

MEMO ON THE OBJECTS OF THE AGRICULTURAL PRODUCT STANDARD AMENDMENT BILL, 2020

1. PURPOSE AND THE BACKGROUND

1.1 The Agricultural Product Standards Amendment Bill seeks to amend the Agricultural Product Standards Act, 1990 (Act No. 119 of 1990) (hereinafter referred to as “the Act”). The Act provides for control over the sale and export of certain agricultural products, control over the sale of certain imported agricultural products; and control over other related products; and for matters connected therewith.

1.2. Various deficiencies in the Act which necessitated the amendments were identified. A key deficiency in the definition of management control system, which covered all management systems pertaining to inspection, audition and production practices and was found to have not been correctly captured in order to fully address what was intended. This revelation was made by the State Law Adviser when the Organic regulations were developed which were found to be *ultra vires* (beyond the scope of the Act).

1.3 The main purpose of the Bill is to—

- (a) provide for a clear and effective application of the management control;
- (b) provide for auditing of a product for quality control; and
- (c) make further provision for matters to be prescribed.

2. SUMMARY OF BILL

2.2 Clause 1: Amendment of section 1

This clause amends certain definitions namely “assignee”, “auditor”, “Director-General”, “management control system” “Minister” and “sell’ and inserts a new definition for “audit”.

2.3 Clause 2: Amendment of section 2

This clause provides that Minister may designate as an assignee, for the purpose of inspection of the commodity for quality control and auditing for management control system, that an entity, undertaking, body, institution, association or board who or which, as the case may be, has particular knowledge.

2.4 Clause 3: Amendment of section 3

This clause amends section 3 in order to provide for the procedure in respect of the determination of fee by the assignee.

2.5 Clause 4: Amendment of section 3A

This clause provides for the insertion of the word “audit”.

2.6. Clause 5: Amendment of section 15

This clause inserts in section 15 references to “management control system” (subsection (1)(dA)) and “audit” (in subsection (1)(g)), as matters in respect of which the Minister may make regulations.

BODIES CONSULTED

3. Complete List of all Government (National, Provincial and Local), Public entities and Third Party Stakeholders consulted.

3.1. The stakeholders that have been consulted thus far are the internal (Directorates Food Safety and Quality Assurance and the Inspection Services). Assignees: Perishable Product Exports Control Board (PPECB), Product Control for Agriculture (PROKON) and South African Meat Industry Company (SAMIC).

3.2 Public consultation has been had with the following stakeholders relating to the Bill, which was also published for comments:

- * Various national departments, provincial and local government units.
- * Various commodity associations such Hortgro, CGA, GrainSA, Grain Silo Industry;
- * Representative associations /unions such as AgriSA, NAFU;.
- * Retailers and wholesalers;
- * Exporters, transporters, packhouses and agencies;
- * Sellers and importers;
- * Consumer Unions; and
- * Ordinary interest citizens.

4. IMPLICATIONS FOR NATIONAL GOVERNMENT DEPARTMENTS AND PUBLIC ENTITIES

4.1 There will be minimal implication in so far as personnel, financial and infrastructural needs are concerned. The amendment of management control system may have implication relating to acquisition of personnel either in the public entities or designation of assignees.

4.2 Exporters, farmers and sellers may benefit from guarantees that may come with claims such as Organic, free range, amongst others, that may be authenticated. Consumers will also benefit from being protected against misleading claims and thereby getting value for their money. Quality of products offered for sale will also be enhanced. South Africa may have a strengthened food control system as a consequence of the anticipated proposed changes which will serve as a good base for facilitation of trade and market access.

5. IMPLICATIONS FOR DEPARTMENT

There will be a minimal implication apart from minor structural adjustment within the Directorates: Food Safety and Quality Assurance and Inspection Service.

6. IMPLICATIONS FOR PROVINCIAL GOVERNMENT

None.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the Department of Agriculture, Land Reform and Rural Development are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution on the following basis:

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.

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 matter of the constitutionality of the Liquor Bill, the court stated the following:

“...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.

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”.

Following the earlier decision in *Liquor Bill*, the Court in *Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*¹, confirmed that ‘a Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 must be dealt with under section 76’. This 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.’”

¹ 2010 (8) BCLR 741 (CC)

Furthermore, the Constitutional Court stated that:

“...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...”(see para 66)

As the Court held in *Tongoane*, ‘a Bill must be tagged as a section 76 Bill even if only one provision or feature in substantial measure deals 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 since it falls within a functional area listed in Schedule 4 to the Constitution, namely “Agriculture.”

7.2 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.