

**MEMORANDUM ON THE OBJECTS OF THE PLANT HEALTH  
(PHYTOSANITARY) BILL,**

**1. BACKGROUND**

- 1.1 The national phytosanitary regulatory system is currently administered under the Agricultural Pests Act, 1983 (Act No.36 of 1983) (APA) and its associated regulations. The purpose of the Agricultural Pests Act, 1983 with regard to phytosanitary matters is to provide for measures by which quarantine pests of plants, plant products and other regulated articles may be prevented from entering and establishing in South Africa, and for combating plant pests of national concern.
- 1.2 South Africa is a signatory member of the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures (WTO-SPS Agreement) and the International Plant Protection Convention (IPPC), so it needs to align its phytosanitary legislation with the relevant obligations and standards to facilitate safe and fair international trade.
- 1.3 The Agricultural Pests Act, 1983 (Act No. 36 of 1983) was promulgated in 1983, with its latest amendment promulgated in 1992. It has therefore been in force for nearly three decades, been through two different government systems and was promulgated before the adoption of the International Plant Protection Convention's 1997 text and the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures (WTO-SPS Agreement) of 1995. As a necessary step in the management of legislation, frequent revisions ought to be performed to determine the validity and relevance of the provisions of legislation.

**2. PURPOSE OF BILL**

- 2.1 The Plant Health (Phytosanitary) Bill seeks to address gaps and challenges in the current phytosanitary system in view of the requirements of this country's major trading partners and the requirements under the relevant international agreements and treaties of which South Africa is a signatory member. It aims

to support the South African Government's objectives and priorities such as sustainable management and use of natural resources, the provision of effective national regulatory services and risk management systems as well as increased contribution of the sector to the country's economic growth and development.

- 2.2 In accordance with the National Development Plan (NDP), the agricultural sector has been identified as one of the important sectors contributing to job creation and employment. The Plant Health (Phytosanitary) Bill will support South Africa's efforts to enter new markets and maintain current export markets, which will have a positive impact on the South African economy.
- 2.3 Phytosanitary legislation is important in securing the country's domestic and international trade in plants and plant products. Considering its active agricultural and forestry sectors, South Africa needs a sound, nationally coordinated phytosanitary systems in order to maintain and expand its competitive position in the global trade arena.

### **3. OBJECTS OF BILL**

#### **3.1 Clause by clause analysis**

The Bill consists of 38 clauses and a Schedule.

In clause 1 certain terms and expressions are defined so that the contents of the Bill may be more understandable.

In terms of clause 2, the Minister is responsible for the administration of the Bill.

Clause 3 gives certain powers to the Minister to further the objectives of the Bill.

Under clause 4 the Minister may prescribe control measures which must be complied with by users of land in order to achieve the objectives of the Bill.

Clause 5 provides for the designation of the executive officer.

Clause 6 empowers an executive officer to instruct a user of land by written order to comply with a control measure in respect of a quarantine area or regulated area determined in that order.

Clause 7 provides for orders with regard to land which must be served in the prescribed manner.

In terms of clause 8, an authorised person may on the authority of a warrant enter, search and inspect any land to combat pests or to carry out a control measure.

Clause 9 provides for the establishment of the National Plant Protection Organisation of South Africa.

Clause 10 provides for the composition of the National Plant Protection Organisation of South Africa (NPPOZA), required in terms of membership of the IPPC.

Clause 11 provides for the functions of the National Plant Protection Organisation of South Africa.

Clause 12 sets out import regulations in order to prevent the introduction and spread of regulated pests.

Clause 13 provides that regulated articles may be imported only on the authority of a permit and under certain conditions. The Minister may by notice in the *Gazette* make provision for certain exceptions.

Clause 14 sets out the conditions for exporting regulated articles.

Clause 15 provides provisions for the re-export of consignments imported into the Republic for further export to another country.

Clause 16 sets out the requirements and/or conditions that should be adhered to by a person transiting a consignment of regulated articles through the Republic to another country.

Clause 17 provides for conditions under which the executive officer may declare regulated pests.

In clause 18, provisions are made for the compulsory notification of the presence of certain pests by a user of land.

Clause 19 sets out conditions under which the executive officer may declare quarantine areas.

Under clause 20, the executive officer may declare certain areas as pest free areas, or pest free places and sites of production.

Under clause 21, the executive officer may declare areas of low pest prevalence.

Clause 22 gives the Minister the power to assign certain powers conferred upon him or her, or to assign any duty imposed upon him or her by this Bill, to a juristic person or organs of state.

Clause 23 gives an aggrieved person the right to appeal against a decision of an executive officer to the Minister in the prescribed manner.

Clause 24 provides for the establishment of the Appeal Board by the Minister, composition of the Appeal Board and its membership.

Clause 25 provides for investigations and consideration by the Appeal Board.

Clause 26 provides for the consideration of an appeal by the Minister.

Clause 27 regulates the preservation of confidentiality.

Clause 28 prescribes penalties for certain offences.

In terms of clause 29, the employer may be convicted for an offence committed by his or her manager, agent or employee.

In terms of clause 30 the Minister may make regulations regarding certain matters.

Clause 31 provides for compensation by the Minister regarding certain matters in the Bill.

Clause 32 provides for assistance and cooperation to the executive officer by different authorities and parties in order for the executive officer to perform his or her functions.

In terms of clause 33, no person, including the State, is liable for anything done legally under the Bill.

Clause 34 provides that the State is bound by the Bill, excluding clauses 27, 29 and 30.

According to clause 35, the Bill gives effect to international agreements that bind the Republic.

Clause 36 provides for the transitional provisions.

Clause 37 repeals the Agricultural Pests Act, 1983, and its amendments.

In terms of clause 38, the Bill, when passed, shall be called the National Plant (Phytosanitary) Health Act, 2016, and will come into operation on a date fixed by the President by proclamation in the *Gazette*.

In the Schedule the laws that are repealed by clause 37 are set out.

#### **4. CONSULTATION**

4.1 The Draft Bill was developed and forwarded to the State Law Adviser (SLA) for legal opinion in 2011. Following internal consultation, a revised draft was published in the *Government Gazette* No.35823, in 2012, for public comment. A National stakeholder's workshop for discussion was conducted in 2013.

4.2 The following departments and parties were consulted:

State Law Adviser, National House of Traditional Leaders, Department of Environmental Affairs, Provincial Departments of Agriculture, South African Local Government Association, Agricultural industry: Deciduous, Citrus and Subtropical industry, Grain SA, Business Enterprise at the University of Pretoria (BE at UP), South African National Seed Organization (SANSOR) and the Perishable Products Export Control Board (PPECB).

- 4.3 The draft Bill was also notified for international comment from trading partners through the transparency system of the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures in 2013. Subsequently, it was forwarded to the State Law Adviser for pre-certification and was pre-certified in July 2014.
- 4.4 The Plant Health (Phytosanitary) Bill has been presented to and was recommended by the Economic Sectors, Employment and Infrastructure Development Cluster of Directors-General on 01 October 2014.

## **5. FINANCIAL IMPLICATIONS FOR STATE**

- 5.1 The implementation of the Bill has no additional implication in terms of human and financial resources since the NPPO of South Africa has already been established and funded.
- 5.2 Key activities such surveillance and response will be catered for under the current MTEF allocation and further prioritization will be undertaken in the Branch: Agricultural Production, Health, Food Safety and Disaster Management over multiple MTEF.
- 5.3 The Branch has received additional MTEF allocation (2020 to 2023) to respond to biosecurity threats, strengthen inspection services at points of entry, revitalise laboratories and quarantine stations. This will serve as additional resource to support the implementation of the Bill.

## **6. PARLIAMENTARY PROCEDURE**

- 6.1 The Department and the State Law Advisers are of the opinion that the Bill must be dealt with in accordance with the procedure set out in section 76 of the Constitution of the Republic of South Africa, 1996 (the "Constitution"), since it deals with agricultural matters that affect the provinces.

6.2 The tagging of the Bill requires firstly, considering all the provisions of the Bill as opposed to a single provision in the Bill and, thereafter, employing the term "substantially" when considering the impact of these provisions on the provinces. When considering if the Bill substantially affects the provinces this must be done in accordance with an assessment of all the relevant provisions of the Bill and thereafter a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial.

6.3 Other key points to consider as stated in the *Tongoane case* are as follows:

- The tagging of Bills before Parliament must be informed by the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them.
- To apply the "pith and substance" test to the tagging question, therefore undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) of the Constitution requires to be enacted in accordance with the section 76 procedure.

6.4 In light of the *Tongoane* matter, we are of the view that the Bill falls within the functional area of "Agriculture", listed in Part A to Schedule 4 of the Constitution, which is an area of concurrent national and provincial legislative competence. In accordance with section 76(3)—

"A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 ...".

The Bill should be dealt with in accordance with the section 76(1) or (2) process, since it also affects the provinces to a large extent.

6.5 The State Law Advisers and the Department of Agriculture, Land Reform and Rural Development are further 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.