

PLANT BREEDERS AND FARMERS' RIGHTS BILL

To provide for the establishment of an effective system for protection of new varieties of plants and the rights of plant breeders and farmers; to encourage the development of new varieties of plants; to provide for the establishment of a Plant Breeders and Farmers Rights Advisory Council and its powers and functions; to provide for the establishment of the Community Gene Fund; and to provide for matters connected therewith or incidental thereto.

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PREAMBLE

WHEREAS, Namibia is a Party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Agreement adopted at Marrakesh, Morocco on 15th April, 1994,

AND WHEREAS, Article 27.3b of the TRIPS Agreement requires that members provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof;

AND WHEREAS for accelerated agricultural development in the country, it is necessary to protect plant varieties and plant breeders' rights to stimulate investment for research and development, both in the public and private sector, for the development of new plant varieties;

AND WHEREAS such protection will facilitate the growth of the seed industry in the country which will ensure the availability of high quality seeds and planting material to the farmers;

WHEREAS, Namibia is party to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) which was adopted in November 2001 and came into force in June 2004;

AND WHEREAS, Article 9 of the ITPGRFA acknowledges that contracting Parties to the said Treaty recognize the contribution that local and indigenous communities and farmers have made and continue to make for the conservation and development of plant genetic resources, and requires member states to take measures to protect and promote farmers rights which are specified therein;

AND WHEREAS, to give effect to the objectives stated in the aforementioned provisions of the TRIPS Agreement and the International Treaty on Plant Genetic Resources for Food and Agriculture, it is necessary to enact legislation for the protection of the rights of plant breeders and farmers;

NOW THEREFORE, BE IT ENACTED by the Parliament of the Republic of Namibia as follows:-

CHAPTER 1 PRELIMINARY

Definitions

1. In this Act-

“Advisory Council” means the Plant Breeders and Farmers Rights Advisory Council established in terms of section 53;

“applicant” means a breeder or a person acting on behalf of a breeder, who files an application for the grant of a plant breeders’ right according to section 17

“assignee”, in relation to a variety, means -

- (a) a person who has derived his or her title to the variety directly or indirectly from the breeder or owner thereof; or
- (b) the legal representative of the person referred to in paragraph (a);

“benefit sharing”, in relation to a variety, means such proportion of the benefit accruing to a breeder of such variety or such proportion of the benefit accruing to the breeder from a licensee of such variety, as the case may be, for which a claimant is entitled as determined by the Minister in terms of section 50;

“breeder”, in relation to a variety, means -

- (a) a person or group of persons or a farmer or group of farmers or any institution which has bred, evolved, discovered or developed any variety;
- (b) an employer of the person referred to in paragraph (a), if that person is an employee whose duties are such that the variety was bred, or discovered and developed, in the performance of such duties; or
- (c) the successor in title of the person referred to in paragraph (a) or the employer referred to in paragraph (b);

“Board” means body established by the minister to handle the appeal referred in section 75(2) ;

“convention country” means a country which has been declared as such in terms of section 17(2);

“court” means the High Court of Namibia as defined in section 1 of the High Court Act, 1990 (Act No. 16 of 1990);

“denomination”, in relation to a variety entered in the register, means the generic name for that variety;

“essential characteristics” means the essential traits of a variety of a plant as expressed by means of a test or trial or any other acknowledged means of determining the characteristics of a variety of a plant;

“farmer” means any person who in Namibia -

- (a) cultivates crops by cultivating the land himself or herself;
- (b) cultivates crops by directly supervising the cultivation of land through any other person; or
- (c) conserves and preserves, severally or jointly, with any other person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties;

“farmer-conservator” in relation to a new plant variety means -

- (a) an individual farmer or rural person who has provided parent strains contributing to the success of the new variety; or
- (b) a rural or traditional community which has helped to conserve the genetic stocks which have gone into the pedigree of a new variety; or
- (c) the residents of an area rich in plant genetic resources, from where strains which are donors of genes for resistance or tolerance to biotic and abiotic stresses or other valuable characters have been obtained by the breeder or breeders or breeding institution responsible for the new variety;

“farmers’ variety” means a variety which -

- (a) has been traditionally cultivated and evolved by the farmers in their fields; or
- (b) is a wild relative or landrace or a ‘folk’ variety about which the farmers possess the common knowledge;

“folk variety” includes landraces and other strains selected and cultivated by rural farmers;

“Gene Fund” means the Community Gene Fund established in terms of section 62;

“holder” in relation to a plant breeder’s right, means the person to whom such a right has been granted in terms of section 25, or who, according to an entry in the register, is the owner of such a right;

“kind” means one or more related genera, species or subspecies of any plant each individually or collectively known by one common name;

“license” means a license issued pursuant to section 36, in relation to plant breeders rights;

“Minister” means the Minister responsible for agriculture;

“Ministry” means the Ministry responsible for agriculture;

“ breeders rights” means plant breeders rights granted in terms of section 25;

“prescribed” means prescribed by regulations made under section 88;

“register” means the register of plant breeder’s rights kept in terms of section 6;

“Registrar” means the individual appointed or designated as such in terms of section 4;

“regulation” means a regulation made under section 88;

“seed” means a matured ovule consisting of an intact embryo, endosperm or cotyledons, and protective covering (seed coat). It also refers to healthy seedlings, tubers, cutting, bulbs, rhizomes, roots and all types of grafts and other vegetative propagated materials used for multiplying plants;

“sell” includes to offer, advertise, expose, transmit, send, convey, delivery or prepare for sale or to exchange or dispose off for any consideration;

“variety” means a plant grouping within a single botanical taxon of the lowest known classification, which grouping, irrespective of whether or not the conditions for the grant of a plant breeders right are fully met, can be -

- (a) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;
- (b) distinguished from any other plant grouping by the expression of at least one of the said characteristics; and

- (c) considered as a unit with regard to its suitability for being propagated, which remains unchanged after such propagation and includes propagating material of such variety.

CHAPTER 2 GENERAL

Part I

Purpose

- 2.** The purpose of this Act is to grant and protect Plant Breeders' and Farmers' Rights

Application of Act

- 3.** (1) This Act shall be applied to all genera and species of plants
 (2) Despite anything contained in this Act, no registration of a variety may be made under this Act in cases where prevention of commercial exploitation of such variety is necessary to protect public order or public morality or human, animal and plant life and health or to avoid serious prejudice to the environment.
 (3) Despite anything contained in subsection (1) no variety of any genera or species which involves any technology which is injurious to the life or health of human beings, animals or plants may be registered under this Act.
 (4) For the purposes of subsection (3), the expression "any technology" includes genetic use restriction technology and terminator technology.

Part II

Administration

Appointment of Registrar and other staff

- 4.** (1) The Minister may –
- (a) subject to the laws governing public service, appoint a person who is suitably qualified and experienced in plant breeding and seed technology and who has some basic knowledge and experiences of legal matters to be the Registrar ; or
 - (b) designate persons from time to time including officers as technical advisors who shall advice the Registrar in regard to matters referred to them by the Registrar.

Powers and functions of Registrar

5. (1) Subject to such general or specific policy directives which may be given to him or her by the Minister.
- (2) the Registrar shall-
 - (a) Register new varieties subject to such terms and conditions and in the manner as may be prescribed;
 - (b) Grant plant breeder and farmers rights;
 - (c) document, index and catalogue farmers' varieties;
 - (d) collecting statistics with regard to plant varieties, including the contribution of any person at any time in the evolution or development of any plant variety, in Namibia or in any other country, for compilation and publication; and
 - (e) maintain the register.

Plant Breeders' Rights Register

6. (1) The Registrar shall maintain the Plant Breeders Rights in which shall be entered or information to be registered under this Act -

(2) For each registered variety, information to be maintained in the Register shall include –

- (a) information relating to applications and any objections thereto
- (b) species, genus and denomination of variety
- (c) full name and address of the breeder and farmers, any other holder of plant breeder or farmers rights and each person to whom such right have been transferred or assigned;
- (d) any declaration of nullity or cancelation of rights
- (e) any submission, registration, rejection, change or cancellation of variety denomination; and
- (f) any other information which may be required by the regulations

(3) Any person shall, upon payment of a prescribed fee, be entitled, during normal business hour, to examine the register kept in accordance with paragraph 1 and to make or receive copies of or extract from the information contain therein

(4) The Registrar may determine the particulars in the Register which should be open for public.

(5) The Registrar may upon application by the applicant, holder of the plant breeder's right or any other interested person, correct or authorize the correction of any clerical error or any omission in the Register

(6) Where the correction is proposed to the Registrar by any interested person other than the applicant or holder of the plant breeder's right, the Registrar shall give notice of one month to the applicant or holder of the plant breeder's right or that other interested person of the intention of the Registrar to correct the error

(7) The Registrar must keep a seal of office and the impression of that seal must be judicially noticed.

Evidence of certain entries and documents

7. (1) The Register is *prima facie* evidence of all matters directed or authorized by this Act to be noted therein.

(2) 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 is *prima facie* evidence of the matters so certified.

(3) 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;

Certified by the Registrar, must be admitted in evidence in any proceedings without further proof and without production of the register.

CHAPTER 3

REGISTRATION OF PLANT BREEDERS' RIGHTS

Part I

Registration of Plant Breeders' Rights

Conditions for protection of plant breeders' rights

8. (1) Subject to subsection (2) the Registrar may only grant plant breeders rights under this Act in respect of any new variety if it is novel, distinct, uniform and stable

(2) Despite anything contained in subsection (1), a farmers variety may be registered under this Act within a specified period if it is distinct, uniform and stable as may be specified under the regulations.

9. Novelty

(1) A variety shall be considered as novel , at the date of filing of the application for registration for protection, it was not offered for sale or marketed by or with the consent of its breeder or his or her successor for the purposes of exploitation of such variety -

- (a) in Namibia, not more than 12 months prior to the date of application;
- (b) in any other country in respect of –
 - (i) trees and grapevines, for longer than six years before the date of application; or
 - (ii) any other plant, for longer than four years before the date of application;

(2) For the purposes of subsection (1)

- (a) the trial of a new variety which has not been sold or otherwise disposed of does not affect the right to protection; and
- (b) the fact that on the date of filing the application for registration, the propagating or harvested material of such variety has become a matter of common knowledge other than through the sale does not affect the criteria of novelty for such variety.

Distinctiveness

10. A variety shall be considered to be distinct if it is clearly distinguishable by at least one essential characteristic from any other variety whose existence is a matter of common knowledge in any country at the time of filing of the application. In particular, the filing of an application for the granting of breeders right or for the entering of another variety in an official register of a 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 breeder right or to entering of the said other variety in the official register of varieties as the case may be.

Uniformity

11. A variety shall be considered to be uniform, if subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its essential characteristics which are included in examination for distinctness, as well as any others used in the variety description.

Stability

12. A variety shall be considered to be stable if its essential characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

Prior knowledge or publication of new plant variety maybe excused

13. (1) Despite sections 10 and 11, and subject to subsection (2), plant breeders rights may not be refused or held to be invalid by reason only of the fact that the new variety in respect of which such right have been applied for or granted, as the case may be, was made available to the public or was generally known prior to the date of application if the applicant for or holder of such rights, as the case may be, proves -

- (a) that the plant concerned was made available or the knowledge was acquired from him or her without his or her knowledge or consent; and
- (b) if he or she learned of the use or disclosure before the date of application, that he or she applied for the grant of plant breeders rights with all reasonable diligence after learning of the use or disclosure, as the case may be.

(2) Subsection (1) does not apply in relation to an applicant for or holder of plant breeders rights where the variety concerned has been commercially grown in Namibia prior to the date of application otherwise than for the purpose of field trials.

Part II
Procedure for Application of grant of Breeders' Right

Persons entitled to apply for protection

14. (1) An application for protection of breeders' rights under this Act may only be made by -

- (a) the breeder of the variety;
- (b) the assignee of the breeder of the variety in respect of the rights to make such an application;

An application for Breeders' Right may be filed by any natural or legal person individually or jointly with any other person.

Application for Breeders' right

15. (1) An application for the grant of breeders' rights must -

- (a) be in the prescribed form;
- (b) be lodged with the Registrar in the prescribed manner;
- (c) be accompanied by the prescribed application fee and documents; and
- (d) contain an address in Namibia to which any notice or communication may be sent.

(2) An assignee making or joining in an application must 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) must -

- (a) be with respect to a variety;
- (b) give the full name, address and other required information of the applicant including the details of the breeder;
- (c) proposed denomination of the variety or provisional designation;
- (d) technical description of the variety

- (e) identification of the botanical taxon (botanical and common name)
- (f) contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired;
- (g) contain a complete passport data of the parental lines from which the variety has been derived indicating -
 - (i) the names and other details of the land races, wild species or 'folk' varieties which have contributed to the development of the variety, and, where full pedigrees are not available, information will be provided on the parental material used; and
 - (ii) the geographical location in Namibia from where the genetic material has been taken; and
 - (iii) all such information relating to the contribution, if any, of any farmer, village community, institution or organization in breeding, evolving or developing the variety;
- (h) must specify any foreign country where an application for the grant of rights similar to plant breeders rights has been or is being made and, in relation to any such application, must specify -
 - (i) its number or title; and
 - (ii) its effective date; and
- (i) be accompanied by such other particulars as may be prescribed.

Variety denomination

16. (1) The denomination of the variety concerned must be proposed by the applicant under which the variety will be known.

- (2) The denomination of a variety must -
 - (a) be suitable to identify a variety;
 - (b) not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety in question or the identity of the breeder thereof;

- (c) be different from every denomination which designates existing varieties of the same or a closely related kind of plant;
- (d) not be inimical to public order or contrary to morality; and
- (e) comply with such further requirements as may be prescribed.

(3) The Registrar may at any time before the grant of breeders' rights, after considering any representations made by the applicant or an objector, reject any denomination proposed in terms of subsection (1) the denomination proposed does not satisfy the requirements.

(4) A denomination must, subject to the provisions of subsection (2), not be identical with or similar to or liable to lead to confusion with a designation which enjoys the protection accorded to a mark within the meaning of any law relating to the registration of trade marks in Namibia, and which applies to plants or seeds or the use in connection therewith or in connection with a product thereof.

(5) If the denomination of a variety proposed by a person under subsection (1) is a designation in respect of which he or she enjoys the protection referred to in subsection (3), the Registrar may not approve such denomination unless such person in writing renounces his or her right to such mark as from the date on which the variety in question is recognized.

(6) Where a denomination proposed in terms of subsection (1) has already been used for the variety concerned in Namibia or in a convention country, or is proposed or registered in such a country, the Registrar may approve only that name.

Effective date of application

17. (1) The effective date on an application in terms of section 15 is the date on which it is received by the Registrar, and if more than one application in respect of the same variety is received, priority must be given by the Registrar in accordance with the regulations.

(2) Where the person by or on whose behalf an application is made in terms of section 15 has filed an earlier application for rights in regard to the variety concerned in a convention country, the effective date of his or her application in terms of section 15 is deemed to be the date on which that earlier application was filed or, where he has filed;

(3) An applicant is not entitled to the benefits of this subsection unless his or her application -

- (a) is submitted to the Registrar in the prescribed manner within a period of 12 months of the date on which such preceding application was duly deposited in the convention country;

- (b) is accompanied by claim in respect of the priority of his or her earlier application;
- (c) is accompanied by the prescribed application fee; and
- (d) within 90 days after lodging his or her application with the Registrar in terms of section 15, he or she submits to the Registrar a copy of the documents which constituted the earlier application, certified to be a true copy by the authority with which the earlier application was filed.

Rejection of application

18. (1) The Registrar may, after given the applicant a reasonable opportunity to present his or her case, reject any application made in terms of section 15 if it appears to him or her that -

- (a) the application does not comply with any provision of this Act;
- (b) the variety in respect of which the application has been made -
 - (i) is not a variety referred to in section 7 (9);
 - (ii) does not belong to a prescribed kind of plant; or
- (c) the applicant is not entitled in terms of this Act to make the application;
- (d) the application contains a material misrepresentation;
- (e) the applicant refuses or has failed or is not able to propose an acceptable denomination; or
- (f) the production of the plant concerned would require the repeated use of the reproductive material of another plant variety for which plant breeders rights have been granted or are applied for by another person unless such reproductive material is used under a license granted in terms of section 36.

(2) The Registrar may, instead of rejecting an application as contemplated in subsection (1), require the applicant to amend the application or to make such corrections or modifications as may be necessary to ensure that it satisfies the requirements set out that subsection.

(3) If the Registrar rejects an application in terms of subsection (1) he or she must in writing advise the person who applied for the grant of a plant breeder's right of his or her decision and of the grounds on which it was based.

Amendment of application

19. (1) With the consent of the Registrar, a person who has made an application in terms of section 15 may, at any time before the application is published under section 18, add to or alter the description lodged with his or her application or the proposed denomination of the plant concerned.

(2) If an application is made for such addition or alteration after the said publication the Registrar may, if he or she is of the opinion that the addition or alteration is of material importance direct that the date of the application for the addition or alteration is the effective date of the relevant application under section 15, and the Registrar must republish the application under section 20 in amended form.

Publication of information

20. (1) The Registrar shall publish among others the following information-

- (a) Application for the grant of Breeders' Rights
- (b) Variety denomination
- (c) Withdrawal of application for the grant of Breeders' Rights
- (d) Rejection of application for the grant of Breeders' Rights
- (e) Grant of Breeders' Rights
- (f) Changes in applicants, holders and agents
- (g) Nullification, surrender, cancelation and expiry of Breeders' Rights
- (h) Any other information which may be deemed necessary for public knowledge

(2) No confidential information as indicated in the application form, shall be published without the written consent of the breeder of the variety

Publication of application

21. (1) If, on consideration of an application in terms of section 15, it appears to the Registrar that the plant concerned is a new variety of a prescribed kind and the applicant is entitled to apply for plant breeders rights in respect of it, the Registrar must publish a notice specifying the following particulars in relation to the application -

- (a) the name of the applicant;

- (b) the effective date of the application;
- (c) the proposed denomination of the variety; and
- (d) such particulars relating to the application as may be necessary to describe the variety for public comments as prescribed or as the Registrar deems appropriate.

Objection to grant of Breeders' Rights

22. (1) Any person may, within 60 days of the publication of the notice in terms of section 20 and 21, lodge with the Registrar in writing an objection to the grant of breeders' rights on any of the following grounds that:

- (a) the applicant is not entitled to the breeder's right
 - (b) the variety does not comply with the criteria for the grant of the plant breeder's right as provided for in this Act.
 - (c) the variety concerned has been reproduced by the repeated use of the reproductive material of a plant of another variety for which plant breeders rights have been granted to or applied for by a person other than the applicant, without license or permission or in violation thereof
 - (d) the proposed denomination for the plant variety is not acceptable;
 - (e) the variety may have adverse effect on the environment;
 - (f) the published notice is incomplete, or that it does not clearly describe the variety; or
 - (g) the application contains a material misrepresentation.
- (2) A notice of objection in terms of subsection (1) must -
- (a) be accompanied by a statement setting out particulars of the facts alleged in support of the said grounds.
 - (b) be supported by an affidavit as a statement of proof for the objection filed.
- (3) The Registrar must furnish -
- (a) an applicant 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 (3).
- (4) the applicant may respond to the allegations of the objector, in writing to be lodge with the registrar within time limit prescribed , or such further period as the Registrar may allow, from the date of the notification..
- (5) The Registrar must, after hearing the parties if so required, and considering the evidence, decide whether or not the objection should be upheld, and if he or she -
 - (a) upholds the objection and, in the case of an objection on the ground referred to in subsection (1)(d) the applicant does not alter the denomination of the plant concerned, the Registrar must reject the application and must -
 - (i) forthwith notify the applicant and the objector in writing of such rejection; and
 - (ii) within 30 days of such rejection, publish notice of such rejection, except that if an appeal in terms of section 75, 79 and 80 is lodged, the notice may not be published until such time as the appeal has been determined;
 - (b) does not uphold the objection, he or she must notify the applicant and the objector of his or her decision.

Part III

Consideration of Application for Breeders' Right

Examination of Application

- 23.** (1) The Registrar shall –
- (a) examine to determine whether the application and its supporting documents fulfill the criteria for the grant of a breeders' right as provided in Section 7 to Section 12
 - (b) examine the novelty condition in accordance with section 7
 - (c) determine whether the applicant is entitled in terms of this Act to make the application.
 - (d) determine if the prescribed fees have been paid within the time limit specified in accordance with Section 49 and section 88.

- (e) cause the application to be examined or refer the application for examination by such person, body of persons or institution as may be prescribed.
- (f) examine the suitability of the denomination in accordance (Section 16)

Examination for Distinctness, Uniformity and Stability

24 (1) The Registrar shall arrange for the technical examination relating to compliance with the conditions provided for in sections 10, 11 and 12 to be carried out in accordance with this section and any technical examination provided for in the regulation, operating procedures or test guidelines. -

(2) The applicant whose application is being considered must, for the purpose of such tests and trials and at such time and place as the Registrar may determine -

- (a) pay the prescribed examination fee; and
- (b) furnish the Registrar with -
 - (i) the propagating material which he or she may require;
 - (ii) such specimens of plants of the variety or of parts of such plants as he or she may require; and
 - (iii) with such information in connection with the variety as he or she may require.

(c) The registrar shall communicate the results of the technical examination and the variety description to the applicant and give the applicant an opportunity to comment thereon

Grant or refusal of breeder's rights

25. (1) The Registrar shall grant a breeder's right where:

- (a) the plant variety fulfils the requirements of novelty, distinctness, uniformity and stability as provided for under section 9, 10, 11 and 12;
- (b) the proposed denomination of the variety complies with section (16)
- (c) there is no objection filed or, if filed, it does not contain any valid ground

(2) The registrar shall in respect of each breeder's right granted –

- (a) issue a breeder's right certificate in respect thereof to the applicant
 - (b) enter the applicable particulars in the Register, and
- (3) Within 30 days of the grant of plant breeders rights in terms of subsection (1), the Registrar must publish a notice giving such particulars of the grant as he or she deems fit, and in such notice –
- (4) Where the examination shows that the proposed denomination of the variety cannot be registered, the Registrar shall request the applicant in writing to submit another denomination within a period of 90 days, or further time period as a Registrar may allow, failing of which the application shall be rejected.
- (5) An application shall be rejected if it is established that:
- (a) the applicant is not entitled to file an application in accordance to section (a person entitled)
 - (b) the applicant has not replied within the prescribed time limit to the official notification issued by the Registrar, particularly where the:
 - (i) information given was inaccurate or incomplete
 - (ii) application contained a material misrepresentation
 - (iii) variety to which the applicant referred does not satisfy the requirement of the section 6 to 9
 - (iv) applicant refuses or unable to propose an acceptable denomination
 - (v) applicant does not comply with the payment of fee as prescribed
- (6) The Registrar may, subject to subsection (1), require the applicant to amend the application or to make such correction or modification as may be necessary to ensure that it satisfies the requirement set out in that subsection.
- (7) If the Registrar rejects an application in terms of subsection (1) he or she must be in writing advise the applicant who applied for a grant of a plant breeder' right of his or her decision and of the ground on which it was based.

Provisional protection

26. (1) In terms of this Act, provisional protection for the variety concerned shall be granted, in terms of section 17 until the applicant is granted plant breeder' right.

(2) Any legal action in respect of provisional protection can be initiated only after the rights is granted.

Publication of variety lists

27. The Registrar must, within such intervals as he or she deems appropriate, publish, in the prescribed manner, the list of varieties which have been registered during that interval.

Applications from convention countries

- 28.** (1) Where a country, other than Namibia –
- (a) has acceded to an regional and international convention, treaty or arrangement for the protection of plant varieties to which Namibia has also acceded; or
 - (b) has a law on protection of plant varieties on the basis of which Namibia has entered into an agreement for granting plant breeders' rights to the citizens of both the countries,

the Minister may, with a view to the fulfillment of the convention, treaty, or arrangement with that country, by notice in the *Gazette*, declare such country to be a convention country for the purposes of this Act.

(2) Where a person has made an application for the granting of plant breeder's rights to a variety or for entering such variety in the official register of varieties in a convention country and that person, or any person entitled to make application on his or her behalf under this Act, makes an application, in compliance with the provisions of this Act, for the registration of such variety in Namibia within 12 months after the date on which the application was made in the convention country, such variety must, if registered under this Act, be registered as of the date on which the application was made in the convention country and that date is deemed for the purposes of this Act to be the date of registration.

(3) Where applications have been made for granting of plant breeder's right to a variety, or for entering such variety in the official register of varieties in two or more convention countries, the period of 12 months referred to in subsection (2) must be reckoned from the date on which the earlier or earliest of those applications were made.

(4) Nothing in this Act entitles the holder of breeders' rights of a registered variety to claim infringement rights or rights other than protected under this Act for acts which took place prior to the date of application of registration under this Act.

Provisions on reciprocity

29. Where any country declared by the Minister in this behalf by notice in the *Gazette* under section 28(1) does not accord to citizens or residents of Namibia the same

rights in respect of the registration and protection of breeders' rights of a variety, as it accords to its own citizen or residents, no citizen or resident of such country is entitled, either solely or jointly with any other person, to apply for the registration of breeders' rights with respect to a variety or is entitled to get a variety registered under this Act.

CHAPTER 4

RIGHTS OF BREEDERS

Part I

Duration

- 30.** Subject to this Act, the term of the breeders' rights is -
- (a) 25 years in the case of vines and trees effective from the date of the grant; and
 - (b) 20 years in all other genera or species.

The Committee, may upon application made to the Registrar, in respect of specific genera or species, recommend to the Registrar to extend the period of protection for up to another period of two years.

Scope of Plant Breeders' Right

31. (1) Subject to this section, during the period specified in section 30 the following acts in respect of the propagating material of the protected variety shall require the authorization of the holder of the breeder's right, which otherwise would constitute an infringement of the right of the holder.

- (a) offering for sale; and
 - (b) selling or other marketing;.
 - (c) production or reproduction of propagation;
 - (d) conditioning for the purpose of propagation
 - (e) exporting
 - (f) importing
 - (g) stocking for any of the purposed referred to in paragraph (a) to (f)
- (2) the holder may make the authorization subject to conditions and limitations
- (3) the Act referred to in subsection (1) in respect of harvested material, including entire plants and parts of the plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the holder, unless the holder has had reasonable opportunity to exercise his or her right in relation to the said propagating material.
- (4) The provisions of subsection (1), (2) and (3) shall also apply in relation to varieties
- (a) which are essentially derived from the protected variety, where the protected variety is no itself an essential derived variety;

- (b) which are not clearly distinguishable in accordance with article 9 from the protected variety;
 - (c) whose production requires the repeated use of the protected variety.
- (5) For the purposes of paragraph (4)(a), variety shall be deemed to be essentially derived from another variety (“the initial variety”) when
- (a) 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
 - (b) it is clearly distinguishable from the initial variety by one or more characteristics.; and
 - (c) except for differences that 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 that other variety;

Essential derived varieties may be obtained through selection of a mutant variant, or through crossing, genetic engineering or any other means.

Exceptions to Plant Breeder’s Right

32. The plant breeder’s right shall not extend to-

- (a) acts done privately and for non commercial purposes;
- (b) acts done for experimental or research purposes;
- (c) acts done for the purpose of breeding other variety, and except where the provisions of (Section 31 (4) (a)) apply, act referred to in Section 31 (1) and (2) in respect of such other varieties; and
- (d) a person who has purchased the plant, or reproductive material thereof, from the holder of plant breeders rights or from a person authorized by the holder may grow and resell the plant and any material harvested from it, except that he or she may not do so for the sole or primary purpose of reproducing or multiplying the plant; and
- (e) a subsistence farmer will be free to save part of the seed from the first crop of a prescribed plant for sowing in his or her own farm to produce a second and subsequent crop, or to sow another plant, which is essentially derived from the prescribed plant, on that land, and such conduct is not an infringement of the holder’s rights under subsection (1), except that this paragraph does only apply to subsistence food crops prescribed in the

regulations grown for household food security, and does not apply to ornamental or other kinds of plants.

Exhaustion of Plant Breeder's Right

33. (1) A breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provision for (Section 31) (3) which has been sold or otherwise marketed in the National by the breeder or with the breeder's consent or any material derived from the said material, unless such actions involve –

(a) further propagation of the variety in question; or

(b) an export material of the variety, which enable the propagation of the variety, into a country which does not protect varieties of the plant genus or species which the variety belongs, except where the exported material is for final consumption purposes.

(2) for the purposes of subsection (1), “material” in relation to a variety means:

(a) propagating material of any kind

(b) harvested material including entire plants and parts of the plants; and

(c) any product made directly from harvested material.

Measuring regulating commerce

34. The breeder's right shall be independent of any measure to regulate the production, certification and marketing of materials of varieties or the importing or exporting of such materials and in any case, such measure shall not affect the application of the provision of this act.

Maintenance of protected variety

35. (1) the holder of a plant breeder's right shall throughout the period for which the right is valid, be under the obligation to make available, at the request of the Registrar, reasonable samples of the protected variety capable of producing plants which correspond to the characteristics defined for the variety when the right was granted.

(2) The holder of the plant breeder's right shall also provide the Registrar with all such information and assistance as the Registrar may request for the purpose of ensuring that the holder of the plant breeder's right is fulfilling his obligation under subsection 1, including facilities for the inspection by or on behalf of the Registrar of the measures taken for the maintenance of a variety.

Part II

License

Licensing

36. (1) The holder of plant breeder's rights may grant to any persons, an exclusive or non exclusive license relating to all or any of the rights provided for under this Act.

(2) In granting any license referred to in subsection (1), the holder shall, within 90 days of granting such license, notify the Registrar in writing of the grant of the license of the plant breeders rights and may impose such conditions, limitations and restrictions as he or she deems fit.

Compulsory license

37. (1) Subject to this section, any person interested who has been unable to obtain a license referred to in section (36) in respect of a variety to which breeders' rights have been granted may, in the prescribed manner and upon payment of the prescribed fee, apply to the Registrar for a compulsory license on the ground that:

- (a) it is in the public interest to protect the variety concerned;
- (b) the holder of the breeder's right concern, unreasonably refuses to grant the license to such interested person.

(2) Compulsory license shall be granted by the Registrar after consultation and advice from the Advisory Council.

(3) A compulsory license may be granted to any person or category of person satisfying specific requirements for granting of such compulsory license.

(4) The issuing of a compulsory license does not prevent the holder of the breeder's right from granting additional license in terms of Section 36.

(5) The Registrar shall when granting a compulsory license pursuant to this Section taking into account the interest of the holder of the plant breeder's right who will be affected by grant of the compulsory license stipulate the and the specific purpose for which the compulsory license is being granted and specify the reasonable conditions pertaining there to including:

- (a) the period of the license;
- (b) the amount and method of payment of compensation due to the holder of the rights; and
- (c) any other obligations to be fulfilled by the holder which are necessary to make use of the compulsory license.

Assignment and transfer of breeders' rights

38. (1) A breeder's right may be assigned to transfer to another person in accordance with prescribed procedures stipulated in the regulation.

(2) An assignment or transfer of breeder's right shall be in writing, signed by the parties concerned and entered in the register.

(3) Transfer of a plant breeder's right by assignment can only be made to successors who comply with the conditions laid down in (Section 14)

Infringement of breeder's rights and compensation

39. (1) Subject to the provisions of this Act, a right established under this Act is infringed by a person who –

- (a) not being the holder of plant breeders rights granted under this Act or a licensee of the holder of such rights, sells, exports, imports or produces or multiplies such variety without the consent of the holder of the rights or within the scope of a license without the consent of the licensee, as the case may be; or
- (b) uses, sells, exports, imports or produces or multiplies any other variety giving such variety, the denomination identical with or deceptively similar to the denomination of a variety registered under this Act in such manner as to cause confusion in the mind of general people in identifying such variety so registered.

(2) The holder of a plant breeder's right may upon proof of an infringement of that right and without proof of damages which might arise from the infringement, recover by action in any competent court from the person who infringed the plant breeder's right compensation in respect of such infringement in an amount not exceeding N\$10 000.00.

(3) An action under subsection (2) is available to the holder *in lieu* of any action for damages in any amount which might arise from the relevant infringement.

(4) An action referred to in subsection (2) or (3) may not be instituted while the relevant plant breeder's right or variety is the subject of –

- (a) an objection which in terms of this Act is to be determined by the Registrar; or
- (b) an appeal which in terms of section 70 is to be decided by the Board.

(5) The holder of plant breeder's rights or any person to whom a license has been granted under section 28 or 38 may institute a claim for damages suffered by such holder or such person due to the infringement of that plant breeder's right.

(6) In the case of proceedings referred to in subsection (5) instituted by a persons to whom a license has been granted under section 28 or 38 the holder of the relevant plant breeders right must be joined as a party to those proceedings.

(7) In addition to any other remedy, a competent court may, in proceedings due to the infringement of a plant breeder's right, make an order in respect of the custody, surrender or disposal of any book, document, plant, propagating material, product, substance or other article.

Use of approved name

40. (1) Where the approved name of any plant variety -

- (a) is still commercially exploited; or
- (b) has ceased to be commercially exploited, but the name has acquired a special significance in relation to that variety;

No person may use, in relation to any other variety, a name which is identical to or may be confused with the approved name.

(2) Any person who sells -

- (a) a plant in respect of which plant breeders rights have been granted; or
- (b) any seed or reproductive material of a plant in respect of which breeders' rights have been granted;

Must use the variety's approved name in connection with the sale, even if the breeders' rights have expired, except that he or she may use the name in association with a trade mark, trade name or other such mark or name, if the plant's approved name remains easily recognizable.

(3) Any contravention of this section is deemed to be an infringement of the plant breeders rights concerned for purposes of section 39.

CHAPTER 5

SURRENDER, NULLIFICATION AND CANCELLATION OF BREEDER'S RIGHT

Surrender of breeders' right

41. (1) A holder of plant breeders rights who wishes to surrender such rights may, by written declaration to the Registrar, surrender such rights before the expiry prescribed duration Section 30

(2) The date of surrendering shall be that specified in the declaration or, if none is specified, the date on which the declaration is received by the Registrar

(3) Upon surrender of the breeder's right, the certificate of Plant Breeder's Right shall become invalid and shall be returned to the Registrar.

(4) The Registrar shall, upon receipt of a notification for surrender, terminate the breeder's right and publish the said termination.

Nullification of plant breeder's rights

42. (1) The Registrar shall declare a grant of breeders' rights null and void when it is established that:

- (a) when the rights were granted, the conditions provided for in sections 9, 10, 11 and 12 were not complied with at the time the breeder's right were granted
- (b) the person to whom the rights were granted was not entitled to, and the rights have not subsequently been transferred to the person entitled to.
- (c) the right was obtained through fraud, misrepresentation or concealment of any material fact.

(2) A breeder's rights shall not be declared null and void for reason other than those in subsection (1)

(3) Subject to any provision contrary to this Act the breeder's rights that has been declared null and void shall be deemed never to have been granted

Cancellation of Breeder's Right

43 (1) The Registrar may cancel the breeder's rights if:

- (a) the variety no longer meet the criteria set out in section 10 and 12

(b) After being requested to do so within a prescribed period, the breeder or holder has fail to provide to the Registrar information, documents or material deemed necessary for verifying the maintenance of the variety:

(c) the plant breeder holder fails to pay such fees within such time as prescribed to keep the right of the plant breeder or holder in force

(d) the plant breeder's holder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination within the prescribed period.

(2) A plant breeder's right shall not be cancelled for reason other than those referred in subsection (1)

(3) A cancellation shall take effect on the date of its entry in the register.

(4) Upon cancellation of a breeders' rights, the certificate shall become invalid and shall be returned to the Registrar

CHAPTER 6

FARMERS' RIGHTS

Farmers' rights

44. (1) Despite anything contained in this Act, farmers' varieties and breeds are recognized and must be protected either under the provisions of this Act, if they are eligible for registration, and under the rules of practices and laws of the concerned local and indigenous farming communities, whether such laws are written or not.

(2) Without prejudice to the generality of subsection (1) the following provisions apply in relation to farmers and farmers' varieties -

- (a) a farmer who has bred or developed a new variety is entitled to have the variety registered and other protection in like manner as any breeder of a variety under this Act;
- (b) the farmers' variety is entitled for registration if the application contains declaration as specified in section 15(3)(f) and any prescribed particulars as contemplated in section 15(3)(h);
- (c) a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement through selection and preservation is entitled in the prescribed manner for recognition and reward from the Gene Fund, as long as the material so selected and preserved has been used as donors of genes in varieties registrable under this Act;

- (d) a farmer is deemed to be entitled to save, use, sow, resow, exchange, share or sell his or her farm produce including seed of a variety protected under this Act in the same manner as he or she was entitled before the coming into force of this Act, except that the farmer is not entitled to sell seed of a variety protected under this Act; and
- (e) it is not an infringement of plant breeders rights under this Act for a small scale rural farmer to multiply seeds of a variety protected under this Act or to multiply another plant, which is essentially derived from that plant concerned, for own use on that land where the harvest was obtained, or for exchange exclusively with other small scale rural farmers within the norms of that rural community, except that the farmer may not sell farm-saved seed or propagating material in the seed industry on a commercial scale.

(4) Where any propagating material of a variety registered under this Act has been sold to a farmer or a group of farmers or any organization of farmers, the holder of the plant breeder's rights of such variety must disclose to the farmer or the group of farmers or the organization of farmers, as the case may be, the expected performance under given conditions.

Disclosure of information and payment of royalties to farmer-conservers

45. (1) A breeder or other person making application for registration of plant breeders rights of any variety under Section 14 must disclose in the application the information regarding the use of genetic material conserved by any traditional or rural families in the breeding or development of such variety.

(2) If the breeder or such other person fails to disclose any information under subsection (1), the Registrar may, after being satisfied that the breeder or such person has willfully and knowingly concealed such information, reject the application for registration.

(3) Farmer-conservers whose donor varieties have been shown to have contributed to the development of the registered variety, on making a claim under section 46, are entitled to be paid such amount as may be determined by the Minister under section 46 from the royalty paid into the Gene Fund in terms of section 51.

(4) Where it is not possible to identify with a reasonable degree of precision the exact location from where the donors of useful genes originated, the royalty credited to the Gene Fund will be utilized to strengthen the *ex situ* and *in situ* conservation activities of local and indigenous communities in areas threatened with serious gene erosion as determined by the Minister on the basis of the recommendation of the Advisory Council.

Rights of communities

46. (1) Any person or group of persons (whether actively engaged in farming or not), including farmers and farmer-conservers, or any governmental or non governmental organization may, on behalf of any village or local and indigenous community in Namibia, file with any office or institution previously specified by the Minister by notice in the *Gazette* or by regulation, any claim attributable to the contribution of the people of that village or local community, as the case may be, in the evolution or any variety for the purpose of staking a claim on behalf of such village or local community.

(2) Where any claim is made under subsection (1), the office or institution referred to that subsection may verify the claim made by such person or group of persons or such governmental or nongovernmental organization in such manner as it deems fit, and if it is satisfied that such village or local community has contributed significantly to the evolution of the variety which has been protected under this Act, it must report its findings to the Minister through the Registrar.

(3) If the Minister, on receipt of a report under subsection (2) is satisfied, after consultation with the Registrar and after such inquiry as he or she deems fit, that the variety with which the report is related has been registered under the provisions of this Act, he or she may issue notice in the prescribed manner to the holder of breeder's rights of that variety and after providing opportunity to such holder to file objection in the prescribed manner and of being heard, he or she may after consultation with the Advisory Council, by order, grant such sum of compensation to be paid to a person or group of persons or governmental or nongovernmental organization which has made claim under subsection (1), as he or she deems fit.

(4) Any compensation granted under subsection (3) must be deposited in the prescribed manner into the Gene Fund by the holder of the breeder's rights of the variety.

(5) The compensation determined under subsection (3) is, on a reference made by the Minister in the prescribed manner, recoverable in any competent court as a debt owing to the State by the breeder.

Innocent infringement by farmer

47. Despite anything contained in this Act -

- (a) a right established under this Act may not be deemed to be infringed by a farmer who at the time of such infringement was not aware of the existence of such right; and
- (b) any relief which a court may grant in any action for infringement referred to in section 39 may not be granted by such court, nor any cognizance of any offence under this Act may be taken, for such infringement by any

court against a farmer who proves, before such court, that at the time of the infringement he or she was not aware of the existence of the right so infringed.

Consent of farmers needed

48. Despite anything contained in section 31, where an essentially derived variety, as described in subsection (5) of that section, is derived from a farmers' variety, a license referred to in section 36 may not be given by the holder of plant breeder's rights of such farmers' variety except with the consent of the farmers or group of farmers or community of farmers who have made contribution in the preservation or development of such variety.

CHAPTER 7

FEES

Annual fees

49. (1) Fees for the implementation of this Act shall be paid in accordance with schedule of fees made under Section 88

Benefit sharing

50. (1) After issuing a certificate of registration in terms of section 25(2)(a), the Registrar must publish the contents of the certificate and invite claims of benefit sharing to the variety registered under such certificate in the manner as may be prescribed.

(2) On invitation of claims under subsection (1), any person or group of persons or firm or governmental or nongovernmental organization must submit his or her or its claim of benefit sharing to such variety in the prescribed form within such period, and accompanied by such fees, as may be prescribed.

(3) A claim under subsection (2) may only be submitted by any –

- (a) person or group of persons, if such person or every person constituting such group is a citizen of Namibia; or
- (b) firm or governmental or non-governmental organization, if such firm or organization is formed or established in Namibia.

(4) On receiving a claim under subsection (2), the Registrar must send a copy of such claim to the holder of plant breeders rights of the variety registered under such certificate and the holder may, on receipt of such copy, submit his or her opposition to such claim within such period and in such manner as may be prescribed.

(5) On receipt of the notice of opposition from the holder the Register must, as soon as is reasonably possible, forward the claim together with all the documents submitted in support of the claim and the notice of opposition and all supporting documents to the Minister.

(6) The Minister must, as soon as is reasonably possible after receiving the documents, refer all the documents submitted to him or her under subsection (1) to the Advisory Council for its advice and recommendation.

(7) On receipt of documents submitted to it under subsection (5) the Advisory Council must as soon as is reasonably possible, investigate the claim or cause the claim to be investigated by such person or institution as may be prescribed and thereafter make its recommendations to the Minister.

(8) On receipt of the Advisory Council's recommendation, the Minister must, after giving an opportunity of being heard to the parties, determine the claim received under subsection (2).

(9) When determining the claim under subsection (8), the Minister must explicitly indicate in his or her order the amount of the benefit sharing, if any, for which the claimant is entitled and must take into consideration the following matters, namely:

- (a) the extent and nature of the use of genetic material of the claimant in the development of the variety relating to which the benefit sharing has been claimed; and
- (b) the commercial utility and demand in the market of the variety relating to which the benefit sharing has been claimed.

(10) The amount of benefit sharing to a variety determined under this section must be deposited by the holder of rights to such variety in the manner prescribed into the Gene Fund.

(11) The amount of benefit sharing determined under this section is, on a reference made by the Minister, recoverable in any competent court as a debt owing to the State by the holder of the breeder's rights.

Payment of royalty into Gene Fund

51. Where land races, wild species or 'folk varieties' originating from Namibia have contributed to the development of a new a variety, five per cent or such other percentage as may be prescribed of the gross income from the sale of seed of such variety must, in the prescribed manner, be paid into the Gene Fund as royalty by the holder of the breeders rights.

Exemption from fees

52. A farmer or group of farmers or village community are not liable to pay any fees in any proceeding before the Registrar, the Board or the court under this Act or the regulations or rules made there under.

CHAPTER 8

PLANT BREEDERS AND FARMERS RIGHTS ADVISORY COUNCIL

Establishment of the Plant Breeders and Farmers Rights Advisory Council

53. (1) There is established an advisory council to be known as the Plant Breeders and Farmers Rights Advisory Council to advise the Minister on matters referred to in this Act.

(2) The Advisory Council consists of the following nine persons to be appointed by the Minister -

- (a) one staff member of the Ministry, who is the chairperson of the Advisory Council;
- (b) two staff members, nominated by the relevant Government Ministers, to represent the interests of the State;
- (c) one person, nominated by an association or organisation representing large scale commercial farmers, to represent the interests of commercial farmers;
- (d) one person, nominated by an association or organisation representing small scale communal farmers, to represent the interests of communal farmers;
- (e) one person, nominated by an association or organisation representing the seed industry, to represent the interests of the seed industry;
- (f) one female person, nominated by an association or organisation representing women associated with agricultural activities, to represent the interests of women in agriculture;

- (g) two persons, nominated by the Minister responsible for higher education, to represent the interests of universities or other institutions involved in agricultural research.

(3) The Registrar is an *ex-officio* member of the Advisory Council but he or she has no right to vote.

(4) The Minister must in writing invite the relevant Government Ministers or the associations or organisations referred to in subsections (2)(c) to (g) to nominate, within the period stated in the notice, persons as members of the Advisory Council as contemplated therein.

(5) If an association or organisation referred to in subsections (2)(c) to (g) does not exist or fails or is unable to nominate a candidate within a reasonable time after being requested to do so, the Minister may appoint to the Advisory Council, a person whom the Minister reasonably believes would be able to represent the interests of the relevant organisation or association.

(6) The Minister must as soon as possible after the constitution of the Advisory Council or any change in the constitution of the Advisory Council by notice in the *Gazette* publish the names of the members of the Advisory Council and the dates of commencement of their terms of office.

Eligibility for membership

54. (1) A person is not eligible for appointment to the Advisory Council if he or she -

- (a) is a member of the National Assembly or the National Council;
- (b) is an unrehabilitated insolvent;
- (c) has been convicted of an offence of which dishonesty is an element and sentenced to imprisonment without the option of a fine; or
- (d) is considered a mentally ill person under the Mental Health Act, 1973 (Act No. 18 of 1973).

(2) Any person who is in terms of subsection (1) disqualified to be a member of the Advisory Council and who, while he or she is so disqualified and knowing or having reasonable grounds for knowing that he or she is so disqualified, sits as a member of the Advisory Council, commits an offence and is liable to a penalty of N\$1000 for

each day on which he or she so sits, which may be recovered by the Minister by action in any competent court for the benefit of the Gene Fund.

Alternate members

55. (1) The Minister may appoint for each member of the Advisory Council a person to be the alternate of the member concerned.

(2) The alternate to a member of the Advisory Council may, in the event of the member's absence from a meeting of the Advisory Council, attend the meeting in the capacity of a member.

Powers, duties and functions of the Advisory Council

56. The Advisory Council is responsible for -

- (a) making recommendations to the Minister in relation to the application of this Act, any amendment to this Act and the making of regulations;
- (b) advising the Minister on the duties and functions to be performed in terms of this Act and on matters referred to the Advisory Council by the Minister;
- (c) inquiring into, and advising the Minister on, matters relating to the protection of plant breeders and farmers rights matters in Namibia;
- (d) making recommendations to the Minister on the eligibility of claims for benefit sharing, claims for compensation or any other claim referred to it in terms of this Act;
- (e) advising the Minister and the Permanent Secretary on the administration of the Gene Fund; and
- (f) performing any other function as may be directed by the Minister or as may be prescribed.

Tenure and vacation of office

57. (1) Subject to subsection (2), a member of the Advisory Council holds office for a period of three years, but a member is eligible for re-appointment once for another term of three years at the end of his or her term of office.

(2) A member of the Advisory Council vacates office if he or she -

- (a) ceases to hold the office by virtue of which he or she became a member or no longer represents the interests of the association or organisation by virtue of which he or she became a member;
- (b) has, without reasonable excuse, absented himself or herself from three consecutive meetings of the Advisory Council;
- (c) in writing, resigns from office; or
- (d) becomes subject to a disqualification referred to in section 54(1).

(3) Despite subsection (1), the Minister may, after affording a member an opportunity to make representations on the matter, remove a member from office if the Minister has reasonable cause to believe that the member is no longer fit or able to discharge the functions of his or her office

(4) If a member of the Advisory Council vacates office under the circumstances referred to in subsection (2) or (3) or dies, the vacancy must subject to section 54(1), be filled by -

- (a) a staff member appointed by the Minister or by the Minister after a nomination is made by the relevant Minister, if the appointment was made under section 53(2)(a), (b) or (g); or
- (b) a person nominated by the association or organization which originally nominated him or her for appointment, if that person was appointed under section 53(2)(c), (d), (e) or (f).

(5) A member who is appointed under subsection (4) holds office for the remainder of the period for which his or her predecessor was entitled to hold office.

Conduct of members and disclosure of interest

58. (1) A member of the Advisory Council may not -

- (a) engage in an activity that may undermine the integrity of the Advisory Council;
- (b) participate in any investigation or decision concerning a matter in respect of which the member has a financial or other personal interest; or
- (c) use any confidential information obtained in the performance of his or her functions as a member to obtain, directly or indirectly, a financial or other advantage for himself or herself or any other person.

(2) A member who has or acquires any financial or other personal interest, either directly or indirectly, in any matter which is before the Advisory Council for discussion and determination must -

- (a) immediately and fully disclose the interest to the Advisory Council; and
- (b) withdraw from any further discussion or determination by the Advisory Council of that matter.

(3) Any person who contravenes or fails to comply with any provision of this section commits an offence and is liable on conviction to a fine not exceeding N\$ 10 000 or to imprisonment for a period not exceeding 12 months or to both the fine and imprisonment.

Procedure and meetings of Advisory Council

59. The first meeting of the Advisory Council must be held at a place and time that the chairperson determines and any meeting of the Advisory Council thereafter must be held at a place and time that the Advisory Council determines.

(2) If for any reason a meeting determined by the Advisory Council cannot take place, the secretary, with the concurrence of the chairperson, must convene the next meeting of the Advisory Council.

(3) The chairperson -

- (a) may at any time convene a special meeting of the Advisory Council;
- (b) must convene a special meeting of the Advisory Council if requested thereto by the Minister or at least three members of the Advisory Council.

(4) The chairperson presides at all meetings of the Advisory Council at which he or she is present.

(5) The members of the Advisory Council must at the first meeting of the Advisory Council elect a vice-chairperson from their members

(6) In the absence of the chairperson from a meeting, the vice-chairperson presides if present, or in the absence of both the chairperson and vice-chairperson, the members present must elect one of their members to preside at that meeting and perform the functions and exercise the powers of the chairperson.

(7) At a meeting of the Advisory Council -

- (a) a majority of the members of the Advisory Council forms a quorum;
- (b) all questions are decided by a majority of votes of the members present and voting; and
- (c) the member presiding has a deliberative vote and, in the event of any equality of votes, also a casting vote.

(8) The Advisory Council may invite any person who has expert knowledge of a matter before the Advisory Council for determination to attend a meeting of the Advisory Council and take part in discussions in relation to that matter, but such person has no right to vote.

(9) The secretary must keep or cause records to be kept of all the proceedings at meetings of the Advisory Council.

(10) As soon as possible after a meeting of the Advisory Council has taken place, the chairperson must cause a copy of the minutes of that meeting to be submitted to the Minister.

(11) The Minister may make rules regarding the holding of and procedure at meetings of the Advisory Council including those of any committee established in terms of section 60.

Committees

60. (1) The Advisory Council may establish one or more committees –

- (a) to advise the Advisory Council on the performance of its functions; and

- (b) exercise any power or perform any function of the Advisory Council which the Advisory Council may delegate or assign to the committee.
- (2) A committee appointed by the Advisory Council in terms of subsection (1)
 - (a) must comprise at least two members of the Advisory Council; and
 - (b) may include any number of other persons with relevant expertise on subject matter.
- (3) Subject to the approval of the Minister, the Advisory Council may assign any of its functions to a committee on conditions it may decide to impose.
- (4) The Advisory Council must designate a member of the Advisory Council to be the chairperson of a committee.

Administration and finance

- 61.** (1) The Minister -
 - (a) must designate a staff member in the Ministry to act as the secretary of the Advisory Council; and
 - (b) may designate such other staff members in the Ministry to assist the secretary in the implementation and performance of the administrative and secretarial duties and functions of the Advisory Council.
- (2) A member of the Advisory Council or of any committee who is not a member of the Advisory Council, who is not in full time employment of the State is entitled to be paid such remuneration or allowances, as well as such other benefits, as the Minister, with the concurrence of the Minister responsible Finance, may determine.
- (3) The allowances or expenses payable or reimbursable under subsection (2) are payable from money appropriated for that purpose by Parliament.

CHAPTER 9

COMMUNITY GENE FUND

Establishment of Gene Fund

62. There is established a fund to be known as the Community Gene Fund.

Finances of the Gene Fund

- 63.** The Gene Fund consists of -
- (a) moneys appropriated by Parliament;
 - (b) donations or contributions made to the Gene Fund for the purpose of the achievement of its objects;
 - (c) the benefit sharing received in the prescribed manner from the holder of plant breeder's rights of a variety registered under this Act, or propagating material of such variety;
 - (d) the annual fee payable under section 49;
 - (f) any royalty or compensation deposited into the Gene Fund under section 50(10), 51.
 - (g) interest and dividends derived from the investment of moneys made on behalf of the Gene Fund; and
 - (h) moneys accruing to and vesting in the Gene Fund from any other source and which accrues to the Gene Fund.

Utilisation of the Gene Fund

- 64.** (1) The Gene Fund may, in the prescribed manner, be utilised for -
- (a) any amount to be paid by way of benefit sharing under section 50;
 - (b) royalties or compensation payable under section 51, 46, ;
 - (c) the expenditure for supporting the conservation and sustainable use of biological or genetic resources including *in-situ* and *ex-situ* collections and for strengthening the capability of the State in carrying out such conservation and sustainable use in terms of section 45(4);

- (d) the expenditure of the scheme relating to benefit sharing framed under section 65;
- (e) socio-economic development of areas from where such biological resources or knowledge associated thereto has been accessed subject to any approval granted in consultation with the local bodies concerned; and
- (f) any other purpose within the objectives of this Act that the Minister on the recommendation of the Advisory Council may determine.

(2) Specific donations to the Gene Fund may be utilised in a manner as agreed to between the Gene Fund management and the donor.

Establishment of schemes

65. (1) The Minister may, with the concurrence of the Minister responsible for Finance, for the purposes of proper utilization and administration of the Gene Fund establish, by notice in the *Gazette*, one or more schemes.

(2) In particular, and without prejudice to the generality of the provisions of subsection (1), a scheme may provide for all or any of the following matters, namely:

- (a) the registration of the claims for the purposes of section 46 under the scheme and all matters connected with such registration;
- (b) the processing of such claims for securing their enforcement and matters connected therewith;
- (c) the maintenance of records and registers in respect of such claims;
- (d) the utilization, by way of disbursal (including apportionment) or otherwise, of any amounts received in satisfaction of such claims;
- (e) the procedure for disbursal or apportionment by the Minister in the event of dispute regarding such claims; and
- (f) the utilization of benefit sharing for the purposes relating to breeding, discovery or development of varieties;
- (g) the maintenance and audit of accounts with respect to the amounts referred to in paragraph (d).

Administration of Fund and accountability

66. (1) The Permanent Secretary of the Ministry is, for the purposes of the

State Finance Act, 1991 (Act 31 of 1991), the accounting officer of the Gene Fund.

(2) The Permanent Secretary is responsible for the administration of the Gene Fund, subject to the directions of the Minister given after consultation with the Advisory Council, and to the rules made under subsection (4).

(4) The Minister may, with the concurrence of the Minister responsible for Finance, make rules relating to the administration of the Gene Fund.

Exemption from payment of tax and other charges

67. No tax or charge on income or transfer or stamp duty imposed by or under any law is payable by the Gene Fund.

CHAPTER 10

GENERAL PROVISIONS

Part I

Register as evidence and certain powers and functions of Registrar

Evidence of ownership

68. (1) The person appearing from the register to be the holder of a breeder's right or an applicant in an application for any such title under this Act has, subject to any right appearing from the register to be vested in any other person, the power to deal with such right or application as the owner thereof.

(2) In all legal proceedings relating to a registered breeder's right title under this Act, the fact that a person is registered as the owner of the title is *prima facie* evidence of the validity of the original registration of ownership of the title and of all subsequent assignments and transmissions of such ownership.

(3) The provisions of subsections (1) and (2) do not protect any person dealing with an owner or applicant otherwise than as a *bona fide* licensee, purchaser, hypothecary or judgment creditor and without notice of any fraud on the part of such owner or applicant.

(4) Except as expressly otherwise provided in this Act, a document or instrument in respect of which no entry has been made in the register may not be admitted in evidence in any proceedings in proof of the title to breeders right registration or an application to any such title, or to any interest therein, unless the Registrar, Board or the court, on good cause shown, otherwise directs.

Loss of document

69. If any document issued by the Registrar or lodged with the Registrar is lost, the Registrar must, on the request of any person entitled to such document and on payment of the prescribed fee, furnish such person with a copy of such document issued or lodged insofar as this is possible, or, if a copy cannot be furnished, furnish such person with a certificate in respect thereof.

Exercise of discretionary powers by Registrar

70. (1) If the Registrar is satisfied that the circumstances justify it, the Registrar may, on receiving a written request to extend the time for doing any act or taking any proceeding under this Act, on such terms as the Registrar may determine, extend the time.

(2) In exercising any discretion vested in the Registrar by this Act, the Registrar must give any party to a proceeding before him or her, or any other party who appears from the register to be an interested party, an opportunity to be heard before exercising such discretion adversely to that party.

(3) The extension referred to in subsection (1) may be granted even though the time for doing the act or taking the proceeding has expired.

General Powers of Registrar

71. (1) The Registrar may, for the purposes of hearing and determining any proceedings in terms of this Act exercise the same powers exercisable by the Board under section 77

(2) Where express provision is not contained in this Act on any matter of procedure, the Registrar may have recourse to the rules governing procedure before the Board.

Corrections of errors in register

72. (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 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 or she must give notice of his

or her intention to the applicant for, or holder of, the breeders' rights, as the case may be, and to any other person who appears to him or her to be concerned.

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

Rectification of register

73. (1) On application by any person aggrieved, the Board 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) must be lodged with the Registrar and the Registrar must -

- (a) give notice thereof to all interested parties; and
 - (b) forward the application to the Board.
- (3) At the hearing of an application in terms of subsection (1) -
- (a) the Registrar, the applicant and any other interested party are entitled to appear and be heard; and
 - (b) the Board must determine the question in such manner as it considers desirable in the interests of justice

Preservation of secrecy

74. (1) No person may disclose any information acquired by him or her in the carrying out of any duty or the performance of any function under this Act in relation to any plant in respect of which any application of breeders' rights has been made under this Act or to the business affairs of any other persons. , except -

- (a) when is necessary for the proper application of the provisions of this Act; or
- (b) for purposes of legal proceedings under this Act or any other law; or
- (c) when required to do so by any court or under any law; or
- (d) when authorized thereto by the Minister;

(2) Despite the provisions of subsection (1), the Registrar may furnish to the holder of breeders rights or to the person to whom a licence was granted under section 36 or 37, any information he or she has acquired pertaining to any action which constitutes an infringement of the plant breeders rights.

(3) Any person who contravenes or fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.

CHAPTER 11 APPEALS

Appeal against decision of the Registrar

75. (1) A person who feels aggrieved by any decision or action taken by the Registrar in terms of this Act may, within the period and in the manner prescribed and upon payment of the prescribed fees, appeal to the Minister against the decision or action in question.

(2) The Minister must refer the appeal for investigation and decision to a Board, the members of which are appointed by the Minister and which consists of -

- (a) one person designated as chairperson on account of his or her knowledge of law;
- (b) two persons who in the opinion of the Minister have expert knowledge of the subject of the appeal.

(3) A person appointed under subsection (2) is disqualified as a member of the Board if he or she has any direct or indirect interest in the outcome of the appeal.

Time for Appeals

76. (1) An appeal referred to in Section 75 must be submitted within 30 days after the date of the decision or order of the Registrar in question.

(2) An appeal must be heard on the date and at the time and place fixed by the chairperson and he or she must advise the person appealing and any other party that has an interest in the appeal, in writing thereof.

Powers of Board of Appeals

77. (1) For the purpose of any hearing, the Board has the same powers as a magistrates court to summon witnesses, to cause the oath to be administered to them, to examine them and to call for the production of documents.

(2) A subpoena for the attendance of a witness or for the production of any book, document or record before the Board must be signed and issued by the chairperson of the Board, and must be served in the same manner as a subpoena for the attendance of a witness at a criminal trial in a magistrates court.

(3) Any person subpoenaed to give evidence or to produce any book, document or record or giving evidence before the Board is entitled to the same privileges and immunities as if he or she were subpoenaed to attend or were giving evidence at a trial in a magistrates court.

Procedure followed by Board

- 78.** (1) The procedure at the hearing of an appeal is as prescribed in the regulation.
- (2) The Board may after investigation of the appeal -
- (a) confirm, set aside or vary the relevant decision of the Registrar;
 - (b) order the Registrar to execute the decision of the Board.
- (3) The decision of the Board must be in writing, and a copy thereof must be furnished to the Registrar, the appellant and any other party.
- (4) If the Board sets aside any decision or action by the Registrar, the prescribed fees paid by the appellant in respect of the appeal in question must be refunded to him or her, or, if the Board varies any such decision or action, it may in its discretion direct that the whole or any part of such fees be refunded to the appellant.

Appeals against decision of the Board

- 79.** (1) Any person who is aggrieved by the decision of the Board may in the prescribed form and manner appeal against that decision to the court.
- (2) An appeal under subsection (1) must be prosecuted in the same way that a decision of a magistrates court in a civil case is prosecuted before the court and the rules applicable in such appeals apply subject to such necessary changes or modifications as may be required by context.

Appeals against decision of the Minister

- 80.** (1) Any person who is aggrieved by the decision of the Minister made under Section 50, 46 may in the prescribed form and manner appeal against that decision to the court.

(2) An appeal under subsection (1) must be prosecuted in the same way that a decision of a magistrates court in a civil case is prosecuted before the court and the rules applicable in such appeals apply subject to such necessary changes or modifications as may be required by context.

CHAPTER 12

OFFENCES AND PENALTIES

Falsification of documents

- 81.** (1) 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 procedures or tenders or causes to be produced or tendered any document falsely purporting to be a copy of any entry in the register,

commits an offence and is liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.

Failure to obey order of Board or giving false evidence

82. Any person who, without lawful excuse, fails to comply with an order of the Board under section 67 or any other provision of this Act commits an offence and is liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.

Deceiving or improper influencing of officials

- 83.** Any person who -
- (a) for the purpose of deceiving an official in the execution of his or her duties under this Act, or
 - (b) for the purpose of procuring or influencing the doing or omission of anything by an official in the execution of his or her duties under this Act;

makes or submits a statement or representation, whether orally or in writing , which he or she knows to be false or does not know or believe to be true commits an offence and is

liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.

Unauthorized claim of plant breeders' rights or use of unauthorized name

84. (1) Any person who falsely and without lawful excuse represents that -

- (a) any propagating material sold or reproduced or exported by him or her is propagating material of a variety in respect of which plant breeders rights have been granted under this Act; or
- (b) an application has been made in terms of this Act for the grant of plant breeders rights in respect of a plant sold by him or her;

commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 24 months or to both such fine and imprisonment.

(2) Any person who, at the sale of a plant or the seed or a part of a plant for the purpose of reproduction or multiplication -

- (a) uses a name thereof which is different from the name registered in terms of this Act for that plant; or
- (b) uses the registered name of another plant of the same kind or uses a name which corresponds so closely to a registered name that it is misleading;

commits an offence and is liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.

Offences by staff members and other persons

85. (1) Any staff member or person required to perform functions under this Act who acquires, otherwise than in the course of his or her duties, or sells any reproductive material of a plant in respect of which plant breeders rights have been granted or applied for, commits an offence and is liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.

(2) Any reproductive material acquired by any staff member or other person in contravention of the provisions of subsection (1) must be forfeited to the State.

Special jurisdiction of magistrate courts

86. Despite anything to the contrary in any other law, a magistrate's court has jurisdiction to impose any penalty prescribed under this Act.

State bound and limitation of actions against State

87. (1) Plant breeders' rights have the same effect against the State as they have against any other person.

(2) No fees payable under this Act are payable by the State.

(3) No claim lies against the State, the Minister, the Registrar or any other staff member or person for any thing done in good faith and without negligence under the powers conferred by this Act.

Regulations

88. (1) The Minister may, after consultation with the Advisory Council, 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) The Minister may, after consultation with Advisory Council, amend the regulations as and when necessary.

(3) Regulations in terms of subsection (1) may provide for -

- (a) the form of any application, description, objection, counter-statement or other document which may be lodged with the Registrar and the furnishing of the 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 or her, and the authorizing of the rectification of irregularities of procedure;
- (c) the information and facilities to be afforded by an applicant and the reproductive 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 or her possession or under his or her control any reproductive 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 any application, matter or document;
 - (g) the scale of remuneration which may be paid to any member of the Board;
 - (h) the list of food security crops whose varieties when granted plant breeders rights can be harvested by small scale farmers on their own holdings, and the harvest used as seed on those same holdings;
 - (i) preventing the use of false or misleading statements in any advertisement of plant breeders right;
 - (j) any matter which in terms of this Act is required or permitted to be prescribed; and
- (4) The regulations may in respect of any contravention thereof or failure to comply therewith prescribe a penalty -
- (a) in the case of a first conviction, of an appropriate fine or imprisonment for a period not exceeding six months; and
 - (b) in the case of a second or subsequent conviction, of a fine or imprisonment for a period not exceeding 12 months.
- (5) A regulation prescribing any fees must be made only after consultation with the Minister responsible for finance.

Breeders' rights granted in respect of existing varieties

89. (1) Despite anything contained in this Act, if a person who is the breeder of an existing variety of a prescribed kind applies to the Registrar in writing within six months of the date of commencement of this Act for the grant of plant breeders rights in respect of that variety, the Registrar may, if he or she considers that the availability of the variety to the public is effectively controlled by the applicant and that the provisions of section 10 and 11 are satisfied in respect of the variety, grant plant breeders rights in respect of that variety.

(2) Before exercising his or her powers in terms of subsection (1) the Registrar must cause notice of the application to be published calling for objections to be lodged with him or her within such period, being not less than 30 days, as may be specified in the notice, and the provisions of Section 22 do, subject to such changes or modifications as may be necessary, thereafter apply.

(3) Plant breeders rights granted in terms of subsection (1) are deemed to have been granted in terms of Section 25 and the provisions of that section do, subject to such changes or modifications as may be necessary, apply.

(4) Subject to the provisions of Section 15 a person who submits an application in terms of subsection (1) is liable to pay the prescribed fees.