rooibos that may be made from that material, and often of any improvements or derivatives. A standard MTA often includes both the terms on which the original access was granted (which may include restrictions as to future use) and a list of benefit-sharing provisions linked to the uses that may be made of that material.

It may not, however, necessarily address IP rights directly (but instead reflect the fact that the community that gave access to the Rooibos has control over it, as physical property and associated TK). MTAs may include the following terms:

- Prior, informed consent (including terms of original access and benefit-sharing);
- Ownership of the material transferred (including any progeny or derivatives);
- Transfer to third parties (whether or not permitted, and if so, the terms of such transfer);
- Ownership of any resulting IP (whether dependent upon inventorship etc. - including agreement as to how any IP rights may be exploited i.e. licensing, assignment etc.); and
- Benefit-sharing provisions to ensure the fair and equitable sharing of benefits arising from the agreed activities, and any resulting IP.

Memorandum van Verstandhouding (MvV)

Voordat tot ‘n gedetailleerde kontrak, ‘n TVV-ooreenkoms of tot lisensie onderhandelinge oorgegaan word, behoort die BGP op ‘n vroeë stadium van enige samewerking, voorstel dat voornemende deelgenote ‘n “memorandum van verstandhouding” of “ooreenkoms in beginsel” op te stel. Die doel van sodanige dokument is om ‘n voorlopige ooreenkoms oor die raamwerk en voorgenome samewerking daar te stel, insluitend toepaslike kommersiële reëlings. Dit het ook ten doel om te verseker dat toekomstige onderhandelinge oor die besonderhede van ‘n kontrak of lisensie (wat duur en tydrowend kan wees) ‘n soliede basis vir die verstandhouding sal hê.

Betreffende IE, kan die Memorandum van Verstandhouding (MvV) vir die voornemende deelgenote in die gesprekke met die San- en Khoigemeenskappe, voorsiening maak om in effek ‘n IE-oudit van hulle moontlike samewerking daar te stel. Hierdie oudit sal verseker dat, reg van die begin af, die IE-implikasies van hul toekomstige verhouding geïdentifiseer word en dat gevolglik enige IE-regte behoorlik bestuur word. In agneming van IE in die ruimte van ‘n “brief van voorneme” kan ook voornemende gebruikers van Rooibos help asook die San- en Khoigemeenskappe met sleutelkwessies soos eienaarskap van daaropvolgende IE, of eienaarskap toekomstige ontwikkelings sal dek, en hoe voordele, wat uit die ontginning van daardie IE spruit, verdeel sal word.

Vertroulikheid of Nie-Openbaarmakingsooreenkoms

Sodat besluit kan word om ‘n wetlik-bindende kontrak of lisensie te onderteken al dan nie, is dit redelik om te aanvaar dat voornemende deelgenote graag tersaaklike inligting oor die voorgestelde ooreenkoms sal wil ruil. Sommige van hierdie inligting mag kommersiële, kulturele of spirituele waarde hê (bv. die San- en Khoi-Khoigemeenskappe mag begin deur ‘n nie-vertroulike opsomming van ‘n tegnologie van ‘n lisensieerder aan te vra). Sodat ‘n tegnologie na behore oorweeg kan word, mag toegang tot addisionele vertroulike inligting verkry word. Hierdie inligting sal egter gesien word as ‘n handelsgeheim, as dit beskou kan word as inligting wat die verpligting van vertroulikheid benodig. ‘n Vertroulikheids- of nie-openbaarmakingsooreenkoms kan ‘n uiters belangrike instrument wees om te verseker dat die verpligting van vertroulikheid nagekom word.

Materiële Oordragsooreenkoms

In ‘n standaard MOO/MTA, stem die San- en Khoigemeenskappe in om geïdentifiseerde fisiese materiaal aan ‘n gebruiker te gee, en die ontvanger stem dan in om die gebruik van die Rooibos - dus die materiaal wat daaruit mag kom, dikwels in die vorm van verbeteringe of afgeleide produkte, te beperk. ‘n Standaard MOO/MTA sluit menigmaal beide die voorwaardes in waarop die oorspronklike toegang verleen was (wat beperkinge oor toekomstige gebruik mag insluit), en ‘n lys van bepalings vir voordeelverdeling, gekoppel aan die gebruike wat van daardie materiaal vervaardig kan wees.

Dit mag egter nie noodwendig IE-regte direk aanspreek nie (en eerder die feit aantoon dat die gemeenskap wat toegang verleen tot die Rooibos beheer daarvoor het as fisiese eiendom en verwante TK). MOO’s mag die volgende bepalings insluit:

- Voorafgaande ingeligte toestemming (insluitend bepalings van oorspronklike toegang en voordeelverdeling);
- Eienaarskap van oorgedraagde materiaal (insluitend enige afgeleide produkte);
- Oordrag aan derde partye (toegelaat of nie, en indien wel, die bepalings van sodanige oordrag);

Licensing agreements

Licensing agreements are a common way to exploit IP rights related to Rooibos and its TK. They can be structured in many different ways and take many different forms. For the purposes of the commercial use of Rooibos and TK, technology licences enabling the use of patents and associated know-how are probably the most common model. The development of a licensing agreement can involve several different contractual stages, namely:

- Letter of intent;
- Standstill agreement (by which a potential licensor agrees to grant a potential licensee a certain period of time to consider entering into a licensing agreement, within which period the licensor will not consider other potential partners);
- Agreement to negotiate a licence (in which the potential licensor agrees not to license out for a certain period of time and agrees to negotiate towards the conclusion of a licensing agreement); and
- Stand-alone confidentiality agreements.

Benefit-sharing

The crafting of Intellectual Property provisions in an ABS agreement can help create benefits resulting both directly and indirectly from the access to genetic resources, and can be integral to ensuring the benefits are shared effectively and equitably. Some benefits from the use of Rooibos may arise directly from the successful creation and exploitation of IP rights, such as through royalties from licensing IP. But benefits can extend beyond simple monetary payments through joint ownership and/or licensing of the IP. The Bonn Guidelines on Access and Benefit-Sharing as Related to Genetic Resources provide an illustrative list of diverse possible monetary and non-monetary benefits. Specific non-monetary benefits flowing from the exploitation of IP rights could include:

- Responsibility for filing, maintenance and enforcement of those IP rights;
- Responsibility for the negotiation of any subsequent joint ventures, assignments and/or licensing agreements; and
- Capacity building, such as IP-related training and education.

Geographical Indications

Rooibos meets all of the requirements for geographical indication protection as it is only grown in one part of the world and the properties of the plant are a direct result of the unique geographical conditions in which it grows. There is also a strong link between Rooibos and the farmers who have the traditional knowledge to cultivate and produce the plant in the correct manner. Rooibos is a true example of South African identity and, as a result, on 12 July 2013 the South Africa government finally staked its claim to the Rooibos name with the publication of Notice no. 722 of 2013 in the Government Gazette in terms of the Merchandise Marks Act.

The “Rules of Use for Rooibos” published along with the Notice stipulate, in no uncertain terms, how Rooibos products should be identified and labelled. The guidelines also distinguish between pure Rooibos products, Rooibos blended teas or infusions, blended teas or infusions containing Rooibos, Rooibos flavoured teas or infusions with liquid flavours, and other products containing Rooibos. In all of these cases, the control and use of the term “Rooibos” is exerted with care and conspicuously circumscribed to permit all forms of legitimate use.

- Eienaarskap van voortspruitende IE (of dit afhanklik van uitvindenskap is, ens. – insluitend ‘n ooreenkoms oor hoe enige IE-regte ontgin mag word, dit is, lisensiëring, toewysing ens.); en,
- Om voordeelverdelingsbepalings vir billike en regverdige voordeelverdeling, wat spruit uit ooreengekome aktiwiteite, te verseker, sowel as enige voortspruitende IE.

Lisensiëringsooreenkomste

Lisensiëringsooreenkomste is ‘n gewone manier om IE-regte betreffende Rooibos en sy TK te hanteer. Hulle kan op baie maniere gestruktureer wees en kan verskillende vorms aanneem. Vir doeleindes van die kommersiële gebruik van Rooibos en TK, is tegnologie-lisensies, wat die gebruik van patente moontlik maak sowel as verwante kundigheid, waarskynlik die mees gewone model. Die ontwikkeling van ‘n lisensiëringsooreenkoms kan verskeie verskillende kontraktuele stappe behels, naamlik:

- ‘n Brief van voorneme;
- ‘n Stilstaande ooreenkoms (waardeur ‘n potensiële lisensieerder instem om ‘n potensiële lisensiehouer ‘n bepaalde tyd vir oorweging te gun voor lisensiëringsooreenkomste aangegaan word, ‘n periode wanneer die lisensieerder nie ander potensiële deelgenote sal oorweeg nie.);
- ‘n Ooreenkoms om oor ‘n lisensie te onderhandel (waarin die potensiële lisensieerder instem om vir ‘n bepaalde tyd nie te lisensieer nie, en instem om te onderhandel vir die afhandeling van ‘n lisensiëringsooreenkoms); en,
- Alleenstaande vertroulikheids-ooreenkoms.

Voordeelverdeling

Die optrek van IE-bepalings in ‘n TVV/ABS ooreenkoms kan help om voordele te skep wat voortspruit uit beide direkte en indirekte toegang tot genetiese bronne, en kan integraal wees om te verseker dat die voordele effektief en billik verdeel word. Sommige voordele uit die gebruik van Rooibos mag direk spruit uit die suksesvolle skepping en ontginning van IE-regte, soos bv. deur tantième uit lisensiërende IE. Maar voordele kan meer wees as eenvoudige monetêre betalings deur middel van gesamentlike eienaarskap en/of lisensiëring van die IE. Die Bonn Riglyne oor Toegang en Voordeelverdeling betreffend Genetiese Bronne bevat ‘n illustratiewe lys van verskillende moontlike monetêre en nie-monetêre voordele. Spesifieke nie-monetêre voordele, voortspruitend uit die ontginning van die IE-regte, kan insluit:

- Verantwoordelikheid vir die liassing, onderhouding en uitvoering van daardie IE-regte;
- Verantwoordelikheid vir onderhandelinge oor opvolgende gesamentlike opdragte en/of lisensiëringsooreenkomste; en,
- Kapasiteitsontwikkeling, soos IE-verwante opleiding en opvoeding.

Geografiese Indikatore

Rooibos voldoen aan al die vereistes vir die beskerming van geografiese indikatore omdat dit slegs in een deel van die wêreld groei en die eienskappe van die plant ‘n direkte resultaat is van die unieke geografiese kondisies waarin dit groei. Daar is ook ‘n sterk verbinding tussen Rooibos en die boere wat die TK besit om die plant op die korrekte wyse te verbou en te vervaardig. Rooibos is ‘n ware voorbeeld van Suid-Afrikaanse identiteit en

Co-Ownership of Intellectual Property Rights over Rooibos

The Biocultural Community Protocol, as a principle, should propose that the San and Khoikhoi communities be entitled to co-ownership of any Intellectual Property Rights using their Traditional Knowledge. A potential advantage of the co-ownership regime envisaged by the San and Khoikhoi communities is that it would allow straightforward sharing of both monetary and non-monetary benefits. As co-owners of the relevant IP rights, the San and Khoikhoi communities will generally be entitled to derive financial benefits from this status, as well as potentially non-financial, technological benefits, particularly as a result of information exchanges with their co-owners.

However, the San and Khoikhoi communities should assess each application on a case-by-case basis, irrespective of the status - co-ownership also means sharing the associated costs. These costs relate first to the prosecution and maintenance of the IP rights, but also cover the potential costs of its judicial enforcement or, more generally, of any patent litigation, including patent cancellation proceedings. The San and Khoikhoi communities fully understand that these costs can be quite substantial. From this perspective, co-ownership will be considered in lieu of a benefit-sharing model.

Approaches to ownership of patents

Ownership of a patent under the BCP must provide reassurance to the San and Khoikhoi communities that they will retain a say over how the resources are developed and used, and how any new technology derived from the genetic resources are developed, used and disseminated. In cases of joint ownership, the San and Khoikhoi communities and the third party will consider how certain responsibilities are shared, such as making and maintaining a patent application, enforcing the patent in the event of infringement, and negotiating and agreeing to the terms of any subsequent licensing arrangement.

How these detailed arrangements are settled will be determined with reference to the overall arrangements set for access and benefit-sharing. For instance, some agreements will require that any licensing of patents derived from the access to genetic resources should refer back to the original access and benefit-sharing agreement.

Approaches to ownership of Trademarks

In terms of trademark-related issues, the BCP considers that access to genetic resources and related information, resulting in the creation of goods or services, could be identified by a distinctive mark which links the goods or services back to the communities. Permission should be sought to use such words or symbols from the San and Khoikhoi communities and based on mutually agreed terms.

Approaches to ownership of Copyright

Copyright may arise when information about genetic resources is recorded, and when accounts of Traditional Knowledge of the San and Khoikhoi are written down or otherwise recorded and documented. The BCP proposes that an agreement at the time of access on ownership and use of copyright will be an important question in ensuring an appropriate overall arrangement that reflects the interests of the San and Khoikhoi communities and the third party.

as gevolg daarvan het die Suid-Afrikaanse regering finaal op 12 Julie 2013 sy aanspraak op die Rooibosnaam bevestig met die publiserings van Kennisgewing nr. 722 van 2013 in die Staatskoerant volgens die Wet op Handelsmerke.

Die Reëls vir Gebruik vir Rooibos wat gepubliseer was naas die Kennisgewing, spel duidelik uit hoe Rooibosprodukte geïdentifiseer en ge-etiketteer moet word. Die riglyne onderskei ook tussen suiwer Rooibosprodukte, Rooibos gemengde tee of aftreksels (infusies) wat Rooibos bevat, Rooibos gekeurde tee of aftreksels met vloeistofgeure, en ander produkte wat Rooibos bevat. In al hierdie gevalle moet die beheer en gebruik van die term “rooibos” met omsigtigheid hanteer word en presies omskryf word vir alle vorme van wettige gebruik.

Mede-eienaarskap van Intellektuele Eienaarskapsregte oor Rooibos

Die BGP, as ‘n beginsel, behoort voor te stel dat die San en Khoi-Khoi geregtig is op mede-eienaarskap van enige IER/IPR wie hulle TK gebruik. ‘n Potensiële voordeel van ‘n mede-eienaarskapsregime, soos deur die San- en Khoigemeenskappe voorsien word, is dat dit ‘n eerlike verdeling van beide monetêre en nie-monetêre voordele toelaat. As mede-eienaars van die toepaslike IE-regte, sal die San- en Khoigemeenskappe oor die algemeen aanspraak maak op afgeleide finansiële voordele, vloeiend uit daardie status, asook moontlike nie-finansiële, tegnologiese voordele, in besonder as ‘n resultaat van die uitruil van inligting met hul mede-eienaars.

Die San- en Khoi-Khoigemeenskappe behoort egter elke aansoek op ‘n saak-tot-saak basis te oorweeg, ongeag die verleende status dat mede-eienaarskap ook verdeling van aanverwante kostes beteken. Hierdie kostes hou eerstens verband met die uitvoering en behoud van die IE-regte, maar dek ook die moontlike kostes van sy wetlike uitvoering of, meer algemeen, van enige patentprosedering, insluitend die kansellering van patentsverrigtinge. Die San- en Khoi-gemeenskappe begryp ten volle dat hierdie kostes heelwat kan wees. So gesien sal mede-eienaarskap i.p.v. ‘n voordeleverdelingsmodel oorweeg word.

Benaderings tot eienaarskap van patente

Eienaarskap van ‘n patent onder die BGP moet die San- en Khoigemeenskappe weer verseker dat hulle medeseggingskap sal behou oor hoe die bron, en enige nuwe tegnologie wat uit die genetiese bronne voortspruit, ontwikkel, gebruik en versprei sal word. In gevalle van mede-eienaarskap sal die San- en Khoigemeenskappe en die derde party oorweeg hoe sekere verantwoordelikhede gedeel kan word, soos die maak en instandhouding van ‘n patent-toepassing, uitvoering van die patent in geval van ‘n oortreding, en die onderhandeling en instemming oor die bepaling van enige opvolgende lisensieringsooreenkoms. Ooreenstemming oor hierdie gedetailleerde reëlins word bepaal deur verwysing na die totale reëlins, soos vasgestel vir toegang en voordeelverdeling.

Byvoorbeeld, sommige ooreenkomste sal vereis dat enige lisensiering van patente, wat afgelei is van die toegang tot genetiese bronne, terugverwys moet word na die oorspronklike toegang en voordeleverdelingsooreenkoms.

The following copyright-related issues may, therefore, be considered:

- The communities retain custodianship of all copyright in works that contain TK about genetic resources residing in any recordal repositories.
- In cases of joint authorship, responsibilities flowing from co-ownership of copyright will be apportioned for the benefit the San and Khoikhoi communities (copyrighted material produced from such collaboration may be assigned or otherwise licensed to third parties).
- Monetary and non-monetary benefits arising out of publication of copyright works will be shared with the user.
- The communities, as providers of access to genetic resources and any related information, will retain certain contractual rights in relation to the sharing of benefits, regardless of ownership of the copyright itself.

Approaches to ownership of Plant Variety Rights

Plant varieties represent an important form of plant genetic resources for the San and Khoikhoi communities. A plant variety is generally defined as the lowest level of taxonomy (or classification) within the plant kingdom, i.e. a group of plants that is distinct from all other groups of plants within a given species. Thus, a plant variety results from the lowest sub-division of the species. Plant varieties are relevant to ABS for the communities in at least two possible ways:

- The genetic resources that are accessed may be plant varieties; and/or
- The access to genetic resources may provide genetic inputs to plant breeding that creates new plant varieties.

In both cases, there are potential Intellectual Property questions that should be considered before an agreement is reached on the terms of access and benefit-sharing

Sample Clauses

Free, Prior and Informed Consent:

Obtaining Free, Prior and Informed Consent (FPIC) from the San and Khoikhoi communities for the use of Rooibos derived from land in regular use by said communities, or for the use of traditional knowledge of said communities, requires that direct discussions be held with said communities in their local language, on the uses of their traditional knowledge, rights available to these communities under the law, and their options for participating in and benefitting from its use.

The San and Khoikhoi as holders of their Traditional Knowledge associated with Rooibos, maintain ownership of its intellectual property and these rights need to be recognised (in the form of free, prior and informed consent) by all who seek in the future to register formal intellectual property rights which incorporate the aforementioned TK.

The San and Khoikhoi communities, in entering into a benefit-sharing agreement, will identify the allocation of ownership in any IP, and the other rights and obligations of the parties, including reporting requirements and the manner in which any disputes will be handled. Some contracts might provide for express damages in the event of a breach of any of the provisions of the agreement by the party seeking to collect research specimens or other materials. Reporting requirements might include notification of the development of any invention based upon research, using research specimens collected in the parks, and identification of the contract in any patent application claiming an invention developed as a result of the research on collected specimens or other materials.

Benaderings tot eienaarskap van Handelsmerke

Betreffend handelsmerk-kwessies, oorweeg die BGP dat die toegang tot die genetiese bronne en verwante inligting, wat lei tot die skepping van goedere of dienste, aan 'n uitsonderlike merk geken kan word wat daardie goedere of dienste terugverbind aan die gemeenskappe. Toestemming, gebaseer op wedersydse instemming, behoort versoek te word vir sodanige woorde of simbole van die San- en Khoigemeenskappe.

Benaderings tot eienaarskap van Kopiereg

Kopiereg mag 'n kwessie wees wanneer inligting oor genetiese bronne geboekstaaf word, en wanneer vertellings van TK van die San en Khoi-Khoi neerge-skrif word of anderssins gerekordeer en gedokumenteer word. Die BGP stel voor dat 'n ooreenkoms aangegaan word wanneer toegang tot eienaarskap en die gebruik van kopiereg 'n belangrike saak word vir versekering van 'n geskikte totale ooreenkoms, wat die belange van die San- en Khoigemeenskappe en die derde party aanspreek. Die volgende kopiereg-verwante kwessies mag daarom oorweeg word:

- Die gemeenskappe bly die houers van alle kopieregte in werke wat TK bevat aangaande genetiese bronne in enige opneemtoestel;
- In gevalle van mede-outeurskap sal verantwoordelikhede, wat voortvloei uit mede-eienaarskap van die kopiereg, toegesê word tot voordeel van die San- en Khoigemeenskappe (materiaal met kopiereg, vervaardig op basis van samewerking, mag toegewys word of anderssins gelisensieer word aan derde partye);
- Monetêre en nie-monetêre voordele wat spruit uit publikasie van werke met kopiereg sal met die gebruiker gedeel word;
- Die gemeenskappe sal as verskaffers van toegang tot die genetiese bronne en enige ander verwante inligting, bepaalde kontraktuele regte met betrekking tot voordeelverdeling behou, ongeag die eienaarskap van die kopiereg as sodanig.

Benaderings tot eienaarskap van Plantvariëteitsregte

Plantvariëteite verteenwoordig 'n belangrike vorm van plant-genetiese bronne vir die San- en Khoigemeenskappe. 'n Plantvariëteit word gewoonlik gedefinieer as die laagste vlak van taksonomie (of klassifikasie) binne die planteryk, d.i. 'n groep van plante wat te onderskei is van alle ander plantgroepe binne 'n gegewe spesies. Dus, 'n plantvariëteit kom van die laagste sub-divisie van die spesies. Plantvariëteite is relevant vir TVV vir die gemeenskappe op minstens twee moontlike wyses:

- die genetiese bronne vir toegang mag plantvariëteite wees; en,
- die toegang tot genetiese bronne mag genetiese insette tot plantkweking voortbring, wat nuwe plantvariëteite skep.

In beide gevalle is daar moontlike IE-kwessies wat oorweeg moet word voor 'n ooreenkoms bereik kan word oor die bepalings van toegang en voordeelverdeling.

Voorbeelde van Klousules

Vrye, voorafgaande ingeligte toestemming:

Verkryging van Vrye, Voorafgaande Ingeligte Toestemming van die San- en Khoigemeenskappe vir die gebruik van Rooibos uit grond wat gereeld deur genoemde gemeenskappe gebruik word, of vir die gebruik van tradisionele kennis van genoemde

The San and the Khoikhoi, as TK holders, reserve their rights in and to their TK, including any future intellectual property rights derived therefrom.

The San and Khoikhoi further reserve their rights in respect of any applications for new intellectual property rights over their TK, made by any entity and not necessarily a party to this agreement, which fails to recognise such TK rights without their free, prior and informed consent.

Any applications for new intellectual property rights in respect of the abovementioned TK will be applied for with the free, prior and informed consent of the San and Khoikhoi and a separate benefit-sharing agreement shall be entered into.

In any patent application, the San and Khoikhoi community inherently retain their IP (TK associated with Rooibos). In respect of IP rights, the following questions should be asked:

- Who will own a patent in any invention arising out of the collaboration?
- Will it be dependent solely upon scientific contribution and inventorship?
- Will the patent be jointly owned by the partners, regardless of contribution to the invention? If so, what responsibilities will arise out of such joint ownership? For instance, who will pay for the cost of making, and maintaining, any patent application(s)?
- Who will be responsible for enforcing the patent in the event of infringement?
- Do the partners need to consider who is funding the project, and whether there are any terms and conditions relating to ownership of IP rights, or subsequent licensing decisions, attached to the funding itself?

The [3rd Party] acknowledges that the TK associated with the biological resource is or may be the subject of a patent application. Except as provided in this Agreement, no express or implied licences or other rights are provided to the [3rd Party] under any IP rights of the San and Khoikhoi community, including any altered forms of the biological resource made by the San and Khoikhoi community. In particular, no express or implied licences or other rights are provided to use the biological resource associated with the TK of the San and Khoikhoi community, or any related patents of the San and Khoikhoi community for commercial purposes.

The [3rd party] agrees that, should an invention derived from the genetic resources be developed and marketed, or licensed to a company or other institution for development and commercialisation (whether the invention is derived from a direct isolate from the genetic resource, a product structurally based upon an isolate from the genetic resource, a synthetic material for which the research material provided a key development lead, or a method of synthesis or use of any aforementioned isolate, product or material), the [3rd Party] will negotiate and enter into an agreement with the Khoikhoi and San Communities.

The San/Khoi community remains free to file an IP application(s) through the use of the biological resource but agrees to notify the [3rd Party] upon filing such IPR.

Future Decision on Misappropriated Traditional Knowledge

It should be noted the San and Khoikhoi communities have no interest in obtaining the cancellation of current IPRs covering an invention or a creation that unduly misappropriated their TK. The communities agree that it might be of interest in keeping such IP rights alive in order to share in the potential benefits that could result from their commercial exploitation

gemeenskappe, vereis dat direkte samesprekings met die genoemde gemeenskappe plaasvind, in hul plaaslike taal, oor die verwagte uitkomst oor sodanige gebruik, regte beskikbaar aan hierdie gemeenskappe onder die wet, en hulle opsies vir deelname aan en voordele uit die gebruik.

Die San en Khoi-Khoi as houers van hulle TK verwant aan Rooibos, bly eienaars van hul intellektuele eiendom en hierdie regte moet erken word (in die vorm van vrye, voorafgaande ingeligte toestemming VVIT/FPIC) deur almal wat in die toekoms wil registreer vir verkryging van formele intellektuele eiendoms-regte, wat voormelde TK insluit.

Die San- en Khoi gemeenskappe sal, wanneer hulle 'n voordeelverdelingsooreenkoms aangaan, die toewysing van eienaarskap in enige IE, ander regte en die verpligtinge van die partye, identifiseer - insluitend bepalinge oor verslaggewing en die wyse waarop moontlike dispute gehanteer sal word. Sommige kontrakte mag voorsiening maak vir uitdruklike skade in geval van 'n verbreking van enige van die ooreenkomsbepalinge deur die party wat versoek het om navorsingmonsters of ander materiale te versamel.

Verslaggewingsbepalinge mag insluit die kennisgewing van die ontwikkeling van enige uitvinding, gegrond op navorsing oor monsters wat versamel is in die parke, en die identifisering van die kontrak oor enige patent-toepassing wat aanspraak maak op 'n uitvinding wat voortspruit uit navorsing oor versamelde monsters of ander materiale.

Die San en die Khoi-Khoi, as TK-houers, reserveer hulle regte in en tot hulle TK, insluitend enige toekomstige intellektuele eiendomsregte wat daarvan afgelei is.

Die San en Khoi-Khoi verder reserveer hulle regte met betrekking tot enige toepassings vir nuwe intellektuele eiendomsregte oor hulle TK, gemaak deur enige entiteit en nie noodwendig 'n party tot hierdie ooreenkoms nie, wat in gebrek bly om sodanige TK-regte te erken sonder hulle vrye, voorafgaande ingeligte toestemming.

Enige aansoek vir nuwe intellektuele eiendomsregte betreffende die bovermelde TK sal toegepas word met die vrye, voorafgaande ingeligte toestemming van die San en Khoi-Khoi en 'n afsonderlike voordeelverdelingsooreenkoms aangegaan word.

In enige patent-aansoek behou die San- en Khoigemeenskap inherent hul IE (TK verwant aan Rooibos). Betreffende IE-regte, behoort die volgende vrae gevra te word:

- Wie gaan baat uit eienaarskap van 'n patent in enige uitvinding wat spruit uit die samewerking?
- Sal dit alleen afhang van wetenskaplike bydraes en uitvindenskap?
- Gaan die patent gesamentlik deur die deelgenote besit word ongeag van bydraes tot die uitvinding? Indien wel, watter verantwoordelikhede sal uit sodanige mede-eienaarskap voortvloei? Byvoorbeeld, wie gaan vir die kostes vir die vervaardiging en instandhouding van enige patent-toepassing(s) betaal?
- Wie gaan verantwoordelik wees vir uitvoering van die patent in geval van 'n oortreding?
- Moet die deelgenote oorweeg wie die projek sal befonds, en of daar enige bepalinge is asook voorwaardes betreffende eienaarskap van IE-regte, of opvolgende lisensieringsbesluite, bygevoeg tot die befondsing as sodanig?

Die [3de Party] erken dat die TK verwant aan die biologiese bron is of mag die onderwerp wees van 'n patent-toepassing. Behalwe as daarvoor voorsiening gemaak word in hierdie Ooreenkoms, word geen uitdruklike of geïmpliseerde lisensies of ander regte aan die [3de Party] verskaf onder enige IE-regte van die San- en Khoigemeenskappe nie, insluitend enige

thereof. It is in the Khoikhoi and San communities' best interest to allow for exploitation of a potentially valuable patent.

However, on this basis, the BCP suggests a compensatory liability be in place rather than the recognition of exclusive property rights for the owner of the IPR. Such a mechanism would indeed, "...entitle the San and Khoikhoi communities to procure compensation from third party exploitation"; however, it would not grant them the right to block access to third parties.

Conclusion

When developed with regulatory support (e.g. the Department of Science and Technology's, Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2018), the BCP of the San and Khoikhoi will provide a platform for communities to safeguard their resources and associated TK from being pirated. BCPs can protect communities from exploitation, channel benefits to the local level to incentivise conservation, and enhance legal certainty and clarity for both users and providers of genetic resources. They can also help create equitable partnerships between communities and other groups, such as scientific organisations or companies that seek to develop new products based on natural resources. The collective documentation of knowledge on traditional uses of plants, animals, and other resources is vital in maintaining this heritage for the future.

aangepaste vorms van die biologiese bron deur die San- en Khoi-gemeenskap gemaak. In besonder, word geen uitdruklike of geïmpliseerde lisensies of ander regte verskaf, om die biologiese bron verwant aan TK van die San- en Khoigemeenskap, of enige verwante patente van die San- en Khoigemeenskap vir kommersiële doeleindes te gebruik nie.

Die [3de party] stem in dat, indien 'n uitvinding van die genetiese bron afgelei is om ontwikkel en bemark te word, of gelisensieer aan 'n maatskappy of ander institusie vir ontwikkeling en kommersialisering (of die uitvinding direk gemik is op 'n direkte isolasie van die genetiese bron, of struktureel gegrond is op 'n isolasie van die genetiese bron, sintetiese materiaal vir die navorsersmateriaal t.o.v. belangrike ontwikkelingsleiding, of 'n sintetiese metode of gebruik van enige voormelde isolasie, produk of materiaal), die [3de Party] sal onderhandel en 'n ooreenkoms aangaan met die Khoi- en Sangemeenskappe.

Die San/Khoigemeenskap is steeds vry om 'n IE-aansoek(e) in te dien deur gebruik van die biologiese bron, maar stem in om die [3de Party] kennis te gee oor inhandiging van die IER.

Toekomstige Besluit oor Wanaangewende TK:

L.W. die San- en Khoigemeenskappe stel nie belang om huidige IER's/IPRs te kanselleer nie, wat 'n uitvinding of 'n skepping dek en oormatig hulle TK wanaangewend het. Die ondersteunende gemeenskappe meen dat dit belangrik kan wees om sulke IE-regte lewend te hou ten einde om te deel in moontlike voordele wat kan voortvloei uit die kommersiële ontginning daarvan. Dis in die San- en Khoigemeenskappe se beste belange om nie die ontginning van 'n moontlik waardevolle patent te blokkeer nie.

Op hierdie basis, stel die BGP voor dat 'n kompenserende verpligting in plek val i.p.v. erkenning van eksklusiewe eiendomsregte vir die eienaar van die IER/IPR. So 'n meganisme sal inderdaad San- en Khoigemeenskappe in staat stel om kompensasië van 'n derde party te bekom vir ontginning, maar dit sal hulle nie die reg gee om toegang aan derde partye te blokkeer nie.

Konklusie

Wanneer die BGP van die San en Khoi-Khoi ontwikkel word met wetgewende ondersteuning (bv. DWT/DST se Wetsontwerp op IK), sal dit 'n platform wees vir die gemeenskappe om hulle bronne en verwante TK te beskerm teen diewery. BGP's kan gemeenskappe beskerm teen uitbuiting, voordele na die plaaslike vlak kanaliseer en aanspoor tot bewaring, wetlike sekerheid en helderheid bring vir gebruikers én verskaffers van genetiese bronne. Hulle kan ook help om regverdige deelgenootskappe te skep tussen gemeenskappe en ander groepe, soos wetenskapsorganisasies of maatskappye wat nuwe produkte wil ontwikkel gebaseer op natuurlike bronne. Die kollektiewe dokumentering van bronne oor die tradisionele gebruike van plante, diere en ander bronne, is lewensbelangrik om hierdie erfgoed vir die toekoms te bewaar.

We are the Khoikhoi people.

We have occupied and moved around Southern Africa as nomadic herders for thousands of years. Along with the San, we are the first inhabitants of this land.

Today, we are a landless proletariat and de-Africanised, with no access to our resources, no communal land, stripped of our cultural and collective identity, having to re-navigate our road back to a moment of collective hope.

This biocultural community protocol and the signing of the industry-wide Rooibos Benefit-Sharing Agreement exist as the first forms of recognition of our traditional knowledge to Rooibos, Bossietee. Also known scientifically as *Aspalathus linearis*, this is one of South Africa's most precious species which, we, as the Khoikhoi (along with other traditional knowledge holders) have stewarded. This biocultural community protocol is a result of our shared history, testimonies, struggles, resilience and identity as the Khoikhoi. It has been dreamt up and written by our communities for our ownership. In its recognition of us, as the Khoikhoi, as indigenous peoples with powerful indigenous knowledge, we hope this work will bring one step towards healing for our forgotten peoples.

For application purposes and questions, please contact:

The National Khoisan Council
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Secretary, Frans Kraalshoek: fransk@edu.fs.gov.za

Khoikhoi Peoples' Biodiversity Trust
Chairperson, Johannes Jacobus Maarman: maarmanj@gmail.com

The Department of Environment, Forestry and Fisheries (DEFF), Pretoria

Partners/Deelgenote:

