

MALAWI GOVERNMENT

(Published 24th August, 2018)

Act

No. 20 of 2018

I assent

PROF. ARTHUR PETER MUTHARIKA

PRESIDENT

20th August, 2018

ARRANGEMENT OF SECTIONS

SECTION

PART I—PRELIMINARY

1. Short title and commencement
2. Interpretation

PART II—ADMINISTRATION

3. Administration of the Act
4. Technical Advisory Committee
5. Meetings of the Committee
6. Functions of the Committee
7. Plant Breeder's Rights Department
8. Registrar of Plant Breeders Rights and other staff
9. Functions of the Registrar
10. Register

PART III—APPLICATION FOR AND GRANT OF PLANT BREEDER'S RIGHTS

11. Requirements for plant breeder's rights
12. Prior knowledge or publication of new plant excused in certain circumstances
13. Persons entitled to make application
14. Application for plant breeder's rights and effective date thereof
15. Description and samples of new varieties

SECTION

16. Name of plant variety
17. Refusal of application
18. Amendment of an application
19. Publication of an application
20. Rights of applicant for plant breeder's rights
21. Exemptions to the rights of a breeder
22. Objection to grant of plant breeder's rights
23. Grant or refusal of plant breeder's rights
24. Cancellation of plant breeder's rights
25. Duty of a holder of plant breeder's rights
26. Rights of a holder of plant breeder's rights
27. Exceptions to plant breeder's rights
28. Surrender of plant breeder's rights

PART IV—LICENSING

29. Licences
30. Compulsory licences

PART V—APPEALS

31. Appeals Committee
32. Assessors
33. Time for appeals
34. Right of audience
35. Notifications by Registrar to the Appeals Committee
36. Review by the High Court

PART VI—OFFENCES AND PENALTIES

37. Falsification of documents
38. Failure to obey order of Appeal Committee or giving false evidence
39. Deceiving or improper influencing of officer
40. Unauthorized claim of plant breeder's rights or use of authorized name
41. Offences by officers
42. General penalty

PART VII—FINANCIAL PROVISIONS

43. Plant Breeder's Rights Fund
44. Levy

SECTION

45. Administration of the Fund
46. Objectives of the Fund
47. Application of the Fund
48. Holding of the Fund
49. Books and other records of accounts and audit and reports of accounts
50. Financial year

PART VIII—GENERAL

51. Foreign applications
52. Exercise of discretion by Registrar
53. Rights of patent agents and attorneys
54. Powers of Registrar to make corrections
55. Rectification of Register
56. Evidence of certain entries and documents
57. Inspection and provision of certified copies of entries in Register
58. Preservation of secrecy

PART IX—MISCELLANEOUS

59. Application of this Act to Government
60. Assignment etc. of plant breeder's rights
61. Plant breeder's rights granted in respect of existing varieties
62. Regulations

An Act to provide for the registration of plant breeder's rights in respect of certain kinds of plants and the protection of the rights of persons who are registered as the holders of plant breeder's rights; and to provide for matters incidental thereto or connected therewith

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Plant Breeder's Rights Act, 2018, and shall come into operation on such date as the Minister may appoint by notice published in the *Gazette*.

Short title and
commence-
ment

Interpretation

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

“Appeals Committee” means a committee responsible for hearing appeals from the decision of the Registrar under this Act;

“assignee” in relation to a new variety, means—

(a) a person who has derived his title to a new variety for Malawi directly or indirectly from the breeder or owner thereof; or

(b) the legal representative of a person who has derived his title to a new variety for Malawi directly or indirectly from the breeder or owner thereof;

“breeder” means—

(a) a person or legal entity who bred, or discovered and developed a variety;

(b) a person or legal entity who is the employer of the person mentioned under (a) or who has commissioned the latter's work; or

(c) the successor in title of the first or second person mentioned in (a) or (b), as the case may be;

“Committee” means the Technical Advisory Committee appointed under section 4;

“date of application” means the effective date of an application for plant breeder's rights in terms of section 13;

“foreign application” means an application made in terms of section 51, in respect of a variety which has its origin outside Malawi;

“hybrid” means the first generation progeny of a cross which is produced under controlled pollination with parents sufficiently uniform to permit repeated production of the hybrid without change in uniformity or stability;

“kind” in relation to a plant, means all related species, sub-species and varieties of any plant which are known by the same common name;

“legal representative” means the—

(a) liquidator or receiver of a company; or

(b) representative recognized by law of any person who—

(i) has died;

(ii) has become insolvent or bankrupt;

- (iii) has assigned his estate;
- (iv) is an infant or minor;
- (v) is of unsound mind; or
- (vi) is otherwise under a disability;

"new variety" means any plant variety that complies with the requirements of section 11;

"officer" means the Registrar or examiner or any other officer appointed in terms of section 8;

"Plant Breeder's Rights Fund" means a fund established under section 43 (1) of this Act;

"plant breeder's rights" means plant breeder's rights granted in terms of section 23;

"Plant Breeder's Rights Department" means a department established under section 7 of this Act;

"plant concerned" means the plant to which an application in terms of sections 14 and 15, or foreign application, as the case may be relates, and which is claimed by the applicant to be a new variety;

"Register" means the Register of Plant Breeder's Rights kept in terms of section 10;

"Registrar" means the Registrar of Plant Breeder's Rights appointed in terms of section 8;

"reproductive materials" means a plant or part of a plant which is used to multiply the plant;

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

(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 unchanged.

PART II—ADMINISTRATION

Administration
of the Act

3. This Act shall be administered by the Minister and such other officers subordinate to him as may be appointed under this Part, and whose offices shall be public offices.

Technical
Advisory
Committee

4.— (1) There shall be a Technical Advisory Committee which shall consist of the following members appointed by the Minister—

(a) a representative of the Secretary responsible for Agriculture;

(b) two representatives from two public universities offering agricultural programmes;

(c) a representative of the Secretary responsible for Forestry;

(d) a representative of the body regulating seed traders in Malawi;

(e) a representative of the Director of National Herbarium and Botanical Gardens of Malawi;

(f) a representative of a Government agency responsible for administering intellectual property rights;

(g) a representative of a body regulating farmers in Malawi.

(2) The members of the Committee shall, at their first meeting, elect a Chairperson and Vice-Chairperson from amongst their number.

(3) A member of the Committee shall hold office for a period of three years from the date of appointment and may be eligible for re-appointment for another three year term.

Meetings of
the
Committee

5.— (1) The Committee shall meet at such place, and such time, as the Chairperson may determine, and shall meet at least once in every three months.

(2) In the absence of the Chairperson and the Vice-Chairperson, the members of the Committee present shall elect a person from their number to preside over a meeting.

(3) The quorum for any meeting shall be a simple majority of members present.

(4) A decision on any matter before the Committee shall be taken by a simple majority of the votes of the members present.

(5) In the case of an equality of votes, the person presiding over a meeting shall have a casting vote in addition to the member's deliberative vote.

(6) Subject to the provisions of this Act, the Committee shall determine its own procedures for meetings.

6. The Committee pertaining to the implementation of this Act shall—

Functions of
the
Committee

(a) advise the Registrar and the Minister on all technical matters regarding plant breeder's rights;

(b) issue general and specific guidelines and directives to the Plant Breeder's Rights Department in relation to plant breeder's rights;

(c) establish rules of procedures for the Plant Breeder's Rights Department;

(d) review and approve test guidelines pursuant to this Act; and

(e) review and recommend budgetary proposals for the functions of the Plant Breeder's Rights Department.

7. There is hereby established a department of the Government to be known as the Department of Plant Breeder's Rights to be under the supervision of the Secretary responsible for Agriculture which shall be responsible for registration of plant breeder's rights and matters connected thereto.

Plant
Breeder's
Rights
Department

8. There shall be appointed in the public service,—

(a) a Registrar of plant breeder's rights; and

(b) examiners, assessors and inspectors, who shall be subordinate to the Registrar,

Registrar of
Plant
Breeder's
Rights and
other staff

who shall exercise such powers and perform such duties as may be conferred upon them by the Minister.

9. The Registrar shall—

Functions of
the Registrar

(a) receive and evaluate applications, and grant plant breeder's rights in accordance with this Act;

(b) establish and maintain a Register of plant breeder's rights;

(c) collaborate with other national authorities and other regional and international organizations on all matters relating to the administration of plant breeder's rights;

(d) publish all matters relating to the application and granting of plant breeder's rights;

(e) be responsible for the Plant Breeder's Rights Department;

(f) be the secretary to the Committee; and

(g) perform such other functions as are necessary for the furtherance of the objectives of this Act.

Register

10.— (1) The Registrar shall keep a Register of Plant Breeder's Rights, in which shall be entered—

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

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

(2) Documents signed by the Registrar certifying any entry in the Register, shall be *prima facie* evidence of any matters entered therein which are required or authorized by or under this Act to be entered therein.

PART III—APPLICATION FOR AND GRANT OF PLANT BREEDER'S RIGHTS

Requirements
for plant
breeder's
rights

11.— (1) Subject to section 51, plant breeder's rights shall be granted only in cases of a new variety of plant genera and species.

(2) A new variety shall consist of plant genera and species which—

(a) before the date of application, was not available to the public in trade or otherwise in Malawi for longer than one year or in any other country other than Malawi for longer than four years or, in the case of trees and grapevine, for longer than six years;

(b) is novel and that before the date of application, was not generally known;

(c) is distinct by at least one characteristic from any other variety the existence of which is a matter of common knowledge at the date of application;

(d) is uniform; and

(e) is stable.

(3) Subject to sections 51 and 61, plant breeder's rights shall only be granted in respect of new varieties of a prescribed kind.

(4) For the purposes of paragraphs (b) and (c) of subsection (2), general or common knowledge may be established by reference to plant varieties which are—

(a) already in cultivation or accepted for commercial purposes;

(b) included in any commercial or botanical reference collection; or

(c) described precisely in any magazine, journal or other publication.

(5) Novelty shall not be lost as a result of any sale or disposal to others that—

(a) is the result of an abuse to the detriment of the breeder or successor in title;

(b) forms part of an agreement for the transfer of the rights in the variety;

(c) forms part of an agreement under which a person multiplies propagating material of the variety concerned on behalf of the breeder or his successor in title, provided that the property in the multiplied material reverts to the breeder or his successor in title, and that the multiplied material is not used for the production of another variety;

(d) forms part of an agreement under which a person undertakes field tests or laboratory trials, or small-scale procedure trials, with a view to evaluating the variety;

(e) forms part of the fulfillment of a statutory or administrative obligation in particular concerning biological security or the entry of varieties in an official catalogue of varieties admitted to trade; or

(f) involves harvested material being a by-product or a surplus product of the creation of the variety or of the activities referred to in paragraphs (c) to (e) of this subsection, that the said material is sold or disposed of without variety identification for purposes of consumption.

(6) For the purposes of this Act, a variety shall be considered—

(a) novel if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not occurred by or with the consent of the breeder, for the purposes of exploitation of the variety;

(b) 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;

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

(d) stable, if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

Prior
knowledge or
publication of
new plant
excused in
certain
circumstances

12.— (1) Notwithstanding section 11, plant breeder's rights shall not be refused or held to be invalid by reason only of the fact that a new variety in respect of which such rights 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 without his knowledge or consent; and

(b) if he learned of the use or disclosure before the date of application, that he applied for the grant of plant breeder's rights with all reasonable diligence after learning of the use or disclosure, as the case may be.

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

Persons
entitled to
make
application

13.— (1) Subject to section 51, an application for the grant of plant breeder's rights in respect of a new variety may be made by any of the following persons—

(a) a breeder of the new variety; or

(b) an assignee of the person referred to in paragraph (a), and may be made by that person either alone or jointly with any other person who is the breeder of the new variety or his assignee.

(2) Where the breeder provided under subsection (1) is an employee, entitlement to the breeder's right shall be determined by the employment relationship in the context of which the variety was bred, or discovered and developed, and in accordance with the law applicable to that relationship.

(3) An application for grant of plant breeder's rights may be made by the legal representative of—

(a) a deceased person who, immediately before his death, was entitled to make such an application; or

(b) a person under disability who, had it not been for such disability, would himself have been entitled to make such an application.

Application
for plant
breeder's
rights and
effective date
thereof

14.— (1) An application for the grant of plant breeder's rights shall be made in the prescribed form and lodged with the Registrar in the prescribed manner.

(2) An assignee making or joining in an application shall furnish such proof of title or authority as the Registrar may require.

(3) An application under subsection (1) shall—

(a) indicate the origins of the plant concerned and give the full name of the breeder; and

(b) where the applicant or one of the applicants is an assignee, contain a declaration that the applicant believes the person named as the breeder to be the actual breeder of the plant concerned.

(4) In addition to the requirements set out in subsection (3), a foreign application shall specify—

(a) the country in which the variety concerned has its origin and where the application for the grant of rights similar to plant breeder's rights was made, if any;

(b) the number or title of such application, if any; and

(c) the effective date of such application, if any.

(5) The effective date of an application in terms of this section shall be—

(a) in the case of an application which is not a foreign application, the date on which the application is received by the Registrar; or

(b) in the case of a foreign application, the effective date of the application in the foreign country,

provided that where no such application has been made in the foreign country or the application made in the foreign country is subsequently withdrawn, abandoned or refused, the effective date of the application shall be the date on which it was received by the Registrar.

15.— (1) An application in terms of section 14 shall be accompanied by—

Description
and samples
of new
varieties

(a) a complete and validated description of distinctness, uniformity and stability of the variety concerned, where such information is not available the applicant shall pay for the tests; and

(b) samples of reproductive material necessary for the reproduction of the plant concerned in such quantities as the Registrar may require.

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

(a) commence with a title naming the plant concerned or giving it a temporary designation until the grant of plant breeder's rights;

(b) contain or be accompanied by such other particulars as may be prescribed or required by the Registrar; and

(c) specify the procedure to be used for the maintenance and reproduction of the plant concerned.

(3) The Registrar may require that—

(a) the plant concerned or the plant or plants from which it originated be shown to him or to a person designated by him; and

(b) any additional information or specimens which he considers necessary to determine whether or not the plant concerned constitutes a new variety be furnished to him.

Name of plant
variety

16.— (1) A person who applies for the grant of a plant breeder's right shall propose the name of the variety but such name shall be subject to the approval of the Registrar.

(2) The Registrar may at any time grant plant breeder's rights, after consideration of any representations made by the applicant or an objector, reject any name proposed in terms of subsection (1) if, in his opinion, the name proposed—

(a) is identical with or may be confused with—

(i) the name of any other plant, whether or not plant breeder's rights in respect of that plant have been granted; or

Cap. 49:01

(ii) a trade mark which has been registered in terms of the Trade Marks Act for any food, fruit, plant or seed or a trade mark used by any third party;

(b) does not correspond with the international code for the nomenclature of plants;

(c) is misleading or creates a wrong impression of the characteristics of the plant concerned; or

(d) conflicts with any law or is likely to give offence to any person or class of persons.

(3) Where a person is dissatisfied by a decision of the Registrar made under subsection (2), that person may appeal that decision to the Appeals Committee.

Refusal of
application

17.— (1) The Registrar may refuse any application made in terms of section 13, if *prima facie* it appears to him that the—

(a) application does not comply with the requirements of this Act;

(b) variety in respect of which the application has been made is not a new variety of a prescribed kind;

(c) applicant is not entitled in terms of this Act to make the application;

(d) growing of the variety concerned would be contrary to the general interests of Agriculture in Malawi; or

(e) production of the variety concerned would require the repeated use of the reproductive material of another plant variety for which plant breeder's rights have been granted to or applied for by another person unless such reproductive material is used under a licence granted in terms of section 23 or 24.

(2) A person whose application has been rejected by the Registrar under subsection (1) may appeal that decision to the Appeals Committee.

18. With the consent of the Registrar, a person who has made an application in terms of section 14 may, at any time before the grant of plant breeder's rights, add to or alter the description lodged with his application or the proposed name of the plant.

Amendment
of an
application

19. If, in the opinion of the Registrar, a variety in respect of which an application has been made in terms of section 14 appears to be a new variety of a prescribed kind and the applicant appears to be entitled to apply for plant breeder's rights in respect thereof, the Registrar shall publish in the *Gazette* a notice specifying the following particulars in relation to the application—

Publication of
an application

(a) the name of the applicant;

(b) the date of application;

(c) the proposed name of the variety concerned; and

(d) such particulars relating to the variety concerned as he thinks fit.

20. An applicant for plant breeder's rights shall, during the period from the publication of the notice in terms of section 19 until plant breeder's rights are granted, refused or rejected in terms of this Act, have the sole right to sell, reproduce and multiply reproductive material of the variety concerned.

Rights of
applicant for
plant
breeder's
rights

21.—(1) It shall not be an infringement of the rights conferred by section 26 for a person to—

Exemptions
to the rights
of a breeder

(a) use the variety concerned as an initial source of variation for the purpose of creating any other new variety, however, the provisions of this paragraph shall not apply where the variety concerned is repeatedly used for the reproduction or multiplication of another variety; or

(b) propagate, grow and use plants of that variety for purposes other than commerce.

(2) Farmers will be allowed to save, and use for propagating purposes of the product of the harvest in their own farms in limited quantities.

Objection to
grant of plant
breeder's
rights

22.— (1) Any person may, within three months of the publication of the notice in terms of section 19, lodge with the Registrar in writing an objection to the grant of plant breeder's rights on any of the following grounds—

(a) that the application does not comply with the provisions of this Act;

(b) that the application is a fraud of the rights of the person objecting or of any person under or through whom he claims the rights;

(c) that the applicant is not entitled to make the application;

(d) that the application contains a material misrepresentation;

(e) that the variety concerned is not a new variety;

(f) that the variety concerned is not a prescribed kind;

(g) that the name proposed for the variety concerned should be rejected or altered in terms of section 23;

(h) that the variety concerned has been reproduced by the repeated use of the reproductive material of a plant of another variety for which plant breeder's rights have been granted to or applied for by a person other than the applicant, unless such reproductive material is used under a license granted under this Act;

(i) that the description of the variety concerned does not clearly describe the plant variety;

(j) that the plant concerned is not in the general interest of agricultural productivity, public health and environmental protection in Malawi; or

(k) if the application is a foreign one, that the description differs from that in any application made or rights granted in the foreign country and that such latter application or rights would not describe a new variety in terms of this Act.

(2) A notice of objection in terms of subsection (1) shall—

(a) specify the grounds on which the objection to the grant of plant breeder's rights is being made; and

(b) be accompanied by a statement setting out particulars of the facts alleged in support of the said grounds.

(3) The Registrar may require that a notice lodged in terms of this section be supported by an affidavit and such other proof as he thinks necessary.

(4) If the applicant for plant breeder's rights wishes to contest the allegations of the person objecting, he shall, within three months, or such further period as the Registrar may allow, from the date he is furnished with a copy of the notice of objection, lodge with the Registrar, a counter-statement setting out particulars of the grounds upon which he will contest the objection.

(5) The Registrar shall furnish—

(a) the applicant for plant breeders rights with a copy of any notice of objection lodged in terms of subsection (1); and

(b) the person objecting with a copy of any counter-statement lodged in terms of subsection (4).

(6) The Registrar shall, after hearing the parties if so required, and considering the evidence, decide whether or not the objection should be upheld, and if he—

(a) upholds the objection and, in the case of an objection on the grounds referred to in paragraph (g) of subsection (1), the applicant does not alter the name of the variety concerned, the Registrar shall reject the application and shall—

(i) forthwith notify the parties in writing of such rejection; and

(ii) within one month of such rejection, publish in the *Gazette*, a notice of such rejection,

but if an appeal in terms of subsection (7) is lodged, the notice shall not be published until such time as the appeal has been determined; and

(b) does not uphold the objection, he shall notify the parties of his decision.

(7) An appeal shall lie to the Appeals Committee from any decision of the Registrar under this section.

23.— (1) On receipt of an application in terms of section 14, the Registrar shall, subject to the provisions of sections 17 and 22, investigate or cause to be investigated such application in order to determine whether—

Grant or
refusal of
plant
breeder's
rights

(a) the variety concerned should be regarded as a new variety of a prescribed kind; and

(b) the applicant is entitled in terms of this Act to make the application.

(2) Subject to subsection 4, if, after investigation in terms of subsection (1), the Registrar considers that the variety should be regarded as a new variety of a prescribed kind and that the applicant is entitled to apply for plant breeder's rights in respect thereof, he shall—

(a) grant to the applicant plant breeder's rights in respect of the plant;

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

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

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

(4) The Registrar shall grant plant breeder's rights in terms of subsection (2) within a period of three years after the publication of the notice in terms of section 19 or such longer period as the Registrar may, by notice in writing, in any particular case authorize, unless the application has been—

(a) refused in terms of section 17; or

(b) rejected in terms of section 22.

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

(a) the application for plant breeder's rights does not comply with the requirements of this Act;

(b) the variety in respect of which the application has been made is not a variety of a prescribed kind; or

(c) the applicant is not entitled to make the application,

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

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

Cancellation
of plant
breeder's
rights

24.— (1) The Registrar may, at any time, cancel any plant breeder's rights if he is satisfied that—

(a) any information submitted in the application for those rights or any information submitted by or on behalf of the applicant in connection with the application was incorrect and

that if the Registrar had known before the grant that it was incorrect he would have refused the grant;

(b) facts have been discovered which, if known before the grant, would have resulted in the grant being refused in terms of section 17; or

(c) annual maintenance fees have not been paid.

(2) Any person may apply in the prescribed manner to the Registrar for the cancellation of plant breeder's rights in terms of subsection (1) and such application shall be accompanied by a prescribed fee.

(3) On receipt of an application in terms of subsection (2), the Registrar shall inform the holder of the plant breeder's rights of such application and give him an opportunity of lodging a counter-statement.

(4) Within one month of the cancellation of plant breeder's rights in terms of subsection (1), the Registrar shall publish in the *Gazette*, a notice of such cancellation.

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

25.— (1) A holder of plant breeder's rights shall ensure that throughout the period for which the rights are exercisable he or she is in a position to—

Duty of a
holder of
plant
breeder's
rights

(a) produce to the Registrar, reproductive material which is capable of producing the variety to which the rights relate with the morphological and physiological and other characteristics taken into account when those rights were granted in respect of that variety; and

(b) afford the Registrar all such information and facilities as the Registrar may request for the purpose of satisfying himself that the holder of the plant breeder's rights is fulfilling his duty under paragraph (a), including facilities for the inspection by or on behalf of the Registrar of the measures taken for the preservation of the variety concerned.

(2) If it appears to the Registrar that a holder of plant breeder's rights—

(a) is no longer in a position to provide the reproductive material referred to in paragraph (a) of subsection (1); or

(b) has failed to comply with any request under paragraph (b) of subsection (1),

he or she may cancel those rights.

(3) An appeal shall lie to the Appeals Committee from any decision of the Registrar under this section.

Rights of a
holder of
plant
breeder's
rights

26.— (1) Subject to section 21, the holder of plant breeder's rights shall, during the period specified in subsection (3), have the exclusive right to—

(a) sell, including the right to license other persons to sell plants or propagating material of that variety;

(b) produce, including the right to license other persons to produce, propagating materials of that variety for sale; and

(c) export, including the right to license other persons to export, propagating material of the variety.

(2) Plant breeder's rights shall be independent of any measure taken by the State, to regulate within Malawi, the production, certification and marketing of material of varieties or the importing or exporting of such material.

(3) Plant breeder's rights shall expire at the end of the twentieth calendar year following the grant thereof and in respect of trees and grapevines, they shall expire at the end of the twenty-fifth year.

(4) On application by the holder of the plant breeder's rights, the Registrar may, if he or she is satisfied that for reasons beyond the control of the applicant, the applicant has not been adequately remunerated by the grant of such rights, extend the term provided under subsection (3) for such further period, being not more than five years, as the Registrar considers suitable in the circumstances, which extension may be made subject to such conditions, if any, as the Registrar considers to be desirable.

Exceptions to
plant
breeder's
rights

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

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

(b) acts done for experimental purposes; and

(c) acts done for the purpose of breeding other varieties.

(2) Notwithstanding the provisions of section 26, a plant breeder's right shall not extend to a farmer who, within reasonable limits and subject to the safeguarding of the legitimate interests of the holder of the plant breeder's right, uses for propagating purposes, on the farmer's own holdings, the product of the harvest which the farmer has obtained by planting on the farmer's own holdings, the protected variety or a variety covered by section 26(1).

Surrender of
plant
breeder's
rights

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

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

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

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

(a) revoke the plant breeder's rights;

(b) note in the Register that such rights have been revoked; and

(c) call upon the holder to surrender the certificate of registration of plant breeder's rights issued in terms of this Act.

(5) In cases where no notice of opposition has been given in terms of this section, it shall not be necessary for the Registrar to hear the holder of the plant breeder's rights.

(6) Where plant breeder's rights are jointly held or owned by two or more persons, the Registrar shall only accept a surrender of such rights upon written consent of all joint holders.

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

(8) An appeal shall lie to the Appeals Committee from any decision of the Registrar made under this section.

PART IV—LICENSING

29.— (1) The holder of plant breeder's rights may grant to any person exclusive or non exclusive licence relating to all or any of the rights provided for in section 26. Licences

(2) In granting any licence, the holder of the plant breeder's rights may impose such conditions, limitations or restrictions as he deems fit.

(3) If the holder grants to any person a license to the rights in section 26, he shall, within three months of granting such licence, notify the Registrar in writing of the grant of the licence and of any

conditions, limitations or restrictions imposed in terms of subsection (2) and the Registrar shall register the licence.

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

Compulsory
licences

30.— (1) Subject to the provisions of this section, any person who can show that he has been unable to obtain a licence referred to in section 29 in respect of a variety in respect of which plant breeder's rights have been granted, may apply in the prescribed manner to the Registrar for a compulsory licence on the ground that the reasonable requirements of the public with respect to the variety concerned have not or will not be satisfied.

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

(a) set out fully—

- (i) the nature of the applicant's interests;
- (ii) the facts on which his case is based;
- (iii) the relief he seeks; and
- (iv) be accompanied by an affidavit verifying the facts set out in the application.

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

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

(5) On receipt of the counter-statement lodged in terms of subsection (4) or the expiration of the period specified in subsection (4), whichever is the earlier, the Registrar shall, unless the applicant withdraws his application, forward the application and the counter-statement, if any, to the Minister, and the Minister may order the holder of the plant breeder's rights to grant a licence such as is referred to in section 23 to the applicant subject to such conditions, limitations or restrictions as the Minister may fix, and in fixing the conditions the Minister shall fix—

(a) the period of the licences; and

(b) the amount and method of payment of royalties.

PART V—APPEALS

31.— (1) The Minister shall appoint an Appeals Committee, which shall hear appeals from the decision of the Registrar under this Act. Appeals Committee

(2) The Appeals Committee shall comprise—

(a) two plant breeders from the Ministry of Agriculture, one of whom shall be the Chairperson;

(b) a plant breeder representing the private sector;

(c) a representative from an association of farmers;

(d) a legal practitioner nominated in that behalf by the Malawi Law Society; and

(e) two representatives from public academic institutions offering agriculture programmes.

32. The Appeals Committee may appoint any person with special expert knowledge to act as an assessor in an advisory capacity in any case where it appears to the Committee that such knowledge is required for the proper determination of the case. Assessors

33. An appeal shall be brought within thirty (30) days after the date of the decision or order of the Registrar in question. Time for appeals

34.— (1) In any proceedings before the Appeals Committee, the parties to such proceedings may appear in person or be represented by a legal practitioner. Right of audience

(2) The Registrar may appear with the leave of the Appeals Committee.

35.— (1) The Registrar shall notify the Appeals Committee forthwith of any appeal which has been lodged with him against any decision or order. Notifications by Registrar to the Appeals Committee

(2) Where any matter to be decided by the Registrar under this Act appears to him to be of unusual importance or complexity, he may refer that matter to the Appeals Committee for decision.

36. A person who is aggrieved by the decision of the Appeals Committee may apply to the High Court, within thirty (30) days after the date of the decision of the Appeals Committee, for a review. Review by the High Court

PART VI—OFFENCES AND PENALTIES

Falsification
of documents

37. Any person who—

(a) makes or causes to be made a false entry in the register, knowing the entry to be false; or

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

commits an offence and shall, upon conviction, be liable to a fine not exceeding three million Kwacha (K3,000,000) and to imprisonment for a period not exceeding two years.

Failure to
obey order of
Appeals
Committee or
giving false
evidence

38. Any person who—

(a) without lawful excuse, fails to comply with an order of the Appeals Committee; or

(b) having been ordered to attend before the Appeals Committee without lawful excuse—

(i) fails to attend at the time and place specified in the order;

(ii) having attended, fails to be sworn or to make affirmation, or fails to answer any question or to produce any document which he may be lawfully required to answer or produce, as the case may be; or

(iii) whilst giving evidence before the Appeals Committee, makes any statement which he knows to be false or does not know or believe to be true,

commits an offence and shall, upon conviction, be liable to a fine not exceeding five million Kwacha (K5,000,000) and to imprisonment for a period not exceeding three years.

Deceiving or
improper
influencing of
officer

39. Any person who for the purpose of—

(a) deceiving an officer in the execution of his duties under this Act; or

(b) procuring or influencing the doing or omission of anything by an officer in the execution of his duties under this Act, makes or submits a statement or representation, whether orally or in writing, which he knows to be false or does not know or believe to be true,

commits an offence and shall, upon conviction, be liable to a fine not exceeding five million Kwacha (K5,000,000) and to imprisonment for a period not exceeding three years.

40.— (1) Any person who falsely and without lawful excuse represents that—

Unauthorized
claim of plant
breeder's
rights or use
of
unauthorized
name

(a) any reproductive material of a plant sold or reproduced or exported by him as a variety in respect of which plant breeder's rights have been granted; or

(b) an application has been made in terms of this Act for the grant of plant breeder's rights in respect of a plant variety sold by him or her,

commits an offence and shall, upon conviction, be liable to a fine not exceeding five million Kwacha (K5,000,000) and to imprisonment for a period not exceeding three years.

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

(a) a name therefore which is different from the name registered in terms of this Act for that variety; or

(b) the registered name of another variety of the same kind or uses a name which corresponds so closely to a registered name that it is misleading,

commits an offence and shall, upon conviction, be liable to a fine not exceeding five million Kwacha (K5,000,000) and to imprisonment for a period not exceeding three years.

41.— (1) Any officer who acquires, otherwise than in the course of his duties, or sells any reproductive material of a variety in respect of which plant breeder's rights have been granted or applied for commits an offence and shall, upon conviction, be liable to a fine not exceeding three million Kwacha (K3,000,000) and to imprisonment for a period not exceeding two years.

Offences by
officers

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

42. Any person who has been convicted of an offence under this Act, where a penalty has not been specifically provided shall, upon conviction, be liable to a fine not exceeding two million Kwacha (K2,000,000) and to imprisonment for a period not exceeding one year.

General
penalty

PART VII—FINANCIAL PROVISIONS

43.— (1) There is hereby established a Fund to be known as the Plant Breeder's Rights Fund (in this Act otherwise referred to as the "Fund").

Plant
Breeder's
Rights Fund

(2) The Fund shall consist of—

(a) such moneys as may be appropriated by Parliament for the purposes of the Fund;

(b) all levies and fees from all varieties registered under this Act and all varieties in the commercial seed industry in Malawi which shall be prescribed by the Minister under this Act;

(c) all other fees payable under this Act;

(d) such sums or other assets as may be received for the purpose of the Fund by way of voluntary contributions or donations; and

(e) such sums as are paid by way of penalties or costs in respect of offences under this Act.

(2) The Registrar may—

(a) accept money by way of grants, or donations from any source in or outside Malawi; and

(b) charge and collect fees in respect of programmes, publications, documents and other services provided by the Plant Breeder's Rights Department.

Levy 44. The Minister may, in consultation with the Minister responsible for Finance, by order published in the *Gazette*, levy—

(a) a fixed sum on all varieties registered under this Act; or

Cap. 67:06 (b) a fixed sum on all varieties in the commercial seed industry in Malawi according to the provisions of the Seed Act.

Administration of the Fund
Cap. 37:02
Cap. 37:01 45. The Fund shall be administered by the Registrar, subject to this Act, and in accordance with the Public Finance Management Act and the Public Audit Act.

Objectives of the Fund 46. The Fund shall be used for the proper management of plant breeder's rights activities.

Application of the Fund 47. The Fund may be applied for—

(a) financing all administrative costs of the Plant Breeder's Rights Department;

(b) promoting research and training which is intended to promote a conducive environment for the enforcement of plant breeder's rights;

(c) conducting distinctness, uniformity and stability tests or any other procedural tests required under this Act;

(d) maintenance of registered germplasm as required by this Act;

(e) financing the publication of a plant variety journal and any other relevant publication; and

(f) other uses deemed necessary for smooth implementation of the Plant Breeder's Rights.

48.— (1) All sums received for the purposes of the Fund shall be paid into a bank account and no amount shall be withdrawn therefrom except by means of cheques signed by such persons as are authorized in that behalf by the Registrar. Holding of the Fund

(2) Any part of the Fund not immediately required for the purposes of the Fund may be invested in such manner as determined by the Fund and utilized in compliance with the requirements of the Public Finance Management Act. Cap. 37:02

49.— (1) The Registrar shall cause to be kept, proper books and other records of accounts in respect of receipts and expenditures of the Fund in accordance with the Public Finance Management Act and the Public Audit Act. Books and other records of accounts and audit and reports of accounts
Cap. 37:02
Cap. 37:01
Cap. 37:01

(2) The accounts of the Fund shall be audited by the Auditor General in accordance with the Public Audit Act.

(3) The Registrar shall prepare, as soon as practicable, but not later than three months after the end of the financial year, an annual report on all the financial transactions of the Fund.

50.— (1) The financial year of the Fund shall be the period of twelve months commencing on 1st July in one year and ending on 30th June of the following year. Financial year

(2) The first financial year of the Fund may be a period shorter or longer than twelve months as the Minister shall determine, but in any case not longer than eighteen months.

PART VIII—GENERAL

51.— (1) If the Registrar is satisfied that any country is prepared to grant; in respect of any new variety of a prescribed kind, rights which, in the opinion of the Registrar, are similar to the plant breeder's rights contemplated in this Act, he may, by notice published in the *Gazette*, declare that the provisions of this Act shall apply in respect of any new variety of a prescribed kind or any class thereof specified in that notice which has its origin in that country and which, if it had its origin in Malawi, would be a new variety as described in section 11. Foreign applications

(2) The Registrar may grant to any person who is resident in Malawi, authority to apply in terms of this Act for the grant of plant

breeder's rights in respect of a new variety of a prescribed kind which has its origin outside Malawi and which, if it had its origin in Malawi would be a new variety as described in section 11.

(3) A person may make an application for the grant of plant breeder's rights in respect of a new variety for which a similar application has been made—

(a) in a foreign country specified in terms of subsection (1); or

(b) in a foreign country by a person authorized in terms of subsection (2),

by whom that similar application was made or by the assignee of that person as the case may be, at any time within twelve months from the date that similar application was made in the foreign country.

Exercise of
discretion by
Registrar

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

Rights of
patent agents
and attorneys

53.— (1) A patent agent as defined in the Patents Act or a legal practitioner may act as an agent on behalf of any person in connection with any matter or proceeding before the Registrar under this Act and may for that purpose draw and sign all documents and may represent an applicant at all attendances before the Registrar.

Cap. 49:02

(2) The provisions of section 52 (2) of the Patents Act shall apply *mutatis mutandis*, in respect of any act performed by a patent agent in terms of subsection (1).

Powers of
Registrar to
make
corrections

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

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

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

(4) Any opposition to a proposal to correct or authorize the correction of a document or the Register in terms of subsection (1)

shall be dealt with by the Registrar in such manner as he considers desirable in the interests of justice.

(5) An appeal shall lie to the Appeals Committee from any decision of the Registrar under this section;

55.— (1) An application to rectify a Register shall be lodged with the Registrar and the Registrar shall give notice thereof to all interested parties. Rectification of Register

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

(a) the applicant or any other interested party shall be entitled to appear and be heard; and

(b) the Registrar shall determine questions in such manner as he deems desirable in the interests of justice.

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

(2) A copy of—

(a) an entry in the Register or of any document lodged in terms of this Act; or

(b) an extract from the Register or from any document lodged in terms of this Act, which purports to be certified by the Registrar,

shall be admitted in evidence without further proof and without production of the original.

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

58. Save as otherwise provided in this Act, any person who discloses, except— Preservation of secrecy

(a) to the Registrar or any other person for the purposes of the carrying out of his or her duties or the performance of his or her functions under this Act;

(b) to a police officer for the purposes of an investigation or inquiry relating to the enforcement of the provisions of this Act; or

(c) when required to do so by any court or under any law, any information acquired by him in the carrying out of any duty or the performance of any function under this Act in relation to any plant in respect of which an application for the grant of plant breeder's rights has been made under this Act or to the business affairs of any other person,

commits an offence and is liable upon conviction, to a fine not exceeding two million Kwacha (K2,000,000) and to imprisonment for a period not exceeding two years.

Application
of this Act to
Government

59.— (1) Plant breeder's rights shall have the same effect against the Government as they have against any person.

(2) No fees imposed under this Act shall be payable by the Government.

(3) No claim shall lie against the Government, the Registrar or any other officer for anything done in good faith and without negligence under the powers conferred by this Act.

Assignment
etc. of plant
breeder's
rights

60.— (1) The plant breeders rights granted under this Act shall be capable of assignment and of devolution by operation of law and of being mortgaged and pledged.

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

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

Plant
breeder's
rights granted
in respect of
existing
varieties

61.— (1) Notwithstanding anything contained in this Act, if a person is the breeder of an existing variety of a prescribed kind, and applies to the Registrar in writing within one year of the date of commencement of this Act for the grant of plant breeder's rights in respect of that variety, the Registrar may, if he considers that the availability of the variety to the public is effectively controlled by

the applicant and that the provisions of paragraphs (c), (d) and (e) of subsection 11 (2) are satisfied in respect of the variety, grant plant breeder's rights in respect of that variety.

(2) Before exercising his powers in terms of subsection (1), the Registrar shall cause notice of the application to be published in the *Gazette*, calling for objections to be lodged with him within such period, being not less than one month, as may be specified in the notice, and the provisions of section 23 shall, apply *mutatis mutandis*.

(3) Plant breeder's rights granted in terms of this section shall be deemed to have been granted in accordance with this Act.

(4) Subject to section 13, a person who submits an application in terms of subsection (1) shall pay with his application and, if plant breeder's rights are granted, on the grant thereof, the fee that would have been payable had he applied for or been granted such rights in accordance with Part IV.

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

(2) Without derogating from the generality of subsection (1), the regulations may provide for—

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

(b) the procedure to be followed in connection with any application or request to the Registrar or any proceedings before him, 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 breeder's rights are granted and the time within which any such steps are to be taken;

(e) the requirement for any person who has in his possession or under his 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—

- (i) application for or the grant of plant breeder's rights;
- (ii) the examination of samples of reproductive material or any plant grown there from; and
- (iii) the inspection of the Register or the provision of a certified copy of any entry herein;

(g) the rights and duties of the holder of a license granted under this Act and of the holder of the plant breeder's rights in connection with the institution of actions for infringement of the plant breeder's rights where the holder thereof fails or refuses to institute such an action;

(h) the prevention of the use of false or misleading statements in any advertisement of plant breeder's rights; and

(i) the regulation of the practice and procedure of appeals, including provision for the—

(i) fees to be charged in respect of proceedings before the Appeals Committee; and

(ii) remuneration to be paid from the Fund to assessors and farming communities.

(3) Notwithstanding section 21(e) of the General Interpretation Act, the regulations made pursuant to this section may create offences in respect of any contravention to the regulations, and may for any such contravention, prescribe penalties for up to five million Kwacha (K5,000,000) and to imprisonment for a period of up to two years.

Passed in Parliament this twenty-sixth day of June, two thousand and eighteen.

FIONA KALEMBA
Clerk of Parliament