

Conseil**C/Analysis/2020/1****Document d'analyse****Original : anglais****Date : 21 mai 2020**

DOCUMENT D'ANALYSE SERVANT DE BASE À LA PROCÉDURE D'EXAMEN PAR CORRESPONDANCE DE LA CONFORMITÉ DU PROJET DE LOI RELATIVE AUX DROITS D'OBTENTEUR DU ZIMBABWE AVEC L'ACTE DE 1991 DE LA CONVENTION UPOV*Document établi par le Bureau de l'Union**Avertissement : le présent document ne représente pas les principes ou les orientations de l'UPOV*

1. Dans une lettre datée du 27 avril 2020 adressée au Secrétaire général de l'UPOV, le maréchal Perence Shiri, ancien chef de l'armée de l'Air, ministre des terres, de l'agriculture, de l'eau et de la réinstallation rurale du Zimbabwe, a demandé l'examen de la conformité du projet de loi relative aux droits d'obteneur du Zimbabwe (ci-après dénommé "projet de loi") avec l'Acte de 1991 de la Convention UPOV (ci-après dénommé "Acte de 1991"). La lettre fait l'objet de l'annexe I du présent document. L'annexe II contient une copie du projet de loi en anglais.

PROCÉDURE D'EXAMEN DES LOIS OU PROJETS DE LOI PAR CORRESPONDANCE

2. L'article 34.3) de l'Acte de 1991 prévoit que "[t]out État qui n'est pas membre de l'Union ou toute organisation intergouvernementale demande, avant de déposer son instrument d'adhésion, l'avis du Conseil sur la conformité de sa législation avec les dispositions de la présente Convention. Si la décision faisant office d'avis est positive, l'instrument d'adhésion peut être déposé".

3. Dans le cadre de l'organisation d'une seule série de sessions à partir de 2018, et afin de faciliter l'examen de la législation des futurs membres, le Conseil a, à sa cinquante et unième session ordinaire tenue à Genève le 26 octobre 2017, approuvé les propositions de modification du document UPOV/INF/13/1 "Document d'orientation concernant la procédure à suivre pour devenir membre de l'UPOV" en vue d'instaurer une procédure concernant l'examen des lois par correspondance et adopté la révision du document UPOV/INF/13/1 (document UPOV/INF/13/2) (voir le paragraphe 20.g) du document C/51/22 "Compte rendu".

4. Compte tenu de ce qui précède, la procédure d'examen des lois ou projets de loi par correspondance figurant dans le document [UPOV/INF/13/2](#) "Document d'orientation concernant la procédure à suivre pour devenir membre de l'UPOV" prévoit ce qui suit :

Applicabilité de la procédure d'examen du projet de loi par correspondance

"11. La procédure concernant l'examen des lois par correspondance s'applique si :

"i) la requête est reçue moins de quatre semaines avant la semaine de la session ordinaire du Conseil la plus rapprochée et plus de six mois avant la date de la session ordinaire suivante du Conseil; et

"ii) l'analyse du Bureau de l'Union prévoit une décision positive et ne recense aucun problème majeur au sujet de la conformité de la législation avec la Convention UPOV."

5. Conformément au paragraphe 11 du document UPOV/INF/13/2, la lettre contenant la demande d'examen du projet de loi a été reçue le 27 avril 2020, soit plus de six mois avant la date de la cinquante troisième session ordinaire du Conseil de l'UPOV. Le Bureau de l'Union prévoit une décision positive et ne recense aucun problème majeur au sujet de la conformité du projet de loi avec la Convention UPOV.

Publication du document d'analyse et du projet de loi sur le site Web de l'UPOV

"14. [...]

"i) le document d'analyse et la loi sont publiés sur le site Web de l'UPOV dans un délai de six semaines après réception de la demande et les membres et observateurs auprès du Conseil en sont informés en conséquence; et

"ii) les membres et observateurs ont la possibilité de formuler des observations dans les 30 jours à compter de la date de publication du document d'analyse sur le site Web de l'UPOV."

6. Conformément au paragraphe 14 du document UPOV/INF/13/2, le Bureau de l'Union a publié le présent document d'analyse concernant le Zimbabwe (document C/Analysis/2020/1) pour donner la possibilité aux membres du Conseil et aux observateurs de formuler des commentaires (voir la circulaire de l'UPOV E-20/050 du 21 mai 2020). L'annexe II du document d'analyse contient le projet de loi du Zimbabwe.

GÉNÉRALITÉS

7. Le Zimbabwe a entamé la procédure pour devenir membre de l'Union par une lettre datée du 23 avril 1998, dans laquelle il demandait l'avis du Conseil sur la conformité de la loi de 1978 relative au droit d'obtenteur du Zimbabwe (la "loi"). Le Conseil a examiné la loi à sa trente-deuxième session ordinaire tenue à Genève le 28 octobre 1998 (voir le paragraphe 10 du document C/32/16 "Compte rendu") et a :

"i) décidé que la loi zimbabwéenne relative au droit d'obtenteur serait conforme à l'Acte de 1978 de la Convention UPOV lorsque, en substance, les modifications suggérées dans le document C/32/12 lui auront été apportées;

"ii) prié le Secrétaire général d'informer le Gouvernement du Zimbabwe que, une fois la loi ainsi modifiée à la satisfaction du Bureau de l'Union, il pourra déposer son instrument d'adhésion à l'Acte de 1978 de la convention à tout moment avant le 24 avril 1999".

8. Le 26 août 2011, le Bureau de l'Union a reçu de M. Claid Mujaju, directeur de Seed Services Institute, une version consolidée de la loi telle que modifiée en 2001, avec une demande d'observations sur les modifications qu'il est proposé d'apporter pour incorporer les dispositions essentielles de l'Acte de 1991. Par conséquent, le texte de la loi du Zimbabwe soumise au Conseil en 1998 et la décision relative à sa conformité avec l'Acte de 1978 ne sont plus pertinents. Le 31 octobre 2011, le Bureau de l'Union a transmis ses observations sur la loi, telle que modifiée en 2001, sur la base du document UPOV/INF/6 intitulé "Orientations en vue de la rédaction de lois fondées sur l'Acte de 1991 de la Convention UPOV".

9. Le 23 mars 2018, le Bureau de l'Union a reçu une communication de M. Claid Mujaju demandant des informations sur les aspects financiers de l'adhésion à l'UPOV et présentant M. Tshuma, conseiller juridique, responsable du Département juridique du Ministère de l'agriculture. Le 27 mars 2018, le Bureau de l'Union a fourni des informations sur les aspects financiers, souligné que les observations du Bureau de l'Union sur la loi avaient été envoyées le 31 octobre 2011 et expliqué que le Bureau de l'Union devrait recevoir la version la plus récente des modifications qu'il était proposé d'apporter à la loi afin de conseiller M. Tshuma sur les étapes suivantes de la procédure pour devenir membre de l'UPOV.

10. Du 28 au 30 janvier 2019, à Genève, au cours des réunions bilatérales tenues avec la délégation du Zimbabwe durant l'"Atelier sur la rédaction d'une législation conforme à la Convention UPOV" (atelier sur les lois), le Bureau de l'Union a examiné les dispositions pertinentes de l'Acte de 1991 au regard du projet de loi qui lui a été soumis le 24 décembre 2018.

11. Le 21 janvier 2020, M. Tshuma a fourni une version actualisée du projet de loi au Bureau de l'Union et sollicité des observations sur le projet de loi au regard de l'Acte de 1991. Le 31 mars 2020, le Bureau de l'Union a formulé des observations sur le projet de loi et expliqué la procédure d'examen du projet de loi par le Conseil.

BASE POUR LA PROTECTION DES OBTENTIONS VÉGÉTALES AU ZIMBABWE

12. Au Zimbabwe, la protection des obtentions végétales conformément à l'Acte de 1991 sera régie par le projet de loi lorsque celui-ci aura été adopté. On trouvera ci-après une analyse de ce projet dans l'ordre des dispositions de droit matériel de l'Acte de 1991.

Article premier de l'Acte de 1991 : Définitions

13. L'article 2 du projet de loi contient les définitions des termes "obtenteur" et "variété" qui correspondent aux définitions figurant aux alinéas iv) et vi), respectivement, de l'article premier de l'Acte de 1991.

Article 2 de l'Acte de 1991 : Obligation fondamentale des parties contractantes

14. Les articles premier et 14 du projet de loi traitent de la protection et de l'octroi des droits d'obtenteur.

15. Le préambule, à la fin de la partie "Organisation des articles" du projet de loi, est libellé comme suit :

"UNE LOI prévoyant l'enregistrement des droits d'obtenteur sur les obtentions végétales et la protection des droits des personnes qui sont enregistrées comme titulaires de ces droits, et les aspects accessoires ou connexes de ce qui précède. *Seed Services* a été désigné service d'authentification chargé d'octroyer des droits d'obtenteur; son responsable est le directeur de l'enregistrement des droits d'obtenteur."

16. Le projet de loi contient des dispositions qui correspondent à l'obligation fondamentale prévue à l'article 2 de l'Acte de 1991.

Article 3 de l'Acte de 1991 : Genres et espèces devant être protégés

17. L'article 3.3) du projet de loi dispose que "(l)a présente loi s'applique à tous les genres et espèces, y compris aux champignons", ce qui correspond aux dispositions de l'article 3.2)ii) de l'Acte de 1991.

Article 4 de l'Acte de 1991 : Traitement national

18. L'article 3B du projet de loi contient des dispositions relatives au traitement national qui correspondent aux dispositions de l'article 4 de l'Acte de 1991.

Articles 5 à 9 de l'Acte de 1991 : Conditions de la protection, nouveauté, distinction, homogénéité et stabilité

19. L'article 3.1) et 2) du projet de loi contient des dispositions relatives aux conditions de la protection qui correspondent aux dispositions des articles 5 à 9 de l'Acte de 1991.

20. L'article 37 du projet de loi contient des dispositions relatives à la disposition facultative de l'article 6.2) "Variétés de création récente" de l'Acte de 1991 comme suit :

"1) Lorsque, conformément à l'article 3.3), la présente loi devient applicable à des genres ou espèces végétaux auxquels elle ne s'appliquait pas précédemment, les variétés appartenant à ces genres ou espèces végétaux sont considérées comme satisfaisant à la condition de nouveauté définie à l'alinéa 2)a) de l'article 3 même si la vente ou la remise à des tiers mentionnée dans ledit alinéa a eu lieu au Zimbabwe dans les quatre ans précédant la date de dépôt de la demande ou, dans le cas des arbres ou de la vigne, dans les six ans précédant cette date.

2) La disposition prévue à l'alinéa 1) du présent article s'applique uniquement aux demandes de droit d'obtenteur déposées dans un délai maximum d'un an après que les dispositions de la loi sont devenues applicables aux genres ou espèces concernés."

Article 10 de l'Acte de 1991 : Dépôt de demandes

21. L'article 7 du projet de loi contient des dispositions relatives au dépôt des demandes. Le projet de loi ne semble pas contenir de dispositions contraires à l'article 10 de l'Acte de 1991.

Article 11 de l'Acte de 1991 : Droit de priorité

22. L'article 7.5) du projet de loi contient des dispositions relatives au droit de priorité qui correspondent aux dispositions de l'article 11 de l'Acte de 1991.

Article 12 de l'Acte de 1991 : Examen de la demande

23. L'article 8.4) du projet de loi contient des dispositions relatives à l'examen de la demande qui correspondent aux dispositions de l'article 12 de l'Acte de 1991.

Article 13 de l'Acte de 1991 : Protection provisoire

24. L'article 12A du projet de loi contient des dispositions relatives à la protection provisoire qui correspondent aux dispositions de l'article 13 de l'Acte de 1991, comme suit :

"1) La protection provisoire est accordée afin de sauvegarder les intérêts de l'obteneur pendant la période comprise entre la publication de la notification relative à la demande d'octroi d'un droit d'obteneur au sens de l'article 12 et l'octroi de ce droit.

"2) Le demandeur est réputé être le titulaire du droit d'obteneur à l'égard de celui qui, dans l'intervalle prévu à l'alinéa 1), a accompli des actes qui, après l'octroi du droit, requièrent l'autorisation de l'obteneur conformément aux dispositions de l'article 17. Une action en justice au titre de la protection provisoire ne peut être intentée qu'après l'octroi du droit."

Article 14 de l'Acte de 1991 : Étendue du droit d'obteneur

25. L'article 17 du projet de loi contient des dispositions relatives à l'étendue du droit d'obteneur qui correspondent aux dispositions de l'article 14 de l'Acte de 1991.

26. L'article 17.3) du projet de loi contient des dispositions relatives à la disposition facultative prévue à l'article 14.3) "Actes à l'égard de certains produits" de l'Acte de 1991, comme suit :

"3) Sous réserve des articles 17B et 17C, l'autorisation de l'obteneur est requise pour les actes mentionnés à l'alinéa 1)a) à vii) accomplis à l'égard des produits fabriqués directement à partir d'un produit de récolte de la variété protégée couvert par les dispositions de l'alinéa 2) par utilisation non autorisée dudit produit de récolte, à moins que l'obteneur ait raisonnablement pu exercer son droit en relation avec ledit produit de récolte."

Article 15 de l'Acte de 1991 : Exceptions au droit d'obteneur

27. L'article 17B.1) du projet de loi contient des dispositions relatives aux exceptions obligatoires au droit d'obteneur qui correspondent à l'article 15.1) de l'Acte de 1991.

28. L'article 17B.2) à 4) du projet de loi contient des dispositions concernant l'exception facultative prévue à l'article 15.2) de l'Acte de 1991, comme suit :

"2) Il n'y a pas atteinte au droit d'obteneur si les agriculteurs, dans des limites raisonnables et sous réserve de la sauvegarde des intérêts légitimes de l'obteneur, utilisent à des fins de reproduction ou de multiplication, sur leur propre exploitation, le produit de la récolte qu'ils ont obtenu par la mise en culture, sur leur propre exploitation, d'une variété protégée ou d'une variété couverte par l'article 17.4)a) ou ii)."

"3) Les dispositions de l'alinéa 2 ci-dessus s'appliquent aux agriculteurs qui cultivent moins de 10 hectares de terre. Les limites raisonnables et les mesures de sauvegarde des intérêts légitimes de l'obteneur seront précisés dans le règlement."

"4) Les dispositions de l'alinéa 2) ne s'appliquent pas aux variétés de plantes fruitières, ornementales et potagères."

Article 16 de l'Acte de 1991 : Épuisement du droit d'obtenteur

29. L'article 17C du projet de loi contient des dispositions relatives à l'épuisement du droit d'obtenteur qui correspondent aux dispositions de l'article 16 de l'Acte de 1991.

Article 17 de l'Acte de 1991 : Limitation de l'exercice du droit d'obtenteur

30. L'article 19 du projet de loi contient des dispositions relatives à la limitation du droit d'obtenteur qui correspondent aux dispositions de l'article 17 de l'Acte de 1991.

Article 18 de l'Acte de 1991 : Réglementation économique

31. Le projet de loi ne semble pas contenir de dispositions contraires à l'article 18 de l'Acte de 1991.

Article 19 de l'Acte de 1991 : Durée du droit d'obtenteur

32. L'article 17A du projet de loi contient des dispositions relatives à la durée du droit d'obtenteur qui correspondent aux dispositions de l'article 19 de l'Acte de 1991.

Article 20 de l'Acte de 1991 : Dénomination de la variété

33. L'article 9 du projet de loi contient des dispositions relatives à la dénomination de la variété qui correspondent aux dispositions de l'article 20 de l'Acte de 1991.

Article 21 de l'Acte de 1991 : Nullité du droit d'obtenteur

34. L'article 15 du projet de loi contient des dispositions relatives à la nullité du droit d'obtenteur qui correspondent aux dispositions de l'article 21 de l'Acte de 1991.

Article 22 de l'Acte de 1991 : Déchéance de l'obtenteur

35. L'article 16 du projet de loi contient des dispositions relatives à la déchéance de l'obtenteur qui correspondent aux dispositions de l'article 22 de l'Acte de 1991.

Article 30 de l'Acte de 1991 : Application de la convention

36. En ce qui concerne l'obligation de "prévoir les recours légaux appropriés permettant de défendre efficacement les droits d'obtenteur" (article 30.1)i) de l'Acte de 1991), les articles 25A à 25E et l'article 37A du projet de loi contiennent les dispositions pertinentes.

37. L'article 14.2) du projet de loi dispose que le directeur de l'enregistrement est la personne officiellement chargée d'octroyer des droits d'obtenteur conformément aux dispositions de l'article 30.1)ii) de l'Acte de 1991.

38. Les articles 12, 14.3) et 43 du projet de loi reprennent l'obligation de publier les renseignements sur les demandes de droits d'obtenteur, les droits d'obtenteur délivrés et les dénominations proposées et approuvées, telle qu'elle est énoncée à l'article 30.1)iii) de l'Acte de 1991.

Conclusion générale

39. De l'avis du Bureau de l'Union, le projet de loi contient les dispositions de droit matériel de l'Acte de 1991. Ainsi, dès que le projet de loi aura été adopté sans modification et que la loi sera entrée en vigueur, le Zimbabwe sera en mesure de "donner effet" aux dispositions de l'Acte de 1991, comme le requiert l'article 30.2) de celui-ci.

ANNEXE I

Traduction d'une lettre datée du 27 avril 2020 (référence MIN LAW/CRR/2/1)

adressée par : Maréchal P. Shiri
Ancien chef de l'armée de l'air,
Ministre des terres, de l'agriculture, de l'eau et de la réinstallation rurale
République du Zimbabwe

à : M. Francis Gurry
Secrétaire général
Union internationale pour la protection des obtentions végétales
(UPOV)

Objet : présentation du projet de loi relative au droit d'obtenteur au Conseil de l'UPOV

Monsieur le Secrétaire général,

J'ai le plaisir de vous informer que le Gouvernement du Zimbabwe, par l'intermédiaire de mon ministère, a engagé le processus de modification de la loi relative aux droits d'obtenteur [chapitre 18.16].

Le Zimbabwe souhaite adhérer à la Convention internationale pour la protection des obtentions végétales du 2 décembre 1961, révisée à Genève le 10 novembre 1972, le 23 octobre 1978 et le 19 mars 1991 (Convention UPOV).

Conformément aux dispositions de l'article 34.3) de la Convention UPOV, je saurais gré au Conseil de l'UPOV d'examiner par correspondance la conformité de la proposition de loi modifiée du Zimbabwe avec les dispositions de la Convention UPOV.

Veuillez agréer, Monsieur le Secrétaire général, l'assurance de ma considération distinguée.

(Signé : Maréchal P. Shiri
Ancien chef de l'armée de l'air
Ministre des terres, de l'agriculture,
de l'eau et de la réinstallation rurale
République du Zimbabwe)

Pièce jointe : Traduction du projet de loi en anglais

[L'annexe II suit]

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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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.