

IP BRIEFS

Volume 2 / Issue 7 / August 2020

Articles are published for general information purposes and should not be relied on as legal or professional advice. No liability can be accepted for any errors or omissions, nor for any loss or damage arising from reliance upon any information herein. Contact your attorney for specific advice.



FROM THE EDITOR



Dr. MM Kleyn

Madelein.kleyn@outlook.com

IN THIS ISSUE

Where to now for South Africa's copyright reform?

Clearing the Cannabis haze 2.0: When is cannabis, CBD, or hemp legal in South Africa?

The Elixir Of Teas – Part 1

The Greek Freak and celebrity trade marks

Juta case law reports

It's been a really cold winter all around the country, with crisp clear winter mornings, and nature restored to its natural beauty. To the business world, especially the legal practitioners, our worlds are different too. Amazingly everyone is communicating and meeting on ZOOM, Teams and Skype all hours of the day. Productivity is up, but sadly, families are suffering, as working from home is a challenge in itself. Staying in touch with your dearly beloved in the room next door is harder than you could imagine!

Innovation chasing a cure for, treatment of and protective measures against COVID-19, is the center of most research environments as many researchers and pharmaceutical companies are rushing to find both treatment and vaccines. Law firms host webinars on how to protect your IP, or how to enforce a license agreement that is not honored in the face of the pandemic. Some IP sharing initiatives are considered, such as patent pooling as an alternative to the more conventional model of IP licensing¹. There are different views on whether IP protection should be granted for COVID-19 related innovation².

Patent and trademark offices around the world are still not fully operational. The WTO Secretariat compiled a country by country³ information list in an attempt to provide transparency with respect to measures related to IP rights taken in the context of COVID-19. The purpose is to inform members about extended deadlines, on-line services and operating hours during lockdown periods. This can be viewed on the WIPO tracker⁴. Everyone is monitoring the toll the virus is taking on society and our economy. Stay safe!

Quote for today: "He who believes in miracles, is a realist." - Anton Rupert

¹ <https://www.nature.com/articles/d41586-020-01441-2>

² <https://www.devex.com/news/opinion-the-debate-around-intellectual-property-rights-and-the-covid-19-vaccine-97609>

³ https://www.wto.org/english/tratop_e/covid19_e/trade_related_ip_measure_e.htm

⁴ <https://www.wipo.int/covid19-policy-tracker/#/covid19-policy-tracker/ipo-operations>

CONTROVERSIAL LEGISLATION DERAILED



SOUTH AFRICA'S COPYRIGHT REFORM

By André
Myburgh and
Stephen
Hollis

On 22 June 2020, with the announcement of of President Ramaphosa's decision to refer the Copyright Amendment Bill (the "Bill") and the Performers' Protection Amendment Bill back to Parliament, a highly controversial legislative package that was railroaded through Parliament came to a screeching halt.

The President raised a broad range of constitutional reservations which could be summarized in the following categories:

- **Incorrect Parliamentary process** followed, because, with its impacts on cultural matters and trade, the Bill should have been processed with the participation of the Provinces under Section 76 of the Constitution (called "mis-tagging"). Mis-tagging would render the legislation invalid, as held in the 2010 decision of the Constitutional Court, *Tongoane v Minister of Agriculture and Land Affairs*.

An earlier bill that amended the Copyright Act, the Intellectual Property Laws Amendment Bill, suffered the same fate of being referred back to Parliament by then-President Zuma to be re-processed under Section 76. Since the Bill will impact on specific provisions of the Copyright Act introduced by the Intellectual Property Laws Amendment Act, 2013, the President's raising of mis-tagging was inevitable.

- **Arbitrary deprivation of property** in the retrospective parts of the statutory unwaivable royalty sharing provisions, in conflict with the Constitution's Bill of Rights. Arbitrary deprivation of property by the bulk of copyright exceptions, in conflict with the Bill of Rights and with

South Africa's obligations under the Berne Convention and the WIPO Copyright Treaty, to which he should have added the Trade-Related Aspects of Intellectual Property Rights Agreement (the "Treaties"). The Treaties provide for the multilateral recognition of copyright across all their member states.

Also mentioned was the **lack of proper consultation** on a substantial broadening of the 'fair use' copyright exception by the National Assembly, that was not open for public comment.

The concerns raised by the President have some gaps:

- The Bill's provisions for the protection of technological protection measures that are not compliant with the WIPO Copyright Treaty.
- The Bill's omission to introduce new exclusive rights of copyright for computer programs that are required by the WIPO Copyright Treaty.
- The arbitrary exclusion of computer software interface specifications from copyright protection.
- Elements of the copyright exception in favour of the disabled that go beyond what is allowed by the Treaties and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the "Marrakesh Treaty"). South Africa has not yet resolved to accede to the Marrakesh Treaty.

Not mentioned in the President's notice were numerous provisions that would prove to be unworkable or would irreparably damage investment in copyright products.

These include the 25-year time limitation on any assignment (transfer) of copyright of literary and musical works (an incorrect implementation of a recommendation to introduce a right of reversion for musicians), statutorily implied terms for all licences of copyright that include a right to sublicense, unwaivable royalty sharing provisions tied to the exclusive rights of copyright, and a contract override clause that has a blanket, across-the-board, effect. These provisions have no equivalent in any other country. However, the Constitution unfortunately does not prevent Parliament from passing bad laws.

What next?

The President's reasons for referring the Bill back will now be considered by the National Assembly's Portfolio Committee on Trade, Industry and Competition. The Committee must confine itself to the President's reservations. However, even if the Committee were somehow to be able to correct the flaws listed in the President's referral, it would still leave the Bill open to attack for unconstitutionality for the deficiencies pointed out earlier and also on other grounds.

It is possible that the National Assembly might not agree with the reservations raised by the President and it could refer the Bill back to the President for signature. In this case, the President could raise his reservations with the Constitutional Court.

The deficiencies of the Bill, both in its conceptualisation and drafting as well as its

processing, are so material that it would be irrational for the National Assembly to countermand the President's reservations.

We considered other options that the National Assembly, and by extension the Portfolio Committee, could have at its disposal.

The National Assembly could take the President's reservations at face value and attempt to fix the deficiencies in the Bill that he raised. That would mean taking legal opinion and undertaking socio-economic impact assessments on the six clauses' worth of copyright exceptions raised by the President – since no such assessments were conducted before the Bill was introduced – and substantially altering or even scrapping those copyright exceptions that are not found to pass muster. They would have to call a public consultation on at least the 'fair use' copyright exception that was extended by the National Assembly in the last Parliament, and re-conceptualise the set of royalty-sharing provisions that are attached to the exclusive rights of copyright in literary, musical, artistic and audio-visual works. Then they would have to send the Bill, so revised, for the approval of the Provinces under the auspices of the National Council of Provinces in terms of Section 76 of the Constitution.

In the Section 76 proceedings, all of the issues raised by the Bill will be on the table before the Provinces, not only the ones cited by the President. All the points we have listed as having been omitted by the President, and others, can be expected to be argued in Provincial forums. Many of the omitted points happen to have a severe impact on the sustainability of film production, so intense resistance can be expected from Provinces that host vibrant film industries.

We expect that persisting with this fundamentally flawed Bill will take years to complete, already adding to the nine years wasted since the Copyright Review Commission issued its report in 2011.

Muddying the waters

For reasons that remain unclear, the Government has been wedded to the Bill as the instrument for copyright reform, despite its defects having been laid bare for all to see by the legal fraternity, industry stakeholders, and even the experts appointed by the National Assembly in the last Parliament.

The Government has been egged on in its commitment to the Bill by individual activists, including some academics, whose fringe views on copyright have moved to center stage. In order to argue that the President's rejection of the Bill is unlawful, they have to take the position that the Bill is constitutional, in compliance with the Treaties and otherwise good law, contentions that are clearly nonsense. These same activists habitually misrepresent the Bill's 'fair use' copyright exception as being something that already exists in United States law and they write the President's rejection off to foreign interference.

However, even a superficial examination shows that the Bill's 'fair use' clause and the codification of 'fair use' in the United States are materially different from one another.

Also, it was to be expected that foreign governments would be concerned by the Bill's expropriation of copyright, since it impacts on the rights that their citizens have under the Treaties in South Africa.

It is possible that the Department of Trade, Industry and Competition might have prepared a replacement bill in anticipation of the President's action. However, their deafening silence since indicates that they have not experienced a Damascene revelation that they have been on the wrong path all along.

Where to from here for the Bill?

Government, Parliament, creators of copyright works and all other stakeholders in the copyright industry agree that reform of South Africa's copyright law is long overdue. There are solutions to fast-track at least some of the key necessary reforms, but then it has to be accepted from the outset that the Bill has no redeeming features. The National Assembly should therefore reject the Bill and refer it back to Government.

Parliament has the power to develop its own legislation, as the last Parliament did with the National Credit Amendment Act, 2019, that was processed by the Portfolio Committee at the same time as the Bill. Although logistics dictate that one cannot expect legislation developed within Parliament to cover too much ground, it should be possible to develop legislation that at least brings the Copyright Act in line with the WIPO Copyright Treaty by the addition of the new exclusive rights and enforcement measures needed for the digital world, as well as the corresponding copyright exceptions.

It should also be possible, within a short timeframe, for Government to propose and Parliament to agree to South Africa's accession to the Marrakesh Treaty.

If that happens, legislation developed by Parliament could introduce the necessary, and generally supported, copyright exception and enabling provisions for the benefit of the visually impaired.

Where an impact assessment can identify the need and justification for copyright exceptions in addition to those that are already in the Act, new exceptions that comply with the requirements of the Treaties can be introduced by Ministerial regulation in terms of Section 13 of the Act. The existing copyright regulations that include some exceptions for libraries and educational institutions are crying out for a total revamp.

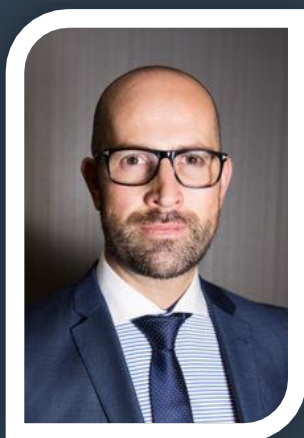
Government's misadventure with the Bill has cost the country dearly, if only in the nine years of lost time while it dabbled with the ill-

fated Draft Intellectual Property Policy of 2013 and the Draft Copyright Bill of 2015 after the Copyright Review Commission had issued its clear recommendations.

Our suggestions for fast-tracking some provisions are limited by what we consider to be the art of the possible, and must not detract from the other pressing needs for reform raised in the Commission's report and in the public consultation process, notably the fair remuneration and protection of authors, musicians, artists, film producers and performers, and the proper and effective regulation of collecting societies.

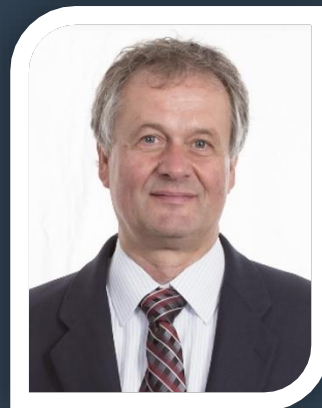
The experience with the Bill, however, shows how not to go about it, and Government and Parliament should take the President's lead in consigning the Bill to history.

The authors compiled the submission to the President raising the constitutional flaws of the Bill on behalf of the Copyright Coalition and its members.



Stephen Hollis is a partner at Adams & Adams in Johannesburg and a member of SAIPL's Copyright Committee. He presented to Parliament on the legal concerns arising from the Copyright Amendment Bill as part of SAIPL's delegation during the August 2017 Parliamentary hearings on the Bill.

André Myburgh was with Spoor & Fisher in Pretoria and then a partner at Fairbridges in Cape Town before moving to Switzerland, where he became a specialist legal consultant in copyright law and policy internationally. He was one of the experts appointed by the National Assembly's Portfolio Committee on Trade & Industry to comment on the Bill.



CLEARING THE CANNABIS HAZE 2.0: WHEN IS CANNABIS OR HEMP LEGAL IN SOUTH AFRICA

JANUSZ LUTEREK

There has been a haze surrounding the use of Cannabis in South Africa ever since the Constitutional Court Judgement in the Prince case in 2018. This confusion extended to the use of CBD in medicines and foodstuffs and then, off-course, the use of hemp as a food ingredient when Notice R 756 of 23 May 2019, excluded from Schedule 4 of the Medicines and Related Substances Act (MRS Act) certain CBD-containing products until May 2020. Then on 22 May 2020 amendments to the Scheduling Regulations were published in terms of which besides scheduling certain CBD medicinal products as Schedule 4, low CBD strength products were rescheduled as Schedule 0.

To understand the situation the terminology must be understood. Both Cannabis (Marijuana/dagga) and Hemp are varieties of the Cannabis Sativa species with Cannabis having a higher

concentration of THC than CBD and therefore psychoactive whereas Hemp has a higher concentration of CBD than THC and therefore less psychoactive. In the USA Hemp has a maximum of 0.3% THC whereas in South Africa this now, in 2020, appears to be 0.2% THC. CBD or Cannabidiol is a naturally occurring non-psychoactive cannabinoid found in the Cannabis plant whereas THC or Tetrahydrocannabidiol is the main psychoactive compound/cannabinoid found in the Cannabis plant (both Cannabis and Hemp).

The Constitutional Court did not legalise Cannabis in all its forms for commercial use and, in a nutshell, merely ruled that it is not illegal for an adult to use Cannabis in private.

There is no legalisation of growing, distribution, or manufacture of Cannabis derived products by the Constitutional Court and the



Janusz holds degrees in both Chemical Engineering and Law and is a registered Attorney, Patent Attorney, and a Professional Engineer. He is a director of Hahn & Hahn attorneys. He is a Custodian Member of the South African Association for Food Science and Technology (SAAFoST) and sits on the Council of FSI of the Consumer Goods Council of South Africa as well as sitting on the Food Law Advisory Group of the Department of Health. In particular, Janusz has been extensively involved in the GMO debate and the issue of advertising to children under R429. This in depth and on-going involvement in the process has given Janusz special insight into Food Law and the Consumer Protection Act.

normal laws still apply to all of these and contravention of these laws can result in criminal prosecution and long jail sentences.

Now, in terms of Regulation R586 of 22 May 2020, Cannabidiol (CBD) is listed in Schedule 4, except -

a. in complementary medicines containing no more than 600 mg cannabidiol per sales pack, providing a maximum daily dose of 20 mg of cannabidiol, and making a general health enhancement, health maintenance or relief of minor symptoms (low-risk) claim; or

b. processed products made from cannabis raw plant material intended for ingestion containing 0,0075 percent or less of cannabidiol where only the naturally occurring quantity of cannabinoids found in the source material are contained in the product.



Products that meet the conditions in a. or b. are now regulated as Schedule 0 which is a Schedule that includes many over the counter medicines such as aspirin and supplements such as vitamins. This

scheduling means that the only CBD containing products which are allowed are those where the producers are registered as GMP- certified medicines manufacturers and the products themselves are registered as medicines (CAMS which are Schedule 0 or Schedule 4) through the South African Health Regulatory Authority (SAHPRA).

So now we know CBD and Cannabis may not be used in food, but what about Hemp? Surely Hemp protein and derivatives have been sold for a long time in South Africa (usually in health shops) as food.

The difficulty is the distinction between Hemp and Cannabis and whether the Hemp is really Hemp! In the USA it has been shown that a large proportion of Hemp and CBD supposedly derived from Hemp actually has levels of THC associated with Cannabis and in excess of the maximum permissible in the USA (and thus in South Africa even under the SAHPRA position).

Presuming that there is certainty that actual Hemp is being used with no THC and no CBD then it is arguable that it can be used in a foods as a food ingredient, such as Hemp protein, or a food additive, such as a flavouring, in terms of the FCD Act (in that it is safe and is ordinarily eaten as a foodstuff). The matter is however complicated by a pending amendment to the Liquor Products Act Regulations which aims to prohibit the use of Hemp flavourings or nature identical Hemp flavourings or extracts or anything derived from the genus Cannabis in any liquor product!

Thus, the haze can be partially lifted on the subject of the commercial use of Cannabis and CBD but there are still areas, especially surrounding the use of Hemp and derivatives as a food ingredient.

Gi's Back in the Spotlight! The Elixir of Teas

Rooibos Tea And Honeybush Tea

PART 1

Andre van der Merwe

Is a retired patent and trade mark attorney with 45 years' experience as practitioner in both patents, trademarks, and unlawful competition. He acted as a senior adjudicator in various domain name disputes since the inception of such adjudications in 2007.

For persons who may not be familiar with the term Geographical Indications ("GI's"), or their commercial-legal aspects, this article provides a background, history and an overview of the topic of GI's from a South African perspective.

To explain GI's these are generally geographical names or indicators used to identify certain agricultural products, each from a different part of the world. Such products originate respectively from various towns (or surrounds), or from various regions, and have one or more unique and recognizable properties that can be ascribed mainly to that town or region and its soil, climate, and/or a particular process to produce such products.

GI's are defined in Article 22(1) of the GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (generally referred to as the "TRIPS" Agreement) and as set out in Annex 1C to the World Trade Organization ("WTO") Agreement adopted on 15 April 1994. South Africa, as a member country of TRIPS and WTO, is accordingly required to provide effective GI protection to its own nationals and, on a similar basis, to the GI's of nationals of other member countries.

More particularly, the abovementioned Article 22(1) defines GI's as follows: "Geographical Indications are, for purposes of this Agreement,

indications which identify a good (sic!) as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."

In essence therefore, GI's relate to, and are used in respect of such agricultural products in the nature of foodstuffs, wines and spirits that originate from a certain area and have developed a distinctive style and/or taste/flavor unique to that area. These products have thereby developed a reputation that makes it possible to characterize and identify such products. Most consumers are generally aware of certain GI's because the relevant products and their names (GI's) are invariably known, some even being well-known, in the marketplace – such as CHAMPAGNE, PROSCIUTTO DI PARMA (PARMA ham), DARJEELING tea, and locally ROOIBOS tea, to name only a few.

What is important about GI's, what is the benefit of GI's in everyday life, and why make a fuss about GI's? To answer these questions, and generally speaking, GI's serve to protect and preserve the value of local products, and ensure that producers receive their fair benefit from quality products that they produce and sell. In addition, GI's protect the interests of consumers in respect of the origin of the products, and

consistent quality. GI's therefore protect both consumers and producers against misrepresentation by unscrupulous third parties as to product origin and quality.

To illustrate the nature and number of GI's and their corresponding products, certain countries of the European Union ("EU"), for example, each produce certain well-known meat products including SERRANO ham and PARMA ham (already mentioned above); certain well-known cheeses including BRIE cheese, CAMEMBERT cheese, ROQUEFORT cheese and GORGONZOLA cheese; certain well-known wines including BORDEAUX wines, BURGUNDY wines, PORT wines, SHERRY wines, RIOJA wines, CHIANTI wines, PROSECO wines and TOKAI wines; certain beers such as MUNCHENER beer and GUINNESS beer (to name only two of many); BALSAMIC vinegar; and certain well-known spirits including COGNAC brandy, OVOZO spirits, and IRISH (Cream) whiskey. Each of these GI products and names originate in a particular country and town or an area in that country of the EU. In the UK, for example, one also encounters well-known products such as ABERDEEN ANGUS beef, SCOTCH whisky; many well-known beers and ciders; and many types of local cheeses including STILTON (blue and white) cheese - with each of these names having become GI's. Once again, each of these products originate in a particular county or region, or in a particular town or its vicinity, in the UK.

In the EU, France especially has always regarded its regional wine and spirit GI names (-some mentioned above) as being of great commercial importance, and has been highly protective of those GI's. The protection of its wine and liquor GI's has largely been conducted through the active agency of its INAO (Institut

National des Appellations d'Origin). France's GI's of course also extend to other agricultural products such as butter, cheese, honey, lentils, and even lavender (for the production of perfume and perfumed products). The same can be said for the United Kingdom and its GI protection, for example, of SCOTCH whisky/SCOTCH, through an industry organization of producers known as the Scotch Whisky Association ("SWA") which closely watches the whisky and spirit market worldwide to ensure that no misrepresentation occurs based on whisky or spirits from other jurisdictions. In this regard, South Africa has in the past seen swift and determined High Court litigation by the Scotch Whisky Association to stop such misrepresentation.

ABOUT GI's

To date a large number of GI's, including the abovementioned examples, have been registered in the EU to provide the necessary legal protection against imitation by third parties. By comparison to the EU's rich and varied agricultural food, wine and spirits heritage, South Africa has had but a few agricultural food (product) names or terms that were recognized as GI's.

These were originally ROOIBOS tea, HONEYBUSH tea, and KAROO lamb. However, South Africa has many wine-producing towns/centres and areas (or so-called wine districts) that include well-known names that can also be considered as GI's in their own right such as CONSTANTIA, STELLENBOSCH, PAARL, WELLINGTON, WORCESTER, SWARTLAND, KLEIN KAROO.

However, in the past, the above first-mentioned three South African GI's (or others) have not enjoyed any statutory legal protection. Accordingly, in the past, parties have been

obliged to resort to the common law and to rely on remedies such as unlawful competition and passing off. This has, of course, required costly litigation before the High Court. This position has similarly applied to the GI's of foreign countries and their producers who market their products in South Africa.

A few comments as set out hereunder, about the abovementioned three local GI's ie ROOIBOS tea, HONEYBUSH tea and KAROO lamb may be appropriate and interesting.

It should be mentioned at the outset that, while GI's usually include the name (or a variation thereof) of the place of origin, this is unusually not the case with either ROOIBOS or HONEYBUSH tea. These are both merely descriptive names or terms for the two respective plants from which the respective products are made. In the author's respectful view, a more proper or classical GI name for ROOIBOS tea would possibly be, for example, CEDERBERG tea or CEDERBERG ROOIBOS tea - and for HONEYBUSH tea, for example, OVERBERG tea or OVERBERG HONEYBUSH tea. This would indicate that the respective plants for these two teas originate from and grow naturally (with Rooibos plants now being cultivated) in these two particular areas and their surrounds.

By comparison to the GI's ROOIBOS tea and HONEYBUSH tea, the GI KAROO lamb is cast in the conventional GI form by indicating the particular region where the particular lambs/sheep are reared namely in the KAROO. Although ROOIBOS and HONEYBUSH plants are used mainly to produce the two respective teas (as well as blends of these two teas), in particular ROOIBOS plants and extracts made therefrom are also used in other products such

as soaps and shampoos, cosmetic products, skin and healing creams, etc.

Interestingly, ROOIBOS tea has found its way into coffee shops, not only in South Africa but also in countries abroad, where it is offered both as a tea in its own right and as a component of various unique beverages such as Red Latte, Red Espresso and Red Cappuccino (a la its well-known coffee counterparts).

Last but by no means least, historically ROOIBOS plants and its infusions, including some alleged health benefits, were known for centuries to the earliest inhabitants of the Cederberg region namely the indigenous Khoisan people. This knowledge was shared with, and passed on to, the early European settlers (of the 17th century and in later years). However, no formal acknowledgement of (the source of) this traditional knowledge, or its transfer, had ever been expressed, and no benefit-sharing with the Khoisan community had ever been implemented.

These long-standing problems have recently received attention, and this will be explained in further detail below ie under the heading "Important Recent Developments etc".

SOME TECHNICAL ASPECTS OF ROOIBOS AND HONEYBUSH

Some clarification is required regarding "tea" terminology. It should be explained that interestingly, ROOIBOS and HONEYBUSH plants are part of the Fynbos biome found mainly and uniquely in the Western Cape, and are typical Fynbos plants. These plants grow as broom-like bushes or shrubs which bear long spiky and needle-like stalks but not flat or flattish leaves. These two plants are not tea plants per se but are in reality herb bushes - like other Fynbos (and Karoo bushes). Hence when

soaked/infused in boiling/hot water, their cuttings produce a “herbal infusion” and, strictly-speaking, not a “tea” as such (or in the narrow sense of a “tea”).

Technically speaking, teas (both green and black/processed) are produced and made from the (flat) leaves of various plants of the Asian evergreen tea shrub species known as *Camellia sinensis* (which is a totally different plant species and which, to the knowledge of the writer, does not grow in South Africa). However, in this article, for reasons of historical and common usage, the loose and widely used descriptive term “tea” is used to refer to the infusions of ROOIBOS and HONEYBUSH plants, respectively.

ROOIBOS tea

ROOIBOS plants which occur in various forms of the species *Aspalathus linearis*, are part of the legume family (Fabaceae), and grow as a broom-like bush or shrub. These shrubs occur and grow naturally in the Western Cape Cederberg Mountains (and also in adjacent parts of the coastal winter rainfall area and inland in the winter rainfall area of the Karoo in the Northern Cape Province). ROOIBOS tea is made from selected forms of the above species that are found mainly, and traditionally, as mentioned above, in the Cederberg Mountains and its surrounds. Currently Rooibos plants are mainly cultivated and then processed (-see further below). Cultivation takes place generally on sandy soils in the valleys of the Olifants River, the Hex River, and the Breede River. However, small-scale harvesting of ROOIBOS cuttings from shrubs growing wild in the Cederberg Mountains takes place, and is sold as “green” (ie unprocessed) ROOIBOS tea - as compared to the more commonly-known “red” (ie processed) ROOIBOS tea.

Cultivated Rooibos cuttings, when harvested, are chopped very finely and then bruised to ensure that an important chemical reaction takes place that releases the characteristic flavour and colour. After watering and airing, the cuttings are left to “sweat” in heaps, during which the above-mentioned process of fermentation (ie oxidation) takes place, causing the cuttings typically to become reddish-brown in colour and to develop a sweetish flavour. After such “sweating”, the heaps are spread out in large drying yards and left out in the open to dry in the sun, followed by packaging of the (processed) brown/red fine tea cuttings.

ROOIBOS tea is known as a health product ie being low in, or not containing, certain undesirable compounds but containing other health-promoting compounds, and therefore having some or potential health benefits. There has been considerable scientific study and numerous publications on ROOIBOS tea and its contents in this regard (as will be seen from a Google or Wikipedia search). The chemical components present in ROOIBOS tea have been scientifically established with certainty. However, while some health studies of certain of these compounds have been conducted on animals many of the other health benefits have not been proven in human trials. Various health benefits have been observed and some are claimed on an anecdotal basis. Some details of the above are set out below.

ROOIBOS tea (sometimes also called “Red” tea or “Bush tea” or “African Red tea”) has been shown scientifically to be low in tannins (as compared to ordinary black or green tea), and to be free from caffeine and oxalic acid (-the latter being known to cause kidney stones). It has also been shown scientifically to contain vitamins (such as vitamin C) and minerals (such as magnesium), and very importantly to be rich in

polyphenols including flavonoids, flavonols, flavones, flavanones, dihydrochalcones, aspalathin and nothofagin, to name only a few of these compounds which importantly act as anti-oxidants in the human body.

Rooibos plants are the only known natural source of the polyphenol anti-oxidant aspalathin which has been shown in animal studies to have anti-diabetic effects.

Among the above polyphenols are flavonoids, such as chrysoeriol and quercetin, known to have anti-oxidant and anti-inflammatory properties, and which assist *inter alia* in dealing with allergies ie having anti-allergic activity. Additional flavonoids are luteolin and orientin, which studies have shown to assist in increasing mineral uptake in bones. Test-tube studies have shown that the anti-oxidants quercetin and luteolin can kill cancer cells and prevent tumour growth - so ROOIBOS tea may have the potential to reduce cancer risk (although no human studies have been conducted to date).

Test-tube studies have also shown that ROOIBOS tea may assist heart health by improving good cholesterol levels (HDL); and may assist in increasing metabolism and fat-burning to promote weight loss (although no human studies have been conducted to date). Beneficially, ROOIBOS tea, unlike coffee and decaffeinated coffee, does not inhibit iron absorption in the human body.

The processed cuttings of ROOIBOS tea have been found to contain benzoic acid and cinnamic acid, both being beneficial nutrients. It has also been found to have nutrients that assist as an anti-spasmodic agent - as used to deal with acid reflux and colic. Lastly and of some importance, ROOIBOS tea contains alpha-hydroxy acid which is known and used as a (or sometimes

the) major component in various beneficial skin treatments.

Unverified and largely anecdotal benefits include claims for promoting bone health, for treating indigestion, for treating sleep problems (insomnia), for dealing with allergies (including in babies and infants), for colic, for headaches; or for dealing with other health problems.

HONEYBUSH tea

HONEYBUSH plants, in turn, also being part of the Fynbos biome and a typical Fynbos shrub, are found in various forms of the species *Cyclopia* such as *Cyclopia genistoides* - Coastal Honeybush, *Cyclopia intermedia* - Mountain Honeybush, and *Cyclopia subternata* - Marsh Honeybush. These occur and grow naturally in the mountainous areas of the Overberg region of the Western Cape Province, and further along the coast eastwards towards Port Elizabeth. Honeybush plants are a distant cousin of Rooibos plants i.e. are also part of the legume family (Fabaceae).

The yellow blossoms of the Honeybush shrub in the wild have a honey-like scent - hence its name. Its infusions in boiling/hot water are slightly sweeter than Rooibos tea. Interestingly, HONEYBUSH tea has been found to have substantially higher levels of polyphenols than ROOIBOS tea - so logically it may have increased health benefits.

Honeybush plants are much scarcer in the wild than Rooibos plants, and mostly wild/natural Honeybush plants are used for commercial purposes. However, cultivation of Honeybush has started on a small scale. Both black and green tea are produced, and blends of ROOIBOS tea/HONEYBUSH tea (eg in a ratio of 70% to 30%, respectively) are sold commercially. The Honeybush industry is still a small industry

compared to the Rooibos industry, but it has considerable potential for growth.

KAROO lamb

In respect of KAROO lamb, interestingly certain of the various Karoo bushes/shrubs that sheep and lambs graze include herbs or herb-like substances that characteristically influence the flavour of the meat giving it a unique and recognizable herb-like taste. Research in this regard had been carried out on Karoo bushes by Prof Kirstein of the University of Pretoria some years ago. He was able to identify a number (-some five or six) of these unique herb-like substances in certain Karoo bushes that apparently do not grow in all parts of the Karoo.

UNFOLDING OF GI's IN SOUTH AFRICA

The long-standing importance that France has always attached to its regional wine names was first confirmed by a bi-lateral agreement (referred to informally as the "Crayfish Agreement") between France and South Africa about 70 years ago. In terms of that agreement, South Africa had undertaken to cease all use of French wine and spirits regional names in respect of wines and spirits produced in South Africa. These included names such as Bordeaux, Burgundy, Champagne, Cognac, etc. This will explain why, for example, South African wine makers have for many years referred to their twice-fermented sparkling wines as "Cap Classique" and not as "Champagne" – and have referred to the local method of manufacture as the "Method Cap Classique" or "MCC" and not as the "Methode Champenoise" (although the local method is technically the same as the French method of making Champagne.

In 2002 following trade negotiations between the EU and South Africa, these two parties had entered into another Agreement on Trade in Wines and Spirits. In terms of that Agreement,

South Africa had agreed that it would cease use of the fortified-wine terms PORT and SHERRY because these were important GI's in the EU (and used for the marketing of those well-known fortified wines from, and produced in, Portugal and Spain, respectively). In terms of that agreement, South Africa was given a 12-year phasing out period, and the South African wine industry has in the meanwhile adopted alternative general terms for these wines. The general term "CAPE" has been adopted for the former Port-type locally produced fortified wines such as CAPE Ruby, CAPE Tawny, and CAPE Vintage. More descriptive terms including and such as "Pale Cream", "Medium Cream" and "Full Cream" have been adopted for the former Sherry-type locally produced fortified wines.

Reverting to the term ROOIBOS, there had been two separate international attempts by third parties to wrongfully adopt the term ROOIBOS internationally. In the first attempt, about 30 years ago, a South African business had commenced selling cosmetic products that incorporated ROOIBOS tea/extract as an element of the products, in the USA. That entity registered ROOIBOS as a trade mark in the USA, and sold the business to a USA entity. Thereafter, the USA trade mark registration came to the attention of the South African government, and more particularly the DTL, which successfully applied to expunge the USA trade mark registration.

In the second attempt, about 6 years ago, a French entity applied to register ROOIBOS as a trade mark in France for its business. Again, this was brought to the attention of the South African government which took the necessary steps to prevent registration of ROOIBOS as a trade mark in France by that French entity.

Realizing that protection of some kind was required to protect the ROOIBOS industry, the South African government took a first step to regulate the use of ROOIBOS by issuing a notice in the Government Gazette about 5 years ago, in terms of the Merchandise Marks Act. These provisions inter alia regulated the use of the term ROOIBOS in South Africa to products, including tea of course, which must contain ROOIBOS or an extract of ROOIBOS, in other words providing a kind of product guarantee that protects both the consumer and the industry. However, this did not provide effective legal protection for the name or term ROOIBOS per se.

In 2016, the EU and the South African Development Community ("SADC") comprising South Africa, Botswana, Lesotho, Swaziland (now eSwatini), Namibia and Mozambique, entered into an Economic Partnership Agreement ("EPA"). This EPA includes a Protocol on GI's and on trade in wines and spirits between the EU and South Africa.

It is important to note that the Protocol replaces the 2002 Agreement on Trade in Wines and Spirits between the EU and South Africa. In the Protocol, South Africa has agreed to protect 251 EU GI names for agricultural products and foodstuffs such as various fruits, vegetables, cereals, vinegars, cheeses, meat, and fish/seafood & their products, beers, wines, and spirits, etc. In turn, the EU has agreed in the Protocol to protect 105 specified South African GI names in total – being the abovementioned 3 agricultural product names ie ROOIBOS, HONEYBUSH and KAROO LAMB; and 102 wine/spirit town and regional names such as CONSTANTIA, STELLENBOSCH, PAARL, WORCESTER, KLEIN KAROO, etc.

This means that South African wine and spirit producers, and those producing ROOIBOS and/or HONEYBOS tea and related products,

not forgetting KAROO lamb producers, will have the exclusive right to register and use these respective GI names in South Africa and in the EU countries, and will have the right to prevent other entities from registering and using these GI names in those markets in respect of these and other products. By the same token, reciprocal rights will apply in respect of the 251 EU specified GI names in South Africa, and in the other SADC countries.

In June 2017 Mr Talkmore Chidede, a researcher at the TRALAC organization, published an article in TRALAC's Newsletter entitled "Recognition and Protection of Geographical Indications in the EU-SADC Economic Partnership Agreement". The article had reported on the above EU-SADC EPA and the Protocol dealing with GI's and trade relating to wines and spirits. However, South Africa had in the intervening years not yet taken the necessary legislative steps to protect its GI's, and reciprocally the GI's of the EU countries, in terms of this EPA.

Looking to the future briefly in respect of the above EPA – What about Brexit? Will Brexit affect the EPA and the above position regarding the UK and South Africa, and if so, how? The position of the UK when it finally exits the EU in the near future, will be that the UK will cease to be a party to all EU trade agreements including the EU's above 2016 EPA with SADC (and thereby with South Africa). The UK and South Africa (alternatively SADC) will therefore be required to re-negotiate a suitable GI/trade agreement, possibly even a similar agreement/protocol to the 2016 EPA, in order to ensure that the respective South African and UK GI names are protected in South Africa (alternatively in the SADC countries) and reciprocally in the UK.

By Gaelyn Scott

The Greek Freak and celebrity trade marks



GAELYN SCOTT

Gaelyn is an executive at ENSAfrica. She heads up the firm's intellectual property ("IP") department. Gaelyn specialises in strategic brand management and the enforcement of IP rights, both locally and internationally, with extensive experience in Africa.

She is experienced in litigation and dispute resolution relating to IP rights, including trade mark infringement, passing-off and unlawful competition matters, trade mark oppositions, copyright litigation, franchising and licensing disputes, corporate name and domain name objections and Advertising Standards Authority complaints. She is a leading expert in the ASA field in South Africa.

One of the biggest names in US basketball right now is Giannis Antetokounmpo.

Giannis is huge in every way and he is the NBA's current MVP (Most Valuable Player). For years Giannis has been all over the sports news but now Giannis is in the IP news frame too.

He has become involved in trade mark disputes!

The name "Giannis Antetokounmpo" hardly rolls off the tongue. Which may just be why the basketball star has a nickname: "the Greek Freak".

If you are thinking that this does not sound like a very nice name, the moniker does of course refer to both the star's heritage and his sporting prowess. It is the nickname that is at the centre of the trade mark proceedings.

Nicknames are very common in the world of sport. In basketball Kobe Bryant was The Black Mamba or just plain Mamba, whereas LeBron James is King James. The world's greatest male tennis player is Fed-ex, followed closely by Rafa.

The most charismatic of the current crop of heavyweight boxers is the Gypsy King, whereas the most newsworthy football manager is the Special One.

In South Africa we like to give our sports personalities nicknames too. Remember Biff (Graham Smith), Rhoo aka The Chief (Lucas Radebe) and Nasty Booter (Naas Botha). In golf we had the Big Easy (Ernie Els) and, of course, the big daddy of them all, the Black Knight (Gary Player), who has recently been involved in legal proceedings for unpaid royalties with a company run by his son Marc (awkward) – these proceedings have resulted in Gary getting a USD 5million payout.

In some cases it may be the sportsperson or team that creates the nickname, but in others it's the fans, as famously happened in the case of Bafana Bafana (the South African football team), a name eventually and reluctantly acknowledged by the football authorities (SAFA) after it had become clear that it wasn't going to go away.

Greek Freak enforces his rights

Giannis instituted legal proceedings to enforce his rights against a number of companies in the USA that are using his nickname without approval. In an article that appeared on 3 June 2020 in The TMCA, “The Greek Freak Flexes His Trademark Muscles”, we are informed that these proceedings involve various online retailers, and that the unauthorised goods feature both the nickname and Giannis’s likeness. Giannis has obtained trade mark registrations for the name Greek Freak. He also has pending applications for Greek Fr34K, with 34 being his vest number. Giannis claims to have commercialised his nickname by licensing it, together with his image, to various companies.



[image source](#)

Celebrity trade marks

This story illustrates the extraordinary commercial opportunities that come the way of famous sportsmen and women, and indeed all celebrities. These opportunities aren’t limited to the celebrities’ real names, they might extend to nicknames, likenesses, signatures, catchphrases and squad numbers.

What the smart, or well advised, celebrity does is register their name, nickname, signature, likeness, catchphrase and the like as a trade mark. They register in the countries where they feel they are most likely to need protection and will certainly include countries that are commercially important and where piracy is very likely. They register trade marks for the goods and services in respect of which they are most likely to enter into licensing arrangements such as clothing, sporting goods and cosmetics, but licensing opportunities might also exist for a host of services.

The next step is to enter into licence agreements with manufacturing or service-oriented companies that then use the trade marks on goods or services. The celebrity receives royalty payments for the use of the trade marks. The wise celebrity monitors the markets to ensure that no unauthorised users are using the trade marks. If they do find unauthorised use, they enforce their rights and let it be known that they will not tolerate any infringements of their rights.

Fame is fleeting and wise celebrities know that they need to act quickly if they want to make a real fortune.



From the Juta Law Reports

The following judgments were
reported May to Jul 2020

Trademark – Infringement – Breach of interdict prohibiting infringement – Whether amounting to contempt of court order – Applicant having obtained interdict prohibiting respondent from using its AUTOFIT FITMENT CENTRE mark – Respondents breaching interdict by their continued use of the word AUTOFIT – Respondent denying that they were in contempt since they relied on advice by their legal representative refraining from using words FITMENT CENTRE in their name or logo while retaining only AUTOFIT would not contravene interdict – Court finding that the evidence advanced and the history of the parties' relationship indicated that the respondents' actions were wilful and *mala fide* – Finding of contempt of court made – Respondents each fined R10 000 and given suspended sentences of 30 days' imprisonment – Respondents also ordered to remove name and logo AUTOFIT FITMENT CENTRE and any reference to it from all their products, producing proof of this within 14 days. *Steelite Towbar and Silence Centre CC v Autofit Fitment Centre CC* Gauteng Division, Pretoria case No 84301/2017, 23 March 2020 (2020 JDR 980 (GP)), Molefi J, 15 pages

Trademark – Infringement – Application for interdict – Applicant seeking to interdict first respondent, an internal trade union, from using its trademarks and logo – Court finding that respondent's continued use of those could result in confusion in the world at large, as was apparent from a media statement made by one of the respondents – Applicant having complied with requirements for granting of interdict – First respondent interdicted from presenting, either in media or otherwise, that the first respondent forms part of the applicant, alternatively that the business of first respondent is that of or is associated with that of or relates to the applicant – Respondents also interdicted from using the name, alternatively the trademark(s), of the applicant – *South African Medical Association NPC v South African Medical Association Trade Union* Gauteng Division, Pretoria case No 2020/21526, 19 May 2020 (2020 JDR 1095 (GP)), Mokose J, 6 pages

Competition – Unlawful competition – Passing off – Interim interdict pending final interdict and ancillary damages claim – Appellant's OSTEOEZE GOLD joint care supplement – Respondent caused advertisement to be broadcast on national television in which it claimed that ingredient of OSTEOEZE GOLD constituted a health risk to certain categories of persons – Whether this amounted to false disparagement of appellant's goods – Initial advertisement withdrawn and replaced with one in which pictures of OSTEOEZE products blurred – Not sufficiently altered in opinion of court – Therefore amounting to unlawful competition – Interim interdict justified – *Nativa (Pty) Ltd v Austell Laboratories (Pty) Ltd* Supreme Court of Appeal case No 1289/2018 (2020 JDR 651 (SCA)), 19 March 2020, Schippers JA (Navsa and Molemela JJA and Eksteen and Mojapelo AJJA concurring), 10 pages

Competition – Restraint of trade – Enforcement – Urgent application for interdictory relief – Urgency contested – Effect of applicant’s inaction during crucial period – First respondent undertook not to compete with the applicant or to be employed by any of its competitors for a period of 12 months and within a radius of 250 km of Graaff-Reinet and Cradock – Allegation that first respondent actively soliciting clients of the applicant within area covered by restraint – Applicant was dilatory in approaching court – Self-created urgency meaning that matter must be struck from roll. *Oos Vrystaat Kaap Operations Ltd v De Klerk* Eastern Cape Division, Grahamstown case No 1075/2020, 3 July 2020 (2020 JDR 1371 ECG), Rugnanan J, 6 pages

Competition – Restraint of trade – Enforcement – Application for interdictory relief – Applicant, carrying on business as physiotherapist with 19 employees, formerly including respondent, who worked for applicant for nine years – Respondent having undertaken not to compete within 10 km for period of nine months and not to approach its suppliers – Respondent worked as locum over holidays in breach of restraint – Respondent denying that applicant had interest worthy of protection such as goodwill and that restraint against public policy – Court finding that applicant had protectable interest in trust relationships developed by respondent during her employment with applicant (customer trade connections) – Respondent would not be inactive and unproductive if restraint enforced – Interdict granted. *Deidre Steyn Physiotherapy Inc v Stander* Eastern Cape Local Division, Port Elizabeth case No 440/2020, 9 June 2020 (2020 JDR 1176), Gqamana J, 9 pages