PROTECTION OF NEW PLANT VARIETIES ACT, 2023

No. 18 **of 2023**

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PART I — *Preliminary*

Short title and commencement

1. This Act may be cited as the Protection of New Plant Varieties Act, 2023, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Interpretation

2. In this Act, unless the context otherwise requires —

"Appeals Board" means the Protection of New Plant Varieties Board established under section 45;

"Authority of a Contracting Party" means the Authority entrusted with the implementation of the law on the protection of new varieties of plants for that Party;

"Contracting Party" means a State other than Botswana or an intergovernmental organisation;

"Court" means the High Court;

"gene bank" means a biological material repository that collects, processes, stores and preserves genetic material for future use;

"holder" means the holder of a breeder's right;

"Office" means the Plant Breeder's Rights Office established under section 3;

"periodical" means a journal circulating in Botswana or other publication issued by the Plant Breeder's Office;

"plant breeder" means —

(*a*) a person who bred a variety or discovered and developed a variety;

(*b*) a person who is the employer of the person referred to under paragraph (*a*) or who has commissioned the latter's work; or

(*c*) the successor in title of either the person referred to under paragraph (*a*) or (*b*), as the case may be;

"protected variety' means any variety that is the subject of a breeder's right;

"register" means the Register of Plant Breeder's Rights kept under section 5;

"Registrar" means the Registrar of Plant Breeder's Rights appointed under section 4; and

"variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, distinguished from any other plant grouping by the expression of at least one of the said characteristics and considered as a unit with regard to its suitability for being propagated unchanged.

(*a*) novel;
(*b*) distinct;
(*c*) homogenous;
(*d*) stable; and
(*e*) given a variety denomination which is acceptable for registration in accordance with section 32.

Novelty

8. (1) Subject to subsection (2), a variety shall be considered new if the propagating or harvested material of the variety has not been sold or otherwise disposed of with the authorisation of the plant breeder —

(*a*) in Botswana, for longer than one year before the date on which protection is applied for under this Act; and
(*b*) outside Botswana, for longer than six years in the case of trees or vines or longer than four years in the case of other plants, before the effective filing date in Botswana.

(2) It shall not be considered detrimental to the novelty of a variety if the propagating or harvested material of that variety has been sold or otherwise disposed of in Botswana with the authorisation of its breeder or his or her successor in title for up to four years prior to the inclusion of the genus or species to which the variety belongs in the list of genera and species specified in the Regulations, and for a maximum of six months after such inclusion where the application is filed within that six months period.

Distinctness

9. (1) A variety shall be considered to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application or, where relevant, at the priority date.

(2) Common knowledge of a variety may be established by reference to various factors such as —

(*a*) the exploitation of the variety already in progress;
(*b*) grant of a breeder's right in the variety;
(*c*) entry of the variety in a catalogue of varieties admitted to trade;
(*d*) entry in the register of varieties kept by a recognised professional association; or
(*e*) inclusion of the variety in a reference collection.

(3) The filing, in any State, of an application for a breeder's right, or for entry in a catalogue of varieties admitted to trade, shall be deemed to render the variety that is the subject of the application a matter of common knowledge from the date of the application, provided that the application leads to the grant of the breeder's right or the entry in the catalogue, as the case may be.

Homogeneity

10. A variety shall be considered to be homogeneous if its plants show the same expression of the same characteristics, subject to the variation which may be expected in view of the particular features of its propagation.

Stability

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

Right to apply for protection

12. (1) Subject to this Part, the breeder of a variety shall be entitled to apply to protect a variety under this Act.

(2) Where two or more persons have bred, or discovered and developed, a variety jointly, the right to protection shall vest in them jointly and, subject to any agreement to the contrary between the joint breeders, their shares in the property of the breeder's rights shall be equal.

(3) Where a variety has been bred, or discovered and developed by several persons independently of each other, the right to apply for the grant of the breeder's right shall belong to the person who has first applied for protection or filed an application with an earlier priority date with the Office.

(4) Where a variety has been bred, or discovered and developed, in execution of a commission or a contract of employment, the right to apply to protect the variety shall belong, in the absence of contractual provisions to the contrary, to the person who commissioned the work, or to the employer as the case may be.

Presumption of title

13. An applicant shall, in the absence of proof to the contrary, be presumed to be entitled to apply to protect a variety under this Act, but where the application is made by a successor in title, it shall be accompanied by sufficient proof of the successor's title.

Application by person other than owner

14. Where an application is filed for a breeder's right by a person who is not entitled to apply to protect a variety, the person entitled may bring an action before the Court for the assignment to him or her of the application or, if the application is already granted, of the breeder's right.

Persons entitled to file applications

15. (1) An application for the grant of a breeder's right may be filed by the owner of a variety who is a national or resident of —

(*a*) Botswana;

(*b*) a Contracting Party; or

(*c*) any State which, not being a Contracting Party, grants reciprocity of treatment to Botswana.

(2) For the purposes of subsection (1) (*b*), "national" means, where the Contracting Party is a State, a national of that State, and where the Contracting Party is an intergovernmental organisation, the nationals of the States that are members of that organisation.

Agents

16. (1) An application for the grant of a breeder's right on behalf of a person whose ordinary residence or principal place of business is outside Botswana, in this section referred to as a "principal", shall be filed by an agent who is resident in, and is practising in Botswana in accordance with the relevant law.

(2) The principal shall give the agent power to act on his or her behalf before the Office and in legal proceedings relating to the grant of a breeder's right.

(3) For the purposes of instituting legal proceedings by or against any person represented by an agent, the place which the Office identifies as the address of the agent, or where there are several agents, the address of the main agent or agent first designated, shall be deemed to be the place where the right in the variety is located.

PART V — *Assignment and Transfer of the Application or of the Breeder's Right*

Assignment and transfer

17. (1) An application for the grant of a breeder's right may be assigned or otherwise transferred to another person.

(2) An assignment or transfer shall be in writing and shall be signed by the parties.

(3) An assignment or transfer under subsection (1) shall be registered in the register on the written request of the assignor or transferor and on payment of the prescribed fee.

(4) No assignment or transfer to a successor in title shall have effect against a third party unless it has been registered in the register.

Joint applicants and joint holders of rights

18. Where there are two or more applicants for the grant of a breeder's right or where there are two or more holders of such a right in any protected variety, in the absence of any agreement to the contrary, each applicant or holder may separately transfer his or her shares, or exploit the variety, as the case may be, or subject to this Act, exclude others from exploiting it.

PART VI — *Scope and Duration of Breeder's Rights*

Scope of the breeder's right

19. (1) Subject to sections 20 and 21, the following acts in respect of the propagating material of a protected variety shall require the authorisation of the holder granted in respect of the variety —

(*a*) production or reproduction (multiplication);

(*b*) conditioning for the purpose of propagation;

(*c*) offering for sale;

(*d*) selling or other marketing;

(*e*) exporting;

(*f*) importing; and

(*g*) stocking for any of the purposes referred to in paragraphs (*a*) to (*d*).

(2) The holder may make his or her authorisation subject to conditions or limitations.

(3) Subject to sections 20 and 21, the acts referred to in subsection (1) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorised use of the propagating material of the protected variety shall require the authorisation of the holder, unless the holder has had reasonable opportunity, before the harvested material is obtained, to exercise his or her right in relation to the unauthorised use of the propagating material.

(4) The provisions of subsections (1) and (2) shall also apply in relation to varieties —

(*a*) which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;

(*b*) which are not clearly distinguishable in accordance with section 9 from the protected variety; and

(*c*) whose production requires the repeated use of the protected variety.

(5) For the purposes of subsection (4) (*a*), a variety shall be deemed to be essentially derived from another variety, in this section referred to as "the initial variety", where —

(*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 genotypes of the initial variety;

(*b*) it is clearly distinguishable from the initial variety; and

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

(6) Essentially derived varieties may be obtained by —

(*a*) the selection of a natural variety;

(*b*) induced mutant of varieties;

(*c*) a somaclonal variant of a variety;

(*d*) the selection of a variant individual from plants of the initial variety;

(*e*) backcrossing of varieties; or

(*f*) transformation by genetic engineering of varieties.

Exceptions to breeder's right

20. (1) A breeder's right shall not extend to —

(*a*) acts done privately and for non-commercial purposes;

(*b*) acts done for experimental and research purposes; and

(*c*) acts done for the purpose of breeding other varieties and, except where the provisions of section 19 (3) apply, acts referred to in section 19 (1) and (2) in respect of such other varieties.

(2) The Minister may, by regulations, within reasonable limits and subject to the safeguarding of the legitimate interests of the holder's right, restrict a breeder's right in relation to the varieties of any specified plant genera or species in order to permit farmers to use for propagating purposes, the product of the harvest which they have obtained by planting, on their own holdings, a protected variety or a variety covered by section 19 (3).

Exhaustion of breeder's right

21. (1) A breeder's right shall not extend to acts concerning any material of a protected variety, or of a variety covered by the provisions of section 19 (3), which has been sold or otherwise marketed by the breeder or with his or her consent in Botswana, or any material derived from the said variety unless such acts —

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

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

(2) For the purposes of subsection (1), "material" means, in relation to a variety —

(*a*) propagated material of any kind; and

(*b*) harvested material, including entire plants and parts of plants.

Maintenance of propagating material

22. (1) A holder of a breeder's right shall, throughout the period for which the right is exercisable, be under an obligation to provide the Registrar with propagating material capable of producing plants which correspond to the characteristics defined for the protected variety when the right was granted.

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

Period of protection

23. (1) Subject to subsection (2), a breeder's right in respect of vines, forest trees, fruit trees and ornamental trees including, their rootstocks, shall expire 25 years after the grant thereof.

(2) Protection of a breeder's right shall, in respect of all other genera or species, expire 20 years after the grant thereof.

(3) Where in the cases referred to in section 8 (2), a variety has already been offered for sale or marketed in Botswana for a period more than one year before the date of the filing of the application for a breeder's right, the duration of the protection shall be reduced by the number of full years minus one year that has elapsed since the beginning of the offering for sale or the marketing, with the authorisation of the breeder, before the filing of the application.

Renewal fees

24. A holder shall, every year during the period of protection, pay the Registrar the annual renewal fee prescribed.

PART VII — *Termination, Invalidation and Forfeiture*

Termination of protection

25. (1) A breeder's right shall terminate before its term expires where the holder of that right renounces it by written declaration addressed to the Registrar.

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

Invalidation

26. (1) The Registrar shall invalidate a breeder's right at the request of any interested person where it is established that —

(*a*) the variety is not new or distinct within the meaning of, and on applicable dates referred to in, sections 8 and 9; or

(*b*) the holder of the right is not the plant breeder.

(2) Where the fee prescribed in accordance with section 28 (1) is not paid within three months of the request being filed, the request shall be deemed never to have been filed.

Forfeiture

27. (1) The Registrar shall declare a breeder's right to be forfeited where the holder of the right —

(*a*) is no longer in a position to provide the Registrar, if he or she requests it, with the propagating material capable of producing plants which correspond to the characteristics defined for the variety when the right was granted;

(*b*) does not fulfill his or her obligation under section 22 (2); and

(*c*) does not, three months after he or she has been reminded in writing to do so by the Registrar, pay the renewal fee.

(2) A licence agreement made under Part XVI of this Act shall become ineffective if the breeder's right under which it was granted is invalidated or forfeited.

(3) No payment of any royalty which was due before the invalidation or forfeiture under subsection (2) shall be demanded by the licensee.

PART VIII — *Procedure in Cases of Requests for Invalidation and Forfeiture*

Procedure in cases of requests for invalidation

28. (1) An application for the invalidation of a breeder's right may be filed by any interested person in writing who shall state the reasons thereof.

(2) An application may be filed even after the breeder's right has expired.

(3) The application may not be filed during the period within which an appeal may still be made against the grant of the breeder's right or while proceedings on such appeal are still pending before the Court.

(4) The Registrar shall not accept the application if it is not accompanied by a reasoned statement, or the prescribed fee, or if it was filed during the period within which an appeal could still be made against the grant of the breeder's right, or while proceedings on such an appeal are still pending before the Court.

(5) Where the Registrar accepts the application, he or she shall afford the holder an opportunity to respond in writing to the application and may obtain any other evidence and shall conduct the hearing according to the prescribed procedure.

(6) The Registrar shall discontinue the hearing if the request for the invalidation is withdrawn.

(7) Where the Registrar finds that the application is not justified, he or she shall reject it.

(8) Where the Registrar finds that the application is justified, he or she shall declare the breeder's right null and void and shall immediately inform the holder in writing.

Procedure for forfeiture of breeder's right

29. (1) Proceedings for forfeiture of a breeder's right shall be initiated by the Registrar if the requirement specified in section 27 (1) (*a*) is fulfilled, or shall be initiated by the Registrar or a third person if any of the requirements specified in section 27 (1) (*b*) are fulfilled.

(2) An application shall not be necessary for the commencement of proceedings under subsection (1), but where any such application is filed, the Registrar shall treat the application as a suggestion to initiate proceedings.

(3) The Registrar, shall afford the holder a hearing before declaring a breeder's right to be forfeited.

(4) Where, after having heard the holder, the Registrar finds that there is no reason to declare the right forfeited, he or she shall declare the proceedings terminated and inform the holder accordingly in writing.

(5) Where the Registrar declares a breeder's right forfeited, he or she shall inform the holder in writing, giving reasons therefore and shall state the date of forfeiture.

PART IX — *Applications*

Application

30. (1) An applicant for the protection of a variety shall file an application with the Registrar in the prescribed form.

(2) An application made under subsection (1) shall be accompanied by the prescribed fee and a completed technical questionnaire in the prescribed form for the relevant genus or species.

(3) At the request of the Registrar, an applicant shall, on the date and at the place fixed by the Registrar, submit the amount of propagating material determined by the Registrar.

(4) The Registrar shall publish in a periodical —

(*a*) every application received by him or her;

(*b*) the date of filing;

(*c*) the name and address of the applicant;

(*d*) the original plant breeder;

(*e*) the variety denomination proposed under section 34; and

(*f*) the main characteristics of the variety as indicated in the application.

(5) The refusal or withdrawal of an application shall also be published in a periodical.

Priority

31. (1) An applicant may avail himself or herself of the priority of an earlier application, in this Act referred to as the "right of priority", that has been duly filed for the same variety by himself or herself or by his or her predecessor in title with the Authority of a Contracting Party.

(2) Where an application filed with the Registrar is preceded by several such applications, priority may be based only on the earliest application.

(3) The right of priority shall be expressly claimed in the application filed with the Registrar and may only be claimed within a period of 12 months from the date of filing of the earliest application, but the day of filing shall not be included in the said period.

Documents and material to be furnished for priority

32. (1) In order to avail himself or herself of the right of priority, an applicant shall submit to the Registrar within three months of filing the application in Botswana, a copy of the documents that constitute the earlier application, certified to be a true copy by the Authority with which that application was filed.

(2) The effect of the right of priority shall be that, with respect to the conditions of protection attached to the variety, an application shall be deemed to have been filed at the date of the filing of the earlier application.

(3) An applicant may declare that he or she will submit the propagating material referred to in section 30 (3) or any additional documents required by the Registrar at a later date, but not later than two years after the end of the priority period unless the earlier application referred to in subsection (1) has been withdrawn or refused in the country in which it was filed.

(4) If any of the provisions of this section are not complied with, the application shall be dealt with as if no priority has been claimed.

Where application not in English

33. Any application or other document filed under this Act not being an application or document referred to in section 32 shall, if not in English, be accompanied by a translation thereof in English, certified by the translator that the translation is, complete and correct.

PART X — *Variety Denomination*

Application and procedure for variety denomination

34. (1) An applicant for a breeder's right shall, within three months of the filing of the application, propose on the form prescribed by the Registrar for that purpose, a variety denomination in accordance with subsection (3).

(2) A variety denomination may consist of one word, a combination of not more than three words, a combination of words and figures, of words and letters or of letters and figures, but shall not consist wholly of figures save however that in a word or figure combination, the figures shall have a meaning in relation to the words.

(3) A person shall not propose a variety denomination a designation of which —

(*a*) does not enable the variety to be identified;

(*b*) is liable to mislead a person or cause confusion concerning the origin, derivation, characteristics, value or identity of the variety, or the identity of the breeder;

(*c*) is identical to or can be confused with a variety denomination which in the country or in another State Party to the Convention designates an existing variety of the same or of a related botanical species, save however that the denomination shall be admissible if the other variety is not registered and has not been grown for a considerable time;

(*d*) is identical to or can be confused with a designation in which a third party enjoys a prior right which would prohibit the use of the designation as a variety denomination;

(*e*) refers solely to attributes which are also common in other varieties of the species concerned;

(*f*) consists of a botanical or common name of a genus or species, or includes such a name, where this is likely to mislead or cause confusion;

(*g*) suggests that the variety is derived from or related to another variety when this is not the case;

(*h*) includes words such as "variety", "cultivar", "form", "hybrid", "cross" or a variation of such words; or

(*i*) is, for reasons other than those mentioned in this subsection in the opinion of the Registrar, not suitable as a generic designation of the variety.

(4) Where a variety is already protected by a Contracting Party or where an application for the protection of the same variety is filed in such State, only the variety denomination which has been proposed or registered in that other State may be proposed and registered, and the Registrar shall not register any other designation as a denomination for the variety.

(5) Where a variety denomination used in another State is inappropriate for linguistic reasons, or for any reason specified in subsection (3), the Registrar may request the applicant to propose another variety denomination.

(6) The Registrar shall publish in a periodical the variety denominations which have been proposed to him or her, or registered or cancelled by him or her.

Use of variety denomination

35. (1) A person who offers for sale or markets propagating material of a protected variety shall, even after the expiration of the protection, use the registered variety denomination only in so far as prior rights do not prevent such use.

(2) When a protected variety is offered for sale or marketed, a trademark, trade name or other similar indication may be associated with the registered variety denomination provided that the denomination is easily recognisable.

(3) A holder may not invoke any trademark, trade name or other right in his or her possession against a variety denomination legitimately used in the offering for sale or marketing of the protected variety by another person, even after the expiration of the protection.

Prior rights of first parties

36. Prior rights of first parties in a designation shall not be affected by this Act.

Cancellation of registered variety denomination

37. (1) The Registrar shall cancel any registered variety denomination —

(*a*) at the request of any interested person or on his or her own initiative if the denomination should not have been registered or if, subsequent to registration, facts become known which would have justified the rejection of the denomination;

(*b*) if a final court decision is delivered according to which the variety denomination should be cancelled;

(*c*) if it is established that a third-party right exists in the denomination and this has been brought to the attention of the holder; or

(*d*) at the request of a person who uses a variety denomination under section 35 (1), if he or she is prohibited by a final court decision from using that denomination, provided that the holder had participated or had been given the opportunity to participate in the court proceedings.

(2) Where the Registrar cancels a variety denomination, he or she shall request the holder to submit, within the time specified by the Registrar, a proposal for a new variety denomination, and shall, if the proposal is acceptable, register it.

(3) The Registrar shall request a holder to submit another proposal for a new variety denomination where the proposal for the new variety denomination is not acceptable.

(4) The Registrar shall establish, at the request of a holder or a third person, a provisional variety denomination where the holder or the third person demonstrates a legitimate interest.

(5) Where, after the period for submitting a proposal for a new variety denomination has expired and a holder has not submitted the requested proposal, the Registrar may establish on his or her own initiative, a provisional or permanent variety denomination.

Filing date

38. The Registrar shall accord, as the filing date of the application, the date of receipt of the application form, the prescribed fee and the technical questionnaire, duly completed.

PART XI — *Examination of Application*

Formal examination of application

39. (1) The Registrar shall examine an application to determine whether such application and its supporting documents fulfill the requirements for applications under this Act and whether the required amount of propagating material has been submitted on the due date and at the proper place.

(2) Where any of the requirements referred to in subsection (1) have not been complied with, the Registrar shall reject the application for the grant of a breeder's right, unless the Registrar grants to the applicant a further period to complete the application or to submit the propagating material, but no such further period may be granted which will expire later than three months after the application date or the date fixed for submission of the material.

Examination of novelty, distinctness, etc.

40. (1) The Registrar shall examine a variety to determine whether it fulfills the requirements of novelty, distinctiveness, homogeneity and stability and where those requirements are not fulfilled, the Registrar shall reject the application.

(2) The Registrar shall require an applicant, on a date fixed by the Registrar before the beginning of each year, to pay the prescribed testing fee for that year or testing period and failure to do so, by the applicant, shall cause the application to be rejected.

(3) The Registrar shall, after receiving the testing fee for the first year or for the first testing period, examine whether the variety fulfills the requirements of novelty, distinctness, homogeneity and stability.

(4) Where the Registrar determines that it is expedient to do so, he or she may arrange to have the examination done by another national or foreign governmental authority and shall base his or her decision on the results of that examination.

(5) The examination results obtained from, and expert opinions given by, foreign government authorities shall be treated as results obtained from and opinions given by the Registrar.

(6) Subject to section 32 (4), the Registrar may, where necessary for an examination, request an applicant to submit additional material or documents within the period specified in the request and where the applicant fails to do so, without giving valid reasons for such failure, the Registrar shall reject the application.

Grant and refusal of breeder's right

41. (1) Where an examination shows that an application satisfies the requirements of novelty, distinctness, homogeneity and stability and that the proposed denomination of the variety can be registered, the Registrar shall grant a provisional breeder's right.

(2) Where an examination shows that the variety is neither novel, distinct, homogenous nor stable, the Registrar shall reject the application.

(3) Where the examination shows that the proposed denomination of the variety cannot be registered, the Registrar shall request the applicant to submit another denomination within a period fixed by the Registrar, failing which he or she shall reject the application.

(4) Where the Registrar makes a decision to grant a provisional breeders' right, he or she shall publish in a periodical —

(*a*) the fact that an application for a breeder's right has been made; and

(*b*) the decision to grant a provisional breeder's right.

Provisional protection

42. (1) Where a breeder's right is granted, the holder of the right shall be entitled to equitable compensation for anything done during the application period which, if done after the grant of the right, would constitute an infringement of such right.

(2) In this section, "application period", in relation to the grant of a breeder's right, means the period —

(*a*) beginning with the day on which details of the application for the grant of the right were published in a periodical pursuant to section 30 (4); and

(*b*) ending with the grant of the right.

PART XII — *Opposition*

Opposition

43. (1) Within three months of the date of publication in the *Gazette* of the provisional grant of a breeder's right, any interested person may, on payment of a prescribed fee, file, with the Registrar, an opposition against the grant of the breeder's right.

(2) An opposition shall be based on any of the following grounds —

(*a*) the applicant is not the plant breeder;

(*b*) the variety denomination is not new or distinct at the pertinent dates in accordance with sections 8, 9 and 32 (3);

(*c*) the variety denomination is neither homogenous nor stable; or

(*d*) the variety denomination that the Registrar intends to register is inadmissible.

(3) Where the opposition is justified, the decision that a provisional breeder's right be granted shall, subject to subsection (5), be revoked by the Registrar.

(4) Where the opposition is not justified, it shall be rejected by the Registrar.

(5) Where the opposition based on the claim that the variety denomination is inadmissible is justified, the Registrar shall revoke the decision that a provisional breeder's right be granted and shall reopen the granting procedure by requesting the applicant to submit another denomination, failing which the Registrar shall refuse the application.

(6) Where no opposition is filed within the period specified in subsection (1) or where all oppositions filed within that period have been rejected, the Registrar shall grant a breeder's right and register the variety denomination.

PART XIII — *Rules on Proceedings before the Office*

Proceedings before the Office

44. (1) The Registrar may, in any proceedings under this Act, conduct an oral hearing provided that the proceedings are recorded in writing.

(2) Proceedings before the Registrar concerning the assignment of an application, the transfer of a breeder's right or the invalidation or forfeiture of such right shall be held in public, unless the legitimate interests of any person might be prejudiced.

(3) In proceedings before the Registrar, evidence may be obtained either by hearing any of the parties to the proceedings, or experts or witnesses, or by requesting the competent court of the country of residence of the person concerned to take such evidence.

(4) Evidence may also be obtained by requesting the submission of documents and other information by, or in the possession of, any party to the proceedings, or information from another government authority, an expert opinion, by inspecting the installations of any party to the proceedings with that party's consent, or by requesting the submission of a sworn statement in writing by any party to the proceedings or by any witness or expert.

(5) A decision of the Registrar may be based only on grounds or evidence on which any party to the proceedings whose rights are affected by that decision has had an opportunity to submit his or her comments.

(6) Facts or evidence which are not submitted when due by any party to the proceedings may be disregarded by the Registrar.

(7) Unless otherwise stated in this Act, the Registrar may commence the necessary investigations of his or her own volition and he or she shall not be restricted to the facts, evidence or arguments provided by any party to the proceedings.

(8) Any interested person may submit observations or suggestions to the Registrar concerning any proceedings pending before the Registrar, but that person shall not become a party to those proceedings by the mere fact of such submission.

(9) Observation and suggestions submitted under subsection (8) shall be communicated in writing to the applicant or the holder as the case may be.

(10) The Registrar shall confirm the receipt of any observations or suggestions in writing, but he or she need not inform the person having submitted them of any steps taken by him or her, or his or her opinion on the observations or suggestions submitted.

PART XIV — *Appeals Board*

Establishment of Appeals Board

45. (1) There is hereby established, the Protection of New Varieties of Plants Appeals Board (hereinafter referred to as the "Appeals Board") which shall hear and determine appeals made against the decisions of the Registrar.

(2) The Appeals Board shall consist of the following five members appointed by the Minister —

(*a*) the Chairperson, who shall be a legal practitioner admitted to practice in the courts of Botswana; and

(*b*) four other members, who, in the opinion of the Minister, possess the necessary knowledge and experience in plant variety protection to make a substantial contribution towards the functions of the Appeals Board.

(3) The members shall elect the Vice-Chairperson from among their number.

(4) The quorum at any meeting of the Appeals Board shall be a simple majority of the members.

Tenure of office

46. The members of the Appeals Board shall be appointed for a term of three years, and shall be eligible for re-appointment for a further term not exceeding three years.

Disqualification for appointment of a member of Appeals Board

47. A person shall not be appointed as a member of the Appeals Board or be qualified to continue to hold office where he or she —

(*a*) has, in terms of any law in force in any country —

(i) been adjudged or otherwise declared bankrupt or insolvent, and has not been rehabilitated or discharged, or

(ii) made an assignment to, or arrangement or composition with his or her creditors, which has not been rescinded or set aside; or

(*b*) has, within a period of 10 years immediately preceding the date of his or her appointment, been convicted —

(i) in Botswana, of a criminal offence, or

(ii) outside Botswana, of an offence which, if committed in Botswana, would have been a criminal offence,

and sentenced by a court of competent jurisdiction to imprisonment for six months or more without an option of a fine, whether that sentence has been suspended or not, and for which he or she has not received a free pardon.

Remuneration and allowance

48. The members of the Appeals Board shall be paid such allowances and remunerations as shall be determined by the Minister.

Removal and suspension from office

49. (1) The Minister may, if satisfied that a member —

(*a*) has acted improperly; or

(*b*) is mentally or physically incapable of performing his or her duties efficiently and the member's medical doctor has issued a certificate to that effect,

require that member, in writing, to vacate his or her office within such time as he or she, may specify.

(2) The Minister may, in writing, suspend from the Appeals Board, a member against whom criminal proceedings are instituted for an offence in respect of which a sentence of imprisonment without an option of a fine may be imposed, and whilst that member is so suspended, he or she shall not carry out any duties under this Act or be entitled to any remuneration or allowances as a member of the Appeals Board.

Meetings of Appeals Board

50. (1) The Appeals Board shall meet as and when necessary, and at such time and place as the Chairperson may determine.

(2) The Appeals Board shall determine its own procedures.

Disclosure of interest

51. (1) Where at any meeting of a Appeals Board, a matter is deliberated on in which a member or the member's immediate family member has a direct or indirect interest in a private capacity, the member shall, as soon as practicable, before the matter is deliberated on or immediately upon the commencement of the meeting, disclose such interest to the Appeals Board and shall not, unless the Appeals Board otherwise directs, take part in the deliberation of that matter.

(2) For purposes of this section "immediate family member" means a spouse, son, daughter, sibling or parent.

(3) A disclosure of interest made under subsection (1) shall be made in writing to the Appeals Board.

(4) Where a member fails to disclose his or her interest in accordance with subsection (1) and he or she takes part in making a decision which benefits that member, or his or her immediate family member, that decision shall be null and void.

(5) Any member who contravenes subsection (1) commits an offence and is liable to a fine not exceeding P6 000 or to imprisonment for a term not exceeding two years, or to both.

Confidentiality

52. (1) A member shall observe and preserve the confidentiality of all matters coming before the Appeals Board and shall not disclose that information, and such confidentiality shall subsist even after the expiry of a member's term of office.

(2) Any person to whom confidential information is revealed through working with the Appeals Board shall not disclose that information to any other person unless he or she is required to do so in terms of any written law or for purposes of any judicial proceedings.

(3) A person who contravenes the provisions of this section commits an offence and is liable to a fine not exceeding P6 000 or to imprisonment for a term not exceeding two years, or to both.

Co-option of experts

53. The Appeals Board may invite any suitably qualified person to attend the proceedings of the Appeals Board or otherwise assist it with its deliberations, and any such person shall have no right to vote or take decisions.

PART XV — *Appeals and Enforcement Proceedings*

Appeals

54. (1) A person aggrieved by a decision of the Registrar under this Act may, within 30 days from the date of the notification of the decision to him or her, appeal, in writing against that decision to the Appeals Board.

(2) A person aggrieved by a decision of the Appeals Board may appeal to the High Court within 30 days of the notification to him or her of the Appeals Board's decision.

Civil Proceedings

55. (1) Subject to this Act, infringements of the right of the holder shall be actionable in the Court at the suit of the holder.

(2) In any proceedings for an infringement, the plaintiff shall be entitled to relief by way of —

(*a*) an interdict to prohibit the committing or continuation of committing, an infringement of the breeder's right set out in section 19;

(*b*) forfeiture, seizure or destruction of propagating material which has been produced in contravention of a breeder's right; and

(*c*) damages, taking into account the pecuniary and non-pecuniary loss suffered by the holder as a result of the infringement of the breeder's right.

(3) Where the person alleged to have infringed a right did not know or could not reasonably be expected to know that he or she was engaged in an activity that infringed a right, the Court may limit damages to the profits attributable to the infringement.

(4) The Court shall not, in respect of the same infringement, award the holder damages and order that he or she be given an amount of profits.

Criminal liability for non-compliance or misuse of variety denomination

56. (1) A person who willfully offers for sale or markets propagating material of a protected variety without using the registered variety denomination commits an offence and is liable to a fine not exceeding P150 000 or to imprisonment for a term not exceeding five years, or to both.

(2) A person who willfully makes use of the registered variety denomination of a protected variety likely to cause confusion with another variety of the same botanical or a related species commits an offence and is liable to a fine not exceeding P150 000 or to imprisonment for a term not exceeding five years, or to both.

PART XVI — *Licenses and Legal Proceedings by Licensee*

Licence contracts

57. (1) An applicant or a holder may grant, to any person, an exclusive or a non-exclusive licence relating to all or any of the rights provided for under this Act.

(2) A licence contract shall be in writing.

(3) A licence contract shall be registered by the Registrar and shall not have effect against a third party unless it has been registered.

(4) The grant of an exclusive licence shall be published by the Registrar in a periodical.

(5) In the case of the grant of an exclusive licence, a holder may grant the exclusive licence to a third party to exploit the variety.

Right of licensor to grant further licences or to exploit the variety

58. In the absence of any provision to the contrary in a licence to grant further licences, the grant of a licence shall not prevent the Registrar from granting further licences to third parties or from exploiting the variety himself or herself.

Non-assignability of licences

59. In the absence of provisions to the contrary in a licence contract, the rights granted shall not be assigned to a third party by the licensee.

Certain clauses in contract void

60. A clause in a licence contract or relating to such a contract shall be null and void in so far as it imposes upon the licensee, restrictions that do not derive from the rights conferred by the breeder's right or are unnecessary for the safeguarding of the right.

Licences of right

61. (1) An applicant or a holder may declare that any person prepared to pay a royalty is entitled to use his or her protected variety as from the date on which he or she has informed the holder or applicant accordingly.

(2) A declaration under subsection (1) shall be addressed to the Registrar and a reference to that effect shall be entered in the register.

(3) The royalty payable shall be stated in the declaration under subsection (1) and shall be entered in the register.

Compulsory licences

62. (1) At any time after the expiration of three years from the date of the grant of a licence of a breeder's right under this Act, any interested person may apply to the Court for the grant of a compulsory licence in respect of any breeder's right on the ground that it is necessary to safeguard the public interest in Botswana.

(2) Subject to subsections (4), (5) and (6), where the Court is satisfied that the ground referred to in subsection (1) is established, the Court may make an order for the grant of the licence in accordance with the application on such terms as it thinks fit.

(3) A licence granted under this section shall confer, on the owner, the non-exclusive right to perform any activity referred to in section 19 for the supply to the national market.

(4) A holder of a compulsory licence shall pay the licensee the remuneration agreed upon or determined by a method agreed upon between that person and the licensee, or in default of agreement, as is determined by the Court on the application of either party.

(5) The Court may require a holder to hold available, for a holder of a compulsory licence, the amount of propagating material necessary for making reasonable use of the compulsory licence against payment of adequate remuneration to the holder of the right and under conditions which are economically acceptable to the holder of a licence.

(6) A licence shall not be granted under this section unless —

(*a*) the applicant for the licence is financially able and otherwise in a position to exploit the breeder's right in a competent and business like manner, and is prepared to do so;

(*b*) the holder of the license has refused to grant the applicant with a licence to produce or market propagating material of the protected variety in a manner sufficient for the needs of the general public as referred to in subsection (1) or is not prepared to grant such permission under reasonable terms; and

(*c*) the applicant for the compulsory licence has paid the prescribed fee for the grant of such licence.

(7) The duration of the licence shall be fixed by the Court and shall not, except under extraordinary circumstances, be granted for less than two or more than four years, but the period may be extended if the Court is satisfied, on the basis of a new application, that the conditions for granting a compulsory licence continue to exist after the expiration of the first mentioned period.

(8) The Court may allow submissions from national non-governmental organisations in the field of plant breeding and the seed trade before granting a licence.

Legal proceedings by licensee

63. (1) A licensee under a contractual or compulsory licence or a licensee of right may request the holder to institute legal action necessary to obtain civil remedies or criminal penalties in respect of any infringement of the breeder's right indicated by the licensee.

(2) Where the licensee refuses or neglects to institute the said legal action within three months after the request has been made, the licensee may institute such action in his or her own name, without prejudice to the right of the licensee to intervene in such action.

Regulations

64. The Minister may make regulations providing for any matter which, under this Act, is to be provided for by Regulations or for the better carrying out of the purposes and provisions of this Act, and, without prejudice to the generality of the foregoing, such Regulations may provide for —

(*a*) the procedure in respect of —
  (i) the receiving and handling of applications,
  (ii) the conduct of the examination of varieties and of variety denominations,
  (iii) the handling of oppositions, the grant of breeder's rights,
  (iv) the refusal of applications,
  (v) the invalidation or forfeiture of breeder's rights,
  (vi) the assignment of an application,
  (vii) the transfer of breeder's rights, and
  (viii) the cancellation of variety denominations;
(*b*) the maintenance and conservation of samples;
(*c*) the cooperation with gene banks or other institutes for the conversation of generic material;
(*d*) the establishment and maintenance of a variety register;
(*e*) the receiving and filing of any documents concerning breeder's rights;
(*f*) the amounts and the collection of all fees provided for under this Act;
(*g*) the making of additional rules to prevent the use of the same or confusing denominations for more than one variety and to regulate the relationship between variety denominations and trademarks;
(*h*) the administration of the register provided for under section 5, including the determination of the facts to be registered; and
(*i*) any other matter relating to the administration of this Act.

PASSED by the National Assembly this 10th day of August, 2023.

BARBARA N. DITHAPO,
Clerk of the National Assembly.