

PLANT BREEDERS BILL

- This document will address issues that arose from the public hearings and response DAFF gave to the processing of Plant Breeders and Plant Improvement Bills before the PC on Agriculture.
- It will also touch on proposed clauses that require a new look for drafting purposes.
- In broad it will determine and address legal issues and not the technical/ policy issues.

UPOV

- The Constitution is now the primary and supreme legal order in our country.
- Thus all other laws have been subsumed into the Constitution and for any interpretation and adoption of any other foreign law, consistency with the Constitution must exist in line with and in terms of section 2 of the Constitution
- The common law, international law all must be consistent with the Constitution in order to maintain their application to our constitutional legal order.

UPOVS AND ADOPTION

- International law are international conventions, treaties and international agreements
- Section 231 of the Constitution stipulates on the status and manner to utilise international agreements whilst section 233 deals with application of international law and section 232 automatically incorporates customary international law into our domestic law unless such law is inconsistent with the Constitution.
- South Africa as a sovereign state must adopt international law to give it binding effect through the approval by its national Parliament

International law

- When interpreting any legislation, courts and other interpreters of law must prefer any reasonable interpretation of the legislation which is consistent with international law over any alternative interpretation that is inconsistent with international law- s233
- S232- customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- As a sovereign state with its own legislative mandate, SA can regulate its territories anyhow as long as there is consistency with our Constitution and international law

Adoption of international agreements

- S231(1) the negotiating and signing of all international agreements is the responsibility of the national executive.
- An international agreement binds South Africa **only after it has been approved by resolution of Parliament.** (both NA and NCOP). Unless the international agreement is a subsection 3 agreement. 231(2)
- 231(3) deals with international agreements of a technical, administrative or executive nature or agreements that do not require ratification or accession once entered into by the national executive. But they still require to be tabled before Parliament.

How does an international agreement become law?

- S 231(4) stipulates that international law becomes law when it is enacted into law by national legislation; but a self executing provision of an international agreement that has been approved by parliament is already law in the Republic unless it is inconsistent with the Constitution or and Act of Parliament
- These provisions confirm the supremacy of our Constitution and domestic laws considering that SA is a sovereign state with power and mandate granted democratically to govern itself.
- 231(5) is crucial as it stipulates that SA is bound by international agreements that were binding to it when the Constitution took effect.

UPOVs

- Section 231(5) then explains the status of the 1978 UPOV and its binding effect.
- DAFF has informed the Committee that only the 1978 UPOV has been ratified and therefore is the only one binding and not the 1991 UPOV.
- But keep under consideration that the 1991 UPOV is the revised version of the 1978 version

UPOVS

- Both these conventions relate to plant breeding and plant varieties hence the relevant Bill linked to them is the Plant Breeders ' Rights Bill.
- For an example if one looks at the definitions in UPOV 1991 that is exactly what this Bill has adopted word for word.
- So considering other provisions in that light I doubt there is a need to argue either for the 78 or 91 UPOV incorporation as other objectors did.

PLANT BREEDERS BILL

- Clause 10(2)(a) v UPOV 1991? Enabling provision for the Minister to prescribe regulations on categories of farmers that may use protected varieties.
- when looking at articles 14 to 17 of the UPOV 91 , I see no restriction or problem created by clause 10(2)(a). In fact the Bill defines “protected variety” as a variety in respect of which a plant breeder’s right has been granted and that definition aligns with the purpose of the Convention as well as the intention of the Bill.

UPOV AND BREEDERS' RIGHTS

- Article 5 of the 91 UPOV determines the conditions of protection. It stipulates that the breeder's right shall be granted where the variety is new, distinct, uniform and stable.
- The protected variety is that which meets the criteria set out in article 5 and the definition in the Bill. See article 14 UPOV 91
- UPOV 78 provides in article 2(2) that each member state may limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication or certain end-use. For me that is exactly the intention and effect of 10(2)(a) of the Bill.

UPOV 78 AND BREEDERS' RIGHTS

- Articles 5, 6, 7, 8, 9, 10, 13 and 14 of the 1978 UPOV addresses protection and rights for breeders with protected varieties. These provisions are also not in contradiction with what clause 10(2)(a) seeks to provide.
- Clause 11: exhaustion of plant breeders' rights
- What does exhaustion mean?: condition of being used up/ consumption. Example= exhaustion of the earth's resources

Exhaustion of breeder's rights

- Objectors said this is a restriction to the breeder's right and confines the extent of the protection of breeder's rights.
- The protection and limitation in clause 11 does not extend to the breeds that are already in the market. It also excludes breeder's rights for varieties mentioned in clause 7(3) and that which are already in the market at the commencement of this Act.

Clause 15/ UPOVS

- Article 6(2) UPOV 1991 has paraphrased what is covered in UPOV 78 articles 6 read together with 12 and 13. What article 6(2) of UPOV 91 did was to bring clarity in draft form and opted simple English that is precise.
- There is not much difference other than as outlined.
- The Bill complies fully with the obligations conferred and expected on member states as depicted in article 30 of UPOV 78 as well as the concern raised in respect of clause 13 of the Bill.

Clauses 19 and 21

- 19: how is the application of a breeder's right rejected=
- The response from DAFF in respect of the clause 21 objection does not provide clarity in that they do not offer a way forward and this is a technical and policy concern.

Constitutionality of clauses 51(3) and 52(1)(b)

- Clause 51(3) empowers the Minister to determine administrative penalties for contravening the regulations and set limits for such penalties.
- Such a provision may be intended to create consistency and guide the courts when deciding sentences on these matters whilst the courts are inherently empowered to consider each peculiarity and circumstances of each case upon conviction.
- A concern is just a question whether Minister of Justice need not be consulted as well seeing that this is justice issue?

Constitutionality of 52(1)(b)

- In respect of clauses 51(3) and 52(1)(b) both these clauses are empowering provisions stemming from the main legislation and that is what the law requires.
- The Minister is legislatively empowered to set threshold penalty for the relevant authority who will be convicting and sentencing.
- Clause 52(1)(b) read with 52(1)(a) indeed create a statutory offence however the offence require no further policing capacity as suggested by the submission instead the contravention will easily be detected through appropriate administrative functions of the Registrar or DAFF systems and taken through the prosecuting processes where necessary.

Drafting issues

- In drafting standards and the Interpretation Act plural form equally refers to singular phrasing.
- Current definition in the Bill: “sell” defined as including to agree to sell; to offer, keep, expose, send, convey or deliver for sale; exchange or to otherwise dispose of to any person in any manner.

Issue with “sell”

- Dictionary meaning= to dispose of or transfer or be disposed or transferred to a purchaser in exchange for money or other consideration; put or be on sale; to give up or surrender for a price or reward
- R v Gontshe and dictionary for legal words indicates that sell or deal must be taken to mean a disposal for some form of consideration
- The underlined portion can perhaps assist to limit the broadness of the definition and be incorporated into the definition to take care of the part objectionable.

Incorporation of s31

- S31 of the current Act amounts to expropriation.
- The Expropriation Bill before Parliament is encompassing of such intentions as well as the current Expropriation Act. No need to repeat it in this Bill.
- Clause 46(6) v S24a(6) of current Breeders Act: these two provisions convey the same message. They enable entry into premises without a warrant but with a consent of the owner or authorised person. This is lawful and constitutional.

Plant improvement Bill

- Clause 38 variety value, cultivation and use (VCU): the Bill does not contend with the view of the objectors but what this clause seek to do is to enable the Registrar when there is doubt and for the benefit of the public to intervene and make an evaluation that determines properly what the value of that variety should be because they posses the expertise and knowledge that can be used comparatively to reach a fair value and know if the variety is harmful.
- Just not sure of the intention for 38(8)? Repeat investigation? Will it not be waste of the resources?

Plant improvement clause 43

- Clause 43 deals with import rules in respect of plants brought into the country and consequences for failure to comply
- – concern with destroying the imported goods without compensation that amounts to unfair deprivation and there is no qualifier whether such material would be harmful to the Republic or have any other repercussions. DAFF may elaborate on what is envisaged here.

Clause 43 importing

- The submission seem to premise on the view that the importer will be different from the buyer or the seller. Clause 43 in the manner it is phrased seem to cater for all such eventualities and determines as to whom the final responsibility of compliance lies with.
- As DAFF pointed out the built in exemptions will provide the necessary protection and room to enable compliance with domestic rules.

Clause 44 export

- What goes out of the country = if the Republic export quality products that are imported into the Republic the same standards must be ensured for the product that the Republic sends out to other countries. This will not only boost economic relations but will also give the country a reputable status and international standing.
- In this regard state will be able to meet its obligations to protect the Republic as argued by DAFF.

Clause 48 & 49

- Agree with DAFF response.
- Point for consideration is in respect of 49(10) whether the remuneration of Advisory Committee members should not be prescribed after consultation with the Minister of Finance?
- Thus such phrases to be added=suggestion.

Clause 47 Appeals Board

- Prescription of the remuneration of the members of the appeal board could have consistence if made after consultation with Minister of Finance- clause 47(2)(b).
- The role played by the Minister during clause 47 appeals must be clear.
- 4 things in the current draft are picked up:

Clause 47 Appeals

- (a) the aggrieved person files the appeal with the Minister but Minister does not make any decision on the appeal instead the board does and Minister does not even get to be informed of the Board's decision.
- (a)(i) what is the role of the Minister in the appeal process other than establishing the appeals board whenever necessary and appointing board members?
- (b) Minister receives the appeal application and refers it to the appeal board. So Minister becomes a kind of the post box but does not receive the decision of the board at the end?

Role of Minister in appeals

- Receive appeal
- Establish board and appoint members of the board
- refer appeal to established board but does not receive decision of the board at the end
- To whom is the board accountable to?
- Board decides and once decision is made, Minister has no role. Proposed redraft of clause 47. see attachment