



SUID-AFRIKAANSE NASIONALE SAADORGANISASIE

SOUTH AFRICAN NATIONAL SEED ORGANIZATION

NPC Reg No 1989/003392/08

2019/09/20

The Registrar, Plant Breeders Rights'
250 Harvest House
30 Hamilton Street
Arcadia
Pretoria

Dear Dr Noluthando Netnou-Nkoana,

SANSOR's Position on the Proposed Farmers' Privilege Regulation to the Plant Breeders' Rights Act, Act 12 of 2018

Breeders intellectual property have to be protected to ensure that South Africa's seed sector continues to be globally competitive. High yielding cultivars are bred to withstand changing climatic conditions and a higher disease pressure. The South African National Plant Breeders' Rights Act 12 of 2018 gives the necessary protection to a plant breeder and their newly bred varieties if regulations will be conducive to an environment that promotes innovation to protect food security.

Local and global seed companies invest vast amounts of time and money to develop new varieties that is adapted for the South African environment, farmers needs and challenges regarding changing climatic conditions and increased disease prevalence.

To ensure sustainable research activities in the seed industry of South Africa the Farmers' Privilege Proposed Regulations dated 14 August 2019 have to be carefully reconsidered to safeguard germplasm, research, agricultural seed businesses, the future of South African Agriculture and food security.

The South African National Seed Organization (SANSOR) representing 80 seed companies in the forage vegetable and agronomy division, strongly disagree with the proposed regulation. More information will be given in the points below:

DIRECTORS:

RH Roselt (Chairman), PR Smit (Vice-Chairman), B Lever, DE Malan, N Goble, SM Hildebrand, Dr L Chetty

- SANSOR strongly disagrees that any farmers should be able to sell, exchange or condition seed of protected varieties. All farmers or entities needs a license from the Plant Breeder Rights' holder to be able to sell, exchange or condition seed of protected varieties.
- South Africa is a signatory of the 1978 UPOV Convention which is silent on the issue of selling, exchanging and conditioning seed. The proposed regulations in our opinion also excessively surpasses UPOV 1991 which South Africa are considering ratifying to.
- Selling, conditioning and exchanging of seed are rights that are exclusively plant breeder's rights. The proposed regulations in this context would reduce the scope of the plant breeder's rights in terms of the 1978 UPOV Convention and potentially creating an anomaly of SA law as the regulations will be in conflict with the 1978 UPOV Convention.
- UPOV 1991 permits farmers to use farm-saved seed of a protected variety on their own farms. UPOV 1991 also allows members to adopt solutions which is specifically to their agricultural circumstances allowing that the provision protects the legitimate interest of the breeder and continues ensured incentive for the development of new plant varieties. However, the proposed regulations don't safeguard breeders and the seed industry.

Objections to the proposed regulation:

- **Section 1:** The categories of farmers:

Differentiating on farmers' turnover is problematic:

- The effects of inflation will have unintended consequences and will move farmers towards a larger category of farmer over time without any change in production.
- The effect of climate change, disease prevalence and the economic environment will have the ability to move farmers from one category to another. A commercial farmer might qualify as a small-scale farmer in one season due to severe weather conditions.
- Farmer turnover is not publicly available information. This will leave the regulation unenforceable.
- The proposed turnover "model" doesn't consider relative differences in crops (forage, horticulture and agronomy) and the scale of an operation. Hectares crops planted should rather be considered as an alternative measure rather than turnover, however careful consideration should be taken when looking at different crops.
- SANSOR and its members understand that the heart of the regulations have a social welfare objective. The proposed turnover of a small-scale farmer is up to 1 million, however does not represent an individual or entity that deserves a social welfare benefit. Please consider the two examples below.

Two examples for consideration:

1. *The South African GDP according the [world bank](#) is 6340 USD/capita (\approx 95260 ZAR/capita) and according to the National Minimum Wage act of 2018, the minimum wage is R18 per hour, therefore on average R37440/year.*

In relation to these figures, the different turnover levels proposed to differentiate the categories of producers/farmers represent :

R50 000 = 52% GDP/capita = 134% of the minimum wage

R1 million = 10 times GDP/capita = 26 times the minimum wage

Therefore, the upper level (R1 million) proposed for free using/exchanging/selling of protected seeds is substantial and should be considered as a large entity and not as a “subsistence activity” nor as “use for propagating purposes” on the farmer’s own holdings.

2. *In terms of the current proposed regulations, a commercial wheat farmer planting 400 hectares would almost certainly be classified as Smallholder producer/farmer since 400 ha x 2.5 tons per ha x 4000 per ton = R4.0 million. Yet a 400-ha rain fed wheat farm in the Western Cape would cost anywhere between R12 and R25 million, have a production potential of upwards of 1000 tons and use an about 40 tons of seed. This is commercial farming and does not equate the definition described in 1c.*

- **Section 1:** Definition of farmers

- “Individual or business entity” as mentioned in the definitions

Referring to an individual or business entity in small to large scale farmers definitions are unclear as this can also refer to other seed associated business activities such as operating a commercial seed conditioning plant or laboratory. The operation of commercial seed conditioning activities has never been within the ambit of Farmers Privilege yet by the current definition of a Smallholder producer/farmer, it is possible for a person to operate a 1 hectare farm and then also operate a seed cleaning and or seed selling business of commercial scale.

For example, a smallholder could operate a seed cleaning business sufficiently large enough to service 30% of the South African wheat hectares but still operate under the 5 million thresholds. This would be a clear contravention of Section 7(1)(b) of the PBR Act as the individual would be making a business from seed conditioning but could seek protection through the farmers privilege regulations.

- **Section 2:**

- Conventional varieties and genetically modified crops have always been treated the same under the PBR Act and have been evaluated according to the same principles. Therefore genetically modified crops should not be differentiated in the PBR act. Differentiating between genetically modified crops and non-genetically modified crops protected varieties is highly prejudicial to non-technology owned seed business and further prohibit non-tech owning South African companies to continue breeding new varieties.
- The PBR act doesn’t mention any definitions on genetically modified crops and therefore genetically modified crops should be dealt with in the PBR act but referred to the genetically modified crops Act.

- **Section 3:**

- 3a - The definition of Smallholder farmers suggests a turnover of up to R5 million whereas here it refers to 1 million? This confuses the reader.
- 3i – Farmers Privileged is broadened from retaining seed of protected varieties for own use, to conditioning, exchanging and selling.
 - Selling, exchanging and conditioning seed of protected varieties will lead to farmers not being only a producer/farmer anymore but will allow them to be in competition with the breeders and the formal seed sector. No farmer should be allowed to sell, exchange or condition seed of protected varieties.
 - This proposed regulation is also undermining the Plant Improvement Act 11 of 2018, as according to the act conditioners should register their premises in terms of the Plant Improvement Act.
 - The Plant Improvement Act 11 of 2018 act also requires a registered premise when selling seed of protected varieties.
 - The result of the proposed regulation will affect food security for all South Africans due to the quality of seed not being controlled which could lead to lower yields and higher disease prevalence.
- 3a ii – The proposed regulation divides the seed industry into companies that sell genetically modified crops and those that don't. As only three crops of all the crops produced in South Africa are genetically modified crops this proposed regulation will only protect companies in the Agronomy industry selling maize, soybeans and cotton but all other South African Seed Companies selling different crops will be at risk as they will have no return on investment and will not be able to continue to breed varieties for the South African market.
- 3c – This regulation only refers to condition and saving, selling is not reflected in the regulation?
 - Any types of farmers/business entities should have to get a licence from the PBR holder when they want to sell, exchange or condition seed of a protected variety. All type of farmers can save seed for use on their own property as was the case with the PBR Act of 1978.
 - This regulation also proposes that “Smallholder producers/farmers with a turnover of above R1 million, medium and large-scale producers/farmers may: (i) condition, save, exchange and sell protected varieties of seed propagated crops for the purpose of further propagation.” And “The use of a protected variety in terms of subsection 3(b) shall be subject to payment of royalties to the breeder of the variety concerned: (a) The royalty payable must be agreed upon by the breeder and the producer/farmer in a written license agreement in accordance to

section 34 of the Act, or (b) Industry/Commodity groups may apply to the Minister responsible for Agriculture for a Statutory Levy in terms of the Marketing of Agricultural Products Act, 1996 (Act No. 47 of 1996).". This leads to a generalized system of *compulsory license*. This is inconsistent with the Plant Breeders' Act, Act no. 12 of 2018. The section 35 of the Plant breeders' right Plant Breeders Rights Act 12 of 2018 gives the possibility to ask for a compulsory license but only if the holder of a plant breeder's right unreasonably refuses to grant a license. In the proposed regulation, the compulsory license is automatically given.

The proposed regulations will have a detrimental effect on food security for South Africa as well as to the rest of Africa. Breeders and the seed industry will not invest in research to develop new varieties suited for the South African climate and environment if seed of protected varieties can be sold, exchanged or conditioned without a license. South Africa is in the process of working on the regulations for Plant Breeding Innovations (product from gene editing) and these proposed regulations will halt further research in breeding new gene edited seeded crop varieties for the South African market

These proposed regulations will also affect investment in Agriculture in South Africa. The result of lower investment on South African adapted germplasm will lead to lower yield competitiveness compared to international products. New releases of locally bred germplasm will not take place and will lead to the erosion of locally adapted germplasm. South African varieties will not be able to withstand climate change in no further innovation and research is able to take place. This in turn will also lead to job losses as research will be halted in the South African Seed Industry.

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