

REPUBLIC OF SOUTH AFRICA

AGRICULTURAL PRODUCE AGENTS AMENDMENT BILL

*(As amended by the Portfolio Committee on Agriculture and Land Affairs
(National Assembly)) (The English text is the official text of the Bill)*

(MINISTER FOR AGRICULTURE AND LAND AFFAIRS)

[B 53B-2003]

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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 alter certain definitions and to insert others; to change the constitution of the council; to apply certain provisions to fresh produce agents only; to make certain textual alterations; to provide for the extension of the jurisdiction of the council, to enhance the regulating powers of the council; and to provide for transitional matters; 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

1. Section 1 of the Agricultural Produce Agents Act, 1992 (hereinafter referred to as the principal Act), is hereby amended -

(a) by the substitution for the definition of "agent" of the following definition:

" 'agent' means a person who, for the acquisition of gain on his own account or in a partnership, in any manner holds himself out as a person who, **[or] 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, **but excluding -**

(a) **a control board as defined in section 1 of the Marketing Act, 1968 (Act No. 59 of 1968), which in terms of a scheme likewise defined, purchases and sells an agricultural product to which such scheme relates;**

(b) **a person who, in the course of his agency, purchases and sells the agricultural product concerned on behalf of a control board referred to in paragraph (a); and**

(c) **a local authority as defined in section 84(1)(f) of the Provincial Government Act, 1961 (Act No. 32 of 1961), which sells an agricultural product entrusted to an agent as defined above, on behalf of that agent at an auction];**

(b) by the substitution for the definition of "agricultural product" of the following definition:

" 'agricultural product' means an article specified in Part A or B of Schedule 1 or **any article** added thereto under subsection (2) of this section;"

- (c) by the deletion of the definition of "building society";
- (d) by the insertion after the definition of "close corporation" of the following definition:
"consumer means a consumer of an agricultural product;";
- (e) by the insertion after the definition of "council" of the following definitions:
"court means a court of the provincial or local division of the High Court of South Africa having jurisdiction or a judge of any such court and for purposes of section 27(5) also includes a magistrate as defined in the Magistrates' Courts Act 1944 (Act No. 32 of 1944);
'department' means the Department of Agriculture in the national government;";
'deputy registrar' means the deputy registrar of the Agricultural Produce Agents Council appointed in terms of section 8;
- (f) by the insertion after the definition of "deposit-taking institution" of the following definition:
"'export agent' means an agent acting as such with regard to any agricultural product rpecified in Part A of Schedule 1 intended for export;";
- (g) by the substitution 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), includes any director of a company, trustee of a trust or a member of a close corporation who acts as a fresh produce agent as aforesaid;
 (b) for the purposes of sections 12(5), 13(3)(b), 13(3)(c), 13(3)(d), 13(4), 14(5)(a), 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 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;";
- (h) by the substitution for the definition of "fund" of the following definition:
"'fund' [in relation to -
 (a) **fresh produce agents,** means the **[fidelity fund]** Fresh Produce Agents Fidelity Fund referred to in section 12(2);
 [(b) livestock agents, means the fidelity fund referred to in section 12 (3);]";
- (i) by the substitution 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, and for purposes of section 3(1)(b) includes any director of a company, trustee of a trust or a member of a close corporation which acts as a livestock agent as aforesaid;";
- (j) by the deletion of the definition of "officer";
- (k) by the substitution for the definition of "registrar" of the following definition:
"'registrar' means the registrar of the Agricultural Produce Agents Council appointed in terms of section 8, and for purposes of the application of the provisions of this Act, includes the deputy registrar;";
- (l) by the insertion of the following definition after the definition of "registrar":
"'registration certificate' means a registration certificate issued by the council in terms of section 16;".

Substitution of section 3 of Act 12 of 1992

2. The following section is hereby substituted for section 3 of the principal Act:

"Constitution of council

3. (1) The Minister shall appoint as members of the council

for a maximum period of three years -

- (a) two persons who in his or her opinion represent producers of the agricultural products set out in Part A of Schedule 1;
- (b) two persons who in his or her opinion represent producers of the agricultural products set out in Part B of Schedule 1;
- (c) three persons who in his or her opinion represent fresh produce agents;
- (d) three persons who in his or her opinion represent livestock agents;
- (e) three persons who in his or her opinion represent export agents;
- (f) two persons designated by him or her;
- (g) two persons who in his or her opinion represent consumers; and
- (h) one person representing the Department.

(2) The registrar and deputy registrar shall *ex officio* be members of the council.

(3) A member may not serve more than two consecutive terms unless the Minister is of the opinion that the appointment for a further term will be beneficial to the council.

(4) Whenever members or a member of the council has to be appointed in terms of subsection (1), the Minister shall call for nominations of suitable persons in the national media.

(5) (a) If a member of a council ceases to hold office for any reason and vacates office, the Minister may appoint a person in his or her place for the unexpired part of the term of office of the vacating member.

(b) If, upon the expiration of the term of office of the members of the council, the Minister has not yet appointed new members to take their place, the existing members shall continue in office until new members have been appointed to replace them.

(6) A member of the council other than the registrar, deputy registrar and a member referred to in subsection (1)(h) shall be paid such remuneration or allowances from the funds of the council, as the council may determine.

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

- (a) is not a South African citizen resident in South Africa;
- (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;
- (d) has been convicted of an offence involving an element of dishonesty or has been sentenced for another offence to a period of imprisonment;
- (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. 6 of 2000), and it has been so determined by an equality court.".

Substitution of section 4 of Act 12 of 1992

3. The following section is hereby substituted for section 4 of the principal Act-

"Vacating of office by members of council

4. A member of the council shall vacate his or her office if-

- (a) he or she becomes subject to any disqualification referred to in section 3(6);
- (b) he or she has been absent from more than two consecutive meetings of the council without the leave of the council;

- (c) he or she resigns as a member of the council and has notified the registrar in writing of his or her resignation;
- (d) he or she is no longer fit to serve on the council; or
- (e) in the case of the registrar, he or she is no longer employed by the council."

Substitution of section 5 of Act 12 of 1992

4. The following section is hereby substituted for section 5 of the principal Act:

"Chairperson of council

5. (1) The Minister shall designate a chairperson for the council from the members contemplated in section 3 (1).

(2) When the chairperson is absent or is unable to perform his or her duties, the members of the council shall from among their number elect a person to act as chairperson until the chairperson is able to resume his or her duties or until a new chairperson is designated by the Minister.

(3) A person whose term of office as chairperson has expired through effluxion of time shall be eligible for re-election to that office: Provided that no person shall serve as chairperson for more than six consecutive years."

Substitution of section 6 of Act 12 of 1992

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

"Meetings and decisions of council

6. (1) The council shall meet at such times and places as the chairperson may from time to time determine.

(2) The chairperson of the council may at any time convene an extraordinary meeting of the council to be held at a time and place determined by him or her and shall, upon a written request signed by not less than three members of the council, convene an extraordinary meeting thereof to be held within two weeks after the date of receipt of such request, at a time and place determined by him or her.

(3) The person presiding at a meeting of the council shall determine the procedure at that meeting.

(4) (a) The quorum for a meeting of the council shall be a majority of all its members.

(b) The decision of a majority of the members of the council present at a meeting thereof shall constitute a decision of the council.

(c) In the event of an equality of votes on any matter the person presiding at the meeting shall have a casting vote in addition to his or her deliberative vote.

(5) No decision taken by the council or act performed under the authority of the council shall be invalid by reason only of a casual vacancy on the council or of the fact that any person not entitled to sit as a member of the council sat as such a member at the time the decision was taken or the act was authorized, if the decision was taken or the act was authorized by the majority of the members of the council who were present at the time and entitled to sit as members of the council."

Amendment of section 7 of Act 12 of 1992

6. Section 7 of the principal Act is hereby amended by -

- (a) the substitution in subsection (1) for paragraphs (a) and (b) of the following paragraphs, respectively:

"(a) There shall be **[two] three** executive committees of the council which shall deal with matters relating to the occupations of export agent, fresh produce agent and livestock agent, respectively.

(b) The executive committees shall consist of the members of the council referred to in paragraphs **[(b)(i) and (c), and paragraphs (b)(ii)]**

- and (d), respectively, of section 3(1).] (c) to (e) of section 3(1) respectively."** and
(b) the deletion in subsection (1) of paragraph (d).

Substitution of section 8 of Act 12 of 1992

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

"Registrar and deputy registrar

8. (1) The work incidental to the performance of the functions of the council and its committees shall be performed by the registrar and deputy registrar, who shall be appointed by the council in consultation with the Minister.

(2) The registrar—

- (a) may 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 implementation of policy, rules and the codes of conduct determined by the council in accordance with this Act;
 - (ii) the day-to-day administrative functioning of the council, including the registration of agents with the council, the keeping of records of account, inspections and investigations into the affairs of agents and the institution and conducting of disciplinary or other proceedings against agents; and
 - (iii) reporting to the council on his or her activities in terms of subparagraphs (i) and (ii);
- (c) shall be appointed on such terms and conditions as the council may decide."

Substitution of section 9 of Act 12 of 1992

8. The following section is hereby substituted for section 9 of the principal Act:

"Objects of council

9. The objects of the council shall be 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 practising those occupations."

Amendment of section 10 of Act 12 of 1992

9. Section 10 of the principal Act is hereby amended by the substitution for paragraphs (a), (b) and (c) of the following paragraphs, respectively:

- "(a) to **[perform any functions in connection with agents entrusted to the council by this Act or any other law] formulate policy**;
- (b) to **[gather information in connection with agents and persons applying for the issue of fidelity fund certificates] establish rules and codes of conduct**;
- (c) to hire, purchase or otherwise acquire such movable or immovable property or such interest in movable or immovable property as the council may deem necessary for the effective performance of its functions, and to let, encumber, sell or otherwise dispose of property so purchased or acquired; and"

Amendment of section 11 of Act 12 of 1992

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

- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
"(b) all other **[money] moneys** which may accrue to the council from any other source.";

- (b) by the addition of the following subsections after subsection (2):
- "(2A) The council may, subject to such terms and conditions as it may deem fit—
- (a) make grants with regard to—
- (i) research in fields of activity relevant to the business of agents in general;
- (ii) the maintenance and promotion of the standard of conduct of agents in general;
- (iii) the maintenance and promotion of the training standards of agents in general;
- (b) pay an honorarium or remuneration to any person or institution for services with the object of enhancing the standard of conduct of agents in general, rendered at the request of the council; and
- (c) utilize such amount as it may determine for the purposes of—
- (i) advertising and promoting the services and facilities offered by agents in general; or
- (ii) promoting public awareness in respect of matters relating to the purchase of agricultural products referred to in Part A or B of Schedule 1.
- (2B) The council may at any time revoke any grant referred to in subsection (3)(a).";
- (c) by the substitution for subsection (5) of the following subsection:
- "(5) The financial year of the council shall end **[in each year upon the date determined by the council from time to time] on 31 March in each year and shall report annually on its activities to the Minister.**";
- (d) by the insertion after subsection (5) of the following subsection:
- "(5A) The council shall, at least three months prior to the start of its financial year, provide to the Minister for his information a business plan of the forthcoming financial year containing at least—
- (a) the budget of the council for that forthcoming year;
- (b) particulars about any training, promotional or other activities that the council plans to undertake during that year,
- (c) such other particulars as the Minister may request."; and
- (e) by the substitution for subsection (10) of the following subsection:
- "(10) The functions of the council in terms of this section may be performed separately in respect of fresh produce agents, export agents and livestock agents."

Substitution of section 12 of Act 12 of 1992

11. The following section is hereby substituted for section 12 of the principal Act:

"Establishment and control of fidelity [funds] fund

12. (1) There ~~[are]~~ is hereby established ~~[two funds]~~ a fund to be known as the Fresh Produce Agents Fidelity Fund ~~[and the Livestock Agents Fidelity Fund, respectively]~~.

- (2) The ~~[Fresh Produce Agents Fidelity Fund]~~ fund shall consist of —
- (a) money in the fidelity guarantee fund established under section 27 of the Agricultural Produce Agency Sales Act, 1975 (Act No. 12 of 1975);
- (b) each amount which is immediately prior to the commencement of this section payable to or on the account of the fund referred to in paragraph (a), and is paid on or after such date of commencement;
- (c) money paid to or on account of the ~~[said]~~ **[said]** fund in terms of subsection (4) by fresh produce agents;
- (d) money recovered by or on behalf of the ~~[said]~~ **[said]** fund in terms of this Act;
- [(e) money received by the said fund by virtue of a contract of insurance referred to in section 15;]**

[(f)](e) income derived from the investment of money in the ~~[said]~~ **[said]** fund:
and

[(g)](f) any other money accruing to the ~~[said]~~ **[said]** fund from any other source.

[(3) The Livestock Agents Fidelity fund shall consist of -

- (a) money paid to or on account of the said fund in terms of subsection (4) by livestock agents;
- (b) money recovered by or on behalf of the said fund in terms of this Act;
- (c) money received by the said fund by virtue of a contract of insurance referred to in section 15;
- (d) income derived from the investment of money in the said fund; and
- (e) any other money accruing to the said fund from any other source.]

[(4)] (3) (a) Each fresh produce agent other than a person employed by such an agent [who is the holder of a fidelity fund certificate] shall annually before or on a date determined by the council [for this purpose,] pay to the council for the account of the [applicable] fund an amount calculated on such basis or in such manner as the council may determine.

(b) A determination by the council in terms of paragraph (a) shall be made with due regard to the purpose for which the fund [concerned] has been established, as well as the present assets and future obligations of [that] the fund.

[(5)] (4) (a) Subject to the provisions of this Act, [The funds are] the fund is established to [compensate persons in accordance with the provisions of this Act] reimburse producers for [monetary] direct losses suffered by them as a result of [the failure of] –

- (i) [commission agents as defined in section 1 of the Agricultural Produce Agency Sales Act, 1975, who were members of the fidelity guarantee fund referred to in subsection (2)(a) of this section prior to the commencement of this section, to comply with the provisions of the said Act and the regulations made thereunder; and] theft, committed by a fresh produce agent, 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) agents who are in possession of valid fidelity fund certificates, to comply with the provisions of this Act and the rules] dishonest conduct by fresh produce agent in' so far as such conduct relates to agricultural produce.

[(b) Compensation in terms of paragraph (a) shall–

- (i) **only be payable from the fund referred to in subsection (2) if it relates to an agricultural product specified in Part A of Schedule 1; and**
- (ii) **only be payable from the fund referred to in subsection (3) if it relates to an agricultural product specified in Part B of Schedule 1.]**

[(c)] (b) Notwithstanding the provisions of paragraph (a), the Minister may, if he or she is of the opinion that the balance of [a particular] the fund is sufficient to meet the obligations contemplated in that paragraph, approve that such portion of the income referred to in [subsections] subsection (2)(e) [and 3(d)] as may be determined by him or her, be made available to the council for utilization as contemplated in section 11(2).

[(6)] (5) The [funds] fund shall be controlled and administered by the council in accordance with the provisions of this Act.

[(7) The council shall open separate accounts with a deposit-taking institution or building society in which the money in the funds is to be kept.]

[(8)] (6) The council may invest any money in the [funds] fund not required for immediate use at a deposit-taking institution.

[(9)] (7) The financial year of the [funds] fund shall terminate on such date in each year as the council may determine.

[(10)] (8) No provision of any law relating to insurance shall apply in respect of the [funds] fund.

[(11)] (9) The provisions of section 11(6), (7), (8) and (9) shall *mutatis mutandis* apply to the [funds] fund.".

Substitution of section 13 of Act 12 of 1992

12. The following section is hereby substituted for section 13 of the principal Act:

"Payments out of [funds] fund

13. (1) Subject to the provisions of this Act, the [applicable] fund shall be utilized for-

- (a) all claims against the fund referred to in section 14 and paid by the council or allowed or established against the fund **[concerned];**
- (b) **[compensation,]** in the discretion of the council, a contribution towards expenses incurred by [to] a claimant for [expenses incurred in respect of proof of] establishing his or her claim;
- (c) legal and accounting costs incurred in, and other expenses arising from, the investigation and defence of a claim made against the fund;
- [(d) premiums in respect of contracts of insurance entered into by the council in terms of section 15;]**
- (e) the costs incidental to the control and administration of the fund, including allowances and remuneration paid for this purpose to members of the council and a committee of the council, the registrar and the persons referred to in section 8(2); and
- (f) other payments required or permitted to be made out of the fund in terms of this Act.

(2) Notwithstanding anything to the contrary in any other Act, [The] the council may in its discretion pay an amount out of the [applicable] fund as interest on the amount of any **[judgment obtained against the fund or of any] claim admitted** against the fund **[admitted];** Provided that -

- (a) the interest shall not run from a date earlier than the date on which the claim **[concerned]** was lodged in writing with the council in terms of subsection (3)(a)(i); and
- (b) the rate of interest shall not exceed the, prevailing rate of interest prescribed under section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).

(3) Notwithstanding **[the provisions of subsection (1),] any other provision,** no person shall have any claim against **[a] the** fund -

- (a) unless the claimant-
 - (i) has lodged it in writing with the council within six months after he or she became aware of the loss **[concerned]**, or by the exercise of reasonable care could have become aware thereof; and
 - (ii) has within three months 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
- (b) if the claimant[-
 - (i)]** is a partner, manager, representative, agent, employee or member of the **[family] household** of the fresh produce agent whose **[omission or alleged omission] conduct referred to in section 12(5)** has caused the loss **[concerned];**
 - [(ii) in the case of an agent who is a company or co-operative, is a director of that company or co-operative;**
 - (iii) in the case of an agent who is a close corporation, is a member of that close corporation.]**
- (c) if the loss occurred as a result of the conduct, referred to in section 12(5), of a fresh produce agent whose fidelity has been guaranteed by any person, either in general or in respect of the particular transaction, to the extent to which the transaction is covered by the guarantee; and
- (d) if the loss occurred as a result of the conduct, referred to in section 12(5), of a fresh produce agent after such claimant received a written notification from the registrar warning him against the employment or continued employment of such fresh produce agent.

(4) A claim for reimbursement contemplated in section 12(5) 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."

Substitution of section 14 of Act 12 of 1992

13. The following section is hereby substituted for section 14 of the principal Act:

"Claims against [funds] fund and actions against council

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

(2) If the council admits such a claim, a payment shall be made to the claimant **[concerned]** 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 **[concerned]**, 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, an action in respect of that claim may be instituted against the council in the court within whose jurisdiction the **[cause of the claim arose,] principal place of business of the council is situated [provided]-**

(a) if the claimant has [in the opinion of the council,] exhausted all legal remedies against the fresh produce agent in respect of whom the claim arose; or

(b) with leave of the council before all legal remedies against the said agent have been exhausted.

(4) In any action against the council **[in respect of a fund,]** all defences which would have been available to the fresh produce agent in respect of whom the claim arose, shall be available to the council.

(5) When the council settles in full or in part any claim under this Act—

(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 **[concerned or any other person]** or, if applicable, in the case of the death, insolvency or other legal incapacity of such fresh produce agent **[or other person]**, against the estate of the said fresh produce agent **[or other person]**; and

(b) the council may use any security furnished by or on behalf of **[an] a fresh produce** agent in terms of section 17, to reimburse the fund **[concerned]** for the amount for which the claim **[concerned]** was settled.

(6) (a) The council may in its discretion decide on the order in which claims admitted by the council or awarded by the court shall be paid out of the **[applicable] fund.**

(b) If, at any time the amount to the credit of **[a] the** fund is insufficient to pay all such claims, the council **[shall pay those claims proportionally to the amount available in the fund concerned at that time.] may** determine the order in which claims in terms of subsection (1) shall be settled, and may, if the revenue of the fund is not sufficient to settle all claims in full, settle any claim in whole or in part.

(c) Without limiting the discretion of the council it shall, in applying the fund towards such settlement of claims, consider—

(i) the relative degrees of hardship suffered or likely to be suffered by the various claimants should their claims against the fund not be settled in whole or in part;

(ii) subject to subparagraph (i), the full settlement of claims not exceeding the amount prescribed by the Minister by notice in the *Gazette*, except in special circumstances, before claims for amounts exceeding such amounts are settled to a greater extent than such prescribed amounts;

(iii) in equal circumstances, the priority of claimants according to the dates when the claims were admitted by the council as the case may be.

[(c)](d) A proportional payment under paragraph (b) shall be deemed to be full and final payment in respect of the claim [concerned].".

Repeal of section 15 of Act 12 of 1992

14. Section 15 of the principal Act is hereby repealed.

Substitution of section 16 of Act 12 of 1992

15. The following section is hereby substituted for section 16 of the principal Act:

"Prohibition on acting as agent under certain circumstances

16. (1) (a) Subject to the provisions of subsection (2), no person shall perform any act as [an] a fresh produce agent unless he or she is the holder of a [valid] fidelity fund certificate issued to him or her and to every employee contemplated in the definition of 'fresh produce agent' in section 1 and, if such person is—

- (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,
- 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.

(b) **[The provisions of paragraph (a) shall, in the case of a partnership, apply to each member of that partnership]** 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.

(2) No [person] agent shall receive remuneration for the performance of an act as an agent, unless—

- (a) in the case of a fresh produce agent, the act has been performed by the holder of a [valid] fidelity fund certificate which has not been suspended; or
- (b) **[the council has under subsection (3) exempted such person from complying with the provisions of subsection (1)]** in the case of an export or livestock agent, the act has been performed by the holder of a registration certificate.

(3) **[(a) The council may on application grant written exemption from the provisions of subsection (1) to a person—**

- (i) **who only occasionally acts as an agent; and**
- (ii) **whose scope of business as an agent, in the opinion of the council does not justify the issue of a fidelity fund certificate.**

(b) Such exemption shall be granted subject to such conditions as the council may in each case determine.

(a) Every prospective fresh produce agent shall, within the prescribed period and in the prescribed manner, apply to the council for a fidelity fund certificate, and such application shall be accompanied by the security referred to in section 17(1) and the application fee determined by the council.

(b) Every prospective export agent and livestock agent shall, within the prescribed period and in the prescribed manner, apply to the council for a registration certificate, and such application shall be accompanied by the application fee determined by the council.

(c) If the council, upon receipt of any application referred to in subsection (1) or (2) 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) 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.

(d) Any document purporting to be a fidelity fund certificate or registration certificate which has been issued contrary to the provisions of this Act shall be null and void and shall on demand be returned to the council.

(4) An application for a fidelity fund certificate shall be made in the manner determined by the council, and shall be accompanied by the applicable amount determined by the council for this purpose.]

[(5) After consideration of any such application the council shall, subject to the provisions of subsection (6), issue to the applicant a fidelity fund certificate in the form determined by the council.]

(6) [The council may refuse to issue a] No fidelity fund certificate or registration certificate as the case may be, shall be issued to [a person who] any person -

- (a) who has at any time by reason of improper conduct been dismissed from a position of trust;
- (b) who has at any time been convicted of an offence involving an element of dishonesty;
- (c) who is of unsound mind;
- [(d) has at any time been convicted of a contravention of the Agricultural Produce Agency Sales Act, 1975 (Act No. 12 of 1975), and whose registration as a commission agent as defined in the said Act, was as a result thereof cancelled in terms of section 6 of that Act;]**
- (e) who has, after an investigation in terms of section 24, been found guilty of improper conduct, **[if the council has as a result thereof withdrawn the fidelity fund certificate previously issued to the person concerned];**
- (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 and to be issued with a fidelity fund certificate or registration certificate, as the case may be; **[or]**
- (g) in a company [or **co-operative**], close corporation or other juristic person, which is being wound-up, whether provisionally or otherwise, or is deregistered, as the case may be; **[has a director or employee, and in the case of a close corporation, has a member or employee, who is subject to a disqualification set out in paragraph (a), (b), (c), (d), (e) or (f).]**
- (h) who has failed to discharge all his or her liabilities to the council;
- (i) who has failed to comply with any lawful requirement of the council;
- (j) in the case of a fresh produce agent, who has failed to comply with the provisions of section 19(1)(a);
- (k) in the case of a fresh produce agent, who carries or intends to carry on business as a fresh produce agent under a trade name which is identical or confusingly similar to a trade name of a fresh produce agent –
 - (i) already issued with a fidelity fund certificate; or
 - (ii) whose fidelity fund certificate is suspended or has lapsed or been withdrawn in terms of this Act;
- (l) in the case of an export agent, who carries or intends to carry on business as a livestock agent under a trade name which is identical or similar to a trade name of a livestock agent -
 - (i) already issued with a registration certificate; or
 - (ii) whose registration certificate is suspended or has lapsed or been withdrawn in terms of this Act;

Provided that if in respect of any person who is subject to any disqualification referred to in this subsection, the council is satisfied that, with due regard to all the relevant considerations, the issue of a fidelity fund certificate or registration certificate, as the case may be, to such person will be in the interest of justice, the council may issue, on such conditions as the council may determine, a fidelity fund certificate or registration certificate, as the case may be, to such person when he or she applies therefor.

(6A) (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 or livestock agent and such a certificate shall be deemed to be a certificate issued on application by such a person.

(b) The issuing of a fidelity fund certificate or registration certificate under paragraph (a) shall not exempt the person from any prosecution for not complying with or contravening any provision of this Act or the rules prior to the issuing of such a certificate.

[(7) Any person to whom a fidelity fund certificate has been issued in terms of subsection (5) shall, when requested thereto by the council, pay to the council within the period determined by the council the amount determined by the council.]

[(8) (a) Subject to the provisions of paragraph (b), each person who immediately prior to the commencement of this section was a member of the fidelity guarantee fund established under section 27 of the Agricultural Produce Agency Sales Act, 1975 (Act No. 12 of 1975), shall be deemed to be the holder of a fidelity fund certificate issued by the council in terms of this Act.

(b) The validity of a fidelity fund certificate referred to in paragraph (a) shall lapse 90 days after the date of commencement of this section unless the holder thereof has on or before such date paid to the council the applicable amount determined by the council for this purpose.]

(9) Each agent who is the holder of a fidelity fund or registration certificate shall-

(a) annually on or before a date determined by the council, pay to the council the amount determined by the council for the maintenance of such certificate;

(b) forthwith notify the council in writing-

(i) of any change of his or her business or postal address;

(ii) if the partnership of which he or she is a partner, dissolves;

(iii) if he or she becomes a member of a partnership;

(iv) if, in the case of a company[, **co-operative**] or close corporation, a change in the directorship of that company [**or co-operative**] or the membership of that close corporation has occurred; **[and]**

(v) if in the case of a trust a change in the trustees of that trust has occurred;

(vi) if he or she ceased to act as an agent; and

[(v)](vii) of any further particulars requested by the council as a result of a notice in terms of the preceding subparagraphs.

(10) (a) A fidelity fund or registration certificate issued to an agent shall automatically lapse when he or she becomes disqualified as contemplated in subsection (6) or if the agent ceases to act as an agent.

[(b) The council may withdraw the fidelity fund certificate of an agent if-

(i) he is found guilty of improper conduct under section 26;

(ii) he fails to pay the amount referred to in subsection (9)(a) within three months after the date of a written request therefor by the registrar, addressed to his last known postal address, as entered in the records of the council;

(iii) he fails to furnish the registrar with his business address and postal address within three months after the date of a written request therefor by the registrar, addressed to his said postal address;

(iv) he fails to comply with the provisions of section 18(2) or 19(1).]

(b) If a fidelity fund certificate which lapsed in terms of subparagraph (a) had been issued to a company, close corporation or trust, then the fidelity fund certificate of-

(i) every director, member, or trustee ; and

(ii) every employee,

as contemplated in the definition of fresh produce agent' in section 1 shall likewise lapse.

(c) If a fidelity fund or registration certificate so lapses or is **[so withdrawn] suspended**, the registrar shall-

(i) by means of a written notice addressed to the said business and postal address of the agent **[concerned]**, notify him or her thereof; **[and]**

(ii) in the case of a fresh produce agent who conducts his or her business at a fresh produce market, by means of a written notice addressed to the person in charge of that market notify him or her thereof; and

(iii) cause particulars thereof to be published in [an Afrikaans and an English newspaper] a newspaper in at least two official languages one of which should be English, circulating in the district in which the said agent's last known business address, as entered in the records of the council, is situated.

(d) [A] 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 [or has been withdrawn] under paragraph (a) [or (b), as the case may be], shall return the certificate to the registrar within 30 days after the [notice referred to in paragraph (c)] last date of publication referred to in paragraph (c)(iii).

(e) A fidelity fund or registration certificate which has lapsed **[or has been withdrawn under this subsection]**, shall be void with effect from the date of such [lapse or withdrawal] lapsing.

(11) No person whose fidelity fund or registration certificate has lapsed, may directly or indirectly participate in the management of any business carried on by an agent in his or her capacity as such, or participate in the carrying on of such business, or be employed, directly or indirectly, in any capacity in such business, except with the written consent of the council and subject to such conditions as the council may determine from time to time.

(12) No agent shall directly or indirectly in any capacity whatsoever employ a person referred to in subsection (11), or allow or permit such person directly or indirectly to participate in any capacity in the management or the carrying on of his or her business as an agent, except with the written consent of the council, and subject to such conditions as the council may impose."

Substitution of section 17 of Act 12 of 1992

16. The following section is hereby substituted for section 17 of the principal Act;

"Security by agents

17. (1) **[The council may require that an agent who is the holder of a fidelity fund certificate shall furnish to the council within the period determined by the council such security as the council may determine,]** 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 [as contemplated in section 14(5)(b), in respect of] to meet any claim arising [from an act or omission by that agent, and which has occurred within two years after the fidelity fund certificate was issued to him.] in terms of section 12(5) 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) **[Such]** The security referred to in subsection (1) shall be returned to the fresh produce agent [concerned] within six months after the lapse of the fidelity fund certificate of that fresh produce agent, [period referred to in subsection (1) has expired,] unless an [inquiry] inspection and investigation under section 24 [into] of an act or omission or alleged act or omission of the fresh produce agent [concerned] 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."

Substitution of section 18 of Act 12 of 1992

17. The following section is hereby substituted for section 18 of the principal Act:

"Account

18. (1) Every fresh produce agent contemplated in paragraph (a) of the definition of 'fresh produce agent' in section 1 [who is the holder of a **fidelity fund certificate] shall in respect of his or her activities as such, keep, at a place approved by the council, [in one of the official languages] full and correct accounting records of—**

- (a) all money received, kept or expended by him or her, including money deposited in a trust account referred to in section 19 (1) (a) or invested in a savings or interest-bearing account referred to in section 19 (3) (a);
- (b) all his or her assets and liabilities; **[and]**.
- (c) all his or her financial transactions~~[,] and~~
- (d) all agricultural produce received kept sold and lawfully destroyed.

(2) (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.

(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 thirty days, an audited statement fully setting out the state of affairs in respect of the matters referred to in subsection (1).

(c) The court may, on good cause shown upon application by the council or any other competent person, prohibit any fresh produce agent from operating in any way his or her trust, savings or other interest-bearing account referred to in section 19(3)(a) and may appoint a *curator bonisto* control and administer such trust, savings or other interest-bearing account, with such rights duties and powers as the court may deem fit.

(3) **[An] A fresh produce agent [referred to in subsection (1)] shall retain the accounting records to be kept in terms of this section, for a period of at least three years after the last entry in respect of any transaction [was] made therein, at the applicable place referred to in subsection (1), together with the vouchers, receipts and other documents relating to those accounting records.**

(4) If the business of such fresh produce agent is terminated for any reason whatsoever, the fresh produce agent shall -

- (a) balance the accounting records referred to in subsection (1) within 21 days, or such other period as the council may determine, of the date on which he or she performed his or her last activity as **[an] a fresh produce agent**, and thereupon have them audited as contemplated in subsection (2)(a) within three months of the said date; **[and]**
- (b) forthwith notify the council in writing of the place at which such accounting records and the vouchers, receipts and other documents referred to in subsection (3) which relate to those records are retained as contemplated in that subsection~~[,] and~~
- (c) wind-up his or her trust, savings or other interest-bearing account in the prescribed manner and pay out in the prescribed manner the amount standing to the credit of any such account to the persons entitled to it.

(5) (a) If such fresh produce agent fails or is in the opinion of the council likely to fail to comply with the provisions of subsection (4), the council may designate any person to comply with those provisions on behalf of the fresh produce agent **[concerned]**.

(b) When the council designates a person under paragraph (a), the expenditure incurred in connection with the performance of the functions **[concerned]** shall be recoverable from the fresh produce agent **[concerned]**."

Substitution of section 19 of Act 12 of 1992

18. The following section is hereby substituted for section 19 of the principal Act:

"Trust accounts

19. (1) Subject to the provisions of subsection (2), each fresh produce agent [who is the holder of a fidelity fund certificate] other than an employee contemplated in the definition of fresh produce agent' in section 1 shall-

- (a) open and keep a trust account at a deposit-taking institution; and
- (b) forthwith deposit therein the proceeds of the sale of agricultural produce sold by him or her on the instructions of or on behalf of his or her principal.

(2) **[(a)]** Only one trust account shall be kept in respect of the business of **[an] a fresh produce agent [who] which** is a partnership.

[(b) The Minister may on the recommendation of the council and by notice in the Gazette suspend the operation of the provisions of this section and of section 20, or such portions thereof as he may determine, in relation to a particular category of agent if he is satisfied that the said provisions or any portion thereof has an unnecessarily restrictive effect on the disposal of the proceeds of the sale of agricultural produce by such category of agent.

(c) A suspension in terms of paragraph (b) shall-

- (i) only be valid in respect of an agent of the category concerned who has furnished the council with such security as the council may determine, to fulfil any obligation that may arise towards any person in respect of the proceeds of the sale of agricultural produce by that agent; and**
- (ii) be subject to such conditions and requirements as the Minister may on the recommendation by council determine and set out in the said notice.]**

(3) [An] A fresh produce agent [referred to in subsection (1)]-

- (a) may invest any amount paid into his or her trust account with a view to payment as contemplated in section 20 and which is not immediately required for any particular purpose, in a separate savings or other interest-bearing account opened by him or her with any deposit-taking institution;
- (b) shall forthwith after opening a trust account or any other account referred to in paragraph (a), or if any change occurs in connection with any such account, notify the council thereof in the manner determined by the council;
- (c) shall keep separate accounting records referred to in section 18 in respect of his or her trust account and savings or interest-bearing accounts referred to in paragraph (a) of this subsection, and shall balance such accounting records within 21 days after the end of each month.

(4) Any agricultural produce received by a fresh produce agent shall, until it is sold or lawfully destroyed, be deemed to form part of his of her trust account.

(5) [(4) An] A fresh produce agent shall cause the auditor referred to in section 18 (2), [shall] immediately after having [completing]completed an audit contemplated in that section[,] to transmit to the council a report in the form determined by the council regarding his or her findings, and a copy thereof to the fresh produce agent [concerned].

[(5)] (6) (a) An amount deposited or to be deposited in terms of subsection (1) (b) in the trust account of [an] fresh produce agent -

- (i) shall not 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 principal [concerned]; and**

(ii) shall not form part of the assets of that fresh produce agent or, if he or she is a natural person and has died, or has become insolvent, of his or her deceased or insolvent estate.

(b) The provisions of paragraph (a) shall not apply to the remainder of the amount **[concerned]** after the principal of the fresh produce agent **[concerned]** has been paid as contemplated in section 20 (1).

(7) The court may upon application by the council suspend a fresh produce agent from conducting business if-

(a) he or she fails to comply with the provisions of subsection (1) within a time specified by the council in a written request addressed to his or her business address or postal address; or

(b) it comes to the attention of the council that the total of the balances shown on the trust account in the accounting records of that fresh produce agent exceed the total amount of the funds in his or her banking account.

(8) (a) Any market authority which receives the proceeds from the sale of agricultural produce shall receive 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.

(b) Any proceeds from the sale of agricultural produce paid to a market authority for the benefit of a fresh produce agent shall be administered separately from any other moneys or accounts held or operated by such market authority and such proceeds shall not form part of the assets and liabilities of that market authority: Provided that the market authority shall be entitled to recover for itself the remuneration referred to in paragraph (a).".

Substitution of section 20 of Act 12 of 1992

19. The following section is hereby substituted for section 20 of the principal Act:

"[Payments] Payment from trust [accounts] account

20. (1) **[An] A fresh produce agent [who is the holder of a fidelity fund certificate]** shall pay to his or her principal from his or her trust account the proceeds of the sale of an agricultural product sold **[on the instruction or on behalf of such principal]** after he or she has deducted from such proceeds his or her agreed remuneration **[as an agent]** and the other reasonable expenses incurred by him or her in connection with the sale of that agricultural product.

(2) (a) If the amount to be paid by **[an] a fresh produce agent** to his or her principal in terms of subsection (1) has not been claimed by the principal **[concerned]** within **[180] 200** days after the sale **[concerned]**, that fresh produce agent shall pay the amount **[concerned]** from his or her trust account to the council, and furnish the council with the particulars required in the rules in connection therewith.

(b) Money so paid to the council shall be dealt with in the manner set out in section 21.

(3) Any withdrawal from a trust account for the purposes of a payment or deduction referred to in subsection (1), the withdrawal of interest earned on a trust account or an interest-bearing account referred to in section 19(3) (a), and **[a] any** payment to the council in terms of subsection (2) of this section, shall be made at the time and in the manner set out in the rules.

(4) No withdrawals other than those specified in subsection (3) shall be made from a trust account or a savings or interest-bearing account referred to in section 19(3)(a): Provided that any fees **[deducted from such accounts] charged** by the institution at which they are kept shall be **[deemed to form part of the remuneration referred to in subsection (1) of this section] debited against the business account** of the fresh produce agent **[concerned]**."

Amendment of section 22 of Act 12 of 1992

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

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

"The council may, in respect of fresh produce agents [**who are the holders of fidelity fund certificates**] make rules as to—";

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

"(i) the regulation, control or prohibition of any practice followed by agents:

- (j) the period within and the manner in which application shall be made for a fidelity fund or registration certificate, as the case may be;
- (k) the form of a fidelity fund and registration certificate;
- (l) the manner in which any account referred to in section 18(4)(c) shall be wound-up and the amount standing to the credit of such account shall be paid out; and
- (in) the manner in which proceedings at a disciplinary hearing contemplated in section 25 shall be conducted."

Substitution of section 23 of Act 12 of 1992

21. The following section is hereby substituted for section 23 of the principal Act:

"Improper conduct

23. [An] A fresh produce agent [**who is the holder of a fidelity fund certificate**] shall be guilty of improper conduct if—

- (a) he or she contravenes or fails to comply with any provision of this Act or the rules [**or of the code of conduct referred to in section 22 (1) (g)**];
- (b) he or she is convicted of an offence involving an element of dishonesty; or
- (c) with due regard to his or her occupation, he or she has through any other act or omission [**in the opinion of the council**] conducted himself or herself unprofessionally, improperly or disgracefully."

Substitution of section 24 of Act 12 of 1992

22. The following section is hereby substituted for section 24 of the principal Act:

"[Inquiry by council] Inspection and investigation

24. (1) The council may, either of its own accord or as a result of a complaint, charge or allegation lodged with it, institute an [**inquiry**] inspection and investigation into the conduct of [**an**] a fresh produce agent [who is the holder of a fidelity fund certificate], or person in the employ of such fresh produce agent, or into [**an act or omission or alleged act or omission of such agent in the practising of his occupation, or into**] a contravention [**or alleged contravention**] of this Act or the rules by such fresh produce agent or employee.

(1A) An inspection and investigation referred to in subsection (1) shall be conducted in accordance with the provisions of section 27(4).

(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 or 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 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;
- (b) order such fresh produce agent or employee to produce at such 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.

(1C) A summons referred to in subsection (1 B), shall be –

- (a) as nearly as possible in the form specified in the rules;
- (b) signed by the registrar or his or her duly authorized representative; and
- (c) served on the fresh produce agent or employee by delivering or tendering it at the business address of the fresh produce agent or employee or by sending it by prepaid registered post to the postal address referred to in section 16(9), or to the address last known to the council.

(2) If such conduct[, **act, omission**] or contravention [**or alleged act, omission or contravention**] forms or is [**in the opinion of the council**] likely to form the subject of criminal or civil proceedings in a court of law, the council may postpone the [**inquiry**] issuing of a summons until such proceedings have been determined.

[(3) The acquittal or the conviction of an agent or person by a court of law upon a criminal charge shall not be a bar to an inquiry in respect of him in terms of this section, even if the facts being inquired into would, if proved, constitute the offence set forth in the criminal charge on which he was so acquitted or convicted, or any other offence of which he might have been convicted at his trial on the said criminal charge.]".

Substitution of section 25 of Act 12 of 1992

23. The following section is hereby substituted for section 25 of the principal Act:

"Disciplinary tribunal

25. (1) A disciplinary tribunal may be convened for the purpose of a disciplinary hearing whenever it becomes necessary to do so in terms of section 24.

(2) A disciplinary tribunal shall consist of a maximum of three members, who shall be appointed by the council on account of –

- (a) their independence from the affairs of the council, the office of the registrar and the agent or person investigated;
- (b) their knowledge of the law;
- (c) their knowledge of the conducting of the business of agents in general;
- (d) experience in the resolution of disputes; and
- (e) any other knowledge or experience which renders them suitable for appointment as members of a disciplinary tribunal.

(3) At least two members of a disciplinary tribunal shall for an uninterrupted period of at least five years have practised as advocates or attorneys or occupied the post of magistrate, or have been involved in the tuition of law or have rendered services as legal advisers or legal consultants.

(4) A disciplinary tribunal shall have the power to inquire into and decide upon any charge in terms of this Act or the rules.

(5) The registrar may appoint a competent person to exercise the powers and perform the duties of a prosecutor.

(6) A disciplinary tribunal shall conduct its proceedings in accordance with rules made for this purpose: Provided that–

- (a) such rules shall be in accordance with the requirements of this Act and the Constitution; and
- (b) the onus of proof shall be the same as in criminal proceedings.

(7) If a vacancy occurs on a disciplinary tribunal after that tribunal has commenced with a hearing, the hearing may be proceeded with before at least two members of the tribunal, but if only two serving members remain they may take any decision referred to in section 26(1)(c) only by unanimous vote.

(8) The prosecutor may for the purposes of such hearing–

(a) subpoena any person to give evidence who is able to furnish information relevant to the hearing, or who the prosecutor has reason to believe has in his or her possession or custody or under his or her control any book, document or record relating to the subject of the inquiry, to appear at a date, time and place specified in the subpoena to be examined or to produce such book, document or record, and the prosecutor may retain for examination any book, document or record so produced; and

(b) through the person presiding at the hearing, administer an oath to, or accept an affirmation from, any person present at the inquiry, and examine him or her or cause him or her to be examined by the prosecutor and instruct him or her to produce any book, document or record in his possession or custody or under his or her control.

(9) (a) A subpoena referred to in subsection (8) shall as far as possible be as prescribed in the rules, shall be signed by the prosecutor and shall be served in the same manner as a subpoena issued by a magistrate's court in civil proceedings.

(b) No person—

(i) having been duly summoned to be present at the hearing, shall without lawful excuse fail so to appear; or

(ii) having been called as a witness at a hearing, shall without lawful excuse refuse to be sworn or to make an affirmation, or to produce any book or other document or to answer any question which he or she may be required to produce or answer.

(c) The registrar shall pay a witness called and present at a hearing such fees as the council may from time to time determine generally, or in any particular case.

(10) The law relating to privilege, as applicable to a witness called to give evidence or to produce a book, document or record in a civil trial before a court of law, shall apply *mutatis mutandis* in relation to the examination of or the production of any book, document or record by any person called in terms of this section.

(11) An agent or person in respect of whom the hearing is instituted in terms of this section shall be entitled to be present at the hearing, to be assisted or represented by another person, and—

(a) to be heard;

(b) to call witnesses;

(c) to cross-examine any person called as a witness in support of the charge; and

(d) to have access to all documents produced in evidence or relevant to the hearing and which are available.

(12) The registrar shall keep or cause to be kept a record of the proceedings at the hearing.

(13) Any person who, having been duly sworn or having made an affirmation, tenders false evidence at the hearing held under this section, knowing such evidence to be false, shall be guilty of an offence and liable on conviction to the penalties which may lawfully be imposed for the offence of perjury.

(14) The disciplinary tribunal may, if it is of a view that an agent or employee of such agent has committed an offence, submit a certified copy of the record of the proceedings at any hearing held in terms of section 24 to the office of the National Director of Public Prosecutions having jurisdiction in the matter."

Substitution of section 26 of Act 12 of 1992

24. The following section is hereby substituted for section 26 of the principal Act:

"Disciplinary powers of tribunal

26. (1) If **[the council]** a disciplinary tribunal, after **[an inquiry]** a hearing under section **[24]** 25, finds an agent or employee of such agent guilty of improper conduct, **[the council]** it may -

- (a) reprimand or caution him or her;
- (b) impose conditions and restrictions subject to which the agent **[concerned] or employee of such agent** may, for a specified period, practise his or her occupation: **[or]**
 - (bA) impose on such agent or employee a fine not exceeding such amount as may be prescribed by the Minister by notice in the *Gazette*;
 - (bB) suspend that agent from conducting his or her business or from acting as an agent on such conditions and for such period as that tribunal may determine; and
- (c) withdraw the fidelity fund or registration certificate issued **[or deemed to have been issued]** to that agent and—
 - (i) if such agent is a company, to every director of such company;
 - (ii) if he or she is a director of a company which is an agent, to such company;
 - (iii) if he or she in partnership acts as an agent, to every partner in such partnership;
 - (iv) if such agent is a close corporation, to every member contemplated in the definition of 'fresh produce agent' or 'livestock agent', as the case may be, of that corporation;
 - (v) if he or she is a member of a close corporation which is an agent, to such corporation;
 - (vi) if such agent is a trust, to every trustee of such trust; or
 - (vii) if he or she is a trustee of a trust which is an agent, to such trust.

(2) The **[council]** disciplinary tribunal may **[postpone the taking of its decision under subsection (1), or]** suspend the execution of its decision taken under subsection (1)(bA), (bB) or (c), for such period not exceeding three years and subject to such further conditions as **[the council]** it may in each case determine.

(3)(a) A fine imposed under subsection (1)(bA) shall have the effect of and may be executed as if it were a civil judgment in favour of the council.

(b) The registrar shall **[**—

- (a) **inform an agent who is so found guilty, in writing of the decision of the council and of the grounds on which it is based;**
- (b) **except where the execution of a decision has been suspended under subsection (2),** publish the name and address of the agent or employee of such agent **[so]** 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*.

[(4) (a) If at the end of the period for which the taking of a decision has been postponed under subsection (2), the council is satisfied that the agent has observed all the relevant conditions, the registrar shall inform the agent concerned that the council will not take a decision under subsection (1).

(b) If the execution of a decision has been suspended under subsection (2) and the council is satisfied that the agent concerned has observed all the relevant conditions throughout the period of suspension, the registrar shall inform such agent that such decision will not be executed.]

(5) If an agent or employee of such agent fails to comply with any conditions determined under subsection (2), the **[council]** registrar shall **[take a decision under subsection (1), or cause the decision taken under subsection (1)(c) to be executed,]** cause the decision taken under subsections (1)(bA) or (bB) to be executed unless the said agent or employee of such agent satisfies the **[council]** registrar that the non-compliance with such conditions was due to circumstances beyond his or her control.

[(6) A decision taken under this section by a committee authorized thereto in terms of section 7 shall only come into effect after it has been confirmed by the council.]

(6) In addition to any of the sanctions referred to in subsection (1), the disciplinary tribunal may order that agent or employee to pay the costs incurred by the council in connection with such hearing and –

- (a) such costs shall be calculated in accordance with the High Court tariff applicable to civil litigation; and
- (b) for the purpose of assessing such costs, the registrar of the High Court having jurisdiction shall be empowered to tax such costs.

(7) Without derogating from the generality of any such order for the payment of costs, such costs shall include–

- (a) the costs of recording, transcribing and preparing copies of any record;
- (b) the costs incurred by the council in respect of the prosecutor and the accountant or other persons appointed to inspect and investigate the agent or his or her employee's books of account and any other documents or records or things relating to the agent or his or her employee's business operation or former business operation; and
- (c) the costs of procuring the attendance of witnesses and their witness fees, including those of the complainant.

(8) The order contemplated in subsection (7) for the payment of costs incurred by the council in connection with an inspection and investigation shall have the effect of and may be executed as if it were a civil judgment in favour of the council.

(9) (a) The disciplinary tribunal may, whenever a fine has been imposed on an agent as contemplated in subsection (1)(bA), order that any portion of that fine, but not exceeding 80% thereof, be applied towards the payment of compensation to any person who suffered a pecuniary loss as a result of the conduct of the agent or employee in question.

(b) The registrar shall, on receipt of the fine imposed on the agent in question, make the payment contemplated in paragraph (a).

(c) This subsection shall not preclude any person from pursuing any civil remedy against the agent or employee contemplated in paragraph (a): Provided that if an award is made by a court in favour of a person who has received payment from the council as contemplated in paragraph (b), the court shall take the payment into account in making such award."

Substitution of section 27 of Act 12 of 1992

25. The following section is hereby substituted for section 27 of the principal Act:

"Entry and inspections

27. (1) The registrar may designate a suitable person (hereinafter referred to as an inspector) to exercise and perform periodic regulatory inspections and investigations at the business premises of any agent with a view to determining whether the provisions of sections 18, 19, 20 and 21 and the rules pertaining thereto have been complied with, and for that purpose an inspector shall be entitled to enter such business premises and to exercise any of the powers referred to and in accordance with subsection (4) insofar as they relate to the aforesaid sections and rules.

(2) An inspector shall be furnished with a certificate of appointment signed by or on behalf of the council in which it is stated that he or she is an inspector appointed in terms of this Act.

(3) An inspector shall, when performing any functions in terms of this Act, have his or her certificate of appointment in his or her possession.

(4) In order to obtain any information required by the registrar in relation to a complaint, charge or allegation lodged, an inspector may be designated who may, subject to this section, enter any premises on or in which any book, document or other object connected with such investigation is or is suspected to be, and may –

- (a) inspect or search those premises, and there make such investigations or inquiries as may be necessary for the purpose of obtaining any such information;
- (b) examine any object found on or in the premises which has or might have a bearing on the investigation in question and request from the

- owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;
- (c) make copies of or extracts from any book or document found on or in the premises which has or might have a bearing on the investigation in question, and request from any person who is suspected of having the necessary information an explanation of any entry therein;
 - (d) seize, against the issue of a receipt, anything on or in the premises which has or might have a bearing on the investigation in question, if the inspector needs to retain it for further examination or for safe custody.

(5) Unless the owner or person in charge of the premises has consented thereto in writing an inspector shall enter premises and exercise any power contemplated in subsection (4) only under a search warrant, which may only be issued by the court if it appears to that court from information given to the court on oath or solemn affirmation that there are reasonable grounds to suspect-

- (a) that a contravention of this Act or the rules has taken place or is taking place; and
- (b) that a book, document or other object which may afford evidence of such contravention is on or in those premises.

(6) A search warrant contemplated in subsection (5) shall -

- (a) authorize an inspector mentioned in the warrant to enter the premises identified in the warrant for the purpose of exercising any power contemplated in subsection (4);
- (b) be executed by day, unless the court authorizes the execution thereof during the night;
- (c) be of force until it is executed or cancelled by the court, or a period of one month from the day of its issue expires, whichever occurs first.

(7) An inspector referred to in subsection (1) or an inspector executing a search warrant under subsection (6) shall, before such execution, upon demand by any person whose rights may be affected -

- (a) show that person his or her certificate of appointment;
- (b) hand to that person a copy of the warrant if he or she is acting in terms of subsection (5).

(8) A person from whose possession or charge a book or document has been taken under this section shall, as long as the book or document is in the possession or charge of the inspector or of the council, be allowed on request to make copies thereof or to take extracts therefrom at any reasonable time at his or her own expense and under the supervision of that inspector or a person in the service of the council.

(9) A person shall be guilty of an offence if-

- (a) he or she obstructs or hinders an inspector in the performance of the inspector's functions in terms of this section;
- (b) after an inquiry having been made of him or her under subsection (4)(a) or after having been requested for information or an explanation under subsection (4)(b) or (c) -
 - (i) he or she refuses to answer, or to answer fully and satisfactorily to the best of his or her knowledge and belief, such inquiry or request for information; or
 - (ii) gives an answer or information or an explanation which is false or misleading, knowing it to be false or misleading.

(10) Any person from whom information or an explanation has been requested in terms of this section shall not be entitled to refuse to answer any question or to produce any book, document or object on the ground that he or she would thereby be exposed to a criminal or disciplinary charge: Provided that, to the extent that such answer, book, document or article does expose the person to a disciplinary or criminal charge, no evidence thereof shall be admissible in any disciplinary or criminal proceedings against that person except where the person stands trial on a charge contemplated in subsection (9)(b).

(11) An inspector who is not in the full-time service of the State shall be appointed on such conditions and at such remuneration as the council may determine."

Amendment of section 29 of Act 12 of 1992

26. Section 29 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections respectively:

"(1) Any person who—

- (a) contravenes or fails to comply with t provision of section **[12(4)(a),]** 16(1) **[or (9)(a)]**, 16(11 or (12), 19(1), 19(8), 20(2)(a), 27(9)(a) and (b)(i) or 28;
- (b) contravenes or fails to comply with a provision of section 16(2), **[(7), (9)(b) or (10)(d)], (6)(a) or (7)(d)**, 18 or 19(3)(b) or (c) or 19(5);
- [(c) contravenes or fails to comply with a requirement under section 17(1) or a condition or requirement under section 19 (2) (c);**
- (d)
 - (i) hinders or obstructs an inspector in the exercise of his powers or the performance of his duties under section 27;**
 - (ii) without valid excuse refuses or fails to answer to the best of his ability any question which an inspector in the exercise of his powers or the performance of his duties under the said section has put to him;**
 - (iii) refuses or fails to comply to the best of his ability with any requirement made by an inspector in the exercise of his powers or the performance of his duties under the said section; or**
 - (iv) wilfully furnishes to an inspector any information which is false or misleading;]**

(bA) contravenes or fails to comply with the provisions of section 25(9);

- (e) in any application in terms of this Act, knowingly furnishes information or makes a statement which is false or misleading, shall be guilty of an offence.

(2) Any person who is convicted of an offence—

- (a) mentioned in subsection (1) (a)**[(c) or (d) (i), (ii) or (iii)]** shall be liable—
 - (i) on a first conviction, to a fine **[not exceeding R8 000]** or to imprisonment for a period not exceeding two years or to both **[that] a fine and [that] such** imprisonment; and
 - (ii) on a second or subsequent conviction, **[whether of the same offence or any other offence mentioned in this paragraph,]** to a fine **[not exceeding R16 000]** or to imprisonment for a period not exceeding four years or to both **[the] a fine and [the] such** imprisonment;
- (b) mentioned in subsection (1)(b), **[(d)(iv) or (e)]**, shall be liable to a fine **[not exceeding R4 000]** or to imprisonment for a period not exceeding one year or to both **[that] a fine and [that] such** imprisonment; and
- (c) mentioned in subsection (1)(bA), shall be liable to a fine or to imprisonment not exceeding three months or to both a fine and such imprisonment."**

Amendment of section 30 of Act 12 of 1992

27. Section 30 of the principal Act is hereby amended—

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

"(1) Whenever any fresh produce agent or his or her manager, representative, agent, employee or **[family]** member of his or her household owing to the appropriation of money in the 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 is insufficient for the payment of all amounts payable from it in terms of section 20, the court **[concerned]** 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 and order the fresh produce 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."; and

- (b) by the deletion of subsection (3).

Amendment of section 31 Act 12 of 1992

28. Section 31 is hereby amended by the deletion of subsection (2).

Deletion of section 32 of Act 12 of 1992

29. Section 32 of the principal Act is hereby deleted.

Insertion of section 35A in Act 12 of 1992

30. The following section is hereby inserted in the principal Act, after section 35:

"Transitional provisions

35A. (1) Every fresh produce agent who was the holder of a fidelity fund certificate immediately prior to the date of commencement of the Agricultural Produce Agents Amendment Act, 2003, shall within the period determined by the council by notice in the *Gazette* apply on his or her own behalf and on behalf of every person who acts as an agent on his or her behalf as contemplated in subparagraph (i) of paragraph (a) of the definition of 'fresh produce agent' in section 1, for a fidelity fund certificate, and shall furnish the council with the information that the council may determine relating to himself and such persons.

(2) Notwithstanding subsection (1), each person who immediately prior to the date of commencement of the Agricultural Produce Agents Amendment Act, 2003—

- (a) was the holder of a fidelity fund certificate contemplated in that subsection, shall—
 - (i) in the case of a fresh produce agent, be deemed to be the holder of a fidelity fund certificate issued in terms of that section: Provided that such certificate shall lapse if a new certificate is not issued to the agent within the period specified in subsection (1);
 - (ii) in the case of a livestock agent, be deemed to be the holder of a registration certificate;
- (b) carried on business as an export agent, shall be deemed to be the holder of a registration certificate.

(3) The provisions of subsection (2) shall not relieve any person who acts or professes to act as—

- (a) a fresh produce agent and who is not in possession of a fidelity fund certificate at the commencement date of the Agricultural Produce Agents Amendment Act, 2003, to apply to the council for a fidelity fund certificate and to furnish the council with such information as it may determine;
- (b) a livestock agent and who is not in possession of a registration certificate at the commencement date of that Act, to apply to the council for a registration certificate and to furnish the council with such information as it may determine;
- (c) an export agent and who is not carrying on business as such at the commencement date of that Act, to apply to the council for a registration certificate and to furnish the council with such information as it may determine.

(4) Members of the council in office immediately prior to the commencement of the Agricultural Produce Agents Amendment Act, 2003, shall remain in office until the termination of their term of office: Provided that the Minister shall appoint such additional members to the council as may be required from time to time."

Short title

31. This Act is called the Agricultural Produce Agents Amendment Act, 2003.

MEMORANDUM ON THE OBJECTS OF THE AGRICULTURAL PRODUCE AGENTS AMENDMENT BILL, 2003

BACKGROUND AND OBJECTS

The Agricultural Produce Agents Act (the Act) was enacted in 1992 to regulate the professions of fresh produce agent and livestock agent. In essence it is the same as other legislation governing professions, such as the Estate Agents Act or the Veterinary Professions Act. The principle underlying this kind of legislation is self-governance, i.e. the profession basically governs itself and is not dependent on Government support or funding.

Not all agents are the same or operate in the same manner. Two main types can be identified, namely ones that take a price risk (i.e. offer a minimum price or a fixed price to their principals) (e.g. livestock agents) and ones where the risk of profit or loss is totally for the account of the principal (such as commission agents operating on the national fresh produce markets). The Act is mainly concerned with the latter, as these agents deal with the assets and money of other people in a fiduciary capacity. Farmers are often the target of unscrupulous business practices and especially the weakest are not in a position to protect themselves. Nevertheless, they are expected to compete in a free market environment and it is legislation such as this that is absolutely necessary to give them some form of protection.

Most of the existing fresh produce markets operate, on the principle of commission sales, i.e. agents that sell on a commission basis for producers, and the Act requires these agents to keep trust accounts and to belong to a fidelity fund. If a farmer incurs losses the fund compensates him or her. On the other hand, livestock agents offer their principals a fixed price up front and are not required to keep trust accounts or to belong to a fidelity fund, on the basis that there is little risk for the principal. However, they still have to adhere to a code of conduct published under the Act.

The Amendment Bill is aimed at correcting practical deficiencies which have surfaced with the passing of time while at the same time accommodating present-day concepts such as good corporate governance.

The most important amendments to the Act are:

- The reconstitution of the governing body (the Agents Council) to facilitate the government policy on representivity and enhance good corporate governance;
- to make clear distinction between the functions of the Agents Council and those of the registrar;
- to require salesmen (and not only their principals) to also hold fidelity fund certificates;
- to amend the requirements relating to the lodging of guarantees in order to facilitate entry into the occupation;
- to safeguard the guarantee fund against overutilisation;
- to enhance the functioning of disciplinary committees to regulate the occupation; and
- to provide for the extension of the jurisdiction of the Agents Council to export agents.

The major changes proposed by the Amendment Bill are generally of a technical nature and do not introduce new concepts. Minor amendments are proposed in the following areas:

- To provide for gender neutral references; and
- to provide certain transitional provisions so as to ensure continuity between the existing and the reconstituted Councils.

CONSULTATION

In addition to the Bill being published in the *Government Gazette* for general comment, the following role players were consulted:

- Agricultural Produce Agents Councils
- Institute of Marketing Agents in South Africa
- Institute of Market Masters in South Africa
- South African Federation of Livestock Auctioneers
- National Agricultural Marketing Council.

All welcomed the proposed amendments.

FINANCIAL IMPLICATIONS FOR STATE

The Bill holds no financial implications for the State.

PARLIAMENTARY PROCEDURE

The State Law Advisers and the national Department of Agriculture are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.