

REPUBLIC OF SOUTH AFRICA

AGRICULTURAL PRODUCE AGENTS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76);
explanatory summary of Bill and prior notice of its introduction published in
Government Gazette No. 43723 of 18 September 2020))
(The English text is the official text of the Bill)*

(MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT)

[B 33—2020]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Agricultural Produce Agents Act, 1992, so as to refine certain definitions; provide for certain provisions of the Agricultural Produce Agents Act, 1992, to apply to all categories of agents; clarify the appointment and responsibilities of the registrar; provide for financial statements of the council to be audited by the Auditor General; provide for insurance of the fidelity fund; further clarify the conditions for acting as an agent; provide for trust accounts for export agents; provide for insurance by export and fresh produce agents; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 12 of 1992, as amended by section 1 of Act 47 of 2003

1. Section 1 of the Agricultural Produce Agents Act, 1992 (Act No. 12 of 1992) (hereinafter referred to as the “principal Act”), is hereby amended— 5

(a) by the substitution in subsection (1) for the definition of “agent” of the following definition:

“**‘agent’** means a person who, for the acquisition of gain on his or her own account or in a partnership, in any manner holds himself or herself out as a person who, either directly or indirectly advertises that he or she, on the instructions of or on behalf of any other person, **[purchases or]** sells agricultural produce or negotiates in connection therewith or canvasses or undertakes or offers to canvass a purchaser or seller therefor;”;

(b) by the substitution in subsection (1) for the definition of “auditor” of the following definition: 15

“**‘auditor’** means a person registered in terms of section **[15 of the Public Accountants’ and Auditors’ Act, 1991 (Act No. 80 of 1991)]** 37 of the Auditing Profession Act, 2005 (Act No. 26 of 2005), as **[an accountant or]** registered auditor, **[and engaged in public practice as such]** who provides professional services;”;

(c) by the insertion in subsection (1) after the definition of “auditor” of the following definitions, respectively:

“**‘Auditor-General’** means the institution contemplated in section 181(1)(e) of the Constitution of the Republic of South Africa, 1996; 25
‘bank’ means a bank as defined in section 1 of the Banks Act, 1990 (Act No. 94 of 1990);”;

- (d) by the deletion in subsection (1) of the definition of “deposit-taking institution”;
- (e) by the substitution in subsection (1) for the definition of “export agent” of the following definition:
- “**‘export agent’** means an agent acting as such with regard to any agricultural product specified in Part A of Schedule 1 intended for export on the basis that the risk of profit or loss at all times remains with the principal, and—
- (a) for the purposes of section 3(1)(e), includes any director of the company, member of a close corporation or trustee of a trust which is registered as and acts as an export agent as aforesaid and provided that such director, member or trustee is in possession of a registration certificate; and
- (b) for the purposes of sections 16(1)(b), 16(6)(f), 16(6A)(a), 19A(1), 23, 24(1), 24(1B), 24(1C), 25, 26 and 27, includes—
- (i) any director of the company, member of a close corporation or trustee of a trust which is registered as and acts as an export agent; and
- (ii) any person who is employed as an export agent and who acts as an export agent as aforesaid on behalf of his or her employer;”;
- (f) by the substitution in subsection (1) for the definition of “fresh produce agent” of the following definition:
- “**‘fresh produce agent’** means an agent acting as such with regard to any agricultural product specified in Part A of Schedule 1 on the basis that the risk of profit or loss at all times remains with the principal, and—
- (a) for the purposes of section [3(1)(a)] 3(1)(c), includes any director of a company, trustee of a trust or a member of a close corporation [who] which acts as a fresh produce agent as aforesaid: Provided and provided that such director, trustee or member is in possession of a fidelity fund certificate; and
- (b) for the purposes of sections [12(5)] 12(4), 13(3)(b), 13(3)(c), 13(3)(d), 13(4), 14(3)(a), 14(4), 14(5)(a), 16(1), 16(6)(f), 16(6A), 22, 23, 24, 25, 26, 27 and 30, includes—
- (i) any director of a company, or a member of a close corporation or a trustee of a trust [who] which acts as a fresh produce agent as aforesaid; and
- (ii) any person who is employed by a fresh produce agent and who acts as a fresh produce agent as aforesaid for the employer;”;
- (g) by the substitution in subsection (1) for the definition of “livestock agent” of the following definition:
- “**‘livestock agent’** means an agent acting as such with regard to any agricultural product specified in Part B of Schedule 1, on the basis that the risk of profit or loss at all times remains with the principal and—
- (a) for purposes of section [3(1)(b)] 3(1)(d) includes any director of a company, trustee of a trust or a member of a close corporation which is registered as and acts as a livestock agent as aforesaid: Provided that such director, trustee or member is in possession of a registration certificate; and
- (b) for the purposes of sections 16(1)(b), 16(6)(f), 16(6A)(a), 23, 24(1), 24(1B), 24(1C), 25, 26 and 27, includes—
- (i) any director of the company, member of a close corporation or trustee of a trust which is registered as and acts as a livestock agent; and
- (ii) any person who is employed as a livestock agent and who acts as a livestock agent as aforesaid on behalf of his or her employer;”;

(h) by the insertion after subsection (1) of the following subsection:

“(1A) For purposes of this Act, a company shall include any voluntary association with legal personality which acts as an agent, and the members of such a voluntary association who hold executive powers shall, for purposes hereof, be deemed to be the directors of that voluntary association.”.

Amendment of section 3 of Act 12 of 1992, as substituted by section 2 of Act 47 of 2003

2. Section 3 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraphs (c), (d) and (e) of the following paragraphs, respectively:

“(c) three persons who in his or her opinion represent fresh produce agents and who are holders of a fidelity fund certificate;

(d) three persons who in his or her opinion represent livestock agents and who are holders of a registration certificate;

(e) three persons who in his or her opinion represent export agents and who are holders of a registration certificate;”;

(b) by the substitution for subsection (7) of the following subsection:

“(7) No person may be appointed as a member of the council, who—

(a) is not a South African citizen and a permanent resident and is not ordinarily resident in [South Africa] the Republic;

(b) is an unrehabilitated insolvent [in respect of whom the trustee of the insolvent estate has not certified that the insolvent is a fit and proper person to serve as a member of the council];

(c) has failed or is unable to comply [in full] with a judgment or order, including an order as to costs, given against him or her by a court of law in civil proceedings or by a disciplinary tribunal referred to in section 25;

(d) has been convicted [of an offence involving an element of dishonesty or has been sentenced for another offence to a period of imprisonment], in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the amount determined by the applicable Minister for theft, fraud, forgery, perjury, or an offence—

(i) involving fraud, misrepresentation or dishonesty;

(ii) in connection with the promotion, formation or management of a company; or

(iii) in connection with any act contemplated in section 69(2) or 69(5) of the Companies Act, 2008 (Act No. 71 of 2008), or under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984 (Act No. 69 of 1984), the Competition Act, 1998 (Act No. 89 of 1998), the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), or Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);

(e) is of unsound mind; [or]

(f) has contravened section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), and has been so determined by an equality court;

(g) is a juristic person or a trust;

(h) is an unemancipated minor;

(i) is prohibited in terms of any law or by a court to be a director of a company;

(j) has been removed from an office of trust on the grounds of misconduct involving dishonesty;

(k) has been placed on probation by a court in terms of section 162 of the Companies Act, 2008 (Act No. 71 of 2008), or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or

(l) has been declared to be delinquent in terms of section 162 of the Companies Act, 2008 (Act No. 71 of 2008).”.

Amendment of section 4 of Act 12 of 1992, as substituted by section 3 of Act 47 of 2003

3. Section 4 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph:

“(a) he or she becomes subject to any disqualification referred to in section [3(6)] 5
3(7);”.

Amendment of section 6 of Act 12 of 1992, as substituted by section 5 of Act 47 of 2003

4. Section 6 of the principal Act is hereby amended by the addition of the following subsections: 10

“(6) A decision that could be voted on at the meeting of the council may instead be adopted by written consent of a majority of the members of the council, given in person, or by electronic publication, provided that each member has received notice of the matter to be decided.

(7) A decision made in the manner contemplated in subsection (6) is of the same force and effect as if it had been approved by voting at a meeting of the council.”. 15

Amendment of section 7 of Act 12 of 1992, as amended by section 6 of Act 47 of 2003

5. Section 7 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph:

“(a) The council may at its discretion appoint one or more other committees 20
consisting of so many members of the council and other persons who are not members of the council as the council may [deem] consider necessary, to perform, subject to the directives of the council, such functions of the council as the council may determine, or to advise the council on any matter assigned to the council by or under this Act, and the council may at any time dissolve or reconstitute such a 25
committee: Provided that—

- (i) any such member who is not a member of the council, must not be ineligible or disqualified from being a member of the council in terms of section 3(7);
- (ii) a person who is not a member of the council does not have a vote on a matter to be decided by the committee; 30
- (iii) such committee may consult with or receive advice from any person; and
- (iv) such committee has the full authority of the council in respect of the matter referred to it, unless the council’s resolution establishing the committee provides otherwise.”. 30

Substitution of section 8 of Act 12 of 1992, as substituted by section 7 of Act 47 of 2003 35

6. The following section is hereby substituted for section 8 of the principal Act:

“Staff of council

8. (1) (a) Work incidental to the performance of the functions of the council must be performed by the registrar. 40

(b) The registrar must be appointed by the council.

(c) The registrar must be appointed on such terms and conditions as the council may determine: Provided that such a person will be appointed as registrar for a renewable term of five years.

(d) The appointment of the registrar is subject to the conclusion of a written performance agreement entered into between that person and the council. 45

(e) The council and the registrar may, in writing and by agreement, amend the performance agreement.

(f) The council may terminate the registrar’s employment in accordance with applicable labour law. 50

(g) The registrar must, subject to subsection (3), appoint members of the staff of the council on a full-time or part-time basis, after consultation with

and approval by the council: Provided that the council may grant approval for the registrar to appoint members of staff without its consultation.

(h) The staff members contemplated in paragraph (g) must be under the control of the registrar.

(2) The registrar—

(a) may, subject to subsection (3), delegate or assign to a person appointed or designated by him or her any power or duty conferred or imposed upon him or her by or under this Act;

(b) is accountable to the council and responsible for—

(i) the management of the council, subject to the direction of the council;

(ii) the day to day administrative functioning of the council to ensure the realisation of the functions of the council as contemplated in section 10;

(iii) the compilation of an annual budget and strategic plan in accordance with section 11(5A)(a);

(iv) the compilation of annual reports and financial statements in terms of section 11(6)(b); and

(v) reporting to the council on his or her activities in terms of subparagraphs (i), (ii), (iii) and (iv); and

(c) may, with the approval of the council, enter into written agreements with persons for the performance of specific functions or the provision of specific services.

(3) The council—

(a) must determine a human resources policy for the council;

(b) must determine the remuneration and conditions of service of the registrar and the other members of staff of the council;

(c) may determine non-pensionable allowances for the registrar and the other members of staff of the council; and

(d) may determine any other lawful policy that will contribute to the efficient and effective operation of the council.”.

Amendment of section 10 of Act 12 of 1992, as amended by section 9 of Act 47 of 2003

7. Section 10 of the principal Act is hereby amended—

(a) by the substitution for paragraph (a) of the following paragraph:

“(a) to formulate policy that will contribute to the efficient and effective operation of the council;”;

(b) by the deletion of the word “and” at the end of paragraph (c), and the addition of the following paragraphs:

“(e) to coordinate and enforce the accreditation of all new and existing fresh produce agents, livestock agents and export agents; and

(f) to issue fidelity fund and registration certificates subject to the provisions of section 16.”.

Amendment of section 11 of Act 12 of 1992, as amended by section 10 of Act 47 of 2003

8. Section 11 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) money paid to the council in terms of this Act [**; and**], other than money referred to in sections 12(2), 16(3) and 21(1);”;

(b) by the addition to subsection (1) of the following paragraphs:

“(c) grants, donations and bequests made to the council; and

(d) money lawfully obtained by the council from any other source, including loans raised by the council which are subject to the approval of both the Minister and the Minister of Finance.”;

(c) by the substitution for subsection (3) of the following subsection:

“(3) All moneys referred to in subsection (1) must be deposited in a banking account in the name of the council with a bank established under

the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank established under the Mutual Banks Act, 1993 (Act No. 124 of 1993).”;

- (d) by the substitution in subsection (5A) for the words preceding paragraph (a) of the following words:
 - “The council shall, at least three months prior to the start of its financial year, provide to the Minister for his or her **[information]** approval a business plan of the forthcoming financial year containing at least—”;
- (e) by the substitution in subsection (5A) for paragraph (a) of the following paragraph:
 - “(a) the budget and strategic plan of the council for that forthcoming year.”;
- (f) by the substitution in subsection (6) for paragraph (b) of the following paragraph:
 - “(b) as soon as possible, but not later than three months after the end of each financial year, **[cause annual financial statements to be prepared]** compile annual reports and financial statements showing, with all the appropriate particulars, the money received and the expenditure incurred by it during, and its assets and liabilities at the end of, that financial year.”; and
- (g) by the substitution for subsections (7) and (8) of the following subsections, respectively:
 - “(7) The records and annual financial statements referred to in subsection (6) shall be audited by **[an auditor appointed by the council]** the Auditor-General.
 - (8) The council shall within six months of the end of each financial year submit to the Minister a copy of the audited annual financial statements referred to in subsection (6)(b), together with **[a]** an annual report on the activities of the council during that financial year.”.

Amendment of section 12 of Act 12 of 1992, as substituted by section 11 of Act 47 of 2003

9. Section 12 of the principal Act is hereby amended by the substitution in subsection (4)(a) for subparagraphs (i) and (ii) of the following subparagraphs, respectively:

- “(i) theft, committed by a fresh produce agent or any of his or her employees, of any money or agricultural produce entrusted by or on behalf of the producers thereof to him or her as a fresh produce agent; and
- (ii) dishonest conduct by a fresh produce agent **[in so far as such conduct relates to agricultural produce]** or any of his or her employees but only to the extent that such dishonest conduct caused or contributed to the loss or damage suffered by the claimant.”.

Insertion of section 12A in Act 12 of 1992

10. The following section is hereby inserted in the principal Act after section 12:

“Insurance of fund

12A. (1) The council may arrange any insurance scheme with any insurer registered under the Long-Term Insurance Act, 1998 (Act No. 52 of 1998), for provision of indemnity insurance to cover the fund’s liability to producers in respect of the conduct referred to in section 12(4).

(2) Any premium payable in respect of the insurance contemplated in subsection (1) shall be paid from the fund.”.

Amendment of section 13 of Act 12 of 1992, as substituted by section 12 of Act 47 of 2003

11. Section 13 of the principal Act is hereby amended—

- (a) by the deletion in subsection (1) of the word “and” at the end of paragraph (e), and the addition after paragraph (f) of the following paragraphs: 5
- “(g) legal costs for disciplinary hearings in terms of section 25; and
- (h) costs relating to the institution of legal action by the council or for defending any action instituted against the council in respect of the practice of the fresh produce agent.”;
- (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 10
- “(a) the interest shall not run from a date earlier than the date **[on which the claim was lodged in writing with the council in terms of subsection (3)(a)(i)]** of settlement of a claim or adjudication of a claim by a court; and”;
- (c) by the substitution for subsection (3) of the following subsection: 15
- “(3) Notwithstanding any other provision, no person shall have any claim against the fund—
- “(a) unless the claimant—
- (i) has lodged it in writing with the council within **[six]** three months after he or she became aware of the loss, or by the exercise of reasonable care could have become aware thereof; **[and]** 20
- (ii) has within **[three months]** one month after having been requested thereto in writing by the council, furnished the council with such proof of that loss as the council may reasonably require; and 25
- (iii) has cooperated with and assisted the council, at the expense of the council, to recover such loss from the fresh produce agent whose conduct referred to in section 13(4) has caused the loss;
- (b) if the claimant is a partner, manager, representative, agent, employee or member of the household of the fresh produce agent whose conduct referred to in section **[12(5)]** 12(4) has caused the loss; 30
- (c) if the loss occurred as a result of the conduct, referred to in section **[12(5)]** 12(4), of a fresh produce agent whose fidelity has been guaranteed by any person or any other form of insurance taken out by the agent concerned, either in general or in respect of the particular transaction, to the extent to which the transaction is covered by the guarantee or insurance; **[and]** 35
- (d) if the loss occurred as a result of the conduct, referred to in section **[12(5)]** 12(4), of a fresh produce agent after such claimant received a written notification from the registrar warning him or her against the employment or continued employment of such fresh produce agent; 40
- (e) if the claimant has directly or indirectly caused or contributed to or has been party to the conduct which caused the loss; and 45
- (f) in respect of any loss suffered—
- (i) as a result of theft or dishonest conduct committed by a fresh produce agent while he or she is in the employ of any person who is not the holder of a valid fidelity fund certificate issued by the council; 50
- (ii) as a result of any theft or dishonest conduct committed by any partner or employee of the fresh produce agent, or by any employee of any partnership in which he or she is a partner; 55
- (iii) as a result of any theft or dishonest conduct committed by any member, director, trustee or employee of a close corporation, company or trust which acts as a fresh produce agent of which he or she is a member, director or trustee; or 60
- (iv) as a result of theft of money which a fresh produce agent has been instructed not to pay to that person immediately, or has been instructed to invest on behalf of such person.”;

(d) by the substitution for subsection (4) of the following subsection:

“(4) A claim for reimbursement contemplated in section [12(5)] 12(4) shall be **[limited, in the case of money entrusted to a fresh produce agent, to the amount actually handed over, without interest, and, in the case of agricultural produce, to an amount equal to the average market value of such produce on the date when written demand was first made for its delivery, or if there is no average market value, the fair market value as at that date, without interest]** limited, in the case of money entrusted to a fresh produce agent, to the amount actually handed over, without interest and, in the case of agricultural produce, to the lesser of an amount equal to the average market price of such produce on the first business day following the day on which the consignment was received by the said fresh produce agent, or the average market price on the day when the entire consignment of the principal was sold by the said fresh produce agent, such average market price to be determined with reference to the records of the fresh produce market with the highest turnover in the Republic.”; and

(e) by the addition of the following subsections:

“(5) Publication of notification referred to in subsection (3)(d) on the council’s website or through other media shall serve as proper notification.

(6) No action for damages shall be instituted—

(a) against the fund, the council or any member, official or employee of the council in respect of anything done in good faith during the exercise or the performance of its powers or duties in terms of the provisions of this Act; or

(b) against the fund, the council or any member or official or employee of the council or the publisher of the notification in respect of any notification issued in good faith for purposes of subsection (3)(d).

(7) Any record or document in the possession of the council relating to any claim instituted against the fund shall, subject to the provisions of subsection (8), be preserved at the office of the registrar of the council.

(8) The chairperson of the council may, after the lapse of five years from the date on which any claim to which any record or document relates is settled by the council or adjudicated upon by the court, or rendered unenforceable by lapse of time, direct that such record or document be removed to some other place of custody or be destroyed or otherwise disposed of.”.

Amendment of section 14 of Act 12 of 1992, as substituted by section 13 of Act 47 of 2003

12. Section 14 of the principal Act is hereby amended—

(a) by the substitution for subsections (1), (2) and (3) of the following subsections, respectively:

“(1) A claim for the reimbursement from the fund of a monetary loss that arose under the circumstances set out in section [12(5)] 12(4) shall, subject to the provisions of section 13(3), be lodged with the council in writing and in the form of an affidavit.

(2) If the council admits such a claim, a payment shall be made to the claimant in accordance with the provisions of section 13(1): Provided that the amount of such payment shall not be more than the difference between the amount of the loss suffered by the claimant, but subject to the limitations stipulated in section 13(4), and the amount or value of all moneys or other benefits received or entitled to be received by that claimant, whether gratuitously or otherwise, from any other source.

(3) If the council rejects a claim in writing, an action in respect of that claim may be instituted against the council in the court within whose jurisdiction the principal place of business of the council is situated—

(a) if the claimant has exhausted all legal remedies against the fresh produce agent **[in respect of whom the claim arose]** concerned or the other person or persons contemplated in section 12(4); **[or]**

- (b) with written leave of the council[,], acquired before all legal remedies against the **[said agent]** concerned fresh produce agent or the person or persons contemplated in section 12(4) have been exhausted; or
- (c) if the claimant institutes the action against the council within one year of the date of notification to the claimant by the council informing him or her that the council rejects the claim to which such action relates.”; 5
- (b) by the substitution for subsection (4) of the following subsection: 10
 - “(4) In any action against the council, all defences which would have been available to the fresh produce agent, or other person or persons contemplated in section 12(4), in respect of whom the claim arose shall be available to the council.”;
- (c) by the substitution in subsection (5) for paragraph (a) of the following paragraph: 15
 - “(a) there shall pass to the council, to the extent of such settlement, all the rights and remedies of the claimant in respect of such claim against the fresh produce agent or other person or persons contemplated in section 12(4), or, if applicable, in the case of the death, insolvency or other legal incapacity of such fresh produce agent or other person or persons, against the estate of the said fresh produce agent or other person or persons: Provided that the only rights and remedies that do not pass to the council are the claimant’s rights and remedies against the third party contemplated in section 13(3)(c); and”;
- (d) by the deletion in subsection (6) of paragraph (c). 25

Amendment of section 16 of Act 12 of 1992, as substituted by section 15 of Act 47 of 2003

13. Section 16 of the principal Act is hereby amended—

- (a) by the deletion in subsection (1) of the words following paragraph (a)(iii); 30
- (b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
 - “(b) Subject to the provisions of subsection (2), no person shall perform any act as an export agent or a livestock agent unless a registration certificate has been issued to him or her as well as to every employee of such export or livestock agent as contemplated in the definitions of ‘export agent’ and ‘livestock agent’ in section 1, and if such person is— 35
 - (i) a company, to every director of that company;
 - (ii) a close corporation, to every member of that corporation; or
 - (iii) a trust, to every trustee of that trust.”; 40
- (c) by the substitution for subsection (2) of the following subsection:
 - “(2) No agent shall **[receive]** be entitled to any remuneration [for] or other payment in respect of or arising from the performance of [an] any act as an agent, unless at the time of the performance of the act, a valid fidelity fund certificate or registration certificate, as the case may be, has been issued— 45
 - (a) **[in the case of a fresh produce]** to such agent[, the act has been performed by the holder of a fidelity fund certificate which has not been suspended]; [or] and 50
 - (b) **[in the case of an export or livestock agent, the act has been performed by the holder of a registration certificate]** if such agent is a company, a close corporation or a trust, to every director of such company, member of such close corporation or trustee of such trust.”; 55
- (d) by the substitution in subsection (3) for paragraph (c) of the following paragraph:
 - “(c) If the council, upon receipt of any application referred to in **[subsection (1)]** paragraph (a) or **[(2)]** (b) and the security (where applicable) and application fee referred to in those subsections, is satisfied that the applicant is not disqualified in terms of subsection (6) 60

from being issued with a fidelity fund or registration certificate, the council shall in the prescribed form issue to the applicant a fidelity fund certificate or a registration certificate, as the case may be.”;

(e) by the addition to subsection (3) of the following paragraph:

“(e) An application for a certificate referred to in paragraphs (a) or (b) must be submitted to the council in the form and manner determined by the council by notice in the *Gazette*, and must be accompanied by information to satisfy the council that the applicant is a fit and proper person in respect of—

(i) personal character qualities of honesty and integrity;

(ii) the competence and operational ability of the applicant to fulfil the responsibilities imposed by this Act; and

(iii) the applicant’s financial soundness: Provided that where the applicant is a company, close corporation or a trust, the applicant must, in addition, satisfy the council that any director, member or trustee in respect of the applicant complies with the said requirements in respect of—

(aa) personal character qualities of honesty and integrity; and

(bb) competence and operational ability to the extent required in order for such director, member or trustee to assure that such company, close corporation or trust will be able to fulfil the responsibilities imposed upon an agent by this Act.”;

(f) by the substitution in subsection (6) for paragraphs (a) and (b) of the following paragraphs, respectively:

“(a) who has at any time by reason of improper conduct, involving dishonesty, been dismissed from a position of trust;

(b) who has at any time been convicted [of] in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence—

(i) involving **[an element of]** fraud, misrepresentation or dishonesty;

(ii) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in section 69(2) or section 69(5) of the Companies Act, 2008 (Act No. 71 of 2008); or

(iii) under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984 (Act No. 69 of 1984), the Competition Act, 1998 (Act No. 89 of 1998), the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 (Act No. 12 of 2004);”;

(g) by the substitution in subsection (6) for paragraph (f) of the following paragraph:

“(f) who is an unrehabilitated insolvent in respect of whom the trustee of the insolvent estate has **[not certified that the insolvent is a fit and proper person to assume a position of trust]** stated that the insolvent has committed an offence under the Insolvency Act, 1936 (Act No. 24 of 1936), or any other offence during the period of his or her appointment as trustee and the trustee has not stated that the insolvent is fit to be issued with a fidelity fund certificate or registration certificate, as the case may be;”;

(h) by the deletion in subsection (6) of paragraph (h);

- (i) by the substitution in subsection (6) for paragraph (i) of the following paragraph:
- “(i) who has failed to comply with **[any lawful requirement of the council]** sections 17, 18 and 19;”;
- (j) by the addition to subsection (6) of the following paragraphs: 5
- “(m) who is younger than 18 years;
- (n) who is not a South African citizen or has been lawfully admitted to the Republic for permanent residence therein and is ordinarily not resident in the Republic;
- (o) who has not attended a training course approved by the council and completed such training course; or 10
- (p) who is an unemancipated minor or is under a similar legal disability.”;
- (k) by the substitution in subsection (6A) for paragraph (a) of the following paragraph: 15
- “(a) The council may issue a fidelity fund certificate or registration certificate to any person who is acting or intending to act as a fresh produce agent, export agent or livestock agent and such a certificate shall be deemed to be a certificate issued on application by such a person.”;
- (l) by the substitution in subsection (10) for paragraphs (d) and (e) of the following paragraphs, respectively: 20
- “(d) The agent or any person who is in possession of or has under his or her control a fidelity fund or registration certificate which has lapsed under paragraph (a), or which has been withdrawn by a court or disciplinary tribunal, shall return the certificate to the registrar within 30 days after the last date of publication referred to in paragraph (c)(iii). 25
- (e) A fidelity fund or registration certificate which has lapsed **[shall be]** or has been withdrawn is void with effect from the date of such lapsing or the date of such withdrawal, as the case may be.”; and
- (m) by the addition of the following subsections: 30
- “(13)(a) The council may—
- (i) require an applicant, contemplated in subsection (3), to furnish such additional information, or require such information to be verified, as the council may consider necessary; and
- (ii) take into consideration any other information regarding the applicant derived from whatever source, including any other regulatory or supervisory authority, if such information is disclosed to the applicant and the latter is given an opportunity to respond thereto. 35
- (b) The council must, after consideration of an application— 40
- (i) if satisfied that an applicant complies with the requirements of this Act, grant the application; or
- (ii) if not so satisfied, refuse the application.
- (14) Where an application is granted, the council may impose such conditions and restrictions on the exercise of the authority granted by the certificate, and to be included in the certificate, as are necessary, having regard to— 45
- (a) all facts and information available to the council pertaining to the applicant and any director, member or trustee of the applicant;
- (b) the category of services which the applicant, as agent, could appropriately render or wishes to render; and 50
- (c) any guidelines provided to the council by any committee of the council.
- (15) Where an application is granted, the council must issue to the applicant— 55
- (a) a certificate authorising the applicant to act as agent in the form determined by the council by notice in the *Gazette*; and
- (b) such number of certified copies of the certificate as may be requested by the applicant.
- (16) The council may at any time after the issue of a certificate— 60
- (a) on application by the applicant, or on own initiative, withdraw or amend any condition or restriction in respect of the certificate, after having given the applicant an opportunity to make submissions on

- the proposed withdrawal or amendment and having considered those submissions, if the council is satisfied that any such withdrawal or amendment is justified and will not prejudice the interests of clients of the applicant; or
- (b) pursuant to an evaluation of a new director, member or trustee, or a change in the personal circumstances of a director, member or trustee, impose new conditions on the applicant after having given the applicant an opportunity to be heard and having furnished the applicant with reasons, and must in every such case issue an appropriately amended certificate to the applicant, and such number of certified copies of the amended certificate as may be requested by the applicant. 5 10
- (17) Where an application referred to in subsection (3) is refused, the council must—
- (a) notify the applicant thereof; and 15
- (b) furnish reasons for the refusal.
- (18) An agent must—
- (a) display a certified copy of the certificate in a prominent and durable manner within every business premises of the applicant; and
- (b) ensure that a reference to the fact that such a certificate is held is contained in all business documentation, advertisements and other promotional material. 20
- (19) A person may not in any manner make use of any certificate or copy thereof for business purposes—
- (a) where the certificate has lapsed in terms of subsection (30); 25
- (b) where the certificate has been withdrawn; or
- (c) during any time when the applicant is under provisional or final suspension contemplated in subsection (26).
- (20) Where an agent is a company, close corporation or trust, the agent must— 30
- (a) at all times be satisfied that every director, member or trustee of the agent complies with the requirements in respect of personal character qualities of honesty and integrity as contemplated in subsection (3); and
- (b) within 15 days of the appointment of a new director, member or trustee, inform the council of the appointment and furnish the council with such information on the matter as the council may require. 35
- (21) If the council is satisfied that a director, member or trustee does not comply with the requirements as contemplated in subsection (3), the council may suspend or withdraw the certificate of the agent as contemplated in subsection (26). 40
- (22) The council may, on written application made to it in accordance with this Act, readmit any person who was previously issued with a fidelity fund certificate or registration certificate, and whose fidelity fund certificate or registration certificate, as the case may be, has been withdrawn or has lapsed, if— 45
- (a) such person, in the discretion of the council, is a fit and proper person to be so reissued with a fidelity fund certificate or registration certificate; and 50
- (b) the council is satisfied that he or she, being a natural person, is a South African citizen or has been lawfully admitted to the Republic for permanent residence therein, and is ordinarily resident in the Republic.
- (23) Any person who applies to the council to be reissued with a fidelity fund certificate or registration certificate shall satisfy the council— 55
- (a) that he or she is a fit and proper person to be so reissued with a fidelity fund certificate or registration certificate;
- (b) if he or she is a natural person and his or her estate has at any time been sequestrated, whether provisionally or finally, that despite such sequestration he or she is a fit and proper person to be so reissued; and 60

- (c) if such applicant is a company, close corporation or trust, that every director, member or trustee of such applicant, as the case may be, in the discretion of the council, is a fit and proper person to be issued with a fidelity fund certificate or a registration certificate, as the case may be. 5
- (24) The council may at any time suspend or withdraw any certificate, subject to subsection (2), if the council is satisfied, on the basis of available facts and information, that the agent or employee—
- (a) no longer meets the requirements contemplated in section 16; 10
- (b) did not, when applying for the certificate, make a full disclosure of all relevant information to the council, or furnished false or misleading information; or
- (c) has failed to comply with any other provision of this Act.
- (25) (a) Before suspending or withdrawing any certificate, the council— 15
- (i) may consult any regulatory authority; and
- (ii) must inform the agent or the employee concerned of the intention to suspend or withdraw and the grounds therefor and must give the agent or employee concerned a reasonable opportunity to make a submission in response thereto. 20
- (b) Where the council contemplates the suspension of any certificate, the council must also inform the agent or the employee concerned of—
- (i) the intended period of the suspension; and
- (ii) any terms to be attached to the suspension, including— 25
- (aa) a prohibition on concluding any new business by the agent or the employee as from the effective date of the suspension and, in relation to uncompleted business, such measures as the council may determine for the protection of the interests of principals of the agent; and
- (bb) terms designed to facilitate the lifting of the suspension. 30
- (c) The council must consider any response received, and may thereafter decide for or decide against the suspension or withdrawal of the certificate and must notify the agent or the employee concerned of the decision.
- (d) Where the certificate of the concerned agent or employee is suspended or withdrawn, the council must make known the reasons for the suspension or withdrawal and any terms attached thereto by notice in the *Gazette* and may make known such information by means of any other appropriate public media. 35
- (26) During any period of suspension, whether provisional or final, the agent or the employee concerned is for the purposes of this Act regarded as a person who is not authorised to act as an agent. 40
- (27) A certificate lapses—
- (a) where an agent or employee, being a natural person— 45
- (i) becomes permanently incapable of carrying on any business due to physical or mental disease or serious injury;
- (ii) is finally sequestered; or
- (iii) dies;
- (b) where the agent, being a trust, is finally sequestered;
- (c) where the agent, being a company or close corporation, is finally liquidated; 50
- (d) where the business of the agent has become dormant; or
- (e) in any other case, where the agent or the employee concerned voluntarily and finally surrenders the certificate to the council.
- (28) The council must be advised in writing by the agent or the employee concerned, or another person in control of the affairs of the agent, of the lapsing of the certificate and the reasons therefor and the council shall make known any such lapsing of a certificate by notice in the *Gazette*, and by means of any other public media.”. 55

Amendment of section 17 of Act 12 of 1992, as substituted by section 16 of Act 47 of 2003

14. Section 17 of the principal Act is hereby amended—

- (a) by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) Every fresh produce agent who is responsible to open and keep a trust account in terms of section 19(1), shall before a fidelity fund certificate is issued to him or her furnish the council with security in such amount and in such form as is acceptable to the council, for use by the council to meet any claim arising in terms of section [12(5)] 12(4) or to defray the costs or part of the costs of an inspection and investigation held in terms of section 24 where such fresh produce agent has been disciplined in terms of section 26(1).”

(2) The security referred to in [subsection] subsections (1) and (3) shall be returned to the fresh produce agent or export agent within six months after the lapse of the fidelity fund or registration certificate, as the case may be, of that fresh produce agent or export agent, unless an inspection and investigation under section 24 of an act or omission or alleged act or omission of the fresh produce agent or export agent is being held before such expiration, and may until it has been so returned from time to time be altered, increased or decreased by the council.”; and

- (b) by the addition of the following subsections:

“(3) Every export agent who is responsible to open and keep a producer trust account in terms of section 19A(1) shall, before a registration certificate is issued to him or her, furnish the council with security in such amount and in such form as is acceptable to the council, for use by the council in terms of section 17A(1) or to defray the costs or part of the costs of an inspection and investigation held in terms of section 24 where such export agent has been disciplined in terms of section 26(1).”

(4) The costs of an inspection and investigation referred to in subsection (3) shall be borne by the council and be recompensed to the council from the agents’ security if such agent is found guilty of any improper conduct.

(5) The council is entitled to apply the security in whole or in part in meeting any financial obligation due by the fresh produce agent or export agent to the council at any time while he or she is acting as such, or after the withdrawal or lapsing of his or her fidelity fund or registration certificate, as the case may be, and whenever such security is so applied in whole or in part, the fresh produce agent or export agent must, on demand, reinstate the security to its original amount.”.

Insertion of section 17A in Act 12 of 1992

15. The following section is hereby inserted in the principal Act after section 17:

“Insurance by export agents and fresh produce agents

17A. (1) Each export agent must take out fidelity insurance, credit insurance, marine insurance or any other form of insurance acceptable to the council that shall provide for reimbursement of producers for direct losses suffered by them as a result of—

- (a) theft, committed by an export agent of any money or agricultural produce entrusted by or on behalf of the producers thereof to him or her as an export agent; or
(b) dishonest conduct by an export agent in so far as such conduct relates to any agricultural produce.

(2) Each fresh produce agent must take out appropriate insurance in the form and cover acceptable to the council to provide for reimbursement of producers for direct losses suffered by them as a result of causes other than theft or dishonest conduct by such fresh produce agent or his or her

employee: Provided that such losses occurred while the produce was in the care of such fresh produce agent.”.

Amendment of section 18 of Act 12 of 1992, as substituted by section 17 of Act 47 of 2003

16. Section 18 of the principal Act is hereby amended by the substitution in subsection (2) for paragraphs (a) and (b) of the following paragraphs, respectively: 5

“(a) Such fresh produce agent shall cause the said accounting records to be audited at his or her expense by an auditor within four months after the final date of every financial year of the fresh produce agent, which final date shall not be amended by him or her without the prior written approval of the council, and for purposes of conducting such audit, the auditors shall have access to the trust banking account and all other banking accounts, as referred to in section 19, of the fresh produce agent and to the trust and business account records of that fresh produce agent. 10

(b) Notwithstanding the provisions of subsection (2)(a), the council may, on good cause shown, at any time order any fresh produce agent by notice in writing to submit to the council within a period stated in such notice, but not less than 30 days, an audited statement fully setting out the state of affairs in respect of the matters referred to in subsection (1), and for purposes of preparing such audited statement, the auditors shall have access to the trust banking account and all other banking accounts of the fresh produce agent and to the trust and business account records of that fresh produce agent.”. 15 20

Amendment of section 19 of Act 12 of 1992, as substituted by section 18 of Act 47 of 2003

17. Section 19 of the principal Act is hereby amended— 25

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“Subject to the provisions of subsection (2), each fresh product agent other than an employee contemplated in the definition of ‘fresh produce agent’ in section 1 shall, before a fidelity fund certificate is issued—”; 30

(b) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) open and keep a trust account at a [deposit-taking institution] bank; and”; 35

(c) by the substitution in subsection (8) for paragraph (a) of the following paragraph:

“(a) Any market authority which receives the proceeds from the sale of agricultural produce shall receive in trust such proceeds for and on behalf of the fresh produce agent who sold such produce and that market authority must forthwith hand over such proceeds less the remuneration to which it is lawfully entitled for services rendered in respect of such sale to that fresh produce agent for depositing in his or her trust account.”; and 40

(d) by the addition to subsection (8) of the following paragraph:

“(c) Any amount received by a market authority from the proceeds of the sale of agricultural produce in terms of paragraph (a) shall not— 45

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| <p>(i) be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, except such an order issued in pursuance of a claim by the person who is entitled to the proceeds from such sale; and</p> <p>(ii) form part of the assets of that market authority, or if it becomes insolvent, of its insolvent estate.”.</p> | 50 |
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Insertion of section 19A in Act 12 of 1992

18. The following section is hereby inserted in the principal Act after section 19:

“Producer trust accounts for export agents

19A. (1) Every export agent must—

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| <p>(a) open and keep a bank account at a bank which shall be named and designated as the “producer trust account” of that particular export agent;</p> <p>(b) forthwith deposit therein any proceeds of the sale of agricultural produce sold by him or her on the instructions of or on behalf of his or her principal and pay all expenses therefrom incurred on behalf of his or her principal; and</p> <p>(c) conclude a written contract with each principal or have written standard terms and conditions of business that are furnished to each principal prior to the delivery to the export agent of any agricultural product, which contract or standard terms and conditions shall make specific reference to the aforementioned producer trust account.</p> <p>(2) An amount deposited in terms of subsection (1)(b) in the producer trust account of an export agent—</p> <p>(a) may not be liable to be attached or subjected to any form of execution under a judgement or order of a court of law except such an order issued in pursuance of a claim by the principal; and</p> <p>(b) does not form part of the assets of that export agent or if he or she is a natural person and has died, of his or her deceased estate, or has become insolvent, of his or her insolvent estate.</p> <p>(3) An export agent must pay to his or her principal from his or her producer trust account the proceeds of the sale of an agricultural product after he or she has deducted from such proceeds his or her agreed remuneration and the other expenses incurred by him or her in connection with the sale of that agricultural product.</p> <p>(4) Subsection (2)(a) does not apply to the remainder of the amount after the principals of the export agent have been paid in full.</p> <p>(5) Every export agent shall, not later than 10 weeks after delivery to him or her of the agricultural product, furnish his or her principal with a written account of the performance of his or her mandate, which account shall stipulate separately—</p> <p>(a) the gross proceeds achieved for each consignment;</p> <p>(b) any local and international costs and expenses incurred in relation to such product;</p> <p>(c) particulars relating to any quality claims; and</p> <p>(d) all rebates or discounts received by the export agent attributable to the product.</p> <p>(6) Every export agent shall, in addition to the obligation contained in subsection (5), and within 30 days of a written request of his or her principal, furnish such principal with all vouchers, quality reports and other documentation received by the export agent in connection with the performance of his or her mandate.</p> <p>(7) Every export agent who has not paid the full agreed purchase price to the principal within eight weeks of delivery of the product must, within 30 days of a written request from the principal, supply the principal with all the information and vouchers contemplated in subsections (5) and (6).</p> <p>(8) Every export agent purchasing an agricultural product in respect of which the purchase price is not determined and known at the time of delivery to such export agent, and such a price is determined at a later date according to a formula or otherwise, shall have the same obligations in respect of that product as contained in subsection (7).</p> <p>(9) Only in the event of a complaint, charge or allegation lodged with the council, that an export agent or exporter has not properly complied with his or her obligations contained in this section or on the council’s own accord, the council shall, with the necessary changes required by the context—</p> | <p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p> <p>50</p> <p>55</p> |
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- (a) have powers of inspection and investigation in respect of such export agent as provided in section 24;
- (b) have powers of entry and inspection in respect of such export agent as provided in section 27; and
- (c) have powers to convene a disciplinary tribunal contemplated in section 25: Provided that the disciplinary tribunal shall have the same powers contemplated in section 26 and that any export agent affected by a determination of the disciplinary tribunal may appeal against such determination in the High Court.”.

Amendment of section 21 of Act 12 of 1992

19. Section 21 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) If, within the period referred to in subsection (2), no valid claim has been lodged in respect of such money, the council **[shall deposit] must keep [in the guardian’s fund referred to in section 86 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), to be credited in accordance with the provisions of the said Act to the person entitled thereto]** that money for a period of three years, whereafter that money must be used by the council in terms of section 11(2) and section 13(1) and (2).”.

Amendment of section 22 of Act 12 of 1992, as amended by section 20 of Act 47 of 2003

20. Section 22 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) the manner in which and period within which payment must be made and account [shall] must be given to agents’ principals of the sale or other disposal of agricultural products;”;
- (b) by the substitution for subsection (3) of the following subsection:

“(3) The council must, before submitting the rules to the Minister in terms of subsection (4), publish such rules in the Gazette for public comment and must consider any comments received.”; and
- (c) by the addition of the following subsections:

“(4) The council must, after complying with subsection (3), submit the rules made under subsection (1) to the Minister for approval.

(5) The Minister may approve such rules with or without such amendments as he or she may deem fit.

(6) The Minister must publish the rules approved under subsection (4) by notice in the *Gazette* for implementation.

(7) The council may propose amendments to the rules published under subsection (6) and submit the proposed amendments to the Minister for approval, and the provisions of subsections (4), (5) and (6) shall, with the necessary changes required by the context, apply to such submission.”.

Amendment of section 23 of Act 12 of 1992, as substituted by section 21 of Act 47 of 2003

21. Section 23 of the principal Act is hereby amended by the substitution for the words preceding paragraph (a) of the following words:

“A fresh produce agent, export agent or livestock agent shall be guilty of improper conduct if—”.

Amendment of section 24 of Act 12 of 1992, as substituted by section 22 of Act 47 of 2003

22. Section 24 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:

“(1) The council may, either of its own accord or as a result of a complaint, charge or allegation lodged with it, institute an inspection and

investigation into the conduct of a fresh produce agent, export agent, livestock agent, or a person in the employ of such **[fresh produce]** agent, or into a contravention of this Act or the rules by such **[fresh produce]** agent or employee.”;

- (b) by the substitution for subsection (1B) of the following subsection: 5

“(1B) On receipt of the results of an inspection and investigation referred to in subsection (1) the council may decide to charge the fresh produce agent, export agent, livestock agent or an employee concerned with a contravention of this Act or the rules, and shall, on so deciding—

- (a) summons the **[fresh produce]** agent or employee on not less than 10
30 days’ notice to appear before a disciplinary tribunal contemplated in section 25 on the date and at the time and place specified in such summons, to answer to the charges set out in writing in a charge sheet attached to such summons; and

- (b) order such **[fresh produce]** agent or employee to produce at such 15
hearing any book or other document specified in the summons which the said **[fresh produce]** agent or employee has in his or her possession or custody or under his or her control or which is suspected to be in his or her possession or custody or under his or her control and which has a bearing on the matter.”; 20

- (c) by the substitution in subsection (1C) for paragraph (c) of the following paragraph:

“(c) served on the fresh produce agent, export agent, livestock agent or an employee by delivering or tendering it at the business address of the **[fresh produce]** agent or employee or by sending it by prepaid 25
registered post to the postal address referred to in section 16(9), or to the address last known to the council.”; and

- (d) by the addition of the following subsections:

“(3) If there is reason to believe that an agent or person in his or her employ is contravening or failing to comply with, or has contravened or failed to comply with, a provision of this Act, the registrar may— 30

- (a) by notice, direct that agent or employee—
(i) to furnish the registrar, within a specified period, with any specified information or documents in his or her possession or under his or her control and which relate to the subject matter of such contravention or failure; 35

- (ii) to appear before the registrar or a committee of the council at a specified time and place for the purpose of discussing such matter with the registrar or with such committee; or

- (iii) to make arrangements for the discharge of all or any part of that agent’s or employee’s obligations in terms of this Act; 40

- (b) if satisfied that, in the case concerned, significant prejudice or damage to principals or other persons has occurred or may occur, apply to a court for an order restraining such agent or employee from continuing business or dealing with the funds or agricultural 45
produce held by such agent or employee on behalf of principals or other persons, pending the institution by the registrar of an application or action contemplated herein, or the exercising by the council of such legal remedy as may be available to the council; or

- (c) if prejudice or damage may have occurred to a principal or other person, refer the matter, together with any information or documentation in the registrar’s possession, to the council or to a disciplinary tribunal to be dealt with as a complaint by the principal or other person concerned. 50

(4) The council may, when satisfied on the basis of the available facts and information that an agent or his or her employee has contravened or not complied with any provision of this Act, or is likely so to contravene or not to comply, apply to a court for an order restraining such agent or employee from continuing to commit any such act or omission or from committing same in future, and requiring such agent or employee to take 55
such remedial steps as the court deems necessary to rectify the consequences of the act or omission, including consequences which prejudiced or may prejudice the council or any other person.”. 60

Amendment of section 25 of Act 12 of 1992, as substituted by section 23 of Act 47 of 2003

23. Section 25 of the principal Act is hereby amended—

- (a) by the substitution for subsection (3) of the following subsection:

“(3) At least **[two members]** one member of a disciplinary tribunal, who must also be the chairperson, shall for an uninterrupted period of at least five years have practised as **[advocates]** an advocate or **[attorneys]** an attorney or have occupied the post of a magistrate, or shall have been involved in the tuition of law or have rendered services as a legal **[advisers]** adviser or legal **[consultants]** consultant.”;
- (b) by the substitution in subsection (6) for paragraphs (a) and (b) of the following paragraphs, respectively:

“(a) such rules shall be in accordance with the requirements of this Act and the Constitution of the Republic of South Africa, 1996; and

(b) the onus of proof shall be the same as in **[criminal]** civil proceedings.”; and
- (c) by the substitution in subsection (11) for the words preceding paragraph (a) of the following words:

“**[An]** A fresh produce agent, export agent, livestock agent or a person in respect of whom the hearing is instituted in terms of this section shall be entitled to be present at the hearing and to be assisted or represented by another person who is an admitted advocate or attorney, and—”.

Amendment of section 26 of Act 12 of 1992, as substituted by section 24 of Act 47 of 2003

24. Section 26 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“If a disciplinary tribunal, after a hearing under section 25, finds **[an]** a fresh produce agent, export agent, livestock agent, or an employee of such agent or any other person, guilty of improper conduct, it may—”;
- (b) by the substitution in subsection (1)(c) for the words preceding subparagraph (i) of the following words:

“withdraw the fidelity fund or registration certificate issued to that agent on such conditions as the disciplinary tribunal may stipulate and—”;
- (c) by the substitution in subsection (1)(c) for subparagraph (iv) of the following subparagraph:

“(iv) if such agent is a close corporation, to every member contemplated in the definition of ‘fresh produce agent’, ‘export agent’ or ‘livestock agent’, as the case may be, of that corporation;”;
- (d) by the deletion in subsection (1) of the word “and” at the end of paragraph (bB);
- (e) by the insertion in subsection (1) of the word “and” at the end of paragraph (c)(vii);
- (f) by the addition to subsection (1) of the following paragraph:

“(d) declare a person, who is not in possession of a fidelity fund certificate or registration certificate, disqualified from being issued with a fidelity fund certificate or a registration certificate for a specific period.”;
- (g) by the substitution for subsection (2) of the following subsection:

“(2) The disciplinary tribunal may suspend the execution of its decision taken under subsection (1)(bA), (bB) **[or]**, (c) or (d), for such period not exceeding three years and subject to such further conditions as it may in each case determine.”; and
- (h) by the substitution in subsection (3) for paragraph (b) of the following paragraph:

“(b) The registrar shall publish the name and address of the agent or employee of such agent or any other person found guilty in terms of subsection (1), particulars of his or her conviction and the penalty imposed upon him or her, by notice in the *Gazette* and any other public media.”.

Amendment of section 29 of Act 12 of 1992, as amended by section 26 of Act 47 of 2003

25. Section 29 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) contravenes or fails to comply with a provision of section 16(1), 16(11) or (12), 19(1), [19(8)] 19A(1), 20(2)(a), 27(9)(a) and (b)(i) or 28;”.

Amendment of section 30 of Act 12 of 1992, as amended by section 27 of Act 47 of 2003

26. Section 30 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Whenever any fresh produce or export agent or his or her manager, representative, [agent,] employee or member of his or her household owing to the appropriation of money in the trust account or producer trust account of that agent, is convicted of an offence involving fraud or dishonesty, and it has been proved that the amount standing to the credit of that trust account or producer trust account is insufficient for the payment of all amounts payable from it in terms of section 20 or section 19A, the court shall at the request of the prosecutor made on behalf of the council, inquire into and determine the amount of the deficit in the trust account or producer trust account and order the fresh produce agent or export agent to pay an amount equal to the amount so determined to the council, and any such order shall have all the effects of and may be executed as if it were a civil judgment in favour of the council.”.

Amendment of Schedule 1 to Act 12 of 1992

27. Schedule 1 to the principal Act is hereby amended—

(a) by the substitution in Part C for the definition of “Fruit” of the following definition:

“ ‘**Fruit**’ means apples, apricots, avocados, bananas, blackberries, Cape gooseberries, cherries, coconuts, custard apples, figs, granadillas, grapefruit, grapes, guavas, jak fruit, kumquats, lemons, limes, litchis, loganberries, loquats, mangos, medlars, mulberries, nectarines, olives, oranges, pawpaws, peaches, pears, pineapples, plums, pomegranates, prickly pears, prunes, quinces, raspberries, sour figs, strawberries, tangelos, tangerines, tree nuts, tree tomatoes and youngberries.”; and

(b) by the substitution in Part C for the definition of “Vegetables” of the following definition:

“ ‘**Vegetables**’ means artichokes, asparagus, bamja, beetroot, bell peppers, brinjals, broad beans, broccoli, Brussels sprouts, butter beans, cabbage, calabash, carrots, cauliflower, celery, chayote, chillies, cucumbers, endives, French endives, garlic, green beans, green mealies, green peas, groundnuts, horseradishes, [kaffir] melons, kohl rabi, leeks, lettuce, madumbies, marankas, mushrooms, musk-melons, okra, onions, parsnips, pickle onions, potatoes, pumpkins, radishes, rhubarb, shallots, spinach, spring onions, squashes, sugar-cane, sweet cane, sweet potatoes, tomatoes, turnips and watermelons.”.

Insertion of arrangement of sections in Act 12 of 1992

28. The arrangement of sections of the principal Act is hereby substituted for the following arrangement of sections:

“ARRANGEMENT OF SECTIONS

1. Definitions	
2. Establishment of Agricultural Produce Agents Council	50
3. Constitution of council	
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SCHEDULE 2

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Short title and commencement

29. This Act is called the Agricultural Produce Agents Amendment Act, 2020, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE AGRICULTURAL PRODUCE AGENTS AMENDMENT BILL, 2020

1. BACKGROUND

- 1.1 The Agricultural Produce Agents Act, 1992 (Act No. 12 of 1992) (“principal Act”), as amended by the Agricultural Produce Agents Amendment Act, 2003 (Act No. 47 of 2003), provides for the establishment of the Agricultural Produce Agents Council (“APAC”), the Fresh Produce Agents Fidelity Fund (“Fidelity Fund”) in respect of agricultural produce agents and the control of certain activities of agricultural produce agents.
- 1.2 The objects of the APAC are to regulate the occupations of fresh produce, export and livestock agents and to maintain and enhance the status and dignity of those occupations and the integrity of persons practicing those occupations. The functions of the APAC include the formulation of policy and the establishment of rules and codes of conduct.
- 1.3 In preparation for the publication of the Agricultural Produce Agents Amendment Bill, 2020 (“Bill”), the Department of Agriculture, Forestry and Fisheries (“Department”) consulted widely with and obtained inputs from representatives of agents, industry stakeholders and organisations, as well as the APAC.

2. OBJECTS OF BILL

- 2.1 To amend the principal Act so as to refine certain definitions and to provide for certain provisions of the principal Act to apply to all categories of agents; to clarify the appointment and responsibilities of the registrar; to provide for financial statements of the council to be audited by the Auditor-General; to make provision for the insurance of the Fidelity Fund; to further clarify the conditions for acting as an agent; to provide for producer trust accounts to be opened and kept by export agents; to require export and fresh produce agents to have insurance which is acceptable to the APAC; and to provide for matters connected therewith.

3. SUMMARY OF BILL

3.1 *Ad Clause 1*

This clause provides for the substitution, deletion and insertion of certain definitions and the insertion of subsection (1A) which provides that a company which acts as an agent includes a voluntary association with legal personality.

3.2 *Ad Clause 2*

Clause 2 seeks to amend section 3 of the principal Act to indicate that only fresh produce agents who are holders of fidelity fund certificates and export and livestock agents who are holders of registration certificates are eligible to be appointed as members of the APAC. Clause 2 further amends section 3 by expanding the ineligibilities that disqualify a person from being appointed as a member of the APAC. This is necessary to ensure that the principal Act is consistent with recent legislation, such as the Companies Act, 2008 (Act No. 71 of 2008) (as amended).

3.3 *Ad Clause 3*

Clause 3 seeks to amend section 4 of the principal Act by correcting an erroneous reference in paragraph (a).

3.4 *Ad Clause 4*

Clause 4 seeks to amend section 6 of the principal Act by adding subsections (6) and (7) which allow the APAC to adopt a decision by written consent by a majority of the members as opposed to voting on same at an APAC meeting.

3.5 *Ad Clause 5*

Clause 5 seeks to amend section 7 of the principal Act by providing the conditions to which the dissolution or reconstitution of an APAC committee is subject. The section is further amended to provide for the terms and conditions for the constitution of such committees and the persons to be appointed on such committees. The amendment further provides that persons appointed on such committees who are not APAC members are also subjected to the same eligibility criteria provided in section 3(7).

3.6 *Ad Clause 6*

This clause seeks to substitute section 8 of the principal Act to provide for the conditions of service and responsibilities of the registrar of the APAC. The amendment further provides that the registrar must obtain the APAC's approval before appointing any staff members for the APAC and that the APAC must determine the human resources policy, as well as the remuneration and conditions of service for the registrar and such staff members.

3.7 *Ad Clause 7*

Clause 7 seeks to amend section 10 of the principal Act by expanding on the functions of the APAC and to include the coordination and enforcement of the accreditation of new and existing agents. The amendment further provides for the APAC to issue fidelity fund and registration certificates to agents.

3.8 *Ad Clause 8*

This clause seeks to amend section 11 of the principal Act by—

- (a) excluding from the funds of the APAC—
 - (i) fidelity fund monies;
 - (ii) security paid by agents; and
 - (iii) unclaimed monies in respect of the sale of agricultural products belonging to producers which were paid to the APAC;
- (b) adding paragraphs (c) and (d) in subsection (1) which includes grants, donations and bequests to the APAC to form part of the funds of the APAC and to provide that loans raised by the APAC are subject to the approval of the Minister of Agriculture, Forestry and Fisheries (“Minister”) and the Minister of Finance;
- (c) providing that the funds of the APAC must be deposited into a banking account at a bank established under the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank established under the Mutual Banks Act, 1993 (Act No. 124 of 1993);
- (d) providing that the APAC's financial records and annual statements will be audited by the Auditor-General; and
- (e) giving authority to the Minister to approve the business plans of the APAC.

The principal Act provides for the APAC to provide the Minister with the business plan for his or her information only and not for his or her approval. The amendment further provides for the budget and strategic plan to be submitted to the Minister for approval.

3.9 *Ad Clause 9*

Clause 9 seeks to amend section 12 of the principal Act to include the reimbursement of producers for direct losses suffered as a result of theft and dishonest conduct by the employees of fresh produce agents, but only to the extent that such dishonest conduct caused or contributed to the loss or damage suffered by the producers.

3.10 *Ad Clause 10*

This clause proposes the insertion of section 12A in the principal Act to enable the APAC to arrange indemnity insurance to cover the Fidelity Fund's liability to producers.

3.11 *Ad Clause 11*

Clause 11 seeks to amend section 13 of the principal Act by—

- (a) extending the utilisation of the Fidelity Fund to include legal costs for disciplinary hearings and for legal action instituted by and against the APAC;
- (b) providing that the interest the APAC may pay on the amount of any claim admitted against the Fidelity Fund shall not run from a date earlier than the date of settlement of a claim or adjudication of a claim by a court;
- (c) extending the requirements a claimant must meet before being able to lodge a claim against the Fidelity Fund by providing that such person must have cooperated with and assisted the APAC to recover the loss suffered by the claimant from the fresh produce agent;
- (d) further extending the instances in which a person will not have a claim against the Fidelity Fund;
- (e) correcting the erroneous reference to section 12(5) of the principal Act and substituting same with section 12(4) and reducing a claim for reimbursement contemplated in section 12(4) to the extent that the negligent conduct of the claimant contributed to the loss suffered by the claimant;
- (f) reducing the period for the lodgement of a claim from six months to three months from the time that the producer becomes aware of the loss. The period for the submission of proof requested by the APAC is also reduced from three months to one month in order to expedite the claim;
- (g) amending subsection (4) to provide for claims for compensation to be limited to the average market price of such produce on the first business day following the day on which the consignment was received by the said fresh produce agent, or the average market price on the day when the entire consignment of the principal was sold by the said fresh produce agent, such average market price to be determined with reference to the records of the fresh produce market with the highest turnover in the Republic;
- (h) adding subsection (5) to enable the APAC to publish notices warning producers from using the services of certain agents;
- (i) adding subsection (6) to protect the APAC, its members and its employees against claims for damages in respect of anything done in good faith during the exercise or the performance of the APAC's powers or duties; and
- (j) adding subsections (7) and (8) to provide for the safe-keeping and disposal of documents relating to any claim instituted against the APAC.

3.12 *Ad Clause 12*

Clause 12 seeks to amend section 14 of the principal Act by—

- (a) providing that claims lodged against the Fidelity Fund must be in writing and in the form of an affidavit and that the amount paid by the APAC for any admitted claim must be subject to the limitations stipulated in section 13(4) of the principal Act;

- (b) adding paragraph (c) in subsection (3) to provide for actions to be instituted against the APAC within one year of the date of the APAC's notification to the claimant of the APAC's rejection of the claim;
- (c) amending paragraph (a) in subsection (5) to reflect that the only rights and remedies that do not pass to the APAC are the claimant's rights and remedies against the third party as contemplated in section 13(3)(c); and
- (d) deleting paragraph (c) in subsection (6), as the APAC will not be in a position, nor will it be in possession of the necessary facts, to make an informed decision in respect of the matters referred to in the paragraph. In order to determine the relative degrees of hardship suffered or likely to be suffered, as contemplated in subsection (6)(c), the APAC will have to conduct its own investigation and will probably have to hear oral evidence in this regard. This will not only prove to be time-consuming, but will increase costs tremendously. In regard to subparagraph (iii), it will also be difficult for the APAC to determine whether it is dealing with equal circumstances without having conducted a proper investigation, which could include oral evidence.

3.13 *Ad Clause 13*

Clause 13 seeks to amend section 16 of the principal Act by—

- (a) deleting the words “who acts as an agent on behalf of that company, close corporation or trust contemplated in the definition of ‘fresh produce agent’ in section 1”, as the words imply that the provision only applies to the said director, member or trustee if he or she acts as an agent, which is not the case. These words must therefore be deleted;
- (b) amending paragraph (b) of subsection (1) by requiring that registration certificates must be issued to the employees of export and livestock agents and if such export or livestock agent is a company, close corporation or trust, the registration certificates must be issued to every director, corporation member or trustee, as the case may be;
- (c) amending subsection (2) to re-emphasise that every agent must be issued with a fidelity fund or registration certificate, as the case may be, and that if such agent is a company, close corporation or trust, the certificate must be issued to every director of such company, or member of such close corporation, or trustee of such trust;
- (d) correcting reference errors in paragraph (c) of subsection (3);
- (e) adding paragraph (e) in subsection (3) to prescribe the manner in which an application for the issue of a fidelity fund or registration certificate should be made to the APAC;
- (f) further expanding the conditions, in terms of subsection (6), under which a fidelity fund or registration certificate may not be issued to a person;
- (g) deleting paragraph (h) in subsection (6) which concerns a person who is already registered with the APAC;
- (h) including export agents in paragraph (a) of subsection (6A);
- (i) amending subsection (10)(d) by including the withdrawal of a fidelity fund or registration certificate by a court or disciplinary tribunal as an instance in which an agent or another person in possession of a fidelity fund or registration certificate must return such certificate to the registrar;
- (j) adding subsections (13) to (17) to clarify the responsibilities of the APAC in the issuing or denial of a fidelity fund or registration certificate to an agent;
- (k) adding subsections (18), (19) and (20) to provide for the responsibilities of an agent with regard to the display and use of certificates and that such agent has a valid certificate at all times;
- (l) adding subsection (21) to provide for the suspension or withdrawal of a certificate, and adding subsections (22) and (23) to provide for the reissue of fidelity fund or registration certificates which have lapsed or have been suspended or withdrawn;
- (m) adding subsection (24) to enable the APAC to suspend or withdraw a certificate in certain instances;

- (n) adding subsection (25) which requires the APAC to notify the agent, or the agent's concerned employee, of any impending suspension or withdrawal of a certificate and to give the agent or concerned employee an opportunity to make representations relating to such pending suspension or withdrawal;
- (o) adding subsection (26) to indicate that a person may not act as an agent during the period of the final or provisional suspension of a certificate; and
- (p) adding subsection (27) which provides for instances in which a certificate will lapse, and adding subsection (28) in order to place a responsibility on the agent or employee concerned, or another person in control of the affairs of the agent, to advise the APAC in writing of the lapsing of a certificate.

3.14 **Ad Clause 14**

Clause 14 seeks to amend section 17 of the principal Act by rectifying a reference error and to extend its application to export agents. This is necessary to ensure that the export agents furnish the APAC with security before a registration certificate can be issued to them.

3.15 **Ad Clause 15**

This clause proposes the insertion of section 17A to provide that export and fresh produce agents must take out insurance that will provide for reimbursement of producers for direct losses suffered by them while such produce was in the care of the agents.

3.16 **Ad Clause 16**

Clause 16 seeks to amend section 18 of the principal Act by amending paragraphs (a) and (b) in subsection (2) to provide for the auditors to have access to all banking accounts of fresh produce agents for purposes of conducting an audit.

3.17 **Ad Clause 17**

Clause 17 seeks to amend section 19 of the principal Act by inserting the words "in trust" in subsection (8)(a) to make it clear that the account held by the market authority must be a trust account. Paragraph (c) is inserted in subsection (8) which provides that any amount received by a market authority from the proceeds of the sale of agricultural produce will not be liable to be attached or subjected to any form of execution under a court order and will not form part of the assets of the market authority or its insolvent estate should it become insolvent.

3.18 **Ad Clause 18**

This clause proposes the insertion of section 19A in the principal Act which provides that every export agent must open a trust account at a bank which shall be designated as the producer trust account of such export agent. Export agents must deposit any proceeds from the sale of agricultural produce into the producer trust account and producers must be paid from the said account. The section further provides that any amount deposited into the producer trust account may not be liable to be attached or subjected to any form of execution under a court order and will not form part of the assets of the export agent or his or her insolvent estate should he or she become insolvent. Furthermore, this section is inserted to ensure that the APAC has regulatory powers over export agents.

3.19 *Ad Clause 19*

Clause 19 seeks to amend section 21 of the principal Act by deleting the reference to the guardian's fund in subsection (4) and providing that the APAC must keep the unclaimed moneys for a period of three years, whereafter the money must be used by the APAC in terms of section 11(2) and section 13(1) and (2) of the principal Act.

3.20 *Ad Clause 20*

Clause 20 seeks to amend section 22 of the principal Act by—

- (a) amending subsection (1)(c) to provide for rules to be made to stipulate the period within which payment must be made to the principals after the sale or disposal of agricultural products; and
- (b) substituting subsection (3) and adding subsections (4) to (7) to provide for the procedure for the publication, approval and amendment of the rules.

3.21 *Ad Clause 21*

Clause 21 seeks to amend section 23 of the principal Act by extending its provisions to include export and livestock agents.

3.22 *Ad Clause 22*

Clause 22 seeks to amend section 24 of the principal Act by—

- (a) extending its provisions to include export and livestock agents;
- (b) adding subsection (3) to provide the steps the registrar may take if there is reason to believe that an agent or employee of such agent is contravening or failing to comply with any provision of the principal Act; and
- (c) adding subsection (4) to provide that the APAC may, when satisfied that an agent or his or her employee has or is likely to contravene any provision of the principal Act, apply for a court order restraining such agent or his or her employee from continuing such contravention or from committing such contravention in the future.

3.23 *Ad Clause 23*

Clause 23 seeks to amend section 25 of the principal Act by—

- (a) amending subsection (3) to provide that at least one member of the disciplinary tribunal, who must be the chairperson, must be qualified as prescribed in the said subsection. The costs occasioned as a result of a disciplinary hearing are substantial, and by requiring that two members of the disciplinary tribunal should have legal qualifications will only further increase such costs;
- (b) amending paragraph (a) in subsection (6) to clarify that the Constitution referred to is that for the Republic and paragraph (b) is amended to provide that the onus of proof shall be the same as in civil proceedings; and
- (c) amending subsection (11) to extend its provisions to include export and livestock agents and providing that such agent or person in respect of whom the hearing is instituted may be represented by an admitted attorney or advocate.

3.24 *Ad Clause 24*

Clause 24 seeks to amend section 26 of the principal Act by extending its provisions to include export and livestock agents.

3.25 *Ad Clause 25*

Clause 25 seeks to amend section 29 of the principal Act by deleting the reference to section 19(8) in subsection (1)(a) and substituting same with section 19A(1).

3.26 *Ad Clause 26*

Clause 26 seeks to amend section 30 of the principal Act by extending its provisions to include export agents.

3.27 *Ad Clause 27*

Clause 27 seeks to amend Part C of Schedule 1 to the principal Act by—

- (a) inserting “tree nuts” in the definition of “Fruit”; and
- (b) inserting “groundnuts” and deleting the word “kaffir” from the definition of “Vegetables”.

3.28 *Ad Clause 28*

This clause proposes the insertion of an arrangement of sections in the principal Act.

3.29 *Ad Clause 29*

This clause provides the short title and commencement of the envisaged Act.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

The following organisations and institutions submitted written comments and participated during public hearings after the publication of the Bill:

Organisations that submitted written comments	Organisations that participated during public hearings
Agricultural Produce Agents Council Golden Macadamias Pty Ltd (represented by Werkmans Attorneys) Tshwane Fresh Produce Market SUBTROP Massmart/Walmart Independent Regulatory Board for Auditors Institute for Market Agents of South Africa Fresh Produce Exporters Forum South Africa Federation of Livestock Agents Red Meat Producers Organisation Auditor-General Noordelike Uie Komitee Potatoes South Africa Core Fruit Pty Ltd AGRISA Department of Agriculture — Western Cape Banana Growers Association of South Africa Cape Town Market	AGRISA Red Meat Producers Organisation Red Meat Industry Forum Potatoes South Africa Agricultural Business Chamber National Agricultural Marketing Council Tshwane Fresh Produce Market RSA Market Agents Institute of Market Agents of South Africa SUBTROPICO Market Agents South African Federation of Livestock Auctioneers Dapper Agencies CL De Villiers Agents KORKOM Premier Fruit Exports Hortgro Services Rhoda's Market Agency Fruitone Western Cape Department of Agriculture Cape Town Market Fine Bros DISTELL

Organisations that submitted written comments	Organisations that participated during public hearings
Cape Town Market Agents Association Multiflora Pietermaritzburg Fresh Produce Market Agricultural Business Chamber Hortgro Services Joburg Market South African Union of Food Markets	ZZ2 SUBTROP C. Tabanelli Export Pty Ltd Westfalia Marketing Pty Ltd Tomato Producers Organisation Afrupro Exporters Allesbeste Boerdery Noordelike Uie Komitee NAFCOC Agricultural Produce Agents Council Citrus Growers Association Pietermaritzburg Market GW Poole Pty Ltd Durban Market John Bell and Co South Africa Union of Food Markets

5. Financial implications for the State

The Bill holds no financial implications for the State.

6. Parliamentary procedure

- 6.1 The State Law Advisers and the Department are of the opinion that the Bill must be dealt with in accordance with the procedure established in section 76 of the Constitution of the Republic of South Africa, 1996 (“Constitution”).
- 6.2 Chapter 4 of the Constitution specifies the manner in which legislation must be enacted by Parliament. It prescribes different procedures for Bills, including ordinary Bills not affecting provinces (section 75 procedure), and ordinary Bills affecting provinces (section 76 procedure). The determination of the procedure to be followed in processing the Bill is referred to as tagging.
- 6.3 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with section 76 if it falls within a functional area listed in Schedule 4. Schedule 4 to the Constitution lists functional areas of concurrent national and provincial legislative competence. In the Constitutional Court judgment of *Ex-Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill (CCT/12/99) [1999] ZACC 15* (“Liquor Bill judgment”), Cameron AJ held the following:

“[27] It must be borne in mind that section 76 is headed ‘ordinary Bills affecting provinces’. This is my view, a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76.

...

[29] Once a Bill falls within a functional area listed in Schedule 4, it must be dealt with not in terms of section 75, but by either the section 76 (1) or the section 76(2) procedure. . .”.

- 6.4 Following the *Liquor Bill* judgment, the Constitutional Court in the judgment of *Tongoane and Others vs Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (“*Tongoane* judgment”), confirmed the following:

“[59] . . .the tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.”.

6.5 Furthermore, the Constitutional Court held that:

“[66] . . .procedural safeguards are designed to give more weight to the voice of the provinces in legislation substantially affecting them. . .they are fundamental to the role of the NCOP in ensuring that provincial interests are taken into account in the national sphere of government. . .”.

- 6.6 As the Court held in the *Tongoane* judgment, a Bill must be tagged as a section 76 Bill if its provisions in substantial measure deal with a Schedule 4 functional area. We are therefore of the view that the Bill should be classified as a section 76 Bill, which is an ordinary Bill affecting provinces, as its provisions fall within a functional area listed in Schedule 4 to the Constitution, namely “Agriculture”.
- 6.7 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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