



# Rooibos Restitution

*Lesle Jansen, Natural Justice*



# OUTLINE

- Rooibos trailer
- **X5 main outcomes (2012 – 2017):**
  - (i) *Community Protocol*
  - (ii) *TK holders clarified*
  - (iii) *Nestle BSA*
  - (iv) *Benefits received*
  - (v) *SA Rooibos Industry-wide BSA*
- Lessons, challenges, going forward
- Reflections from SA ABS focal point



# Nestle: Patent applications (background)

- Nestec South Africa/Nestle claimed x5 patents on use of Rooibos & Honeybush
- Filed patents (2009). None of the patents were granted
- Nestle's main claim innovation: use of Rooibos extract for preparation of product to treat and inflammatory disorders, skin and hair related products.
- These applications were claimed at the time, to be in violation of South African law as it relates to Nayoga Protocol because of the Provider country did not give consent to its use
- Berne Declaration, Natural Justice supported by ABSI: advocacy work around this issue
- <https://www.youtube.com/watch?v=GH5JF-n-rnA>

# THE ROOIBOS PLANT : *Aspalanthus Linearis*

- Rooibos (“Red bush” in Afrikaans) is endemic to SA & only grows in Cedarburg mountains in Western Cape province.
- The plant, known as Rooibos, now forms the basis of a massive South African industry, divided roughly into Rooibos tea, and other Rooibos related products.
- It is common cause that the plant is an anti-oxidant possesses numerous healing properties from dermatitis, allergies, digestive problems (11) powerful antioxidant (12) nervous tension and anti-HIV and tumour properties.(13) Other claims include anti-ageing properties (14) improvement of absorption of vitamins, healthy skin, teeth and bones.(15)

- (11) *Physiol Res.* 2003;52(4): 461-6
- (12) *J Agric Food Chem* 2003 Dec 31; 51 (27):8113-9 and *J Agric Food Chem* 2003 Dec 31; 51 (25):7472-4
- (13) *Leukemia.* 1997 April; 11 Suppl 3: 128-30 and *biosci Biotechnol biochem.* 2001 Oct; 65(10): 2137-45
- (14) *Neurosci Lett.* 1995 Aug 18; 196(1-2): 85-8
- (15) ‘[www.rooibosteastore.com/rooibos](http://www.rooibosteastore.com/rooibos) and <http://www.raysahelian.com/rooibos.html>



# The LAW: South Africa

**National Environmental Management: Biodiversity Act 10 of 2004 (the Act)** provides, inter alia, for the “fair and equitable sharing of benefits arising from

bioprospecting involving ‘indigenous biological resources’

“**Bioprospecting**” is defined in S(1) as “any ...development or application of indigenous biological resources for commercial or industrial exploitation” including

- (b) The utilisation ...of any information regarding any traditional uses of indigenous biological resources by indigenous communities..” and
- (c) “the application, development or modification of any such traditional uses



# “Bioprospecting”

**The Rooibos Industry is involved in the commercialisation phase of “bioprospecting”<sup>(1)</sup>**

The **definition of “commercialisation”** includes “the multiplication of indigenous biological resources through cultivation, propagation, ..or other means to develop and produce products, such as drugs, industrial enzymes, food flavours, fragrances, cosmetics, colours and extracts”<sup>(1)</sup>

**The definition of “the commercialisation phase of bioprospecting”** means “any research on or development ..of indigenous biological resources where the nature and extent of any actual or potential commercial or industrial exploitation in relation to the product is sufficiently established to begin the process of commercialisation.”<sup>(1)</sup>

**According to the Act, all utilization of Rooibos for commercial products, from tea, to medical and other products, is “use of an indigenous biological resource based upon traditional uses, and is thus, Bioprospecting.**

<sup>(1)</sup> NEMBA 10 of 2004 (as amended)

# San & Khoi community claim

- Rooibos is an “indigenous biological resource” governed by the NEMBA Act, and all trade in rooibos tea and other products falls under the South African definition of “bioprospecting”
- Even though it took place during the 17<sup>th</sup> and 18<sup>th</sup> Centuries, there is no doubt that the TK of the San and Khoi re medicinal and related uses of rooibos was conveyed, as required by the CBD and the ACT, and that such TK contributed to or gave rise to the “bioprospecting” that is part of the rooibos industry today.
- The San and the Khoi are the modern holders of the TK, and are the “indigenous community” as defined, whose **“traditional uses have initiated or have contributed to the bioprospecting”** (Defn, BABS regulations)
- Therefore no further permits should be issued around any form of commercialization of Rooibos should be issues without a benefit sharing agreement between the industry, and the San/ Khoi



## So what happened after 'Nestle'?

2012

### ➤ X5 Main Outcomes:

- ❑ Community Protocol
- ❑ **Traditional Knowledge holders** associated with Rooibos was **identified, clarified & formally endorsed by SA government**
- ❑ **First historic BSA agreement** on Rooibos concluded: Nestle & Rooibos TK holders
- ❑ **X2 Monetary benefit instalments received** from Nestle
- ❑ **Process underway** around Benefit sharing with the **whole SA Rooibos industry**

2017





# 1<sup>st</sup> Outcome : Community Protocol: National Khoisan Council

- 2013: started their community protocol process
- **6-8 priorities** identified: recognition, land, healing, traditional knowledge/ABS, youth/women, indigenous languages
- Sub committees for each priority
- ABS largely became focus: X3 BSAs signed, with others in pipeline
- Challenge in finalization of CP: definition of community, proper consent, representation, x30 plus community interests, backdrop of non recognition issue of them as customary community
- Potential BCP resource specific: Rooibos

## 2<sup>nd</sup> Outcome:

**Traditional Knowledge holders associated with Rooibos was identified, clarified & formally endorsed by SA government**

### Traditional Knowledge Associated with Rooibos and honeybush Species in South Africa

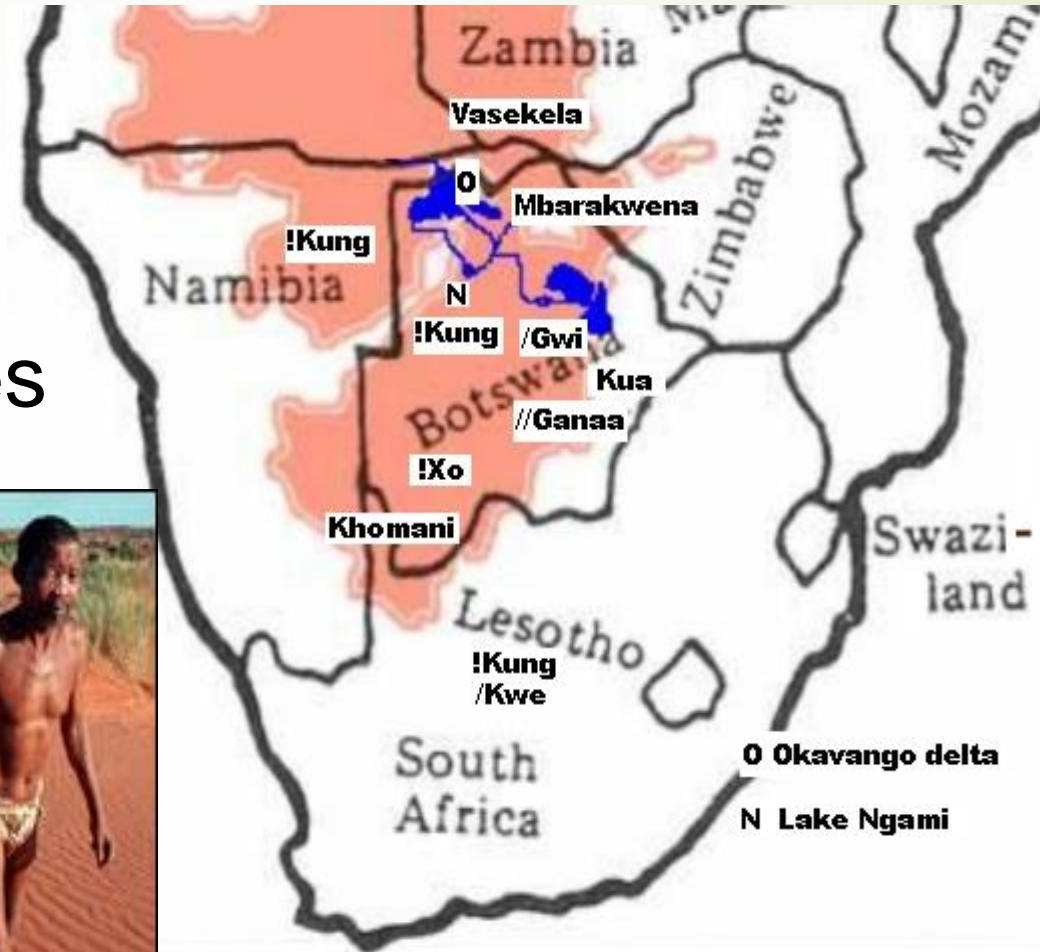


OCTOBER 2014

- 2014, study completed as commissioned by SA DEA.
- Confirmed the Khoi and San African indigenous communities as the associated TK holders to Rooibos
- Signed & endorsed by Minister DEA, Edna Molelwa
- Findings were based on:
  - (i) species being **endemic in areas** where its in abundance
  - (ii) San & Khoi **were resident in these areas** before arrival of colonialism
  - (iii) **Industry evolved** & expanded in these areas where **they (TK holders) lived**
  - (iv) **no evidence to dispute** the Khoi & San as the original TK holders

# THE SAN PEOPLES

- 100,000
- Five countries
- Ancient Peoples
- Several languages





# THE KHOI KHOI PEOPLES

- The first traces of other peoples (than San) on the subcontinent are those of the Khoe herders, who emerged as separate and distinct tribes or people about 2000 years ago. Research indicates that the modern Khoe peoples, including Griqua, Nama, Attaqua, Baster and other subgroups, emerged from and are related to the early San.(5)
- It is generally assumed that the Khoi (actually the Khoikhoi,) branched from the San by adopting the practice of herding/pastoralism (5)

(5) Metapedia and Barnard, A (1992) *Hunters and Herders of Southern Africa: A Comparative Ethnography of the Khoisan Peoples*. New York; Cambridge: Cambridge University Press, p 29

# Modern Khoi Scenes



# SAN AND KHOI TODAY

- **The San of South Africa** are represented by the San Council of South Africa, based in Upington
- **The San Council of South Africa** is an elected body, representing the three San groups resident in the Northern Cape, namely the !Khomani, the !Xun and the Khwe, numbering in total an estimated 9 000 people



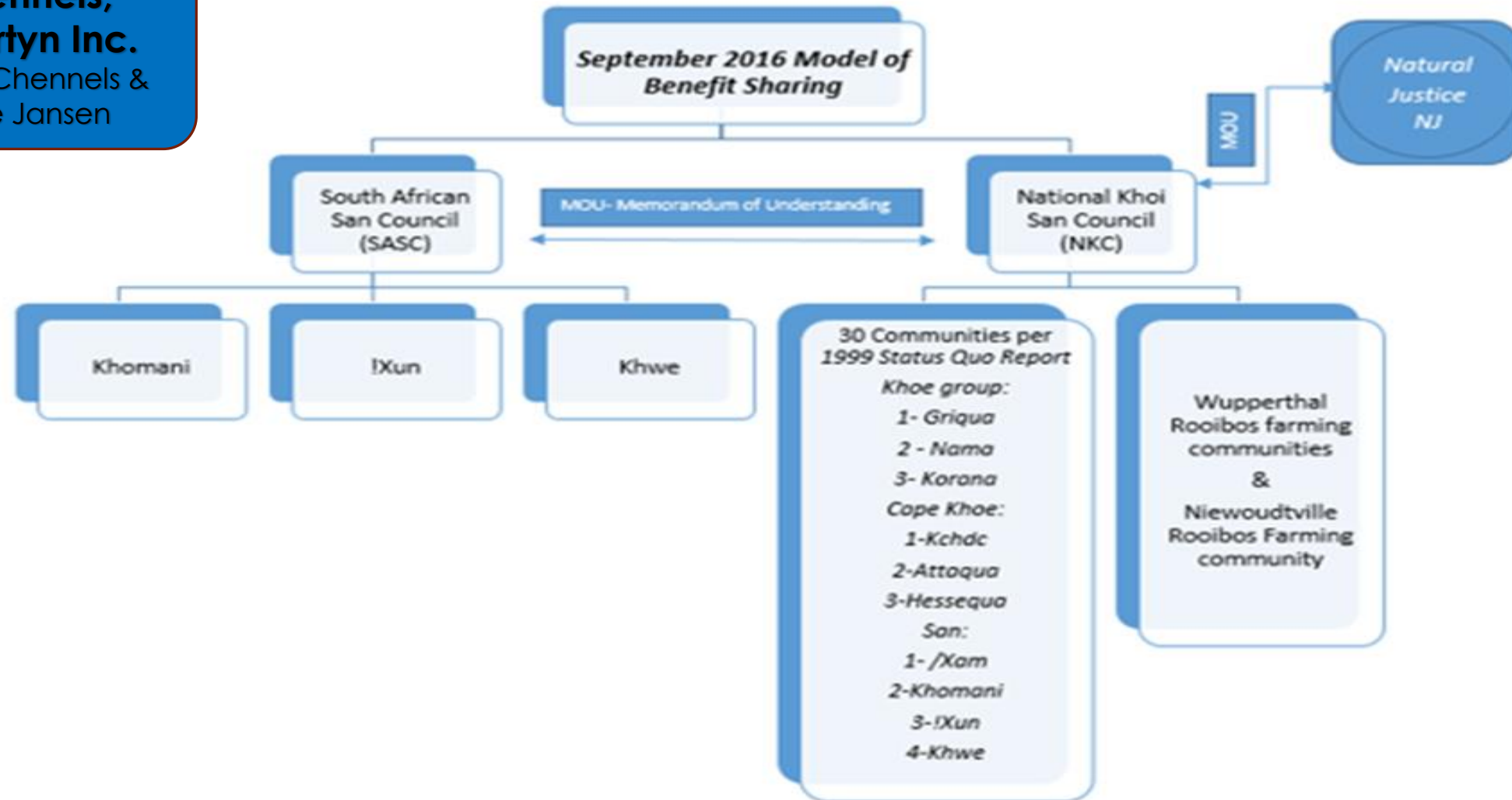
- **The Khoi Khoi** are spread over much of the Northern, Western and Eastern Cape, and include groupings such as the Nama, Griqua, Koranna, Cape Khoi/ Attaqua and others.

- **The Khoi peoples** are represented politically by the **National Khoisan Council**, a body recognised by the RSA Government with the aim of Representing the various Khoi and San communities. This NKC represents 30 historical Khoi and San communities

**The San/ Khoi negotiating team represents Rooibos knowledge holders**

# San & Khoi BS model: 50-50%

**Chennels,  
Albertyn Inc.**  
Roger Chennels &  
Lesle Jansen



# 3<sup>rd</sup> Outcome:

## **First historic BSA agreement:**

### Nestle & Rooibos TK holders



- August 2013 Nestle Professional (South Africa), a division of Nestle Ltd made contact
- Red cappuccino product using Rooibos
- Nestle started negotiating Benefit Sharing Agreement with the San Council & National Khoisan Council
- Nestle BSA signed January 2014



# Features of Nestle BSA:

- Between Nestle Professional (SA) and San Council & NKC
- Nestle developed a tea product.
- Nestle acknowledges Khoi and San as indigenous knowledge holders to Rooibos and that their consent is required for their project
- Only monetary benefits was included in BSA
- However, the contract does make provision as part of future reviews to explore other non monetary options such as employment, bursaries and community programs
- Khoi and San agreed to marketing assistance



# Process to concluding BSA:

- 2013 initial contact, Nestle consulted with DEA, lawyers, communities
- Several negotiations meetings were held, supported by Nestle.
- In attendance, NKC, San council ABS negotiating team, Nestle SA, DEA, Natural Justice and Roger Chennels
- Negotiations meetings were facilitated by SA, Environmental Affairs, its where terms of the contract was agreed to.
- Rooibos TK study were completed early 2014.
- Shortly thereafter, the Benefit Sharing Agreement with its terms were agreed to by end of January 2014 and signed by the SA San Council
- National Khoisan Council conference were held with all x30 historical Khoisan communities where contract lawyer was brought in.
- National Khoisan Council only signed contract late 2014 after the national conference
- Permit were issued

4<sup>th</sup> Outcome:

## **Nestle Monetary Benefits paid out**

- Benefits received via SA Bioprospecting Fund(x2 instalments) (September 2016 & February 2017)
- 50% San Council
- 50% National Khoisan Council
- Benefits for National Khoisan Council has not been distributed as yet
- Contract does refer to a significant percentage goes into specific programs within the community based on social needs



5<sup>th</sup> Outcome:

**Process underway** around Benefit sharing  
with the **whole SA Rooibos industry**

- ▀ Status: benefit sharing discussions are currently being held
- 



# What did it take to get here?

- **Lessons, ongoing challenges, opportunities**
  - ❑ Enabling South African legislative environment
  - ❑ Clear recognition and protection of IPLCs aTK within regulations
  - ❑ Indigenous biological resource rather than only GR
  - ❑ Community mobilization, impacts other possible TK cases
  - ❑ Ongoing training
  - ❑ Lawyers willing to beyond what's needed
  - ❑ Partners
  - ❑ Communities being very clear on where they stand, who they are and what is important to them



# Challenges



- Funding
- Identity politics: revivalist movement
- Representation
- Community's traditional authority is not recognized
- What is a community



# Opportunities

- Community organized for other plant species into PIC and ATK
- South African government's TK study on Rooibos and Honeybush species
- Indirectly impacts the community's other resource rights, land, customary institutions
- ABS gave a huge leap to communities' historical concerns



# Thank you

Email: [lesle@naturaljustice.org.za](mailto:lesle@naturaljustice.org.za)