



SADC-EU ECONOMIC PARTNERSHIP AGREEMENT: GEOGRAPHICAL INDICATIONS



ABOUT THIS PAPER

This paper identifies opportunities created by the SADC-EU EPA for geographical indications. It highlights the legislative framework both domestic and international. The procedural process and what that entails is provided for stakeholders wanting to register a GI.

The paper identifies present and future export opportunities created by the SADC EPA for GIs in South Africa. It provides a comprehensive list of all the South African GI products that will be covered by the agreement.

SADC-EU EPA OUTREACH SOUTH AFRICA

The Economic Partnership Agreement between the European Union and the Southern African Development Community EPA Group, comprising Botswana, Lesotho, Mozambique, Namibia, South Africa, and Swaziland, came into effect in October 2016.

The SADC-EU EPA Outreach South Africa initiative supports the implementation of the agreement in South Africa by providing information on its potential benefits. It comprises the Delegation of the European Union to South Africa, the Department of Trade and Industry, the Department of Agriculture, Forestry and Fisheries, and the South African Revenue Service. It is funded by the European Union.

DISCLAIMER

The views expressed in this paper do not necessarily reflect those of the various partners of the SADC-EU EPA Outreach South Africa initiative.

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FOR MORE ABOUT THE SADC-EU EPA

<https://sadc-epa-outreach.com>

Cover: Karoo lamb is South Africa's only GI in the meat industry – see page 12.

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ABBREVIATIONS

CIPC	Companies and Intellectual Property Commission
CTM	Community Trade Mark
DAFF	Department of Agriculture, Forestry and Fisheries
dti (the)	Department of Trade and Industry
EPA	Economic Partnership Agreement
EU	European Union
GIs	Geographical Indications
HACCP	Hazard Analysis and Critical Control Points
SACU	Southern African Customs Union
SADC	Southern African Development Community
TDCA	Trade, Development and Cooperation Agreement
TRIPS	Trade Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organization



Geographical indications (GIs) are defined under Protocol 3 to the SADC-EU EPA as “indications which identify a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin”.

WHAT IS A GEOGRAPHICAL INDICATION?

The SADC-EU Economic Partnership Agreement (EPA) is a trade agreement between the European Union (EU) and Southern African Customs Union (SACU) members plus Mozambique. The agreement incorporates a bilateral Protocol 3 on GIs and trade in wine and spirits between South Africa and the EU.

The agreement relies on the World Trade Organization (WTO) definition under Article 22 (1) of the Trade Related Aspects of Intellectual Property (TRIPS) Agreement, which defines geographical indications as “indications which identify a good as originating in the territory of a party, 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”. This includes, for example, some place names (and in some countries also words associated with a place) used to identify the origin and quality, reputation or other characteristics of products, such as “Champagne”, “Tequila” or “Roquefort” (WTO, online).

In essence, a GI is a sign used on products that have a specific geographical origin and possess qualities, characteristics or a reputation that are due to that origin. In GI literature, this has been described as the “product-quality-origin” nexus (Bramley, Bienabe and Kirsten, 2013). Thus, there must be a clear link between a product and its quality and original place of production. GI protection is necessary to ensure that local producers receive the benefits associated with their product quality. They are also intended to protect consumers against the misrepresentation of the actual origin of the product.

GIs can be divided into two main categories covering agricultural products (food stuffs, wines, spirits) and non-agricultural products (industrial products). The most common, long-standing and well-known GIs are for agricultural products. However, both enjoy protection through different legal systems.

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LEGAL PROTECTION OF GIs

International legal framework

GIs are one type of intellectual property rights that get protection if registered. GIs are protected in different countries and under regional systems through a wide variety of approaches. Often countries use a combination of two or more approaches. There are *three main approaches* used to legally protect GIs.

DIFFERENT APPROACHES TO PROTECTION OF GIs

Sui generis system or specific intellectual property right

Sui generis is a Latin term meaning of its own kin. In relation to Intellectual Property, more specifically GIs, it is a special system of law or specific law that considers geographical indications as a specific, separate intellectual property right.

Collective or Certification trade marks

A collective mark is used to indicate that the producer belongs to the certifying organisation.

A certification mark is used to indicate that the goods are of a certain quality or geographic origin.

Business practices

Methods focusing on business practices include administrative product approval schemes.

The scope and application of the three means of protection contain different features. For example, the *sui generis* and the collective or certification marks provide rights for collective use by interested parties that have complied with specific standards.

Paris Convention

At the multilateral level, there are many treaties that provide for protection of GIs. Treaties protecting intellectual property date back to the 1800s with the conclusion of the Paris Convention of 1883. The Paris Convention has 173 signatories and South Africa is one of them.

The treaty mostly applies to industrial property but also extends to the protection of geographical indications. The WTO's TRIPS agreement is one of the main instruments relied on for protection, with a commonly used definition of GIs (also adopted in the SADC-EU EPA).

Madrid Agreement

The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods is also an agreement designed to protect against counterfeit goods bearing a false or deceptive indication of source. Under the Agreement, signatory members implicated with exporting counterfeit goods bearing a false place of origin will be sanctioned and the goods seized on importation.

NAME OF TREATY	TOTAL MEMBERSHIP	NUMBER OF AFRICAN COUNTRIES
Paris Convention	173	47
Madrid Agreement on Indications of Source	35	4
Lisbon Agreement	26	6
TRIPS Agreement	163	41

Source: WIPO and WTO websites

Lisbon Agreement

The Lisbon Agreement is tailor-designed to protect appellations of origin – which is the geographical denomination of a country of origin, region or locality which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographic environment, including natural and human factors (WIPO, online).

The EU legal framework

The EU has a long history of GI protection dating back to the 19th century. The protection of GIs is at the core of the EU agricultural policy and covers a wide variety of products from both EU Member States and third countries (Insight Consulting, 2009).

The EU relies on two mechanisms for the protection of GIs; the EU *sui generis* system and the trademarks regime. This comprehensive framework protects GIs in wines, spirits, agricultural products and foodstuffs. At the EU level, the *sui generis* protection of GIs dates back to 1970 for wines, 1989 for spirits and 1992 for other agricultural and foodstuff products (Insight Consulting, 2009). Non-agricultural GI products at the EU level are protected by the Community Trade Mark (CTM) regime, which allows for the protection of geographical names under certain conditions. This mechanism is also available to agricultural products.

The protection of GIs is at the core of the EU agricultural policy and covers a wide variety of products from both EU Member States and third countries



RELEVANT SOUTH AFRICAN LEGISLATION FOR GEOGRAPHICAL INDICATIONS

Trade Marks Act

Liquor Products Act

Merchandise Marks Act

Protection of Traditional Knowledge

Agricultural Products Standards Act

The South African legal framework

Under the SADC-EU EPA, mutual protection of GIs is applicable only bilaterally to South Africa and the EU. Interestingly, South Africa does not have a history of protecting GIs and does not have specific legislation regulating the use of GIs. Historically for wines, the Wine of Origin Scheme has applied to all wines linked to a claim of origin, cultivar or vintage.

To protect GIs, parties have been relying on the various pieces of legislation available in South Africa under the existing intellectual property rights and business practices regime. The four main pieces of relevant South African legislation are the Trade Marks Act No 194 of 1993, Liquor Products Act No 60 of 1989, Merchandise Marks Act No 17 of 1941, and the Protection of Traditional Knowledge legislation. Each piece of legislation incorporates provisions to protect different geographical origins. For example, to protect geographical origins of wines, the Liquor Products Act applies and parties can obtain certification marks from the Wines and Spirits Board. The Trade Marks Act regulates the registration of both Certification Marks and Collective Marks. While the Traditional Knowledge legislation includes a provision that allows for GIs to be registered as certification marks or collective marks under the Trade Marks Act if those are capable of distinguishing geographical origin.

The Merchandise Marks Act regulates the “marking of merchandise and of coverings in or with which merchandise is sold and the use of certain words and emblems in connection with business”. The Act prohibits the use of any misleading mark or word in connection with any trade or business. This has been interpreted to extend to marks associated with GIs.

Another Act regulating geographical origins is the Agricultural Products Standards Act No 119 of 1990. The Act prohibits the false or misleading description of products. Currently the Act under section 6A provides that the Minister (of Agriculture) may, inter alia “taking into account other agricultural laws and the Republic’s international obligations, by notice in the Government Gazette prohibit the use of specified geographical or other names or terms in connection with the sale or export of a specified product”. This also shows the overlap that exists in the current pieces of legislation all dealing with the protection of geographical origins.

However, it is important to note that South Africa is amending the Agricultural Products Standards Act to extend the provisions on the protection of GIs in South Africa. The new proposed regulations were circulated for public comment in 2016. The proposed regulations include the application and registration process for GIs. The proposed regulations have yet to be finalised. Thus, any party that desires to register a GI can currently do so under the Liquors Act and the Trade Marks Act.



SADC-EU EPA PROVISIONS ON GIs

Prior to finalising the SADC-EU EPA, only EU GI names for certain wines and spirits were protected following the bilateral Agreement on Trade in Wines and Spirits signed with South Africa in 2002. Following the EPA negotiations, South Africa and the EU concluded a bilateral protocol on the protection of geographical indications and on trade in wines and spirits (Protocol 3).

Under Protocol 3 to the SADC-EU EPA, South Africa protects 251 EU GIs covering food (e.g. meats, cheeses, fruit, vegetables, olive oil), wines and spirits. These include well-known GIs such as “Feta” from Greece, “Aceto Balsamico di Modena” from Italy and “Roquefort” from France. In return, the EU protects 105 GI names from South Africa. These include 102 wine GIs that are closely aligned to the registered Wines of Origin in South Africa plus three additional non-wine agricultural products – Karoo Meat of Origin, Rooibos and Honeybush. The SA GIs protected by the EU and the EU GIs protected by SA are all listed in Annex I to the Protocol 3.

In addition, with a view to developing GIs in South Africa, it has the right to add up to 30 more GI names, provided these names do not conflict with the GIs already protected under the Protocol or the origin of these products. This would afford local producers protection for their GI names under the SADC-EU EPA framework. A process is underway for engagement between the Government of South Africa and interested industry associations on the identification of possible additional GIs. Some of the products under consideration include Cape Flora (such as the protea flower and fynbos), Cape Brandy, Cape Olive, Cape Aloe (or aloe verox), mohair and biltong.

A Special Committee on GIs – comprising EU and South Africa representatives – has been provided for to ensure implementation of the Protocol 3, including monitoring the development of Protocol 3, intensifying parties’ cooperation, exchanging information, notably product specifications and summaries thereof and generally improving bilateral dialogue on GIs.

It is also important to note that Protocol 3 only applies between the EU and South Africa, while other parties to the SADC-EU EPA (Botswana, Lesotho, Mozambique, Namibia or Swaziland) may join later.

SCOPE OF PROTECTION UNDER SADC-EU EPA

GIs listed in Annex I to Protocol 3 are protected against:

- a) Any direct or indirect commercial use of a protected name:
 - For comparable products not compliant with the product specification of the protected name; or
 - In so far as such use exploits the reputation of a geographical indication.
- b) Any misuse, imitation or evocation including:
 - Use in connection with an indication of the true origin of the product in question;
 - Use in translation, transcription or transliteration; or
 - Use together with words such as “kind”, “type”, “style”, “imitation”, “method”, or similar words or expressions.
- c) Any other false or misleading indication as to the provenance, origin, nature or essential qualities of a like product, on the inner or outer packaging, advertising material or documents relating to that product, and the packing of the product in a container liable to convey a false impression as to its origin.
- d) Any other practice liable to mislead the consumer as to the true origin of a like product.

REGISTRATION OF A GI IN SOUTH AFRICA

As South Africa does not have a special statute dealing specifically with GIs, by extension there is no special GI registration system. To register a GI, interested parties have to rely on one or more of the pieces of legislation governing GIs in South Africa.

The Trade Marks Act under Section 42(1) provides that “a mark capable of distinguishing goods or services certified by any person in respect of, inter alia, geographical origin from goods or services not so certified, will be registrable as a **certification mark**, provided that a mark may not be so registered in the name of a person who carries on a trade in respect of such goods or services”.

The provisions of the Act are qualified by another provision which states that they are applicable only “in so far as they can be applied”. The Act under section 43(3) also provides that the GI can be registered as **collective mark**. As such a GI is registered as either a certification or a collective mark.

In the case of registration as a certification mark, the person in whose name the registration is effected will be the proprietor of the mark, but such person may not himself carry on a trade in the goods concerned (section 42(1)). Therefore, the proprietor will generally be a certifying body. In the case of a GI registered as a collective mark, the association of which individual users are members will be the proprietor of the mark (section 43(1)).

Interested parties may submit their application to the registrar and the registrar shall advise the applicant of their decision on the application. In the case of acceptance, the application shall be advertised and thereafter be registered.

The Agricultural Products Standards Act does not provide for the registration of a GI. However, it has proposed new regulations which introduce the registration of GIs. Applications for GI shall be submitted to the Executive Officer with personal details of the applicant and product specification. Once the Executive Officer is satisfied that all the conditions have been met and that the information submitted is correct and complete, he/she shall publish a Notice in the Government Gazette for a period not exceeding 30 calendar days to invite written comments or objections on the proposed registration of the geographical indication or designation of origin. Thereafter, the GI will be registered if there is opposition to its registration.



EXPORT OPPORTUNITIES FOR SOUTH AFRICAN GIs

The EU is one of South Africa's main trading partners. The SADC-EU EPA offers new opportunities for South African exporters in the agricultural sector through the protection of GIs. Through the bilateral Protocol 3, products such as Rooibos, Honeybush and Karoo Meat of Origin, as well as 102 wines from areas like Paarl and Stellenbosch are protected.

For example, the protection of Rooibos as a GI allows rooibos producers and manufacturers to differentiate their product offering in the EU without fear of imitation or appropriation.

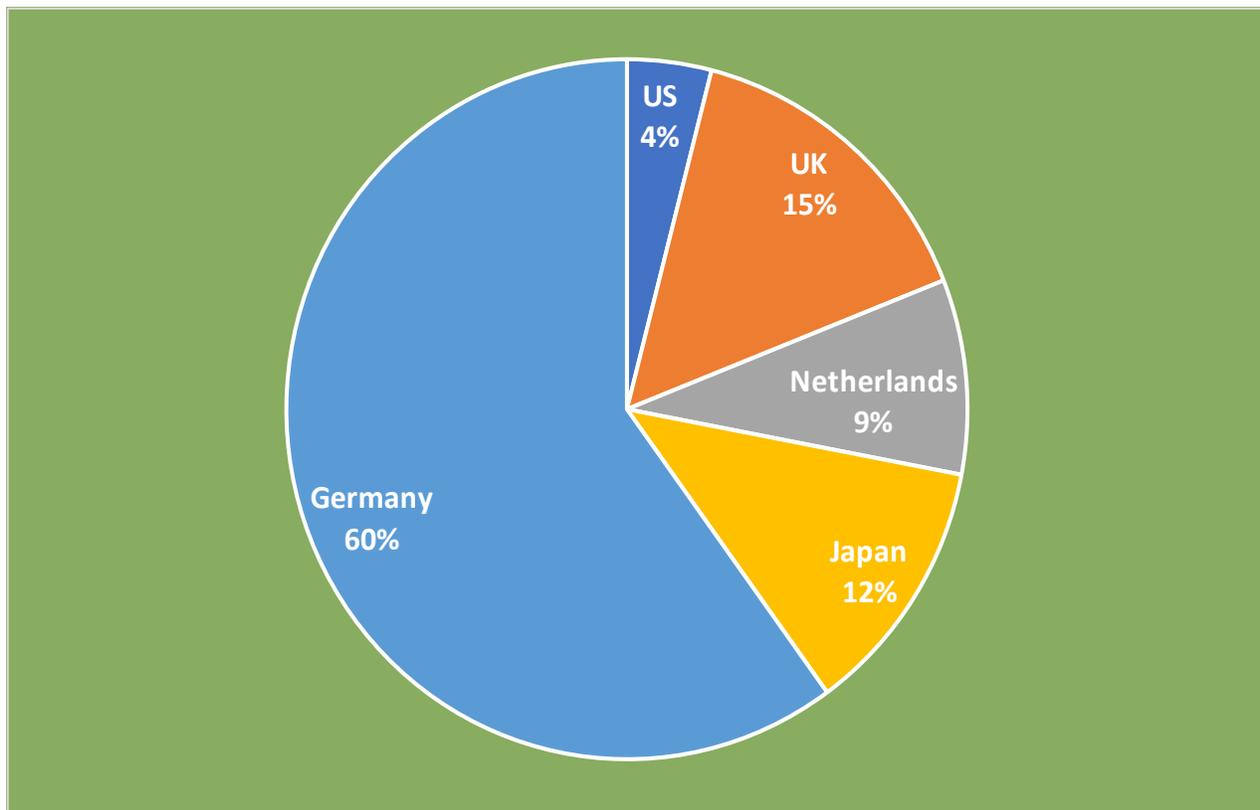
Rooibos grows only in the Cedarberg biosphere in South Africa where there are about 230 farmers and 10 processors. The market for specialty/gourmet tea is emerging and provides a potential product differentiation strategy for rooibos tea (DAFF, 2015).

There is significant scope to increase domestic and international market awareness and presence of rooibos. Trends towards natural ingredients in cosmetic producers have seen a strong rise in interest from multinational cosmetic companies looking for joint ventures and acquisitions of niche, natural cosmetic companies. The GI recognition opens up market access and it enables producers to obtain premium prices for protected products.

Rooibos is becoming increasingly more well-known in the European market and the SADC-EU EPA can support this positive momentum. The GI for Rooibos is registered in the EU, and "Red Tea" is protected under the Merchandise Marks Act in South Africa.

By obtaining a GI status, rooibos tea growers have exclusive rights of ownership to use the name. This also includes products that come from the rooibos plant and are approved by the relevant regulatory authority. In trade terms, a lot of rooibos is exported in bulk, and the opportunity to extract higher prices by creating value chains and diversifying products is not yet developed.

Export markets of conventional rooibos tea from South Africa during 2013



Source: DAFF, 2015 (information from SA Rooibos Council)

Geographical Indications can preserve the name of a product beyond the domestic market.

Honeybush tea comes from the Eastern Cape and Western Cape regions such as the Bredasdorp, Kouga, Baviaans, Tsitsikamma, Langeberg and Swartberg mountains.

The honeybush tea industry has a huge potential in the herbal tea category because of its unique characteristics. As a result, it has no international competition from other countries. According to the Department of Agriculture, Forestry and Fisheries (DAFF), several new markets exist which are not been explored by South African companies in this industry. For example, international buyers pack the tea themselves, develop their own brand names and trademarks, and then make more money from a unique South African product than the country itself. Exporters cannot simply stop selling bulk honeybush tea, but they could add more value by developing a variety of products that will meet the demands and preference of both the buyers and their consumers.

The increasing demand for health drinks creates more export opportunities for honeybush. The product is known for its unique health benefits as consumers are increasingly seeking functional ingredients in beverages. According to DAFF, sophisticated and health-conscious markets are showing strong demand for honeybush as a stand-alone tea, as well as for blending with other herbal teas and fruit juices. This is coupled with the fact that international demand for South African indigenous teas has steadily gathered momentum over the years and the markets for these are far from saturated, even in the largest importing countries (DAFF, 2011).

A GI is only one tool that can be used for product differentiation and there are challenges in both the process of registration as well as in the enforcement of the GIs, especially in export markets. The following is a summary of some of the issues raised by industries that have been provided GI protection under the SADC-EU EPA.

- Costly and time-consuming process of registration.
- Ensuring the ongoing certification and auditing of quality standards of producers using the GI.
- Maintenance of strong producer associations to oversee the standards for the GI.
- Marketing expertise – how to maximise commercial use of the protected GI.
- Expansion of GI protection to other markets, including China, US and Latin America and the need to exchange best practices and legal approaches.
- Legal costs to protect a GI and to challenge those who breach it.

GIs are relatively new to South African producers and therefore remain underused. There is a need for developing marketing strategies that take full advantage of the potential opportunities offered by the extended GI protection under the SADC-EU EPA, especially in European markets.



Geographical Indications can help differentiate a product by creating a link between a product and its qualities and a place and its people.



With the support of the provincial governments of the Northern and Western Cape, the farmers in the Karoo region successfully established the **reputation and uniqueness of its Karoo Lamb** and developed the rules of use for the name. These rules were established in a protocol registered at DAFF under the Agricultural Products Standards Act.

As well, a certification mark **Certified Karoo Meat of Origin** was registered and filed with the Companies and Intellectual Property Commission (CIPC) at the Department of Trade and Industry (the dti) by the Karoo Development Foundation.

Who can use the mark?

Only registered and certified farmers, abattoirs, meat processors, butchers, retailers and restaurateurs who are in compliance with the rules of the certification scheme.

Inspections and audits are undertaken regularly by a qualified independent organisation appointed by the Karoo Development Foundation.

The certification mark guarantees that:

- Meat originates from the Karoo in that the sheep are born in or raised in the Karoo for least six continuous months before slaughtering.
- Sheep graze freely on natural veld and are not raised in feedlots.
- Animals do not graze on permanent pastures six months before slaughtering.
- No growth hormones are used.
- The industry adheres to Code of Practice of Good Stockmanship and Animal Welfare Practices.
- Meat can be traced back to the farm of origin.
- Slaughtering and processing facilities comply with official food safety standards including HACCP (hazard analysis and critical control points).

WHY 'KAROO LAMB'

South Africa's only GI in the meat industry

The elements of legal protection – plus the dossier on the certification scheme containing the scientific proofs of the uniqueness and reputation and geographical identity – has made it possible for South Africa to include Karoo Meat of Origin as one of the three non-wine GIs in the final text of the EPA agreement.

The establishment and protection of GIs in South African agriculture has been **crucial to the signing of the SADC-EU EPA, but this alone will not bring automatic benefits** to South African producers.



WHAT SOUTH AFRICAN PRODUCERS NEED TO KNOW ABOUT USING GIs ON PRODUCTS COMPETING WITH EU EXPORTS

For South African producers and manufacturers, what they need to know about GIs is that registration of a GI entails the protection of intellectual property names associated with certain products. This means exclusivity and manufacturers without the requisite authority may not trade products under those names. In relation to South African producers and the GIs listed in the SADC-EU EPA, the dti gave notice on 4 February 2014 of its intention to prohibit the use of a large number of European food and drinks names in terms of section 15 of the Merchandise Marks.

The section expressly provides that the Minister of Trade and Industry can prohibit either absolutely or conditionally the use of any mark or word relating to any trade or business. Such listed names in future may only be used by producers in the countries indicated, or as per the Rules of Use. In the absence of authorisation, those GIs remain prohibited marks under the Merchandise Marks Act. Thus, any unauthorised use of such a mark or word would result in a criminal offence. However, it is important to note that the prohibition will not affect the rights of anyone already using any of the names, or names which are similar, for example “Feta”. The prohibition only relates to new entrants into the market.

SOUTH AFRICA IS THE SEVENTH LARGEST WINE-PRODUCING COUNTRY IN THE WORLD

South Africa is a force to be reckoned with in the global wine market and produces 4% (1.05 billion litres) of the global wine production (26.7 billion litres), according to the International Organisation of Vine and Wine, June 2017. The EU is the main export market for South African wines. Wine exports from South Africa show that, in 2016, 312 590 tons (67%) of all exported wine went to the European Union: 217 019 tons bulk and 95 571 tons bottled, according to the International Trade Centre.

Under the Trade, Development and Cooperation Agreement (TDCA), South Africa and the EU concluded a separate wine agreement that provided for the reciprocal protection of geographic names and defined a list of acceptable oenological practices, descriptions and presentations of wine (DAFF, 2011b).

Moreover, it included provision for phasing out the use of certain names such as “Sherry”, “Port”, “Ouzo” and “Grappa” by South African producers in exporting their products. The use of the terms “Port” and “Sherry” by South African producers has been forbidden in all markets since 1 January 2012. The wine agreement under the TDCA has now been replaced by the SADC-EU EPA under Protocol 3.

South African GIs for wine products are protected locally as Wines of Origin and these names are now recognised as GIs by the EU under the EPA.

Examples of South African wine GIs protected in the EPA

Eastern Cape	Banghoek	Cape Agulhas	Elandskloof	Hout Bay	Sutherland-Karoo
Northern Cape	Boberg	Cape Point	Elim	Klaasvoogds	Swartberg
Western Cape	Bonnievale	Cape South Coast	Elgin	Klein Karoo	Tygerberg
KwaZulu Natal	Bottelary	Ceres Plateau	Franschhoek	Klein River	Robertson
Limpopo	Breedekloof	Coastal Region	Goudini	Koekenaap	Prince Albert Valley
Paarl	Buffeljags	Constantia	Greyton	Lamberts Bay	Philadelphia
Stellenbosch	Bamboo Bay	Durbanville	Groenekloof	Malgas	Worcester
Riebeeckberg	Bottelary	Wellington	Napier	Malmesbury	

Source: Chidede (tralac), 2017

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Photo credit: Flowering Honeybush plant (page 11) South African Honeybush Tea Association

