



BIOPROSPECTING IN SOUTH AFRICA

INTRODUCTION

South Africa has a biodiversity of 10% of the world's plants; 7% of the world's reptiles, birds and mammals and 15% of known coastal marine species. Over and above, South Africa is a rich source of traditional knowledge concerning the use of biological resources for the healing of ailments and the like. (Bioprospecting Regulatory Framework Guideline)

THE NATIONAL ENVIRONMENTAL MANAGEMENT BIODIVERSITY ACT, 2004 (ACT 10 OF 2004) ("BIODIVERSITY ACT") AND RELATED LEGISLATION

The Biodiversity Act, together with the Bioprospecting, Access and Benefit Sharing (BABS) Regulations of 2008 (BABS Regulations) are the primary pieces of legislation dealing with bioprospecting, access to indigenous biological resources and material transfer and benefit sharing agreements in South Africa. ("Primary Legislation").

A host of other legislation and regulations feed into the Primary Legislation such as the National Environmental Management Act No. 107 of 1998 and the Marine Living Resources Act No. 18 of 1998 for example. From an intellectual property point of view the Patents Act of 57 of 1978 has been amended to reflect the Primary Legislation and South Africa's commitments to international treaties such as the Trade-Related Intellectual Property Rights Agreement (TRIPS). The Copyright Act 98 of 1978 has similarly been amended to cater for traditional knowledge.

Internationally, South Africa is a signatory of the Convention on International Trade and Endangered Species of Wild Fauna and Flora as well as the International Treaty on Plant Genetic Resources for Food and Agriculture.



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IMPORTANCE

The use of an indigenous biological resource from South Africa should always entail an analysis as to whether the Biodiversity Act is triggered together with its regulatory requirements extending and its permit system.

It is similarly important to determine whether the indigenous biological resource is accessed from an individual, a community, government owned land or a private owner (individual or entity) as this will determine whether access and benefit sharing agreements are required.

Under the Patents Act, 57 of 1978 it is important to keep the above in mind in the context of the "Statement on the use of indigenous biological resources, genetic resource, traditional knowledge or use" (Form P26) in respect of which a material misrepresentation made in respect thereof, which was known or ought reasonably to have been known to be a misrepresentation, can lead to the revocation of a patent.

TRIGGERING THE BIODIVERSITY ACT

The Biodiversity Act will, inter alia, be triggered depending on whether:

- i. one is using an indigenous biological resource and/or traditional knowledge; and
- ii. No exemption exists in respect of the indigenous biological resource; and
- iii. one is bioprospecting.

The Biodiversity Act also differentiates between phases of bioprospecting, namely a discovery phase verse a commercialisation phase. In the former phase research and development is conducted to determine whether a particular resource or resources show promise for use in one or more applications. In the latter phase, an identified resource is considered to have a commercial potential.

Assuming the instances that trigger the Biodiversity Act are satisfied, it becomes important to determine what permits and/or agreements are required.

PERMITS AND/OR AGREEMENTS

The necessity for access and benefit sharing agreements is in addition to the necessity of acquiring the necessary permits.

The following is a short, tabulated summary concerning permits:

In South Africa

Research other than bioprospecting (BP)	No BP permit. Collection/research permits may be necessary.
BP (discovery phase)	No permit but notification to relevant organ of state required.
BP (commercialisation phase)	BP permit needed.

Outside South Africa

Research other than bioprospecting (BP)	Export permit required.
BP (discovery phase)	Integrated BP and export permit required.
BP (commercialisation phase)	Integrated BP and export permit required.

Whether or not access and benefit sharing agreements are required depends on whether an indigenous biological resource is being sourced (including cultivation and the like) from a community who owns the relevant land in South Africa, an individual in said community who owns the land, and/or an organ of state that own the land in South Africa.

NON-COMPLIANCE / OFFENCES

A person convicted of an offence in terms of The Biodiversity Act is liable to a fine not exceeding R10 million (c.a. USD650 000), or an imprisonment for a period not exceeding 10 (ten) years, or to both such a fine and such imprisonment.

SERVICES

- Advising on whether the provisions and regulations of the Biodiversity Act are triggered.
- Advising on and interpreting factual matrices with reference to the requirements for a resource to classify as an indigenous biological resource and/or whether bioprospecting is taking place.
- Advising exporters of indigenous biological resources and overseas importers of said resources.
- Advising, assisting in and drafting the necessary forms and submissions for the obtention of necessary permits.
- Advising, assisting in, negotiating and drafting benefit sharing and access agreements.

EXAMPLE

Sceletium tortuosum, popularly known as kanna or kougoed, is a small genus of low growing succulent shrubs endemic to the Western, Eastern and Northern Cape of South Africa. San and Khoi people have long used the plant for its mood enhancing properties, with records of use dating back as far as 1662. In the 1990s, research was done on kanna in the Paulshoek and Nourivier communities of Namaqualand.

The people of these communities are of Nama origin and provided knowledge of the plant to the researcher. The San, however, are considered primary knowledge holders of this use.

A benefit-sharing agreement was negotiated between a local company and the South African San Council (representing the San in South Africa), who elected to include the communities of Paulshoek and Nourivier. The agreement provides for the payment of a fixed monetary value for three years and a percentage of the net proceeds thereafter. It also includes a once off payment for the development of a product endorsement logo by the San Council and a 1% payment for the exclusive use of the logo. The San Council may use the logo to endorse any other product that is not in competition. This project was awarded the first integrated export and bioprospecting permit by the Department of Environmental Affairs in October 2010. (Bioprospecting Regulatory Framework Guideline).



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