



SENSAKO
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SOUTH AFRICAN PLANT BREEDER RIGHTS (PBR'S) & FARMERS EXEMPTION

Plant Breeding is the science of changing the traits of plants in order to produce desired characteristics. It has been used to improve yields, disease resistance, and the quantity and quality of nutrition in products for humans and animals. Plant breeding can be accomplished through many different techniques ranging from simply selecting plants with desirable characteristics as parents for crossing and propagation, to methods that make use of knowledge of genetics and chromosomes, to more complex molecular techniques.

Intellectual Property rights protect ideas that can be demonstrated as being novel and undiscovered at the time of its legal claim as intellectual property. Proponents of intellectual property laws recognize a need for the financial support of research and development, without which most R&D would most likely not take place. Research and development in agriculture, is recognized as a particularly demanding endeavor, with respect to immediate concerns for the ability to sustainably feed an increasing global population.

Plant Breeders' Rights (PBR), also known as **Plant Variety Rights** (PVR), are a form of Intellectual Property. These are rights that are granted to the breeder of a new variety of plant that give the breeder exclusive control over the propagating material (including seed, cuttings, divisions, tissue culture) and harvested material (cut flowers, fruit, foliage) of a new variety for several years.

With these rights, the breeder can choose to become the exclusive marketer of the variety, or to license the variety to others. In order to qualify for these exclusive rights, a variety must be new, distinct, uniform and stable. ***Breeders can bring suit to enforce their rights and can recover damages for infringement.***

Typically, plant variety rights are granted by national offices, after examination. Seed is submitted to the plant variety office, who grow it for one or more seasons, to check that it is distinct, stable, and uniform. If these tests are passed, exclusive rights are granted for a specified period (typically 20/25 years (or 25/30 years, for trees and vines).

In South Africa, Plant Breeders Rights are governed through the Plant Breeders' Right Act, Act 15 of 1976 (The Act). In terms of section 23(1)¹ of The Act, a Plant Breeders' Rights (PBR) holder of a protected variety

¹ 23A) Rights of holder of plant breeder's right. –

(1) The effect of the protection given under this Act by the grant of a plant breeder's right shall be that prior authority shall during the currency of the plant breeder's right be obtained by way of license under section 25 or 27 by any person intending to undertake the-

- (a) production or reproduction (multiplication);
- (b) conditioning for the purpose of propagation;
- (c) sale or any other form of marketing;
- (d) exporting;
- (e) importing;
- (f) stocking for any of the purposes referred to in paragraphs (a) to (e), of-



has the exclusive right to undertake, the production, multiplication, stocking, sale, marketing, importing, exporting and conditioning for the purpose of propagation of the relevant variety.

Conditioning for Purposes of Propagation includes:

- Cleaning, drying, coating, sorting, grading, or packaging of material
- Testing for germination or vigour; or
- Any other similar treatment, undertaken for the purpose of preparing the material for cultivation and sale; or
- Any activity that would not be performed if the propagating material was not destined for planting.

Therefore, any person that

- (1) Markets or sells PBR protected seed or propagating material, or
- (2) Makes a business or provides a service of Conditioning for Purposes of Propagation including;
 - cleaning or treating seed/propagating material, or
 - Applies chemicals (albeit free of charge) to seed is obliged to first obtain a license from the relevant PBR holder.

The Act also makes provision for certain **exemptions** in section 23(6). These include the reselling of purchased seed, using seed for private or non-commercial purposes and the **Farmers Exemption** or **Farmers Privilege**.

The “Farmers Exemption” clause 23(6)f of the PBR Act states that “

Notwithstanding the provisions of section 23A, a person who procured any propagating material of a variety in a legitimate manner shall *not infringe the plant breeder's right* in respect of the variety if he or she (f)

- Is a farmer;
- Who on land occupied by him or her;
- Uses harvested material obtained on such land from that propagating material for purposes of propagation;
- Provided that harvested material obtained from the replanted propagating material shall not be used for purposes of propagation by any person other than that farmer.

The “Farmers Exemption” is therefore limited to a farmer who produces his own propagating material, on his land and for his own use.

(i) propagating material of the relevant variety; or
(ii) harvested material, including plants, which was obtained through the unauthorized use of propagating material of the relevant variety.