

# Dirty business for clean skin. – Nestlé’s Rooibos Robbery in South Africa

## **BRIEFING PAPER**

### **Updated Version - October 2010**

Nestec S.A has claimed 5 patents on the use of Rooibos and Honeybush. This briefing note is intended to provide a summary on:

- The current state of play on the issue
- The five patent applications;
- Nestec/Nestlé - the patent applicator
- Rooibos and Honeybush; and
- The international and national legislation governing the access and use of these resources.

## **1. Background**

In 2009 Nestec S.A., a subsidiary of Nestlé, filed five patent applications on specific uses of Rooibos and Honeybush for certain medicinal/cosmetic compositions and, among other, the prevention of inflammatory disorders. Both plants are endemic to South Africa and their use for the purpose of bio-prospecting requires, according to South African law, a permit, which Nestec S.A. failed to obtain. According to the South African Biodiversity Act (which implements the Convention on Biological Diversity in South Africa) a company needs a permit of the Government to perform research with commercial intent on, or patent the use of, genetic resources occurring in South Africa.

Further to the illegitimate use of South Africa’s biological resources, some South African producers have also expressed concern over the actual patent applications. They fear that such patents would possibly undermine their existing businesses in South Africa and elsewhere. From their perspective, further research is needed on the actual patent claims of Nestlé to determine what extent they satisfy the ‘novelty’ and ‘inventive step’ criteria common to patentability examination.

Finally, after substantial media coverage in both South Africa and Switzerland, Nestlé has responded to the allegations made in the media (see below), by rejecting any wrong-

doing. Nevertheless, in recent month Nestlé has begun to enter into benefit sharing negotiations with the South African government. With such actions, Nestlé has actually made the first step towards legally accessing South Africa's biological resources. We understand that the confidential negotiations are currently ongoing.

## 2. The Patents

The applicant of the five patents in question is Nestec S.A.. Nestec is the technical, scientific, commercial and subsidiary of Nestlé (and fully owned by Nestlé) whose units, specialised in all areas of the business, supply permanent know-how and assistance to operating companies in the Nestlé Group within the framework of the licence and equivalent contracts. It is also responsible for all scientific research and technological development, which it undertakes itself or through affiliated companies.<sup>1</sup>

All the five patents have been filed as WO patents<sup>2</sup> in 2009 (published in January 2010). None of the patents are granted yet in any of the designated states. The patents are as follows:

### A) Patent WO2010000564; **ROOIBOS AND INFLAMMATION**

Applicant: Nestec S.A.  
Filing Date: 05.06.2009  
Publication: 07.01.2010

#### **Main Claims:**

The claimed innovation is the use of a composition comprising *Aspalathus linearis* (Rooibos) or an extract thereof for the preparation of a product to treat and/or prevent inflammatory disorders- especially inflammatory disorders of the gut, osteoarthritis and rheumatoid arthritis.

The extract is obtainable by a water or an alcohol/water extraction from Rooibos plant material. The patent also seeks to cover the use of the composition for food products, drinks, food supplements, nutraceuticals, cosmetic products, pet food products or medicaments). The long list ranges from cappuccino to salad dressing and toothpaste to lipsticks. Of special note, is the use of the extract in a product together with probiotics.

### B) Patent WO 2010000580; **USE OF ROOIBOS OR ROOIBOS EXTRACTS WITH PREBIOTICS FOR SKIN AND HAIR**

Applicant: Nestec S.A.

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<sup>1</sup> Consolidated Financial Statements of the Nestlé Group (2009)

<sup>2</sup> WO Patents are patents, which have been filed through the Patent Cooperation Treaty (PCT) administered by the World Intellectual Property Organization. There are currently 142 Member States to the PCT.

Filing Date: 09.06.2009  
Publication: 07.01.2010

**Main Claims:**

The claimed innovation is an orally ingestible composition comprising *Aspalathus linearis* (Rooibos) or an extract thereof and at least one prebiotic. The extract is obtainable by a water or an alcohol/water extraction from Rooibos plant material. The composition is used for the preparation of a food product, a drink, a food supplement, a nutraceutical, a pet food product or a medicament to treat (inter alia) skin inflammation, reactive or dry skin, psoriasis, acne, ageing, wrinkles and for preventing hair and coat loss.

C) Patent WO2010000578; **USE OF HONEYBUSH OR HONEYBUSH EXTRACTS WITH PREBIOTICS FOR SKIN AND HAIR**

Applicant: Nestec S.A.  
Filing Date: 09.06.2009  
Publication: 07.01.2010

**Main Claims:**

The claims of this patent are identical with the claims of Patent WO 2010000580; USE OF ROOIBOS OR ROOIBOS EXTRACTS WITH PREBIOTICS FOR SKIN AND HAIR. The only difference being that *Aspalathus linearis* (Rooibos) is replaced with Honeybush.

D) Patent WO 2010000579; **USE OF ROOIBOS OR ROOIBOS EXTRACTS FOR SKIN AND HAIR**

Applicant: Nestec S.A.  
Filing Date: 09.06.2009  
Publication: 07.01.2010

**Main Claims:**

The claimed innovation is the use of a composition comprising *Aspalathus linearis* (Rooibos) or an extract thereof for the preparation of an orally administrable product for improving skin or hair health. This patent includes similar claims as WO 2010000580, with the exception of three claims related to the use of Rooibos combined with a prebiotic, which are not claimed here. An additional difference is that in this case the claims are on "the use" of a composition. WO 2010000580 claims the composition itself.

E) Patent WO2010000577; **USE OF HONEYBUSH OR HONEYBUSH EXTRACTS FOR SKIN AND HAIR**

Applicant: Nestec S.A.  
Filing Date: 09.06.2009  
Publication: 07.01.2010

**Main Claims:**

The claims of this patent are identical with the claims of Patent WO 2010000579; USE OF ROOIBOS OR ROOIBOS EXTRACTS FOR SKIN AND HAIR. The only difference being that *Aspalathus linearis* (Rooibos) is replaced by Honeybush.

### 3. Nestlé, L’Oréal and Cosmetics

It maybe surprising that Nestlé files patents in the cosmetic sector, but Nestlé is a major player in cosmetics. Nestlé holds a 30.5% share in L’Oréal (the biggest cosmetic producer worldwide) with the market value of the shares being US\$ 18 836 million<sup>3</sup>. Further Nestlé holds 50% of Innéov ([www.inneov.com](http://www.inneov.com)) – and the other 50% are held by L’Oréal<sup>4</sup>. Innéov is a cosmetic company specialising in food supplements for skin and hair. They call their products beauty pills. It is obvious that Innéov will be the company to commercialize products based on the patents WO 2010000577 to WO2010000580. Products against hair loss, wrinkles or acne are the core business of Innéov.

### 4. ROOIBOS AND HONEYBUSH

**Rooibos (*Aspalathus linearis*)**

	
<i>(Photo from <a href="http://www.phytochemicals.info/plants/rooibos.php">www.phytochemicals.info/plants/rooibos.php</a>)</i>	<i>(Photo from <a href="http://sarooibos.co.za/images/rooibos-farming/13.jpg">http://sarooibos.co.za/images/rooibos-farming/13.jpg</a>)</i>

*Origin*

The ancient San and Khoi people of South Africa are believed to be the first to discover that rooibos can be used in a refreshing brew.<sup>5</sup> The plant was then used by early settlers<sup>6</sup> as an alternative for black tea and for a range of medicinal practices. It continues to be a very popular drink in South Africa and is available in most South African households.

<sup>3</sup> Consolidated Financial Statements of the Nestlé Group (2009)

<sup>4</sup> Consolidated Financial Statements of the Nestlé Group (2009)

<sup>5</sup> <http://sarooibos.co.za/content/view/31/79/>

<sup>6</sup> For a history of rooibos see the South African Rooibos council: <http://sarooibos.co.za/content/view/31/79/>

Rooibos (which stands for 'red bush' in Afrikaans) is endemic to South Africa and only grown in the Cederberg Mountains in the Western Cape Province of the country. Efforts to grow the plant anywhere else have failed due to the particular climate and soil quality needed for its growth.<sup>7</sup>

*Commonly know medicinal properties<sup>8</sup>*

According to Phytochemicals.com Rooibos contains the following phytochemicals:

Aspalathin, Nothofagin, Caffeic Acid, Chrysoeriol, Isoquercitrin, Orientin, Isoorientin, Luteolin, Vitexin, Isovitexin, Luteolin, Rutin, Flavonoids, Quercetin, Polyphenols.

Rooibos is commonly used in South Africa for a range of medicinal uses – often in the form of tea and/or ointments<sup>9</sup>. These include among other, a large range of skin disorders, anti-inflammatory and anti-allergic properties, prevention and treatment of vascular diseases, Asthma, gastrointestinal disorders, anti viral properties and strengthening of the immune system.

According to Phytochemicals<sup>10</sup> Rooibos is the only known source of the phytochemical aspalathin. Studies in laboratories or on animals suggested that quercetin and luteolin help to prevent cardiovascular disease, some cancers and stroke. Rutin has been associated with the maintenance of blood vessels walls.

**Honeybush (Cyclopia spp.)**



Photos source: <http://www.itmonline.org/arts/honeybush.htm>

<sup>7</sup> <http://www.phytochemicals.info/plants/rooibos.php>

<sup>8</sup> For an overview of research references, see: <http://sarooibos.co.za/content/view/20/50/>

<sup>9</sup> Compiled from: <http://sarooibos.co.za/content/view/20/50/> and

<http://www.phytochemicals.info/plants/rooibos.php>

<sup>10</sup> See <http://www.phytochemicals.info/plants/rooibos.php>

## Origin

Honeybush is a shrub in the Fabaceae family (Leguminosae) which grows in the botanical zone in the fynbos biome that is endemic to the coastal regions of South Africa's Western Cape and Eastern Cape Provinces, broadly stretching between Darling to Port Elizabeth.<sup>11</sup>

It owes its name to its distinctive yellow flowers, which have a honey like scent. Similar to Rooibos the plant has been traditionally used by the Khoi and San as a beverage as well as for certain medicinal use. Early settlers then used the tea as a substitute for black tea, which subsequently developed into a major industry. The first documented use of honeybush dates back to 1705.<sup>12</sup>

There are approximately two-dozen species of Honeybush, whereas most commercial supply is obtained in the form of tea from the species *Cyclopia intermedia* and *Cyclopia subternata*. All honeybush species require a unique habitat to grow.<sup>13</sup>

According to the Agricultural Research Council there are currently 10 commercial growers who contribute approximately 30% of the total annual production of honeybush. The rest is harvested in the wild.<sup>14</sup>

## Medicinal use

Honeybush has been used traditionally for a range of medicinal qualities, including for its anti-coughs and calming properties through its content of pinitol. Its yellow flower pigments traditionally have been used as a dye and are now commercially explored.

It contains the following ingredients:

Flavones, isoflavones, coumestans, luteolin, 4-hydroxycinnamic acid, polyphenols, and xanthones.

Further research has explored honeybush's potential, among a large group of others, in the following fields<sup>15</sup>: blood-sugar and fat level lowering effects, prevention of breast, prostate and uterus cancer, anti-fungal properties, anti oxidant properties, anti inflammatory properties. Its high levels of Zinc and Calcium are of additional benefit to skin care.

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<sup>11</sup> See: [http://www.rooibos.ch/honeybush\\_info.html](http://www.rooibos.ch/honeybush_info.html)

<sup>12</sup> See: <http://www.arc.agric.za/home.asp?pid=4051>

<sup>13</sup> See: "Honeybush: Healthful beverage tea from South Africa by Subhuti Dharmananda, Ph.D., Director, Institute for Traditional Medicine, Portland, Oregon" <http://www.itmonline.org/arts/honeybush.htm>

<sup>14</sup> See: <http://www.arc.agric.za/home.asp?pid=4051>

<sup>15</sup> Compiled from [http://www.rooibos.ch/honeybush\\_info.html](http://www.rooibos.ch/honeybush_info.html) and <http://www.itmonline.org/arts/honeybush.htm>

## 5. INTERNATIONAL AND NATIONAL LEGISLATION

There are international and national laws that provide specific requirements regarding the use of natural resources, or genetic resources as often referred to in such legislation.

According to international law and the laws of the Republic of South Africa, Nestec S.A. are therefore obliged to comply with the following:

### **International**

#### *The Convention on Biological Diversity*

Pursuant to Articles 1, 8(j), and 15 of the *United Nations Convention on Biological Diversity (CBD)*<sup>16</sup> prior informed consent must be obtained from the provider country and the traditional knowledge holders prior to accessing genetic resources and its associated traditional knowledge. In the present matter, the Republic of South Africa is clearly the provider country (article 15.3 of the CBD) and hence Nestec S.A. is obligated to obtain consent for access to Rooibos and/or Honeybush. Additionally, Nestec S.A. is required to share the commercial and other benefits with the providers of the resources and the traditional knowledge on mutually agreed terms. The South African Government confirmed to Natural Justice and the Berne Declaration that Nestlé has never received the consent to access Rooibos or honeybush and has never negotiated a benefit-sharing agreement.

### **National**

#### *The National Environment Management: Biodiversity Act*

South Africa has complied with article 15.7 the CBD by enacting the *National Environment Management: Biodiversity Act, 2004*.<sup>17</sup> Pursuant to Sections 81-84 of Chapter 6 of this Act, Nestec S.A. may not engage in bio-prospecting<sup>18</sup> involving indigenous biological resources<sup>19</sup> without consent, which is obtained through the requisite permit issued by the Minister of Environmental Affairs. In order to obtain such a permit and comply with the conditions in the said Act and its concomitant regulations on *Bioprospecting, Access and Benefit Sharing (2008)* Nestec S.A. must disclose all information concerning the proposed bio-prospecting and the indigenous biological resources to be used, enter into a material transfer agreement that regulates the access to the resources and a

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<sup>16</sup> <http://www.cbd.int/convention/convention.shtml>

<sup>17</sup> <http://www.cbd.int/doc/measures/abs/msr-abs-za-en.pdf>

<sup>18</sup> Bio-prospecting, as defined in Chapter 1, section 1 of the National Environment Management: Biodiversity Act 2004, is any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation.

<sup>19</sup> The National Environment Management: Biodiversity Act, 2005 defines an indigenous biological resource as a species that occurs, or has historically occurred, naturally in a free state in nature within the borders of the Republic, but excludes a species that has been introduced in the Republic as a result of human activity.

benefit sharing agreement that provides for the sharing in any future benefits that may be derived from the bio-prospecting. Prior to the provision of such a permit, the National Environment Management: Biodiversity Act, 2004 also stipulates that the interests of indigenous communities whose traditional uses or knowledge of the indigenous biological resources have initiated or contributed to the proposed bioprospecting, must be considered. Further, pursuant to Section 82 of the said Act, a permit in such circumstances may only be granted when the applicant has disclosed all material information relating to the bioprospecting, obtained the prior consent of any affected indigenous community and entered into a benefit sharing agreement with them. The South African Government confirmed to Natural Justice and the Berne Declaration that Nestlé has never received the permits necessary to use South African genetic resources.

The patent applications also document that the abovementioned indigenous biological resources could be obtained through South African companies Afriplex, a company that supplies products and services in the nutritional, health food sector and Rooibos Limited, producers, processors and marketers of Rooibos. Pursuant to national legislation both these companies must also seek a permit from the Minister when the indigenous biological resource is to be used in bioprospecting.

## 6. NESTLÉ'S RESPONSE

As a result of significant media attention in South Africa and internationally, Nestlé responded to the allegations through its spokesperson Ravi Pillay. Included below are some of the responses of Nestlé to the initial claims. These responses are followed by direct replies from Natural Justice and the Berne Declaration.

1) *"South African suppliers provided Rooibos and Honeybush extracts and material to two Nestlé research facilities in Switzerland and France, which used it as part of their fundamental research programme in bioactive ingredients".<sup>20</sup>*

### **Reply Natural Justice/Berne Declaration:**

Pursuant to the Convention on Biological Diversity (CBD) and the South African National Environment Management: Biodiversity Act, (Biodiversity Act) the need for prior informed consent and sharing of benefits is triggered by the use of a genetic resource (or indigenous biological resource, as mentioned in South African law) no matter where the use takes place. In South African law, indigenous biological resources are defined, among others, as those that historically have come from South Africa, and not as those that have been collected in South Africa. It is therefore irrelevant whether Nestlé accessed the material directly in South Africa or through a supplier abroad. The fact is that Nestlé engaged in bioprospecting with commercial intent on South Africa's genetic resources without the necessary permit required by law.

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<sup>20</sup> See: <http://www.businessday.co.za/articles/Content.aspx?id=110254>

That Nestlé has accessed the material through a South African exporter does not exempt them from the legal obligation of obtaining a bioprospecting permit. Further, the South African exporter would also have to obtain an export permit, if the genetic resource is to be used for bioprospecting. Therefore the onus clearly falls on Nestlé to inform the exporter of its intent to use the genetic resources for bioprospecting.

Nestlé has an obligation to verify if the exporter had the necessary permits to export the plant extract and material for the purpose of bio-prospecting. This obligation is also explicitly mentioned in the ABS-Management Tool<sup>21</sup>, published by the Swiss State Secretariat for Economic Affairs [“Does provider have right to grant access?”]. If Nestlé uses genetic resources accessed by an exporter without the necessary permit, it could be seen as receiving stolen goods. The behavior of Nestlé is also in contradiction with its own business guidelines<sup>22</sup> and supplier guidelines which highlight the importance of respecting national law as well as ensuring that its suppliers respect national law.

2) *Nestlé's subsidiary Nestec had, following research, filed several patents in Switzerland to protect its research results, which showed potential benefits for consumers. “Nestec has not filed any patent relating to the plants themselves, or extracts of the plants.”*<sup>23</sup>

#### **Reply Natural Justice/Berne Declaration:**

The first claim in two of the patents reads: *“Use of a composition comprising [Rooibos/Honeybush] or an extract thereof (...) for improving skin or hair health (...)”*. In two other patents the first claim reads: *“An orally ingestible composition comprising [Honeybush/Rooibos] or an extract thereof and at least one prebiotic.”* Nestlé clearly claims the specific use of extracts of the plants and the extracts themselves in combination with prebiotics. In the description of patent WO 2010/000579 Nestlé write: *“One typical example of an extract of *Asphalatus linearis* [Rooibos] that can be used in the framework of the present invention is rooibos tea.”*

However, the central question here is not the exact wording of patent claims and whether the claims include the extract itself. The CBD and the South African Biodiversity Act refer to the use of a genetic/biological resource. There is no doubt that rooibos and honeybush have been used to engage in the research necessary to file the patents. Therefore the patent applications are proof that Nestlé engaged in bio-prospecting in a manner that is in conflict with international and national law. In some jurisdictions, such as South Africa's, this could result in the automatic refusal of granting the patent.

3) *“Nestlé has not made any commercial use of these patents, and has no plans to do so in the near future”. Should Nestlé decide to make commercial use of these patents then it would of course fully comply with the benefit-sharing provisions of*

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<sup>21</sup> See: [http://www.iisd.org/pdf/2007/abs\\_mt\\_standard.pdf](http://www.iisd.org/pdf/2007/abs_mt_standard.pdf)

<sup>22</sup>

<http://www2.nestle.com/CSV/CreatingSharedValueAtNestle/Pages/CreatingSharedValue.aspx>

<sup>23</sup> See: <http://www.businessday.co.za/articles/Content.aspx?id=110254>

*the South African Biodiversity Act.*<sup>24</sup>

**Reply Natural Justice/Berne Declaration:**

This response shows a fundamental misunderstanding of the current law. The South African Biodiversity Act is very clear that before a company engages in bio-prospecting it would require a bio-prospecting permit, which includes a benefit sharing agreement. The Biodiversity Act explicitly states that commercialization includes, among other, the following activities in relation to indigenous biological resources: *“the filing of any complete intellectual property application, whether in South Africa or elsewhere.”*

Cape Town, Zürich; October, 2010

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The briefing paper, “Dirty Business for Clean Skin: Nestlé’s Rooibos Robbery in South Africa” can be found at [www.naturaljustice.org](http://www.naturaljustice.org) or [www.evb.ch](http://www.evb.ch)

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<sup>24</sup> See: <http://www.businessday.co.za/articles/Content.aspx?id=110254>