

Council

C/Analysis/2020/1

Analysis Document

Original: English

Date: May 21, 2020

ANALYSIS DOCUMENT AS A BASIS FOR THE PROCEDURE FOR THE EXAMINATION BY CORRESPONDENCE OF THE DRAFT PLANT BREEDERS RIGHTS ACT OF ZIMBABWE CONCERNING ITS CONFORMITY WITH THE 1991 ACT OF THE UPOV CONVENTION*Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance*

1. By letter dated April 27, 2020, addressed to the Secretary-General of UPOV, The Honorable Air Chief Marshal (Rtd) Perence Shiri, Minister for Lands, Agriculture, Water and Rural Resettlement of Zimbabwe, requested the examination of the Draft Plant Breeders Rights Act of Zimbabwe (hereinafter referred to as the "Draft Act"), for conformity with the 1991 Act of the UPOV Convention (hereinafter referred to as the "1991 Act"). The letter is reproduced in Annex I to this document. Annex II contains a copy of the Draft Act in English.

PROCEDURE OF EXAMINATION OF LAWS OR DRAFT LAWS BY CORRESPONDENCE

2. Article 34(3) of the 1991 Act provides that "[a]ny State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited."

3. In the context of the organization of a single set of sessions from 2018, and in order to facilitate the examination of laws of future members, the Council, at its fifty-first ordinary session, held in Geneva on October 26, 2017, approved the proposals to amend document UPOV/INF/13/1 "Guidance on how to become a member of UPOV", in order to introduce a procedure for examination of laws by correspondence and adopted a revision of document UPOV/INF/13/1 (document UPOV/INF/13/2) (see document C/51/22 "Report", paragraph 20(g)).

4. On the above basis, the procedure of examination of laws or draft laws by correspondence in document [UPOV/INF/13/2](#) "Guidance on how to become a member of UPOV" provides as follows:

Applicability of the procedure of the examination of the Draft Law by correspondence

"11. The procedure of examination of laws by correspondence will be applicable if:

"(i) the request is received less than four weeks prior to the week of the earliest ordinary session of the Council and more than six months before the date of the subsequent ordinary session of the Council; and

"(ii) the analysis of the Office of the Union anticipates a positive decision and does not identify any significant issues concerning the conformity of the legislation with the UPOV Convention."

5. In accordance with paragraph 11 of document UPOV/INF/13/2, the letter with the request of examination of the Draft Act was received on April 27, 2020, being more than six months before the date of the fifty-third ordinary session of the UPOV Council. The Office of the Union anticipates a positive decision and has not identified any significant issues concerning the conformity of the Draft Act with the UPOV Convention.

Posting of the analysis document and the Draft Law on the UPOV website

“14. [...]

“(i) the analysis document and the law will be posted on the UPOV website within six weeks of receipt of the request and members and observers to the Council will be informed accordingly; and

“(ii) members or observers will have the opportunity to provide comments within 30 days from the date the analysis document is posted on the UPOV website.”

6. In accordance with paragraph 14 of document UPOV/INF/13/2, the Office of the Union has posted this Analysis document (document C/Analysis/2020/1) concerning Zimbabwe in order to provide an opportunity for comments from Council members and observers (see UPOV Circular E-20/050 of May 21, 2020). The Analysis document contains, in Annex II, the Draft Act of Zimbabwe.

BACKGROUND

7. Zimbabwe started the procedure to become a member of the Union by means of a letter of April 23, 1998, in which the Government of Zimbabwe requested the advice of the Council on the conformity with the 1978 Act of the Plant Breeders' Rights Act of Zimbabwe (Act). The Council examined the Act, at its thirty-second ordinary session, held in Geneva on October 28, 1998 (see document [C/32/16](#) "Report", paragraph 10) and:

“(i) decided that the Plant Breeders' Rights Act of Zimbabwe, after the incorporation of the substance of the changes suggested in document [C/32/12](#), would conform to the 1978 Act of the UPOV Convention;

“(ii) requested the Secretary-General to advise the Government of Zimbabwe that after the incorporation into the Act of such suggested changes to the satisfaction of the Office of the Union it would be able, at any time prior to April 24, 1999, to deposit an instrument of accession to the 1978 Act”.

8. On August 26, 2011, the Office of the Union received, from Mr. Claid Mujaju, Head, Seed Services Institute, a consolidated text of the Act, as amended in 2001, with a request to provide comments on suggested modifications in order to incorporate the essential provisions of the 1991 Act. Therefore, the text of the Act of Zimbabwe submitted to the Council in 1998 and the corresponding decision in relation to the 1978 Act are no longer relevant. On October 31, 2011, the Office of the Union transmitted its comments on the Act, as amended in 2001, on the basis of document UPOV/INF/6 "Guidance for the Preparation of Laws based on the 1991 Act of the UPOV Convention".

9. On March 23, 2018, the Office of the Union received a communication from Mr. Claid Mujaju, requesting information on financial aspects of becoming a UPOV member and introducing Mr. Tshuma, Legal Advisor, Head of the Legal Department, Ministry of Agriculture. On March 27, 2018, the Office of the Union, provided information on financial aspects, noted that the comments of the Office of the Union on the Act had been sent on October 31, 2011, and explained that the Office of the Union would need to receive the most recent version of the proposed amendments to the Act, in order to advise Mr. Tshuma on the next steps concerning the procedure to become a member of the Union.

10. From January 28 to 30, 2019, in Geneva, during bilateral meetings with the Delegation of Zimbabwe held in conjunction with the "Workshop on drafting legislation in accordance with the UPOV Convention" (Workshop for Laws), the Office of the Union discussed relevant provisions of the 1991 Act with regard to the Draft Act provided to the Office of the Union on December 24, 2018.

11. On January 21, 2020, Mr. Tshuma provided an updated version of the Draft Act to the Office of the Union and requested the provision of comments on the Draft Act in relation to the 1991 Act. On March 31, 2020, the Office of the Union provided comments on the Draft Act and explained the procedure for the examination of the Draft Act by the Council.

BASIS FOR THE PROTECTION OF NEW PLANT VARIETIES IN ZIMBABWE

12. In Zimbabwe, the protection of new plant varieties in accordance with the 1991 Act will be governed by the Draft Act, once adopted. An analysis of the Draft Act follows in the order of the substantive provisions of the 1991 Act.

Article 1 of the 1991 Act Definitions

13. Section 2 of the Draft Act contains definitions of breeder and variety corresponding to the definitions in Article 1(iv) and (vi) of the 1991 Act, respectively.

Article 2 of the 1991 Act: Basic Obligation of the Contracting Parties

14. Sections 1 and 14 of the Draft Act refer to the protection and grant of breeders' rights.

15. The preamble, at the end of the "Arrangement of Sections" of the Draft Act, states the following:

"AN ACT to provide for the registration of plant breeders rights in respect of varieties of plants and the protection of the rights of persons who are registered as the holders of such rights; and to provide for matters incidental to or connected with the foregoing. Seed Services has been designated the Certifying Authority and is the authority entrusted with the task of granting breeders' rights where the Head of Seed Services is the Registrar of Plant Breeders' Rights."

16. The Draft Act contains provisions corresponding to the basic obligation provided by Article 2 of the 1991 Act.

Article 3 of the 1991 Act: Genera and Species to be Protected

17. Section 3(3) of the Draft Act provides that "(t)his Act shall be applied to all genera and species, including all fungi" corresponding to the provisions of Article 3(2)(ii) of the 1991 Act.

Article 4 of the 1991 Act: National Treatment

18. Section 3B of the Draft Act contains provisions on national treatment corresponding to the provisions of Article 4 of the 1991 Act.

Articles 5 to 9 of the 1991 Act: Conditions of Protection, Novelty, Distinctness, Uniformity and Stability

19. Section 3(1) and (2) of the Draft Act contain provisions on the conditions of protection corresponding to the provisions of Articles 5 to 9 of the 1991 Act.

20. Section 37 of the Draft Act contains provisions concerning the optional provision of Article 6(2) "Varieties of recent creation" of the 1991 Act, as follows:

"(1) Where, according to section *three* (3), this Act applies to a plant genus or species to which it did not previously apply, varieties belonging to such plant genus or species shall be considered to satisfy the condition of novelty defined in section *three* (2)(a) even where the sale or disposal of to others described in that paragraph took place in Zimbabwe within four years before the filing date or, in the case of trees or of vines, within six years before the said date.

(2) The provision under paragraph (1) of this section, shall only apply to applications for a breeder's right filed within one year, at the latest, after the provisions of the Act apply to the genera or species concerned."

Article 10 of the 1991 Act: Filing of Applications

21. Section 7 of the Draft Act contains provisions on the filing of applications. The Draft Act does not seem to contain provisions which conflict with Article 10 of the 1991 Act.

Article 11 of the 1991 Act: Right of Priority

22. Section 7(5) of the Draft Act contains provisions on the right of priority corresponding to the provisions of Article 11 of the 1991 Act.

Article 12 of the 1991 Act: Examination of the Application

23. Section 8(4) of the Draft Act contains provisions concerning the examination of the application corresponding to the provisions of Article 12 of the 1991 Act.

Article 13 of the 1991 Act: Provisional Protection

24. Section 12A of the Draft Act contains provisions on provisional protection corresponding to the provisions of Article 13 of the 1991 Act, as follows:

“(1) Provisional protection is provided to safeguard the interests of the breeder during the period between the publication of the notice concerning the application for the grant of a breeder’s right in terms of Section *twelve* and the grant of that right.

“(2) The applicant is considered to be the holder of a breeder’s right in relation to any person who, during the period provided in paragraph (1), has carried out acts which, once the right is granted, require the breeder’s authorization as provided in Section *seventeen*. Legal action in respect of provisional protection can only be initiated after the right is granted.”

Article 14 of the 1991 Act: Scope of the Breeder’s Right

25. Section 17 of the Draft Act contains provisions on the scope of the breeder’s right corresponding to the provisions of Article 14 of the 1991 Act.

26. Section 17(3) of the Draft Act contains provisions concerning the optional provision of Article 14(3) “Acts in respect of certain products” of the 1991 Act as follows:

“(3) Subject to sections *seventeen B* and *seventeen C*, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.”

Article 15 of the 1991 Act: Exceptions to the Breeder’s Right

27. Section 17B(1) of the Draft Act contains provisions concerning the compulsory exceptions to the breeder’s right corresponding to the provisions of Article 15(1) of the 1991 Act.

28. Section 17B(2) to (4) of the Draft Act contains provisions concerning the optional exception under Article 15(2) of the 1991 Act, as follows:

“(2) The breeder’s right shall not be infringed if, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, farmers use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by section *seventeen* (4)(a)(i) or (ii).”

“(3) Provisions of subsection 2 above shall apply to farmers who cultivate less than ten hectares of land. The reasonable limits and the means of safeguarding the legitimate interests of the breeder shall be specified in the Regulations.”

“(4) The provisions of subsection (2) shall not apply to varieties of fruit, ornamentals and vegetables.”

Article 16 of the 1991 Act: Exhaustion of the Breeder's Right

29. Section 17C of the Draft Act contains provisions concerning the exhaustion of the breeder's right which correspond to the provisions of Article 16 of the 1991 Act.

Article 17 of the 1991 Act: Restrictions on the Exercise of the Breeder's Right

30. Section 19 of the Draft Act contains provisions concerning the restrictions on the exercise of the breeder's right which correspond to the provisions of Article 17 of the 1991 Act.

Article 18 of the 1991 Act: Measures Regulating Commerce

31. The Draft Act does not seem to contain provisions which conflict with Article 18 of the 1991 Act.

Article 19 of the 1991 Act: Duration of the Breeder's Right

32. Section 17A of the Draft Act contains provisions concerning the duration of the breeder's right which correspond to the provisions of Article 19 of the 1991 Act.

Article 20 of the 1991 Act: Variety Denomination

33. Section 9 of the Draft Act contains provisions on variety denominations corresponding to the provisions of Article 20 of the 1991 Act.

Article 21 of the 1991 Act: Nullity of the Breeder's Right

34. Section 15 of the Draft Act contains provisions on the nullity of the breeder's right corresponding to the provisions of Article 21 of the 1991 Act.

Article 22 of the 1991 Act: Cancellation of the Breeder's Right

35. Section 16 of the Draft Act contains provisions on the cancellation of the breeder's right corresponding to the provisions of Article 22 of the 1991 Act.

Article 30 of the 1991 Act: Implementation of the Convention

36. In relation to the obligation to "provide for appropriate legal remedies for the effective enforcement of breeders' rights" (Article 30(1)(i) of the 1991 Act), relevant provisions are provided in Sections 25A to 25E and Section 37A of the Draft Act.

37. Section 14(2) of the Draft Act provides that the Registrar is the authority entrusted with the task of granting breeders' rights in accordance with the provisions in Article 30(1)(ii) of the 1991 Act.

38. Sections 12, 14(3) and 43 of the Draft Act correspond to the obligation to publish information concerning applications for and grant of breeders' rights, and proposed and approved denominations as required in Article 30(1)(iii) of the 1991 Act.

General Conclusion

39. In the opinion of the Office of the Union, the Draft Act incorporates the substantive provisions of the 1991 Act. On that basis, once the Draft Act is adopted with no changes and the Act is in force, Zimbabwe would be in a position "to give effect" to the provisions of the 1991 Act, as required by its Article 30(2).

[Annexes follow]

ANNEX I

All correspondences should be addressed to

'MINISTER'

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ZIMBABWE

MINISTER OF LANDS,
AGRICULTURE, WATER AND RURAL
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Ngungunyana Building
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Private Bag 7701
Causeway
HARARE

MIN LAWARR/2/1

27 April 2010

Mr. Francis Gurry
Secretary-General
International Union for the Protection of New Varieties of Plants (UPOV)
34, chemin des Colombettes
1211 Geneva 20
Switzerland

Dear Secretary-General Gurry,

RE: SUBMISSION OF DRAFT PLANT BREEDERS RIGHTS ACT TO UPOV COUNCIL

I have the pleasure to inform you that the Government of Zimbabwe through my Ministry is in the process of amending the Plant Breeders Rights Act [Chapter 18:16].

Zimbabwe intends to adhere to the International Convention for the Protection of New Varieties of Plants of December 2, 1961, revised at Geneva on November 10, 1972, on October 23, 1978 and on March 19, 1991 (UPOV Convention).

Pursuant to the provisions of Article 34(3) of the UPOV Convention, I would appreciate it if the Council of UPOV could examine by correspondence the conformity of the proposed amended Plant Breeders Rights Act of Zimbabwe with the provisions of the UPOV Convention.

Sincerely yours,

Hon Air Chief Marshal (Rtd) P. Shiri
MINISTER OF LANDS, AGRICULTURE, WATER AND RURAL RESETTLEMENT
REPUBLIC OF ZIMBABWE



Enclosure: [Translation of the Draft Law in English]

[Annex II follows]

CHAPTER 18:16

DRAFT PLANT BREEDERS RIGHTS ACT

Acts 53/1973, 39/1979, 11/2001, 22/2001 (s. 4).

ARRANGEMENT OF SECTIONS

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PART III APPLICATIONS FOR AND GRANT OF PLANT BREEDERS RIGHTS

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7. Application for plant breeders rights and effective date thereof.
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- 12A. Rights of applicant for plant breeders rights
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16. Duty of holder of plant breeders rights to maintain reproductive material.
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- 25A. Court that may hear proceedings for infringement of plant breeders rights.
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30. Offences by officers.
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35. Powers of Registrar to authorize corrections.
36. Rectification of Register.
- 37A. Use of approved name.
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38. Evidence of certain entries and documents.
39. Inspection and provision of certified copies of entries in Register.
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42. [Repealed].
43. Particulars to be published.
44. Assignments.
45. Regulatory powers.

AN ACT to provide for the registration of plant breeders rights in respect of varieties of plants and the protection of the rights of persons who are registered as the holders of such rights; and to provide for matters incidental to or connected with the foregoing. Seed Services has been designated the Certifying Authority and is the authority entrusted with the task of granting breeders' rights where the Head of Seed Services is the Registrar of Plant Breeders' Rights.

[Date of commencement: 1st October, 1974.]

PART I

PRELIMINARY

1 Short title

This Act may be cited as the Plant Breeders Rights Act [*Chapter 18:16*].

2 Interpretation

In this Act—

“approved”, in relation to the denomination of a variety, means approved by the Registrar in terms of section *nine*;

“breeder” means: the person who bred, or discovered and developed, a variety, or

- the person who is the employer of the aforementioned person or who has commissioned the latter's work, or
- the successor in title of the first or second aforementioned person, as the case may be;

“Convention” means the International Union for the Protection of New Varieties of Plants, signed at Paris, France, on the 2nd December, 1961, and includes the revisions made in Geneva, Switzerland, on the 10th November, 1972, on the 23rd October, 1978, and on the 19th March, 1991;

“UPOV” means the International Union for the Protection of New Varieties of Plants founded by the International Convention for the Protection of New Varieties of Plants of 1961 and further mentioned in the Act of 1972, the Act of the 1991 Act;

“member of UPOV”, means a State party to the UPOV Convention of 1961/ Act of 1972 or the Act of 1978 or a Contracting Party to the 1991 Act;

“farmer” means a person who normally derives his sole or principal means of livelihood from agriculture carried on by him in Zimbabwe;

“legal representative” means—

- (a) the liquidator or receiver of a company;
- (b) the representative recognized by law of any person who has died, become insolvent or bankrupt or assigned his estate, is an infant or a minor, is of unsound mind or is otherwise under a disability;

“Minister” means the Minister of Agriculture or any other Minister to whom the President, has assigned the administration of this Act;

“officer” means the Registrar or any examiner or other officer appointed in terms of section *four*;

“plant” includes a fungus;

“plant breeders rights” means plant breeders rights granted in terms of section *fourteen*;

“*reciprocating country*” means:

(a) any State which is a party to the Convention or any other treaty to which Zimbabwe is also a party and which provides for the protection of rights in plant varieties; or

(b) any State which is not a party to the Convention or to a treaty referred to in paragraph (a) but which, in the Registrar’s opinion, effectively protects rights in plant varieties held by:

(i) individuals who are citizens or residents of Zimbabwe; or

(ii) companies or bodies corporate which carry on business in Zimbabwe or have their principal offices there;

“Register” means the Register of Plant Breeders Rights kept in terms of section *five*;

“Registrar” means the Registrar of Plant Breeders Rights appointed in terms of section *four*;

“propagating material” means a plant or part of a plant which is used for propagating the plants;

“sell” includes to offer, advertise, keep, expose, transmit, convey, deliver or prepare for sale or to exchange or to dispose of for any consideration whatsoever or to transmit, convey or deliver in pursuance of such a sale, exchange or disposal;

“*variety*” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder’s right are fully met, can be

— defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,

— distinguished from any other plant grouping by the expression of at least one of the said characteristics and

— considered as a unit with regard to its suitability for being propagated unchanged.

PART IA

APPLICATION OFACT

3 Varieties in respect of which plant breeders’ rights may be granted

(1) The Registrar shall grant a plant breeder’s right under this Act in respect of a variety if it is

(a) new,

(b) distinct,

- (c) uniform and
- (d) stable.

The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Section *nine*, that the applicant complies with the formalities provided for in this Act and that he pays the required fees.

(2) A variety shall be

(a) deemed to be new for the purposes of subsection (1)(a) if at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of Zimbabwe earlier than one year before the date of filing of the application and

(ii) in a territory other than that of Zimbabwe earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

(b) deemed to be distinct for the purposes of subsection (1)(b) if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be.

(c) be deemed to be uniform for the purposes of subsection (1)(c) if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics and

(d) be deemed to be stable for the purposes of subsection (1)(d) if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

(3) Genera and Species to be protected. This Act shall be applied to all genera and species, including all fungi.

3A Persons to whom a plant breeder's right may be granted

The following persons are eligible to file an application for the grant of a breeder's right:

(a) an individual who is a citizen or resident of Zimbabwe or a reciprocating country; or

(b) a company or body corporate which carries on business or has its principal office in Zimbabwe or a reciprocating country; where the State or that government, individual, company or body corporate, as the case may be, is a breeder of the new variety concerned.

3B National Treatment

(a) “Treatment”, without prejudice to the rights specified in this Act, nationals of a member of UPOV as well as natural persons residents and legal entities having their registered offices within the territory of a member of UPOV shall, insofar as the grant and protection of breeders’ rights are concerned, enjoy within the territory of Zimbabwe the same treatment as is accorded by this Act to the nationals of Zimbabwe. The said nationals, natural persons or legal entities of a member of UPOV shall comply with the conditions and formalities imposed on the nationals of Zimbabwe.

(b) “Nationals”, for the purpose of paragraph (a), “nationals” means, where the member of UPOV is a State, the nationals of that State and, where the member of UPOV is an intergovernmental organization, the nationals of the States which are members of that organization.

PART II ADMINISTRATION

4 Registrar of Plant Breeders Rights and other officers

Subject to the Public Service Act [*Chapter 16:14*], there shall be—

(a) an officer, to be styled the Registrar of Plant Breeders Rights, who shall exercise such functions as are conferred or imposed on the Registrar by this Act; and

(b) such examiners and other officers as the Minister considers necessary for the better carrying out of the provisions of this Act.

5 Register of Plant Breeders Rights

(1) The Registrar shall cause to be kept a Register of Plant Breeders Rights, in which shall be entered—

(a) particulars of plant breeders rights which are in force and of any licences issued in respect thereof; and

(b) notice of all matters which are required by or under this Act to be entered in the Register and of such other matters affecting the validity or ownership of plant breeders rights as the Registrar thinks fit.

(2) The Register shall be *prima facie* evidence of any matters entered therein which are required or authorized by or under this Act to be entered therein.

PART III APPLICATIONS FOR AND GRANT OF PLANT BREEDERS RIGHTS

6 Persons entitled to make applications for plant breeders’ rights

(1) Subject to subsection (2), an application for the grant of a plant breeder’s right in respect of a new variety may be made by the breeder.

(2) An application for the grant of plant breeders rights shall be made only by a person to whom the right may be granted in terms of section *three A and B*.

7 Application for a plant breeder's right and effective date thereof

- (1) An application for the grant of plant breeders rights shall be—
 - (a) made in the prescribed form; and
 - (b) lodged with the Registrar in the prescribed manner.
- (2) An assignee making or joining in an application shall furnish such proof of title or authority as the Registrar may require or as may be prescribed.
- (3) An application in terms of subsection (1) shall be lodged with the Registrar and
 - (a) shall give the full name of the breeder; and
 - (b) where the applicant or one of the applicants is the successor in title of the person who bred, or discovered and developed of the variety concerned, shall declare the name of the person who bred, or discovered and developed the variety concerned; and
 - (c) shall specify any foreign country where an application for the grant of rights has been or is being made and, in relation to any such application, shall specify
 - (i) its number or title; and
 - (ii) the date the grant was made.
- (4) Subject to subsection (5), the effective date of an application in terms of subsection (1) shall be the date on which the application is received by the Registrar.
- (5) Right of Priority
 - (a) Any breeder who has duly filed an application for the protection of a variety in one of the members of UPOV (the "first application") shall, for the purpose of filing an application for the grant of a breeders' right for the same variety with the Registrar, enjoy a right of priority for a period of 12 months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in the latter period.
 - (b) In order to benefit from the right of priority, the breeder shall, in the application filed with the Registrar, claim the priority of the first application. The Registrar shall require, the breeder to furnish, within three months from the filing date of the application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that first application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.
 - (c) The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time, after such rejection or withdrawal, in which to furnish to the Registrar any necessary information, document or material required for the purpose of the examination under PART III sections *eight* and *nine*.
 - (d) Events occurring within the period provided in paragraph (a) such as the filing of another application or the publication or use of the variety that is the subject of the first application, shall not constitute a ground for rejecting the subsequent application. Such events shall not give rise to any third- party right.

8 Description and samples of new variety

(1) An application in terms of section *seven* shall be accompanied by—

- (a) a complete description of the variety concerned; and
- (b) samples of propagating material necessary for the reproduction of the variety concerned in such quantities as the Registrar may require.

(2) The description referred to in paragraph (a) of subsection (1) shall—

- (a) commence with the proposed denomination for the variety concerned or giving it a temporary designation until the grant of plant breeders rights; and
- (b) contain or be accompanied by such other particulars as may be prescribed or required by the Registrar; and
- (c) specify the procedure to be used for the maintenance and propagation of the variety concerned.

(3) The Registrar may require—

that any additional information, documents or material which he considers necessary to determine whether or not the variety concerned fulfill the conditions established in section *three* (1) be furnished to him.

(4) Examination of application: Any decision to grant a breeder's right shall require an examination for the compliance with the conditions under section *three* (1). In the course of the examination, the Registrar may grow the variety or carry out other necessary tests the growing of the variety or the carrying of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out. For the purpose of examination, the Registrar may require the breeder to furnish all the necessary information, documents or material as specified in sections *eight* and *nine*.

9 Naming of the variety concerned

(1) The denomination of the variety concerned shall be proposed by the breeder but such denomination shall be subject to the approval of the Registrar.

(2) The Registrar may at any time before the grant of plant breeders rights, after considering any representations made by the breeder or an objector, reject any denomination proposed in terms of subsection (1) if, in the Registrar's opinion, the denomination proposed does not satisfy the requirements of subsection (3) or (4). If the denomination is rejected, the Registrar shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered by the Registrar at the same time as the breeder's right is granted.

(3) The denomination proposed in terms of subsection (1) shall be the generic name of the variety concerned and may consist of any word, combination of words, combination of words and figures or combination of letters and figures, with or without any meaning; it may not consist solely of figures except where this is an established practice for designating varieties, provided that:

- (i) whatever combination is used, the denomination shall allow the plant concerned to be identified;
- (ii) subject to paragraph (4), no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right; and

(iii) it must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder; in particular, it must be different from every denomination which designates, in the territory of any member of UPOV, an existing variety of the same plant species or of a closely related species.

(4) Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the Registrar shall require the breeder to submit another denomination for the variety.

(5) Where a denomination proposed in terms of subsection (1) has already been proposed or registered for the variety concerned in a member of UPOV, the Registrar shall approve only that denomination, unless it considers the denomination unsuitable. In the latter case, it shall require the breeder to submit another denomination.

(6) The Registrar ensures that the authorities of the members of UPOV are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the Registrar.

(7) Any person who offers for sale or markets propagating material of a variety protected in Zimbabwe is obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

(8) When a variety is offered for sale or marketed, it is permitted to associate a trademark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

(9) An appeal shall lie from any decision of the Registrar under subsection (2).

10 Refusal of application

(1) The Registrar may refuse any application made in terms of section *seven* if *prima facie* it appears to him that—

- (a) the application does not comply with the requirements of this Part; or
- (b) the variety in respect of which the application has been made does not fulfill the conditions established in section *three* (1); or
- (c) the breeder is not entitled in terms of this Act to make the application; or

(2) An appeal shall lie from any decision of the Registrar under subsection (1).

11 Amendment of application

With the consent of the Registrar, a person who has made an application in terms of section *seven* may, at any time before the grant of a plant breeder's right, make corrections concerning his application or the proposed denomination of the variety concerned.

12 Publication of application

(1) If, on consideration of an application in terms of section *seven*, it appears to the Registrar that the variety concerned fulfills the conditions established in section *three* (1) and the applicant is entitled to apply for plant breeders rights in respect of it, the Registrar shall publish a notice in the *Gazette* specifying the following particulars in relation to the application

- (a) the name of the applicant; and
- (b) the date of the application; and
- (c) the proposed denomination of the variety concerned; and
- (d) such particulars relating to the application and the variety concerned as may be prescribed or as the Registrar thinks appropriate.

(2) An appeal shall lie from any decision of the Registrar under subsection (1).

12A Rights of applicant for plant breeders rights

(1) Provisional protection is provided to safeguard the interests of the breeder during the period between the publication of the notice concerning the application for the grant of a breeder's right in terms of Section *twelve* and the grant of that right.

(2) The applicant is considered to be the holder of a breeder's right in relation to any person who, during the period provided in paragraph (1), has carried out acts which, once the right is granted, require the breeder's authorization as provided in Section *seventeen*. Legal action in respect of provisional protection can only be initiated after the right is granted.

13 Objection to grant of plant breeder's rights

(1) Any person may, within three months of the publication of the notice in terms of subsection (1) of section *twelve*, lodge with the Registrar in writing an objection to the grant of a plant breeder's right on any of the following grounds and no others—

- (a) that the application does not comply with this Part;
- (b) that the application is a fraud of the rights of the objector or of any person under or through whom he claims the rights;
- (c) that the applicant is not entitled to make the application;
- (d) that the application contains a material misrepresentation;
- (e) that the variety concerned does not fulfill the conditions established in section *three* (1);
- (f) that the denomination proposed for the variety concerned should be rejected or altered in terms of section *nine*;

(j)

(k)

[Paragraphs (j) and (k) repealed by Act 11 of 2001]

- (2) A notice of objection in terms of subsection (1) shall—
- (a) specify the grounds on which the objector objects to the grant of plant breeder's rights; and
 - (b) be accompanied by a statement setting out particulars of the facts alleged in support of the said grounds.
- (3) The Registrar may require that a notice lodged in terms of this section be supported by an affidavit and such other proof as he thinks necessary.
- (4) If the applicant for a plant breeder's right wishes to contest the allegations of the objector, he shall, within three months, or such further period as the Registrar may allow, from the date he is furnished with a copy of the notice of objection, lodge with the Registrar a counter-statement setting out particulars of the grounds upon which he will contest the objection.
- (5) The Registrar shall furnish—
- (a) an applicant for a plant breeder's right with a copy of any notice of objection lodged in terms of subsection (1);
 - (b) an objector with a copy of any counter-statement lodged in terms of subsection (4).
- (6) An objection in terms of subsection (1) or counter-statement in terms of subsection (4) may be lodged by the Minister on behalf of the State.
- (7) The Registrar shall, after hearing the parties if so required and considering the evidence, decide whether or not the objection should be upheld, and if he—
- (a) upholds the objection and, in the case of an objection on the grounds referred to in paragraph (g) of subsection (1) the applicant does not alter the denomination of the variety concerned, the Registrar shall reject the application and shall—
 - (i) forthwith notify the applicant and the objector in writing of such rejection; and
 - (ii) within one month of such rejection, publish in the *Gazette* notice of such rejection:
Provided that if an appeal in terms of subsection (8) is lodged, the notice shall not be published until such time as the appeal has been determined;
 - (b) does not uphold the objection, he shall notify the applicant and the objector of his decision.
- (8) An appeal shall lie from any decision of the Registrar under this section.

14 Refusal or grant of a plant breeder's right

- (1) On receipt of an application in terms of section *seven*, the Registrar shall, subject to sections *threeA*, *ten* and *thirteen*, investigate or cause to be investigated such application in order to determine whether—
- (a) the variety concerned fulfills the conditions established in section *three* (1); and
 - (b) the applicant is entitled in terms of this Act to make the application.
- (2) Subject to subsection (4), if, after investigation in terms of subsection (1), the Registrar considers that the variety fulfills the conditions established in section *three* (1); and that the applicant is entitled to apply for plant breeders rights in respect thereof, he shall—
- (a) grant to the applicant a plant breeder's right in respect of the variety; and

(b) note in the Register the prescribed particulars of the person to whom, and of the variety in respect of which, such right has been granted; and

(c) issue or cause to be issued to the applicant a certificate of registration of the plant breeder's right in respect of the variety.

(3) Within one month of the grant of a plant breeder's right in terms of subsection (2) the Registrar shall publish in the *Gazette* a notice giving such particulars of the grant as he thinks fit.

(4) The Registrar shall grant a plant breeder's right in terms of subsection (2) within a period of three years after the publication of the notice concerning the application in terms of subsection (1) of section *twelve* or such longer period as the Minister may, by notice in writing, in any particular case authorize, unless the application has been—

(a) refused in terms of section *ten*; or

(b) rejected in terms of section *thirteen*; or

(c) refused on the ground that the applicant is not qualified for the grant of plant breeders' rights in terms of section *three A*.

(5) If, after investigation in terms of subsection (1), the Registrar considers that—

(a) the application for a plant breeder's right does not comply with the conditions established in section *three* (1); or

(b) the applicant is not entitled to make the application;

the Registrar shall refuse the application and shall forthwith advise the applicant in writing of his decision and the grounds upon which it is based.

(6) An appeal shall lie from any decision of the Registrar under this section.

15 Nullity of a plant breeder's right

(1) Subject to subsection (4), Registrar shall declare a grant of a plant breeder's right void if he is satisfied

(a) that when the right was granted, the variety concerned did not fulfill the conditions of novelty or distinctness established in section *three* (1) (a) or (b); or

(b) where the right was granted essentially based upon information and documents furnished by the applicant, the conditions of uniformity or stability laid down in section *three* (1) (c) or (d) were not complied with at the time when the right was granted; or

(c) that the person to whom the right was granted was not entitled to it, and the right has not subsequently been transferred to the person entitled to it.

(2) The Registrar may make a declaration in terms of subsection (1) on his own motion or pursuant to an application in terms of subsection (3).

(3) Any person may apply to the Registrar in the prescribed manner for the making of a declaration in terms of subsection (1) in regard to any plant breeder's right, and any such application shall be accompanied by such deposit as may be prescribed.

- (4) The Registrar shall not make a declaration in terms of subsection (1) unless he has
- (a) informed the holder of the plant breeder's right concerned that he is considering making such a declaration and has provided the holder with a written statement of his reasons for considering it; and
 - (b) given the holder of the plant breeder's right concerned a reasonable opportunity to make representations in the matter.
- (5) A deposit paid with an application in terms of subsection (3)
- (a) shall be refunded to the applicant if the Registrar makes a declaration in terms of subsection (1) pursuant to the application;
 - (b) shall be forfeited to the State if no such declaration is made.
- (6) Within one month after making a declaration in terms of subsection (1), the Registrar shall publish notice thereof in the *Gazette*.
- (7) An appeal shall lie from any decision of the Registrar under this section.

16 Cancellation of the Breeder's Right

- (1) (a) The breeder's right may be cancelled if it is established that the conditions of uniformity or stability laid down in section *three* (1) (c) or (d) are no longer fulfilled.
- (b) Furthermore, the breeder's right may be cancelled if, after being requested to do so and within the prescribed period,
- (i) the breeder does not provide the Registrar with the information, documents or material deemed necessary for verifying the maintenance of the variety,
 - (ii) the breeder fails to pay such fees as may be payable to keep his right in force, or
 - (iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.
- (2) No breeder's right shall be cancelled for reasons other than those referred to in paragraph (1).

17 Rights of the holder of the plant breeder's right

- (1) (a) Subject to sections *seventeen* B and *seventeen* C, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:
- (i) production or reproduction (multiplication),
 - (ii) conditioning for the purpose of propagation,
 - (iii) offering for sale,
 - (iv) selling or other marketing,
 - (v) exporting,
 - (vi) importing,
 - (vii) stocking for any of the purposes mentioned in (i) to (vi), above.
- (b) The breeder may make his authorization subject to conditions and limitations.

(2) Subject to sections *seventeen B* and *seventeen C*, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

(3) Subject to sections *seventeen B* and *seventeen C*, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

(4) (a) The provisions of paragraphs (1) to (3) shall also apply in relation to

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

(ii) varieties which are not clearly distinguishable in accordance with section *three* (1)(b) from the protected variety and

(iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be essentially derived from another variety (“the initial variety”) when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,

(ii) it is clearly distinguishable from the initial variety and

(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

17A Duration of plant breeder’s right

Subject to this Act, the plant breeder’s right shall be granted for a term of twenty years and twenty-five years for vines and trees, counted from the date on which they were granted.

17B Exceptions to the Breeder’s Right

(1) The breeder’s right shall not extend to

(i) acts done privately and for non-commercial purposes,

(ii) acts done for experimental purposes and

(iii) acts done for the purpose of breeding other varieties, and, except where the provisions of section *seventeen* (4) apply, acts referred to in section *seventeen* (1) to (3) in respect of such other varieties.

(2) The breeder's right shall not be infringed if, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, farmers use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by section *seventeen* (4)(a)(i) or (ii).

(3) Provisions of subsection 2 above shall apply to farmers who cultivate less than ten hectares of land. The reasonable limits and the means of safeguarding the legitimate interests of the breeder shall be specified in the Regulations.

(4) The provisions of subsection (2) shall not apply to varieties of fruit, ornamentals and vegetables.

17C Exhaustion of the Breeder's Right

(1) The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Section *seventeen* (4), which has been sold or otherwise marketed by the breeder or with his consent in Zimbabwe, or any material derived from the said material, unless such acts

- (i) involve further propagation of the variety in question or
- (ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) [*Meaning of "material"*] For the purposes of paragraph (1), "material" means, in relation to a variety,

- (i) propagating material of any kind,
- (ii) harvested material, including entire plants and parts of plants, and
- (iii) any product made directly from the harvested material.

18 Issue of licences

(1) The holder of a plant breeder's right may apply to the Registrar for the right to be registered as a right in respect of which licences may be issued.

(2) On receipt of an application in terms of subsection (1), the Registrar shall cause to be entered in the Register notice that licences in respect of the rights concerned may be issued by the holder and thereafter, if the holder grants to any person a licence to sell, import, reproduce or multiply reproductive material of the variety concerned, he shall, within three months of granting such licence, notify the Registrar in writing of the grant of the licence and of any conditions, limitations or restrictions imposed in terms of subsection (3).

(3) In granting any licence referred to in subsection (2), the holder of the plant breeder's right may impose such conditions, limitations or restrictions as he thinks fit.

(4) Within one month of the entry being made in the Register, the Registrar shall publish in the *Gazette* a notice giving such particulars of the entry as he thinks fit.

(5) Where plant breeder's right are held by the State, the Minister may, on behalf of the State—

- (a) make an application in terms of subsection (1); and

(b) grant licences referred to in subsection (2) to such persons and subject to such conditions, limitations or restrictions as he thinks fit.

19 Compulsory licences

(1) Subject to this section, any person interested who can show that he has been unable to obtain a licence referred to in section *eighteen* in respect of a variety for which a plant breeder's right has been granted may apply in the prescribed manner for a compulsory licence only for reasons of public interest.

(2) An application in terms of subsection (1) shall—

(a) set out fully the nature of the applicant's interests, the facts on which he bases his case and the relief he seeks; and

(b) be accompanied by—

(i) an affidavit verifying the facts set out in the application; and

(ii) a certificate from the Minister stating that it is in the public interest that the variety concerned be made freely available to the public.

(3) An application in terms of subsection (1) shall be lodged with the Registrar who shall forthwith furnish the holder of the plant breeder's right with a copy of the application and the particulars accompanying the application.

(4) If the holder of the plant breeder's right wishes to contest the application, he shall, within one month or such further period as the Registrar may allow from the date he is furnished with a copy of the application, lodge with the Registrar a counter-statement setting out particulars of the grounds upon which he will contest the application, and the Registrar shall furnish the applicant with a copy of the counter-statement.

(5) On receipt of the counter-statement lodged in terms of subsection (4) or the expiration of the period specified in subsection (4), whichever is the earlier, the Registrar shall, unless the applicant withdraws his application, forward the application and the counter-statement, if any, to the Administrative Court, and the Administrative Court may order the holder of the plant breeder's rights to grant a licence such as is referred to in section *eighteen* to the applicant subject to such conditions, limitations or restrictions as the Administrative Court may fix, and in fixing the conditions the Administrative Court shall fix—

(a) the period of the licence; and

(b) the amount and method of payment of royalties to ensure that the breeder receives equitable remuneration.

(6) No order shall be made under subsection (5) which would be at variance with the Convention or with any other international treaty or agreement to which Zimbabwe is a party.

20 Surrender of the plant breeder's right

(1) A holder of a plant breeder's right who wishes to surrender such right may apply, by notice in writing, to the Registrar for the surrender of such right.

(2) Within one month of giving notice in terms of subsection (1), the holder of the plant breeder's right shall advertise in the *Gazette* that he intends to surrender such right.

(3) Any person who is aggrieved by the proposed surrender of plant breeder's right in terms of this section may, within three months of the date of the advertisement in the *Gazette* in terms of subsection (2), give notice to the Registrar in writing of his opposition to the surrender, which notice shall specify the grounds for his opposition.

(4) If, after hearing the holder of the plant breeder's right and any opponent who wishes to be heard, the Registrar is satisfied that the holder of the plant breeder's right should be permitted to surrender such right, he shall—

- (a) revoke the plant breeder's right; and
- (b) note in the Register that such rights have been revoked; and
- (c) call upon the holder to surrender the certificate of registration of plant breeder's right issued in terms of this Act:

Provided that where no notice of opposition has been given in terms of this section, it shall not be necessary for the Registrar to hear the holder of the plant breeder's right.

(5) Within one month of the revocation of plant breeder's right in terms of subsection (4), the Registrar shall publish in the *Gazette* notice of such revocation.

(6) An appeal shall lie from any decision of the Registrar under this section.

PART IV APPEALS

21 Appeals from decision of Registrar

Where this Act provides for an appeal from a decision of the Registrar, such appeal shall be made to the Administrative Court in accordance with this Part and the Administrative Court Act [*Chapter 7:01*] and the rules made thereunder.

22 Assessors

For the purposes of considering any appeal in terms of section *twenty-one*, the Administrative Court may appoint any person with special expert knowledge to act as an assessor in an advisory capacity in any case where it appears to the Court that such knowledge is required for the proper determination of the case.

23 Time for appeals

An appeal referred to in section *twenty-one* shall be brought within one month after the date of the decision or order of the Registrar in question.

24 Right of Registrar to appear at appeal

In any appeal in terms of section *twenty-one*, the Registrar may appear with the leave of the Administrative Court.

25 References by Registrar to Administrative Court

(1) It shall be the duty of the Registrar to notify the Administrative Court forthwith of any appeal which has been lodged with him against any decision or order.

(2) Where any matter to be decided by the Registrar under this Act appears to him to be of unusual importance or complexity, he may refer that matter to the Administrative Court for decision and shall thereafter in relation to that matter act in accordance with the decision of the Administrative Court.

PART IVA REMEDIES FOR INFRINGEMENT OF PLANT BREEDERS RIGHTS

25A Court that may hear proceedings for infringement of plant breeders rights

Proceedings for infringement of plant breeder's right may be instituted by the holder of the right or licensee—

- (a) in the High Court; or
- (b) in the Administrative Court; or
- (c) subject to the jurisdictional limits provided for in the Magistrates Court Act [*Chapter 7:10*], in a magistrates court.

25B Provisions applicable to proceedings for infringement of plant breeder's right

(1) Subject to any rules of court, the following provisions shall apply in connection with proceedings for infringement of plant breeder's right —

- (a) any ground upon which the registration of the rights may be declared void in terms of section *fifteen* may be relied upon by way of defence;
- (b) the defendant or respondent may, by way of counterclaim in the proceedings, apply for the declaration of the registration of the rights void;
- (c) the plaintiff or applicant shall, with the documents instituting the proceedings or subsequently on the order of the court concerned, deliver full particulars of the infringement complained of;
- (d) the defendant or respondent shall, with his statement of defence or plea or replying affidavit or subsequently on the order of the court concerned, deliver particulars of any objections on which he relies;
- (e) except with the leave of the court concerned, at the hearing no evidence shall be admitted of any infringement or on any objection of which particulars have not been delivered in terms of paragraph (c) or (d).

(2) In any proceedings brought under this section by a licensee, the holder of the plant breeder's right concerned shall be added as defendant or respondent, as the case may be, unless he is joined as plaintiff or applicant: Provided that a person so added as defendant or respondent shall not be liable for any costs unless he takes part in the proceedings.

(3) If the holder of plant breeder's right is the plaintiff or applicant in any proceedings under this section, he shall give notice of the proceedings to any licensee of the rights in question, and the licensee shall be entitled to intervene as a co-plaintiff or co-applicant, as the case may be, and to recover any damages he may have suffered as a result of the infringement.

25C Remedies available in proceedings for infringement

(1) Subject to this Act, in proceedings for infringement of plant breeders rights the plaintiff or applicant shall be entitled to any appropriate remedy, whether damages, interdict, attachment, the rendering of account, the delivery of infringing articles used or intended to be used for the purposes of the infringement or otherwise, that is available in respect of the infringement of any other proprietary right.

(2) Damages for infringement of plant breeders rights may, at the option of the person seeking them, be calculated on the basis of the amount that a licensee would reasonably have been expected to pay under the circumstances for his use of the rights concerned:

Provided that, if the person seeking damages intends to exercise this option, he shall give notice of his intention, in writing, to any licensee of the rights concerned.

(3) In determining the amount of damages in an action for infringement of plant breeder's right, the court concerned shall take the following factors into account, in addition to all other material considerations

- (a) the extent and nature of the infringement; and
- (b) the market value of the rights concerned; and
- (c) the amount which could be payable to the holder of the right or his assignee in respect of the use of the right by some other person; and
- (d) any dilatory conduct on the part of the holder of the right or the plaintiff in making the infringer aware that the right was registered.

(4) If it is established, in proceedings for infringement of plant breeder's right, that an infringement was committed and the court, having regard to

- (a) the flagrancy of the infringement; and
- (b) the market value of the right concerned; and
- (c) any benefit shown to have accrued to the person responsible for the infringement as a result of it; and
- (d) the need to deter persons from committing further infringements; is satisfied that effective relief would not otherwise be available to the plaintiff or applicant, the Tribunal or the court, as the case may be, shall have power to award such additional damages as it thinks fit.

(5) If it is established, in proceedings for an infringement of plant breeder's right, that an infringement was committed but that at the time of the infringement the person responsible for it was not aware and had no reasonable grounds for suspecting that he was not entitled to engage in the infringing activity, the plaintiff or applicant shall not be entitled under this section to any damages against that person in respect of the infringement.

25D Anton Piller orders

(1) If a person who has instituted or intends instituting proceedings for an infringement of plant breeder's right satisfies a court that, *prima facie*—

- (a) he has a cause of action against another person which he intends to pursue; and
- (b) the other person has in his possession documents or other things of whatsoever nature which constitute evidence of great importance in substantiation of that cause of action; and
- (c) there is a real and well-founded apprehension that the documents or other things may be hidden, destroyed or rendered inaccessible before discovery can be made in the usual way;

The Court may make such order as it considers necessary or appropriate to secure the preservation of the documents or things as evidence.

(2) An order in terms of subsection (1) may be granted without notice to the person who is allegedly in possession of the documents or other things to which the order relates, and the Court may sit *in camera* for the purpose of hearing an application for such an order:

Provided that the Court shall not grant an order without such notice unless it is satisfied that there is a real possibility that the documents or things will be hidden, destroyed or rendered inaccessible if notice is given.

(3) An order in terms of subsection (1) may be granted on such conditions, including the giving of security by the applicant, as the Court may fix.

(4) This section shall not be taken to limit any power a Court may have under its ordinary jurisdiction to grant orders such as are referred to in this section.

25E Remedy for groundless threats of infringement proceedings

(1) Where any person, whether or not he is entitled to or interested in any plant breeder's right or an application for the registration of any such right, threatens another person with proceedings for infringement of plant breeder's right, anyone who is aggrieved by the threat may bring proceedings against him in a court of competent jurisdiction for the relief referred to in subsection (2).

(2) In proceedings brought by virtue of subsection (1), the plaintiff or applicant shall be entitled to any one or more of the following remedies—

- (a) a declaration to the effect that the threats are unjustifiable;
- (b) an interdict against any continuation of the threats;
- (c) such damages, if any, as he has sustained in consequence of the threats;

unless the defendant or respondent proves that the acts in respect of which he threatened proceedings constitute or, if done, would constitute, an infringement of any registered plant breeders rights, the registration of which is not shown by the plaintiff or applicant to be invalid.

(3) The defendant or respondent in any proceedings brought in terms of subsection (1) may counter-claim for any relief to which he would be entitled in separate proceedings in respect of any infringement by the plaintiff or applicant of the plant breeders rights to which the threats relate.

(4) For the avoidance of doubt, it is declared that a mere notification that a plant breeder's right is registered does not constitute a threat of proceedings within the meaning of subsection (1).

PART V
OFFENCES AND PENALTIES

26 Falsification of documents

Any person who—

- (a) makes or causes to be made a false entry in the Register, knowing the entry to be false; or
- (b) makes or causes to be made or produces or tenders or causes to be produced or tendered any document falsely purporting to be a copy of an entry in the Register, knowing the document to be false;

shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

27 Failure to obey order of Appeal Board or giving false evidence

Any person who, without lawful excuse, fails to comply with an order of the Administrative Court under section *nineteen* or any other provision of this Act shall be guilty of an offence and liable to a fine not exceeding level four or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

28 Deceiving or improper influencing of officer

Any person who—

- (a) for the purpose of deceiving an officer in the execution of his duties under this Act; or
- (b) for the purpose of procuring or influencing the doing or omission of anything by an officer in the execution of his duties under this Act;

makes or submits a statement or representation, whether orally or in writing, which he knows to be false or does not know or believe to be true shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

29 Unauthorized claim of plant breeder's right or use of authorized name

(1) Any person who falsely and without lawful excuse undertakes acts covered by section *seventeen* concerning material of a variety in respect of which a plant breeders rights have been granted shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment. [Subsection as amended by section 4 of Act 22 of 2001]

(2) Any person who offers for sale or markets propagating material of a variety protected in Zimbabwe using a denomination which is different from the denomination registered in terms of this Act for that variety or any person who misuses the registered variety denomination in relation to section *nine* (3)(iii), shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

30 Offences by officers

(1) Any officer who, otherwise than in the course of his duties, undertakes acts covered by section *seventeen* in respect of a variety for which a plant breeder's right has been granted or applied for shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Section as amended by Act 22 of 2001]

(2) Any material acquired by an officer in contravention of the provisions of subsection (1) shall be forfeited to the State.

31...

[Section repealed by Act 22 of 2001]

PART VI GENERAL

32

[Section repealed by Act 11 of 2001.]

33 Hearing before exercise of discretion of Registrar

Where any discretionary or other power is given by this Act to the Registrar, he shall not exercise that power adversely to the applicant for or holder of, as the case may be, a plant breeder's right without giving to that applicant or holder an opportunity of being heard.

34

[Section repealed by Act 11 of 2001.]

35 Powers of Registrar to authorize corrections

(1) The Registrar may correct or authorize the correction of any clerical error or any omission or error in the description of a new variety which occurs in any application or other document lodged in terms of this Act or in the Register.

(2) A correction in terms of subsection (1) may be made either upon a request in writing or without such a request.

(3) Where the Registrar proposes to make or authorize a correction in terms of subsection (1) otherwise than upon a request in writing, he shall give notice of his intention to the applicant for, or holder of, the plant breeder's right, as the case may be, and to any other person who appears to him to be concerned.

(4) Any opposition to a proposal to correct or authorize the correction of a document or the Register in terms of subsection (1) shall be dealt with by the Registrar in such manner as he considers desirable in the interests of justice.

(5) An appeal shall lie from any decision of the Registrar under this section.

36 Rectification of Register

(1) On application by any person aggrieved, the Administrative Court may order the Registrar to rectify the Register by the making of any entry therein or the variation or deletion of any entry therein.

(2) An application in terms of subsection (1) shall be lodged with the Registrar and the Registrar shall—

- (a) give notice thereof to all interested parties; and
- (b) forward the application to the Administrative Court.

(3) At the hearing of an application in terms of subsection (1)—

- (a) the Registrar, the applicant and any other interested party shall be entitled to appear and be heard; and
- (b) the Administrative Court shall determine the question in such manner as it considers desirable in the interests of justice.

37 Varieties of recent creation

(1) Where, according to section *three* (3), this Act applies to a plant genus or species to which it did not previously apply, varieties belonging to such plant genus or species shall be considered to satisfy the condition of novelty defined in section *three* (2)(a) even where the sale or disposal of to others described in that paragraph took place in Zimbabwe within four years before the filing date or, in the case of trees or of vines, within six years before the said date.

(2) The provision under paragraph (1) of this section, shall only apply to applications for a breeder's right filed within one year, at the latest, after the provisions of the Act apply to the genera or species concerned.

37A Use of approved denomination

(1) As provided in section *nine* (7) of this Act, any person who offers for sale or markets propagating material of a variety protected in Zimbabwe is obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of section *nine* (4), prior rights prevent such use.

(2) Any contravention of section *nine* (7) shall be deemed to be an infringement of the plant breeder's rights concerned for the purposes of Part IVA.

38 Evidence of certain entries and documents

(1) A certificate purporting to be signed by the Registrar and certifying that any entry, the making of which is or was at the time authorized by or under this Act, has or has not been made or that any other thing which is or was at the time authorized to be done has or has not been done shall be *prima facie* evidence of the matters so certified.

(2) A copy of—

- (a) an entry in the Register or of any document lodged in terms of this Act; or
- (b) an extract from the Register or from any document lodged in terms of this Act; which purports to be certified by the Registrar shall be admitted in evidence without further proof and without production of the original.

39 Inspection and provision of certified copies of entries in Register

The Register shall at all convenient times be open to inspection by the public on payment of the prescribed fee and a certified copy of any entry in the Register shall be given on payment of the prescribed fee to any person requiring it.

40 Preservation of secrecy

Save as otherwise provided in this Act, any person who, discloses, except—

- (a) to the Minister, the Administrative Court, the Registrar or any other person for the purposes of the performance of his functions under this Act; or
- (b) to a police officer for the purposes of an investigation or inquiry relating to the enforcement of the provisions of this Act; or
- (c) when required to do so by any court or under any law;

any information acquired by him in the carrying out of any duty or the performance of any function under this Act in relation to any variety in respect of which an application for the grant of plant breeders rights has been made under this Act or to the business affairs of any other person shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

41 State to be bound and limitation of actions against State

- (1) Plant breeders' rights shall have the same effect against the State as they have against a subject.
- (2) No fees such as are referred to in paragraph (f) or (i) of subsection (2) of section *forty-five* or deposit referred to in subsection (2) of section *fifteen* shall be payable by the State.
- (3) No claim shall lie against the State, the Minister, the Registrar or any other officer for anything done in good faith and without negligence under the powers conferred by this Act.

42

[Section repealed by Act 11 of 2001.]

43 Particulars to be published

The Registrar shall publish in such manner as he thinks fit particulars relating to the application for or granting, nullity, cancellation or surrender of plant breeder's right, proposed and approved denominations and such other particulars relating to plant breeder's right as he thinks fit.

44 Assignments

- (1) The rights granted to the holder of plant breeders' rights shall be capable of assignment and of devolution by operation of law and of being mortgaged and pledged.

(2) Where any person becomes entitled by assignment, transmission or operation of law to any plant breeder's right or to a share in a plant breeder's right or becomes entitled as mortgagee, licensee or otherwise to any other interest in a plant breeder's right, he may apply to the Registrar in the prescribed manner for the registration in the Register of his title as proprietor or co-proprietor or, as the case may be, of notice of his interest and the Registrar shall, upon proof of such entitlement to his satisfaction, register such title or notice against the plant breeder's right accordingly.

(3) Except for the purposes of an application to rectify the Register under the provisions of this Act, a document in respect of which no entry has been made in the Register under subsection (2) shall not be admitted in any proceedings as evidence of the title of any person referred to in subsection (2) to a plant breeder's right or a share of or interest in a plant breeder's right unless the Administrative Court or a court of competent jurisdiction otherwise directs.

45 Regulatory powers

(1) The Minister may make regulations prescribing anything which under this Act is to be prescribed and generally for the better carrying out of the objects and purposes of this Act or to give effect to its provisions or for its better administration.

(2) Regulations in terms of subsection (1) may provide for—

(a) the form of any application, description, drawing, objection, counter-statement or other document which may be lodged with the Registrar and the furnishing of copies of any such document;

(b) the procedure to be followed in connection with any application or request to the Registrar or any proceedings before him, and the authorizing of the rectification of irregularities of procedure;

(c) the information and facilities to be afforded by an applicant and the propagating material and other plant material to be submitted at the time of application and subsequently;

(d) the tests, trials, examinations and other steps to be taken by the applicant or the Registrar before plant breeders' rights are granted and the time within which any such steps are to be taken;

(e) requiring any person who has in his possession or under his control any propagating material for sale, reproduction or export to keep records relating thereto in the form and manner specified and to render returns in the form and manner and at the times specified;

(f) the fees to be paid in respect of—

(i) applications for or the grant of plant breeders' rights;

(ii) the examination of samples of propagating material or any plant grown therefrom;

(iii) the inspection of the Register or the provision of a certified copy of any entry therein;

(g) the rights and duties of the holder of a compulsory licence granted under section *nineteen* and of the holder of the plant breeder's right concerned in connection with the institution of actions for infringement of the plant breeder's right where the holder thereof fails or refuses to institute such an action;

(h) preventing the use of false or misleading statements in any advertisement of plant breeders' rights.