

## **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 seeks 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 APAC's 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 to. 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 banks 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;

- (i) adding subsection (5) to provide for the APAC to be able to publish notices warning producers from using the services of certain agents;
- (j) 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
- (k) 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 claimant's 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 a 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 has a valid certificate at all times;
- (l) adding subsection (21) to provide for the suspension or withdrawal of a certificate and subsections (22) and (23) are added 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 subsection (28) is added 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 of the lapsing of a certificate in writing.

### 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, where after 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:

<b>Organisations that submitted written comments</b>	<b>Organisations that participated during public hearings</b>
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 Cape Town Market Agents Association Multiflora Pietermaritzburg Fresh Produce Market Agricultural Business Chamber Hortgro Services Joburg Market South African Union of Food Markets	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 ZZ2 SUBTROP C. Tabanelli Export Pty Ltd Westfalia Marketing Pty Ltd Tomato Producers Organisation Afrupro Exporters Allesbeste Boerdery Noordelike Uie Komitee NAFCO 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 province, 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.