FINAL DECISION OF THE APPEAL BOARD REGARDING THE FIVE APPEALS LODGED BY THE APPELLANTS LISTED BELOW IN TERMS OF SECTION 10 OF THE AGRICULTURAL PRODUCTS STANDARDS ACT, 1990 (ACT NO. 119 OF 1990)
[Reg. 5(7)]

MEMBERS OF THE APPEAL BOARD

1. An Appeal Board was constituted in terms of section 10(3) of **Agricultural Product Standards Act, No. 119 of 1990 (as amended)** ("**the APS Act**"), and the following persons were appointed by the Director-General to serve as members of the board:

Duty on board	Name	Company and job title
Chairperson	Ms. Gabriele Gess	Gaby Gess Attorneys
Member	Mr. Malose Daniel Matlala	Deputy Director: Inter-Agency Liaison and Regulatory Nutrition (National Codex Contact Point: South Africa) Directorate: Food Control
Member	Ms. Maphuti Kutu	Technical Specialist: Food & Agro-processing – Regulatory Research and Development National Regulator for Compulsory Specifications

THE PARTIES

2. The Appellants, or groups of Appellants, lodged five separate appeals, and five separate prescribed fees were paid. Although certain Appellants were made up of a group of entities, they will be referred to for the sake of convenience as a single Appellant and are ascribed the numbers First to Fifth Appellants for the sake of convenience and easy reference. The particulars of each of the Appellants (and the bodies constituting each), the Respondent, and the representatives, attorneys and counsel who appeared before the Appeal Board, are set out below.

The First Appellant

3. The First Appellant was the **National Chamber of Milling**, the group of Appellants being made up of the **National Chamber of Milling**, the **South African Chamber of Baking**, **Grain SA**, **Animal Feeds Manufacturers Association**, **South African Cereals and Oil Seeds Trade Association and PepsiCo Inc. South Africa Essential Foods and Snacks and Beverage Business Units**.

4. The First Appellant was represented by Webber Wentzel Attorneys, and Advocates L. Sisilana and A. Raw.

Second Appellant

5. The Second Appellant was the **Consumer Goods Council of South Africa**.

6. The Second Appellant was represented by Clyde & Co Attorneys, and Advocates R.G. Patrick and D.M. Robertson.

The Third Appellant

7. The Third Appellant was **Agbiz Grain**, which acted on behalf of **Afgri**, **BKB Grainco**, **GWK**, **Kaap Agri**, **NWK**, **Overberg Group**, **OVK**, **SSK**, **Senwes**, **Grainlink**, **Suid Wes**, **TWK Agri** and **VKB**.

8. The Third Appellant was represented by Mr. W. Lemmer, a layperson, who prepared the documents on behalf of the Third Appellant and made oral representations, with a Mr. T. Meintjies, at the hearing on behalf of the Third Appellant.

The Fourth Appellant

9. The Fourth Appellant was **Tiger Consumer Brands Limited**.

10. The Fourth Appellant was represented by ENS Africa Attorneys, and Advocate I. Currie.

The Fifth Appellant

11. The Fifth Appellant was **Premier FMCG**.

12. The Fifth Appellant was represented by Primerio South Africa Attorneys, and Advocates A. Stein, SC and T. Palmer.

The Respondent

13. The Respondent was **Leaf Services (Pty) Ltd** ("**Respondent**").

14. The Respondent was represented by Smith Vosloo Attorneys, and by Advocate G. Naudé, SC.

THE APPOINTMENT OF THE APPEAL BOARD

15. The Appeal Board was established in terms of section 10(3) by the Director-General, in terms of the APS Act. Appeals in terms of section 10 are to be conducted in terms of section 10 of the APS Act, read with the relevant Regulations regarding appeal procedures, as published in Regulation 1260, dated 27 September 2019, published in Government Gazette 42726 dated 27 September 2019.

16. The appeals were lodged by five Appellants or groups of Appellants, against a notice published by the Respondent, as an assignee designated in terms of section 2(3)(a) of the APS Act, more particularly

Notice 382 of 2021 ("Notice 382"), published in Government Gazette 44761 dated 25 June 2021.

17. After the appeals had been lodged by the five Appellant groups against Notice 382 within the prescribed period, and the prescribed fees having been paid, the Director-General constituted the Appeal Board, in terms of Regulation 4(1)(a) to assist in dispensing or adjudicating the appeals that had been lodged. The Director-General initially designated three persons to serve as an Appeal Board, being Advocate Siyanda Myendeki (who was designated as Chairperson of the Appeal Board), Mr. Malose Daniel Matlala (as member) and Ms. Maphuti Kutu (as member). Thereafter, Advocate Syanda Myendeki withdrew his availability as Chairperson and member of the Appeal Board, and on **17 August 2021**, the Director-General designated Ms. Gabriele Gess as the third member of the Appeal Board, and as Chairperson thereof.

18. The Appeal Board, as reconstituted by the Director-General, was mindful of the provisions of Regulation 5(8), as to the prescribed period within which the Appeal Board was to decide an appeal (being 21 days) and obtained the requisite consents of the Appellants in writing, to the extension of the prescribed period so as to enable the Appeal Board to undertake its work. This is dealt with below when the procedure adopted by the Appeal Board is addressed.

19. The Appeal Board, as envisaged in section 10(3)(a)(i), was referred the appeals against Notice 382 for investigation and decision. As required by Regulation 5(5) the Appeal Board was required, after hearing all representations from the parties, to either confirm, set aside or amend the decision or direction concerned; and/or issue any order in connection with the decision or direction as it deemed fit.

PROCEDURE ADOPTED BY THE APPEAL BOARD

20. After the five Appellants and the Respondent had been afforded an opportunity of making representations to the Appeal Board with regard to the procedure, the Appeal Board issued, by mutual agreement, procedural directions on **21 September 2021**, as to the manner in which the appeal would be heard. These directions were as follows:

    20.1. All meetings and proceedings would be recorded, and the recording would be made and kept by the Secretariat of the Appeal Board;

    20.2. The appeal hearing itself, for the hearing of oral submissions/arguments, would be conducted virtually by Microsoft Teams;

    20.3. The five appeals would be consolidated, with the consent of all five Appellants and the Respondent, it being understood that the effect thereof would be:

20.3.1. A single hearing would take place, with each of the Appellants and the Respondent being entitled (either through legal representatives or in person) to make their own individual submissions;

20.3.2. Any Appellant was entitled to withdraw their individual appeal at any time, and this would not affect the rights of any of the other Appellants or the Respondent;

20.3.3. The procedure adopted would in no way limit the individual Appellants from advancing any ground of appeal relied upon by them;

20.3.4. Each individual appeal would still be considered on its own merits;

20.3.5. No concession or approach adopted by any one Appellant would in any way bind, or be to the detriment of any of the other Appellants in advancing the grounds of appeal relied upon by them;

20.3.6. A single final decision, with reasons, would be issued by the Appeal Board, in which the merits of all five individual appeals would be considered.

21. It was recorded in the directions given by the Appeal Board, that the Appeal Board intended to submit written questions to the **Department of Agriculture, Land Reform and Rural Development** ("**DALRRD**"), and would seek written responses thereto. Depending on the reply, the Appeal Board might also address questions in writing to the Department of Finance/National Treasury. The Appeal Board was of the *prima facie* view that the written questions and answers should be circulated (preferably prior to the submission of Heads of Argument) to all the Appellants and the Respondent. None of the Appellants, or the Respondent, raised any objection thereto. The Appeal Board, after receiving input from all the parties, further provided a table for the agreed procedural steps and timeline for the completion thereof, as follows:

21.1. All those Appellants who had not yet replied to Leaf Service's response to the appeals, would do so by no later than **21 September 2021**;

21.2. The Appeal Board would send a letter to the DALRRD, with questions by **22 September 2021**;

21.3. The Appeal Board would circulate an index indicating the Appeal Board's paginated record by **30 September 2021**;

21.4. The Appeal Board would make available correspondence (questions/answers) with the DALRRD and the Department of Finance/Treasury (if applicable) on receipt of any reply;

21.5. Heads of Argument (points to be presented in short form) might be submitted by the Appellants, which would be distributed by the Secretariat to all Appellants and to the Respondent, ten days before the submission of oral submissions, and by **5 November 2021**;

21.6. Heads of Argument might be submitted by the Respondent which the Secretariat would distribute to all Appellants (five days before oral submissions) and by **15 November 2021**.

22. It was further agreed that the hearing of oral representations and/or argument would take place over two days on **23** and **24 November 2021**, with the first day being utilised for each of the Appellants to present their arguments; the morning of the second day to be utilised by the Respondent in answer, and the afternoon of the second day for the Appellants to be afforded the right of reply. A specified time slot was afforded for each of these oral submissions.

23. It was further agreed that the Appeal Board would commence deliberation after the commencement of the oral submissions, and would notify of the final decision by **10 December 2021**.

24. By reason of the fact that there had been delays occasioned by the reconstitution of the Board, as also to afford the parties a proper opportunity to file written submissions, thereafter exchange Heads of Argument, and make oral submissions, each of the Appellants was requested to agree in writing, the decision of the appeal to be delivered by **10 December 2021**, and according to extend the period of 21 days that was prescribed for the decision of the appeal. All five Appellants consented thereto, as envisaged in Regulation 5(8), and the Respondent also raised no objection thereto.

25. The Respondent filed five separate written responses, to address the issues raised in the five individual appeals. The Appellants thereafter made use of the opportunity of filing replies.

26. The Board submitted questions to the Executive Officer on **22 September 2021**, and after promptly receiving the written response from the executive officer on **13 October 2021**, circulated these responses to the Appellants and the Respondent.

27. At a later stage, and on or about **2 November 2021**, shortly before the Appellants' Heads of Argument were due in terms of the agreed timetable, the Respondent sought to introduce a considerable volume of additional documents, estimated by the Respondent to constitute approximately 8 lever arch files of paper. The Appeal Board did not admit

these documents and sought submissions from the Appellants as to whether or not same should be provisionally allowed. The Appellants objected thereto, on the ground of prejudice and the likelihood that the appeal timetable would be unduly delayed. The Respondent indicated that it did not wish the appeal process to be postponed, by reason of the introduction of these further documents. In the circumstances, the Appeal Board provisionally did not allow the admission of these further documents. Subsequently, during the hearing, the Appeal Board was not requested by any of the parties to admit these further documents introduced by the Respondent, and same were accordingly not allowed. The Appeal Board had no regard thereto.

28. During the course of the hearing itself, the Fifth Appellant sought to introduce further documents, to which the Respondent objected, unless the Respondent was afforded an opportunity to respond thereto. The Fifth Appellant withdrew same. The Third Appellant after the conclusion of the oral representations on **24 November 2021**, sought to introduce further documents. These were not admitted.

29. Once the Appeal Board had received all documents filed by the parties in terms of the timeline, five separate bundles were prepared, indexed and paginated, each containing the grounds of appeal relied upon by the Appellant, the response by the Respondent, and the reply by the Appellant. The record of the Appeal is made up of the five paginated bundles that were utilised at the oral hearings; the written questions submitted by the Appeal Board to the Executive Officer and the response thereto; the heads of argument; and recordings of the oral hearings.

BRIEF OVERVIEW OF THE APS ACT

30. The APS Act was promulgated in 1990, and commenced in September 1991. It was subsequently amended in 1993[1] ("**the 1993 Amendment**") and 1998[2] ("**the 1998 Amendment**").

31. Section 3(1) of the APS Act empowers the Minister to prohibit the sale of prescribed products unless those products:

    31.1. Are sold according to the prescribed class or grade;[3]

    31.2. Comply with the prescribed standards regarding the quality thereof, or a class or grade thereof;[4]

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[1] General Law Third Amendment Act, 129 of 1993.
[2] Agricultural Product Standards Amendment Act, 63 of 1998.
[3] Section 3(1)(a)(i).
[4] Section 3(1)(a)(ii).

31.3. The prescribed requirements in connection with the management control system, packing, marketing and labelling of that product are complied with;[5]

31.4. If the product contains a prescribed prohibited substance or does not contain a prescribed substance;[6] and

31.5. Unless the product is packed, marketed and labelled in the prescribed manner or with the prescribed particulars.[7]

32. Section 2 of the APS Act provides that the Minister shall designate an Officer in the service of the DALRRD as executive officer, who shall, subject to the control and directions of the Minister, exercise the powers and perform the duties conferred upon or assigned to the executive officer by or under the APS Act.[8] In addition, in terms of section 2(3)(a), the Minister may, for the purpose of the application of the APS Act, or certain provisions thereof, with regard to a particular product, designate any person, undertaking, body, institution, association or board having particular knowledge in respect of the product concerned, as an assignee in respect of that product.[9] In terms of section 2(3)(b)(i) of the APS Act, an assignee thus designated shall, unless expressly provided otherwise and subject to the directions of the executive officer, exercise the powers and perform the duties that are conferred upon or assigned to the executive officer by or under the APS Act, with regard to the product referred to in section 2(3)(a).[10]

33. Section 3A of the APS Act, which was introduced by the 1998 Amendment, grants the executive officer, or the assignee, as the case may be, in the case of control in terms of section 3(1) and 4A(1), the power to enter any place, premises or conveyance in or upon which any product, material, substance or other article in respect of which the Act applies, or is upon reasonable grounds suspected to be produced, processed, treated, prepared, classified, graded, packed, marked, labelled, kept, removed, transported, exhibited or sold, and to conduct certain actions, set out in sections 3A(a) to 3A(f).

34. In terms of section 4 of the APS Act, the Minister may prohibit the export from the **Republic of South Africa** ("**Republic**") of a prescribed product

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5 Section 3(1)(a)(iii).
6 Section 3(1)(a)(iv).
7 Section 3(1)(a)(v).
8 Section 2(1).
9 Section 2(3)(a).
10 Section 2(3)(b).

unless each quantity of that product, intended for export, has been approved by the executive officer for that purpose.[11]

35. In terms of section 4A, the Minister may prohibit the sale of a prescribed product imported into the Republic unless each quantity of such product intended for sale in the Republic complies with the provisions of section 3(1) of the APS Act.[12]

36. Section 7 of the APS Act affords powers to the executive officer or the assignee, on the authority of a warrant issued in terms of section 7(2), and for purposes other than for the purpose of the application of section 3A, to enter upon any place, premises or conveyance for the purposes set out in this section. Such a warrant shall, in terms of section 7(2) be issued by a Judge of a High Court or a Magistrate who has jurisdiction in the area where the place or premises in question are situated, or where the conveyance is or will be.

37. Section 8 of the APS Act provides for the executive officer, or the assignee, to seize the whole or part of any quantity of a product, material, or any book or document, as envisaged in that section.

38. Section 11 of the APS Act, provides for certain offences and penalties. This will be reverted to below.

39. Section 15 of the APS Act empowers the Minister to make Regulations regarding the matters set out in Sections 15(1)(a) to 15(1)(h).

THE PROVISION FOR FEES IN THE APS ACT

Control over the sale of products - Section 3(1A)(a) and (b)

40. The APS Act provides, in section 3(1A)(a) as follows:

> "*a)* ***Fees may be charged*** *in respect of the powers exercised and duties performed by the executive officer or the assignee, as the case may be,* ***to ensure compliance with this section****.*
>
> *(b) In the case of powers exercised and duties performed by–*
>
> *(i) the executive officer, the* ***prescribed fee*** *shall be payable; and*
>
> *(ii) the assignee, the* ***fee determined*** *by such assignee shall be payable*."
>
> (highlighting and underlining added)

[11] Section 4(1)(a).
[12] Section 4A(1)(a).

41. Section 3(1A)(a) was inserted in the APS Act by way of the 1998 Amendment.

Inspection, grading and sampling for quality control - Section 3A(4)

42. Section 3A(4) of the APS Act provides for certain fees, where specific actions are taken by the executive officer or an assignee, in relation to the control of the prescribed product in the case of control in terms of section 3(1), 4(1) and 4A(1),[13] as follows:

> "*(4) In the case of action **under subsection (1)(b), (c), (d) or (e)** by the relevant person referred to in subsection (1), the owner of the product in question shall pay the **prescribed fees** or the amount **determined by the assignee**, as the case may be, for such action*."
>
> (highlighting added)

43. Section 3A(4) was inserted by way of the 1998 Amendment.

Application for approval of export products - Section 4(2)(a) and (b)

44. Section 4(2) of the APS Act provides for fees in the context of approval of the prescribed product for export,[14] as follows:

> "(*2) **An application for an approval** referred to in subsection (1) shall–*
>
> *(a) in the case **where an assignee** has been designated under section 2(3)(a), be made at the time and in the manner determined by such assignee, and **upon payment of the fees that the said assignee determines**; or*
>
> *(b) in the case where **no assignee** has been so designated, be made in the prescribed manner and the **prescribed fee** shall, in respect of such application, be payable in the prescribed manner and at the prescribed time".*
>
> (highlighting added)

45. Section 4(2) was substituted by section 3 of the 1993 Amendment.[15]

Application for approval of imported products – Section 4A(3)

46. Section 4A(3) provides for fees in the context of approval of a prescribed product imported into the Republic,[16] as follows:

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[13] Section 3A(1).
[14] Section 4(1)(a).
[15] The Minister by way of example, promulgated Regulations in respect of the control of the export of grains, Regulation R1026 dated 19 December 2014 in Government Gazette 38320 dated 19 December 2014, and made reference to a gazetted fee payable for inspection and analysis, which was made up of the prescribed inspection fee when grains were presented for inspection, a laboratory analysis fee, and a courier fee.

> *"(3)* ***An application for an approval*** *referred to in subsection (1)(b)(i) shall be made in the prescribed manner and the* ***prescribed fee*** *shall, in respect of such application, be payable in the prescribed manner and at the prescribed time."*

(highlighting added)

47. There is no reference in section 4A(3) to a fee determined by an assignee.

48. Section 4A(3) was inserted in the APS Act by way of the 1998 Amendment.[17]

Offences and penalties - Section 11(1)(b)

49. Section 11 of the APS Act, dealing with offences and penalties, provides in section 11(1)(b) that any person who "*refuses or fails to pay the* ***prescribed fees*** *in terms of section 3(1A)(b)(i), 3A(4), 4(2)(b), 4A(3), 5(3) or 10(2) shall be guilty of an offence*."

(highlighting added)

50. There is no provision for an offence or penalty where a person refuses or fails to pay a fee determined by an assignee.

Definitions - Section 1

51. Section 1 of the APS Act defines "***prescribed***" as meaning "*prescribed by regulation*". "***Regulation***" in turn is defined as meaning "*a regulation made under section 15*".

Regulations – Section 15

52. Section 15 of the APS Act provides as follows:

> *"**15. Regulations**–*
>
> *(1) The Minister may make regulations regarding–*
>
> *(a) any matter which in terms of this Act is required or permitted to be prescribed;*
>
> *…*
>
> *(g) "inspection fees that had been determined by the assignee*";
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> …

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[16] Section 4A(1)(a).

[17] The Minister promulgated Regulation No. 1269 in Government Gazette 42739 dated 4 October 2019, in respect of section 4A(1)(b) of the APS Act.

(4) A regulation prescribing fees shall be made with the concurrence of the Minister of Finance."

53. Section 15(1)(g) was inserted in the APS Act, by way of the 1998 Amendment.

54. It would appear from the above (and to be further discussed below) there may therefore be:

54.1. Fees prescribed for the executive officer (Sections 3(1A)(b)(i), 3A(4), 4(2)(b), and 4A(3));

54.2. Fees determined by an assignee (Sections 3(1A)(b)(ii), 3A(4) and 4(2)(a));

54.3. Fees prescribed by the Minister and in respect of functions of the assignee (Sections 4A(3); and

54.4. Inspection fees determined by an assignee and then subjected to regulation by the Minister (section 15(1)(g)).

55. As appears from what follows, the issue of fees goes to the heart of the five appeals.

THE APPOINTMENT OF THE RESPONDENT AS ASSIGNEE

56. The Respondent was appointed by the Minister of Agriculture, Forestry and Fisheries, under Section 2(3) of the APS Act, with effect from **17 May 2016**, as an assignee for the purpose of the application of sections 3(1)(a) and (b), 3A(1), 4A(1)(a), 7 and 8 of the APS Act, with regard to agricultural products of plant origin destined for sale in the local market.[18] The products in respect of which The Respondent was so appointed as assignee, were grain and grain products, as listed in the appointment.

THE NOTICE APPEALED AGAINST: NOTICE 382 OF 2021

57. On **25 June 2021**, the Respondent caused Notice 382 to be published in the Government Gazette.[19] It is against this Notice 382 that the five appeals have been directed.

58. In the Notice 382, the Respondent stated that it would commence inspections of Affected Parties in line with its mandate, as from **12 July 2021**.

59. With regard to fees, the provisions contained in Notice 382 may be summarised as follows:

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[18] This was published as Notice 345 of 2016, in Government Gazette 40075 of 17 June 2016.
[19] Government Gazette 44761 dated 25 June 2021.

59.1. An "*inspection fee*" was imposed in terms of Section 3(1A) of the APS Act, on all grain and grain products listed in paragraph 2.3 of Notice 382.[20] Such inspection fee would be charged on:

59.1.1. Grains sold by or on behalf of the producer thereof;

59.1.2. Grain products processed or converted or caused to be processed or converted, if the grain product was sold by the processor or convertor thereof; and

59.1.3. Grain in respect of which a silo receipt or any negotiable instrument had been issued if the fee in respect of such grain had not already been paid in terms of sub-paragraph (a) (ie. where it was sold by or on behalf of the producer thereof);[21]

59.2. The inspection fees were to be valid from **12 July 2021**, and would be levied at the rates provided in paragraph 2.3 of Notice 382, until a further Notice published in the Government Gazette;[22]

59.3. The inspection fees to be imposed were listed in paragraph 2.3. These were at the following rates:

59.3.1. In respect of canola, dry beans, ground nuts, maize, malting barley, rice, sorghum, wheat, soya beans, sunflower seeds and other regulated grain, at a rate of **R1.80** per ton;

59.3.2. In respect of maize products and wheat products (excluding bread) at a rate of **R4.00** per ton; and

59.3.3. In respect of bread (per loaf) at a rate of **R0.02** per loaf;[23]

59.4. Paragraph 2.5 provided that the inspection fees payable in terms of paragraph 2.1, read with paragraph 2.3, would be payable at the first point of sale, as follows:

59.4.1. Fees payable on the sale of grains (raw products) by or on behalf of producer, shall be paid by the buyer of the grain;

59.4.2. Fees payable on the sale of grain products, other than bread, shall be payable by the processor or convertor of the grain product;

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[20] Notice, para 2.1.
[21] Notice, para 2.1(a) to (c).
[22] Notice, para 2.2.
[23] Notice, para 2.3.

59.4.3. Fees payable on the sale of bread shall be paid by the baker selling such bread;

59.4.4. Fees payable as contemplated in paragraph 2.1(c) (which was grain in respect of which a silo receipt or any other negotiable instrument had been issued, and the fee in respect of such grain had not already been paid) shall be paid by the person issuing such silo receipt or other negotiable instrument;

59.4.5. Fees payable on imported regulated products shall be paid by the importer of such products;

59.5. Paragraph 2.6 provided that the amount of the fees payable in terms of paragraphs 2.5(a) and 2.5(b) may be recovered from the producer;

59.6. Notice 382 envisaged declaration of sales volumes, to be used for calculation of the inspection fees payable by an affected party. In terms of paragraph 2.8.2, affected parties were required, on a monthly basis, to declare the volumes of regulated products sold in and/or imported into the Republic, by completing the Return of Sales and Imports form provided online by The Respondent, on the Customer Web Portal. The Return of Sales and Imports was required to be completed before or on the seventh day of each month, in respect of sales during the preceding month;

59.7. Paragraph 2.8.3, which provided for invoicing, stated that on the completion of the monthly return as to volumes of regulated products sold in and/or imported into the Republic, by an Affected Party, The Respondent would issue the Affected Party with an invoice reflecting the volume of sales and/or imports declared by that Affected Party in respect of the preceding month; the fee per unit payable in terms of Notice 382; and the total amount of the fee payable to The Respondent in respect of the preceding month;

59.8. Paragraph 3 of Notice 382 stated that the failure by the Affected Party responsible to pay the "*inspection fee*", levied in terms of Notice 382, "*may result in legal steps to enforce the provisions and may render the affected person liable in terms of Section 11 of the Act*." Section 11 is the offences and penalties section of the APS Act;

59.9. With regard to the manner in which inspections were to be carried out, paragraph 4 of Notice 382 stated that:

> "*Inspections will be carried out according to the methodology developed in consultation with role-players in the industry and agreed with the Executive Officer designated in terms of Section 2(1) of the Act, which is available from Leaf Services at www.leafservices.co.za/report or at*

the address provided below, or from the Executive Officer at mbulahenim@dalrrd.gov.za."

59.10. The document referred to in paragraph 4 was described as "Leaf Services Inspection Methodology and Fees June 2021".[24] The express purpose of this document was, inter alia, to communicate the impact on stakeholders of methodology and cost, and to address the frequency of inspections. Important matters raised in this document included;

59.11. It was stated in the Notice that the "*Standard Operating Procedure: Risk-profiling of food business operators of regulated grains, oil seeds and grain products for the purpose of inspection by the designated Assignee"* applied;[25]

59.12. The SOP referred to was stated to be available from the DALRRD website or on request from the Respondent;

59.13. In the initial year of inspections, every **Food Business Operator** ("**FBO**") was to be considered as low risk;

59.14. It was stated that *"according to the guidance from the SOP",* the inspection frequencies were to be adjusted upwards from year two in accordance with the number of annual non-compliances identified. This was set out in tabular form. By way of example, a medium risk FBO with three annual identified non-compliances would have a 25% increase in inspection frequencies; and a high risk FBO with five identified non-compliances would have a 50% increase in inspection frequency. The number of inspections for a low risk FBO, with no identified non-compliances would remain unchanged;

59.15. The frequency of inspections for all FBO's during year one would be four. This would remain the same in year two for the low risk FBO with no identified non-compliances. By way of example, the medium risk FBO with three annual identified non-compliances would have a 25% increase in inspection frequencies to five; and a high risk FBO with five identified non-compliances would have a 50% increase in inspection frequency to six inspections.

59.16. Fees had been determined by the Respondent on a "cost-recovery basis" spread evenly across production in the Republic. It was stated that a unit rate (rate per ton for grain/rate per kg for flour products/rate per loaf for bread) had been determined to recover

[24] A copy of this document appears at Bundle B, page 75 to 87.
[25] Para 2.1.1.3.

the costs of operations and analysis costs to ensure that clients were billed evenly in line with their sales volumes:[26]

59.17. The Respondent was using a recovery rate of 75% of total estimated fees for breakeven, and was said to cover the degree of payment disobedience that might be encountered, currently unknown legal costs, the success rate for debt recovery as well as other contingencies;

59.18. The Respondent had calculated, based on volumes in tons, or of loaves (as set out in tables) and headcount (based upon the number of inspection points, inspection frequency and the number of employees that would be required), that a total cost of **R72 million** would be incurred by the Respondent, which would be recovered by the per unit fees to be charged. The rate per ton across unprocessed/unmilled products was **R1.80** per ton and bread at **R0.02** per loaf.[27]

60. Notice 382 makes it clear that, although the Respondent had been appointed as assignee in terms of Section 2(3) of the APS Act, for the application of sections 3(1)(a) and (b), 3A(1), 4A(1)(a), 7 and 8 of the Act, the "*inspection fees*" were specifically imposed, on the grain and grain products listed in paragraph 2.3, pursuant to paragraph 2.1 thereof, in terms of section 3(1A) of the APS Act.

61. The fees referred to in paragraph 2.1 of Notice 382 (being imposed in terms of Section 3(1A) of the APS Act), were accordingly fees to be charged in respect of the powers exercised and duties performed by the Respondent as assignee, to ensure compliance with Section 3(1). There was no express reference to fees under the following other sections:

61.1. Section 3A(4) which provided for the payment by the owner of the product of prescribed fees, or the amount determined by the assignee (as the case might be) in the case of action under sections 3(1)(b), (c), (d) or (e);

61.2. Section 4(2)(a) in respect of applications for approval of products intended for export, as envisaged in section 4(1) of the APS Act (Respondent had not been appointed as an assignee for exported prescribed products, which are controlled in terms of section 4(1) of the APS Act);

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[26] At para 2.3.
[27] At para 2.3 to 7.

61.3. Section 4A(3), in respect of an application for an approval of a quantity of imported products intended for sale in the Republic, as envisaged in section 4A(1)(b)(i).

62. It was common cause between the Appellants and the Respondent furthermore, that no Regulations had been made by the Minister, in terms of section 15(1)(g) of the APS Act, in respect of The Respondent. In terms of section 15(4) no such Regulation prescribing fees, in respect of the Respondent, had received the concurrence of the Minister of Finance.

THE 2017 STANDARD OPERATING PROCEDURE

63. A Standard Operating Procedure (referred to as an "SOP") was signed by the executive officer, Agricultural Product Standards, on **22 September 2017**. This was referred to during the course of the hearing as the "*2017 SOP*" (and will be referred to herein as the "***2017 SOP***"). This document was described as:

> "*Standard Operating Procedure (SOP): Risk-profiling of food business operators of regulated grains, oil seeds and grain products for the purpose of inspection by the designated Assignee*."

64. The objective contained in the 2017 SOP, was described as being:

64.1. To ensure compliance of grains, oil seeds and grain products intended for sale in the Republic to applicable local/import regulations in terms of the APS Act; and

64.2. To outline how the inspections of grains, oil seeds and grain products shall be carried out by the assignee The Respondent in accordance with the risk profile of each Food Business Operator (FBO) following the first (1st) year of risk profiling.

65. The scheme of the 2017 SOP envisaged at paragraph 6 that a complete database of identified FBO's was to be developed and maintained and inspection points within FBO's identified.

66. With regard to the frequency of inspections, it was provided that: *"The initial (base) frequency of inspection shall be recommended by the Respondent, and such frequency shall be agreed with the affected industry stakeholders before the final confirmation of such".*[28]

67. The inspections were to be undertaken in accordance with the applicable Regulations for grains, oil seeds and grain products.[29]

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[28] 2017 SOP, para 6.4.
[29] 2017 SOP, para 6.5.

68. Each FBO site would then be profiled as either High, Medium or Low risk, which would determine the frequency of inspections, The categorization of FBO's into these three categories was dependent upon the recorded incidence of non-conformities of that FBO, per all inspections conducted during the first year.[30]

69. The frequency of inspection for each inspected and categorized FBO was to be determined as follows. For low risk FBO's, the frequency of inspection was to be reduced by 50% per year from the initially determined frequency during the first year of commencement, or after the profiling of the FBO, (as the case might be). For medium risk FBO's, the frequency of the inspection might in similar circumstances, be reduced by 25% from the initially determined frequency, in the same manner as for the low risk FBO. In the case of a high risk FBO, the frequency of inspection would remain unchanged, but where there were non-compliance within a stipulated range, the frequency of inspections might be increased according to a formula.[31]

70. The undertaking of inspection as set out in the SOP was to be carried out with full consideration of the agreed service level agreement, also referred to as Directive in terms of section 2(3)(b) and (c) of the APS Act.[32]

71. On enquiry by the Appeal Board from the parties, it appeared to be common cause that agreement had (and has) not been reached with affected industry stakeholders as to the initial (base) frequency of inspection.

THE DRAFT 2021 STANDARD OPERATING PROCEDURE

72. The Appeal Board was also informed that a draft SOP had been (and still was) under discussion (the "**2021 SOP**"), but that this had remained as a draft, and had never been agreed to, or finalised.

73. The 2021 SOP was published by the DALRRD, for comment on **17 June 2021**, with comment called for by **25 June 2021**. The latter date was the same date on which Notice 382 (the Notice appealed against) was published by the Respondent in the Government Gazette. A meeting had been arranged by the executive officer to discuss the 2021 SOP on **7 July 2021**.

74. This 2021 SOP envisaged a different methodology to that contained in the 2017 SOP.

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[30] 2017 SOP, para 6.9(a) to (c).
[31] 2017 SOP, para 6.10.
[32] 2017 SOP, para 6.13.

74.1. In similar terms as before, the initial (base) frequency of inspections was to be recommended by the Respondent, and "*such frequency shall be agreed with the affected industry stakeholders before the final confirmation of such*";[33]

74.2. During the first year of implementation, a database of inspection findings was to be compiled for each FBO with a view to profiling the risk inherent in each FBO;

74.3. Each FBO site would be profiled as a high, medium or low risk, according to the number of recorded contraventions in respect of that FBO pursuant to the inspections carried out in that first year;

74.4 The frequency of inspection for each inspected and categorized FBO would be determined and varied on the following formula. The frequency of inspection for an FBO categorized as a low risk FBO would remain the same as the initially determined frequency during the first year of commencement or after the profiling of the FBO. The frequency of the inspections for an FBO categorized a medium risk would be <u>increased</u> by 25% from the initially determined frequency during the first year of commencement or after profiling; year, and in the case of an FBO categorized as high risk, there would be an <u>increase</u> by 50% from that initial frequency. Depending upon the level of non-compliance, in the case of a high risk FBO, the initial frequency level might be further <u>increased</u> by up to 75%, or even 100%.

<u>THE RESPECTIVE STATUS OF THE 2017 SOP AND DRAFT 2021 SOP</u>

75. On **21 October 2021**, in response to written questions put to the executive officer by the Appeal Board, the executive officer advised that:

> "*The Standard Operating Procedure (SOP) signed by the Executive Officer and dated 22 September 2017, its currency did not obtain and further it has since been rendered nugatory by the publication of the "Prohibition Regarding the Removal of Imported Regulated Agricultural Products intended for sale in the Republic of South Africa from the prescribed ports of entry, Notice 1269 of 4 October 2019" to underscore the aforegoing, there is currently an impending SOP, which will become operational in due course that succeeding the impugned SOP*."

76. The Respondent, in its Heads of Argument, confirmed that, as far as it was concerned, the 2017 SOP had not been formally updated, replaced or supplemented, and described it as the "*current*" SOP.[34] The

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[33] 2021 Draft SOP, para 6.4.

[34] The Respondent in its Heads of Argument, page 3, para 6, when referring to the inquiries made by the Appeal Board with regard to the 2017 SOP, stated that the Respondent could confirm "*that this document has <u>not</u> been formally updated, replaced or supplemented*".

publication adopted by the DALRRD of publishing the draft 2021 SOP for comment on 17 June 2021, calling for comment thereon by 25 June 2021, serves to confirm that the 2021 SOP was merely a draft.

77. The above analysis of the methodology contained in the 2017 SOP and the Draft 2021 SOP, confirms that the methodology referred to by the Respondent in Notice 382 (and as set out in the Respondent's June 2021 Inspection Methodology referred to in paragraph 4 of that Notice) with regard to frequency of inspection, was not that provided for in the 2017 SOP but rather that contained in the draft 2021 SOP.

78. An e-mail exchange dated **17 June 2021** and **18 June 2021** respectively, between the executive officer and The Respondent, was attached to the Respondent's Heads of Argument.[35] As indicated therein, the Respondent, with the apparent consensus of the executive officer, had agreed amongst themselves to a minimum initial inspection level for all FBO's for the first year at four inspections per year, with an adjustment upwards where non-conformities were encountered. All FBO's would be viewed, at the start, as low risk, and with a minimum number of inspections to enable a risk-based classification of FBO's to take place. (This was the methodology in line with that contained in the Respondent's June 2021 Methodology and the draft 2021 SOP, and not the 2017 SOP). The initial inspection level for all FBO's was set at four per annum (as also contained in the Respondents June 2021 Methodology), but no agreement to this effect had been reached with industry stakeholders, as appears to have been required in both the 2017 SOP and the draft 2021 SOP.

79. In response to the First Appellant's Appeal, the Respondent contended that the SOP was a "*guiding document*" only and did not have legislative force.[36] The Respondent also contended that, in the absence of agreement have been arrived at with affected industry stakeholders, it could itself determine the initial inspection level for FBO's.[37]

GROUNDS OF APPEAL

80. The various grounds of appeal raised by the five Appellants raised issues of procedural fairness, and also various substantive grounds. These grounds of appeal will be summarised briefly below, in respect of each Appellant. Where the arguments of successive Appellants are not

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(Underlining added). In para 7 of the Heads of Argument the Respondent referred to the 2017 SOP as being the "*current SOP*". The Respondent accordingly does not share the same view as the executive officer with regard to the current status of the 2017 SOP.

35 Respondent's Heads of Argument, unnumbered annexure.

36 Bundle A, page 84, para 117.

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materially different, they will be briefly mentioned but not repeated in any respect of each Appellant.

The First Appellant

81. The First Appellant raised seven grounds of appeal,[38] which it grouped into five groups, as follows:

    81.1. Unconstitutionality on the ground that the Notice purported to be a money Bill

    81.2. The Notice was *ultra vires*;

    81.3. The inspection fees were not computed on a cost-recovery basis;

    81.4. The inspection fees were informed by an inspection frequency that had not been agreed to by industry;

    81.5. The decision was not preceded by a procedurally fair process;

    81.6. The decision to impose the inspection fees was irrational;

    81.7. The decision to impose the inspection fees was unreasonable and unlawful.

Ultra vires the APS Act

82. The First Appellant contended that it was important, when a fee is determined and charged in terms of Section 3(1A)(a) and (b)(ii) of the Act, to identify the power or duty in respect of which the fee is to be determined and charged. It contended that the only relevant power and duty, when it came to inspection fees, was the power and duty to inspect under Section 3A(1)(c) of the APS Act.[39] It contended that Notice 382 was *ultra vires* the powers under Section 3(1A)(a) of the APS Act, because the Respondent purported to charge an inspection fee that had nothing to do with inspections.[40] It then contended that Notice 382 tells its purpose, being to commence inspections and, in doing so, to charge inspection fees for the purpose of carrying out the inspections. Notice 382, in other words, was about inspections, the fees for inspection, and nothing else. It was then contended on behalf of the First Appellant that the fees were being charged for a purpose other than that for which the power had been conferred, and regardless of whether or not any inspections were undertaken at all, and that the fee was levied on sales, not in exchange for inspections. Because The Respondent had charged

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[38] Bundle A, First Appellant's Grounds of Appeal, pg. 6, para 14.
[39] First Appellant's Heads of Argument, pg. 7, para 15-16.
[40] First Appellant's Heads of Argument, pg. 7, para 16.

an inspection fee, whether or not it ever conducted inspections, accordingly rendered Notice 382 *ultra vires* the APS Act, and it fell to be set aside.

The charging of fees was limited to a cost-recovery basis

83. The First Appellant contended that the Respondent, as an assignee, was limited to charging fees on a cost-recovery basis and not permitted to make a profit. Accordingly, if the effect of Notice 382 was to make a profit, then the decision is irrational and should be set aside on that basis, as the Respondent is only permitted to recover its cost of inspection. In advancing this argument, the First Appellant relied upon the reported decision of ***Bertie van Zyl (Pty) Ltd trading as ZZ2 & Others v Minister of Agriculture, Forestry and Fisheries & Others***.[41] The Notice that was impugned in ***Bertie van Zyl*** was a Notice published by Product Control of Agriculture Prokon (an assignee designated in terms of Section 2(3) of the APS Act), for inspection fees in respect of specific categories of products, which were imposed by the assignee in terms of Section 3(1A)(a)(ii) of the APS Act. This was the Notice published in Government Gazette 6 January 2017, referred to in paragraph 31 of the Judgment). The First Appellant also relied, for the submission, upon an unreported case of ***South African Fruit and Vegetable Canners Association & Another v Impumelelo Agri Business Solutions (Pty) Ltd & Others*** **(Perishable Products Export Control Board as *amicus curiae*)**,[42] in which it was also held, in respect of that assignee, that the assignee could only recover its own expenses through the levying of fees.[43]

84. The First Appellant also relied upon various concessions by the Respondent that it was required to charge fees on a cost-recovery basis,[44] as also on a document issued by the DALRRD dated 28 March 2017, in which it was stated that Section 3(1A) of the APS Act allowed an assignee to charge fees in respect of the powers and duties performed,

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41 [2021] 4 All SA (SCA), esp. at paragraph 38, where the Court stated that: "*The purpose of the power to determine inspection fees, as I have explained, is to secure compensation sufficient to meet the assignee's costs of carrying out its public duties in a competent and efficient manner*."

42 [2021] JOL 50418 (GP), esp. at para 29.

43 In that matter, the impugned Notice was one published in Government Gazette dated 25 May 2018, No. 41650, Notice 267 of 2018. Similarly, the assignee, designated in terms of section 2(3) of the APS Act, had imposed certain fees in terms of section 3(1A)(a)(ii) of the APS Act. The fees were said to be imposed as being inspection fees in respect of specified categories of products, which might be sold in the Republic of South Africa, and provided for fees for large processing facilities, fees for importers and fees for small processing facilities, but were costs on the basis of cost per inspection visit, travelling, and costs of laboratory testing.

44 Bundle A, First Appellant's Grounds of Appeal, page 11, para 4.1 and footnote 13.

but that assignees *"must charge their fees on a cost recovery basis and not a profit basis."* [45]

85. The First Appellant further contended that the manner in which the Respondent had calculated the fees (as set out in the income statement provided in the Respondent's 2021 Business Plan), was not on a cost-recovery basis, but on a profit basis. Further, that even if Respondent was entitled to make a profit and was not simply recovering its costs, it was unreasonable to seek to recover costs on the basis set out in Notice 382.[46] Insofar as the fee was not linked to the actual cost of inspection, but was rather intended to recover the cost of the operations of the Respondent as a whole, and included costs such as head office costs, salaries, provision for bad debt, depreciation and for fixed costs,[47] this was unreasonable.[48] The Appellant also referred to one of the Respondent's comments, with regard to the calculation of the budget based upon a 75% recovery, that the potential over-recovery should rather be seen as the provision for the total sum of contingencies, *"and to provide a reasonable return for investors".* [49]

<u>The inspection fees were informed by an inspection frequency that had not been agreed to by industry</u>

86. The First Appellant contended that, contrary to the provisions of the 2017 SOP, the initial (base) frequency of inspection was not subject to agreement with affected industry stakeholders.[50]

87. The Respondent had itself, impermissibly, determined the initial (base) frequency for inspections and then proceeded to calculate it's inspection fees thereon.[51]

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[45] Bundle A, First Appellant's Grounds of Appeal, page 11, para 4.1 and 'Questions and Answers (Q&A) on Assignees Designated in terms of the Agricultural Products Standards Act, 1990 (Act No 119 of 1990)", dated 28 March 2017, at Bundle A, page 50 to 57 and esp. at page 53, Q9.

[46] First Appellant's Heads of Argument, pg. 17, para 44.

[47] First Appellant's Heads of Argument, pg. 18, para 46.

[48] First Appellant's Heads of Argument, pg. 19, para 48.

[49] Bundle A, Appellant's Grounds of Appeal, Annexure "A1", page 37, para 26.

[50] It should also be noted that in the 'Questions and Answers (Q&A) on Assignees Designated in terms of the Agricultural Products Standards Act, 1990 (Act No 119 of 1990)", dated 28 March 2017, at Bundle A, page 50 to 57 and esp. at page 54, Q12, it was stated that: "*the frequency of inspection will be discussed and <u>agreed with each individual industry</u> and will, where possible and necessary, be accommodated in the existing regulations.*" (underlining added).

[51] Bundle A, First Appellant's Grounds of Appeal, page 12 para 5.1 to 5.3.

The decision was not preceded by a procedurally fair process

88. The First Appellant contended that the determination of the inspection fees by the Respondent constituted administrative action, and accordingly that in this instance the process preceding the publication of Notice 382 was inadequate and did not afford affected parties to make meaningful representations.

89. In advancing this argument the First Appellant contended that where there were material changes, or substantially new material, or additional documentation, affected parties must be afforded the opportunity to comment afresh, and that the requirement of comment could not be negated by a decision maker contending that affording multiple opportunities to comment would result in a protracted and repetitive process.[52]

90. The First Appellant contended that the information made available was deficient which made it impossible for the affected parties to comment meaningfully. Furthermore, there were material differences between the second notice published on 23 April 2021 and Notice 382 (including the number of proposed initial (base) inspections, and new information that was not available at the time that the Second notice was published for comment. This included the publication of the document "Leaf Services Methodologies and Inspection Fees June 2021", which was published on the Respondent's website after the 23 April 2021 notice (and which is that referred to in Notice 382). Accordingly, so it was contended, no opportunity was provided to comment on this document.[53]

91. It was contended that these shortcomings vitiated the requirement of procedural fairness.

The decision to impose the inspection fees was irrational

92. The First Appellant contended that there was no rational connection between inspection fees that were levied on the volume of the total sales and the monitoring and ensuring of compliance with the APS Act. What was being introduced, so it was contended, was a levy on sales, and that it was unclear how that levy on every item sold related to inspections conducted four times per year and how it would further compliance with the APS Act.[54] Secondly, that the inspection of products by the

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[52] Bundle A, First Appellant's Grounds of Appeal, page 14, para 7.3. The First Appellant relied in this regard upon the decision of *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism and Another* 2006 (10) BCLR 1179 (C), at para 85 to 90.

[53] Bundle A, First Appellants' Grounds of Appeal, page 13 to page 18.

[54] Bundle A, First Appellant's Heads of Argument, page 18 to 19, para 8.2.1.

Respondent constituted a duplication of existing functions and served no purpose.[55]

The decision to impose the inspection fees was unreasonable and unlawful.

93. The First Appellant further sought to impugn Notice 382, on the following grounds:

    93.1. There was no indication of non-compliance, or that the current system of self-regulation did not adequately control the quality of the regulated products;

    93.2. The application of a volume-based approach was unreasonable;

    93.3. The differentiated treatment of wheat and maize products for purposes of determining inspection fees was unreasonable.

    93.4. The total value of the inspection fees to be collected by the Respondent was unreasonable;

    93.5. The contents of the income statement included in the 2021 Business Plan was unreasonable;

    93.6. The inspection frequency was arbitrary and unreasonable.

The Second Appellant

94. The Second Appellant contended *inter alia* that Notice 382 was *ultra vires* and unconstitutional because it amounted to the imposition of a levy, in a similar fashion as a levy is recovered under the **Marketing of Agricultural Products Act, 47 of 1996** ("**MAP Act**"), and that the APS Act did not permit an assignee to raise revenue by levies. Further, that it amounted to a money bill, which imposed levies, duties or surcharges as opposed to a fee.[56]

95. It was also contended that Notice 382 was *ultra vires* the APS Act, for two reasons, being:

    95.1. The inspection fees charged by the Respondent were not charged in exchange for services; and that section 3(1A) and 3A(4) only permitted the Respondent to charge fees in exchange for services;

    95.2. The attempt to recover fees based upon volumes, rather than in exchange for a service rendered, was *ultra vires* because the APS Act required a genuine fee to be paid.

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[55] Bundle A, First Appellant's Heads of Argument, page 19 to 20, para 8.2.2.
[56] Second Appellant's Heads of Argument, pg. 4-5, para 6-9.

96. With regard to the method of inspection, the Respondent was required to establish where and how often it must discharge its duties, before it could establish any reliable method for inspection. It had failed to do this, and had afforded no reason or rationale for adopting the initial inspection frequency of four times per annum. It had also failed to take into account self-regulation by facilities or bakers, or the extent to which different products called for different approaches in the nature and frequency of inspections.[57]

97. The Second Appellant further contended that the fees were required to be on a cost-recovery basis, which they were not. They were also excessive, amounted to profiteering, and were against the public interest. Reliance was placed on the passage, at paragraph 35, of the Judgment in ***Bertie van Zyl***.[58]

98. With regard to the issue of procedural fairness, the Second Appellant referred to the fact that the determination of a fee amounted to administrative action and was accordingly required to be procedurally fair, in terms of the **Promotion of Administrative Justice Act, Act 3 of 2000** ("**PAJA**"), and it was contended that the procedure adopted by the Respondent with regard to Notice 382 were procedurally unfair. In this regard it was maintained that the procedure had fallen short because:

    98.1. The Respondent had published a Notice for comment in **23 April 2021**;[59] and had thereafter subsequently gazetted the Notice 382, on **25 June 2021**, which stated that inspections were to commence on **12 July 2021**, without any further invitation to comment;

    98.2. Because Notice 382 disclosed substantial changes in fees and methodology from the previous Notices published for comment on **5 February 2021** and **23 April 2021** respectively, there ought to have been an further opportunity to comment on the changed methodology and fees contained in Notice 382, and for the Respondent to take their comments into account. This not taken place, and no such further opportunity for comment had been afforded.

99. Second Appellant contended that Notice 382 sought to impermissibly change the instance of liability for the fees. That Section 3A(4) of the

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[57] Second Appellant's Heads of Argument, pg. 9, para 23.

[58] In this passage, at para 35, the Court had stated: "*The purpose of the power of the assignee to determine a fee is to permit the assignee to be compensated for the cost of carrying out its duties in a competent and efficient manner*." Reference was also made to ***South African Fruit and Vegetable Canners*** (supra) at para 41.

[59] General Notice No. 212 of 2021 of 23 April 2021.

APS Act, required fees to be paid by the owner of the product, but that Notice 382 envisaged fees to be payable by buyers of grain and convertors of grain, which might be recovered from the producer of grain, with fees payable by the baker of bread to be recovered from the person issuing a silo receipt or other negotiable instrument.

100. Finally, that Section 238 of the Constitution, provided that an Executive Organ of State might delegate any power or function to those to be exercised or performed in terms of legislation to any other Executive Organ of State. It was argued that, since its designation, and prior to implementation, the Respondent had become foreign owned, and was not an Organ of State, but a private for profit company and therefore that the delegation had been impermissibly implemented in terms of Section 238.

The Third Appellant

101. The Third Appellant represents an association of 11 members involved in the handling and storage of a claimed more than 67% of the Republic's raw grain and oilseed crop.

102. This Appellant, opposed the introduction of an "*inspection service*" at all, and contended that the grain industry was successfully self-regulated and had not requested the introduction of inspection services. This introduction was not, so it was contended introduced as a consequence of proven complaints with regard to non-compliance by affected stakeholders that would justify the introduction of these services.[60] At the hearing, in answer to a question from the Appeal Board as to how many FBO's would be required to be inspected by the Respondent if the initial (base) frequency of inspection were to be applied, the Respondent's Counsel indicated there were approximately 3300, and that at four inspections per year, this amounted approximately 13 000 per annum.

103. It was further contended that whilst it might be legally justified in compliance with the APS Act to introduce inspection services, there was no justification to add an additional layer of costs in the food chain.[61]

104. The Third Appellant further stated that it had proposed that the Respondent consider a volume-based approach at the first point of sale.[62] At the hearing Mr. Lemmer, who represented the Third Appellant in person indicated that he was of the view that the most efficient manner of levying fees was in a similar manner to which statutory levies were imposed and collected on different products in terms of the MAP Act. In

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[60] Bundle C, Third Appellant's Grounds of Appeal, page 17, para 12.3.
[61] Bundle C, Third Appellant's Grounds of Appeal, page 17, para 12.3.
[62] Bundle C, Third Appellants further Heads of Argument dated 20 August 2021, page 10-11.

terms thereof, different rates were imposed per weight on various different product types and not according to uniform across the board tariffs. He pointed out that in his view the imposition by the Respondent of a uniform fee per ton for all grain types, as contained in Notice 382, would prejudice certain product types and advantage others, and result in unjustified cross-subsidizations. The issue was also previously raised by Mr. Lemmer as to the possible subsidization of the rates applied to grain products by the tariffs applicable on raw grains.[63]

105. Mr. Wessels also raised a concern with regard to the issue of potential reserves in the hands of the Respondent, and how these might be addressed.[64]

106. The Third Appellant raised similar objections to Notice 382 to the other Appellants, including those relating to the procedural issues, the manner in which the quantum of fees had been determined and the failure of the Respondent to reach agreement with affected parties regarding the initial (base) inspection frequency.

The Fourth Appellant

107. The Fourth Appellant also contended, *inter alia*, that the Respondent, in publishing Notice 382, purported to employ a fee collection method, similar to that provided for in the MAP Act and that the APS Act does not permit fees to take the form of levies. It was envisaged in terms of the APS Act that assignees would perform acts of inspection, for which they will charge a fee, and the imposition of a form of statutory levies was not permitted. The Respondent's fees were in reality levies, which were not permitted in terms of the APS Act. It was contended that the Marketing Act provided for statutory levies, whilst there was no such express provision contained in the APS Act;[65]

108. That the Respondent planned to undertake its operations, and levy its levies, on the basis of an SOP that was a draft, and which the DALRRD had already stated "*would become operational in due course*."[66]

109. The Fourth Appellant further contended that Notice 382 stood to be set aside, and challenged the imposition of the fees on *inter alia* the grounds that the fees imposed by the Respondent:

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[63] Bundle C, Third Appellants further Heads of Argument dated 20 August 2021, page 12.
[64] Bundle C, Third Appellants further Heads of Argument dated 20 August 2021, page 11.
[65] Fourth Appellant's Heads of Argument, pg. 3, para 6.
[66] Third Appellant's Heads of Argument, pg. 1-2, para 32.

109.1. Were required to be calculated on a cost recovery basis, which was the only basis upon which administrative charges could be imposed in terms of the APS Act;

109.2. The Respondent did not charge impose fees on a cost-recovery basis and the Respondent's model is to recover a profit, and achieve a return to investors, was irreconcilable with cost-recovery.

109.3. Had have no discernible or cognizable connection to the costs incurred by Respondent to carry out its duties in a competent and efficient manner.[67]

The Fifth Appellant

110. The Fifth Appellant took issue with the procedural fairness relating to Notice 382, and also raises substantive matters.

111. The Fifth Appellant contended that the Respondent failed to discharge its public comment duties with regard to Notice 382, and that the previous versions of the Notice were materially different to Notice 382, both with regard to methodology and tariff, and therefore that the Respondent had failed to follow an appropriate public participation process. It developed this argument with reference to the timeline of events, and in particular:

111.1. The first Notice published for comment on **5 February 2021**, contained a methodology based on a feasibility study that was commissioned by Respondent, dated **31 January 2021**, and which explored various methodology models and a proposed fee structure, calculated on a per unit of commodity basis, and premised on Respondent earning **R15 million** in profit;

111.2. The second Notice published on **23 April 2021**, was accompanied by, and based upon the 2017 SOP, and Respondent's business plan dated **April 2021**;

111.3. On **18 June 2021** Respondent had circulated a draft final Notice, advising that it would publish same on **25 June 2021**, but there was no further invitation for comment thereon;

111.4. Notice 382 was published on **25 June 2021** and stated that the fees had now been imposed. Notice 382 contained a link to a methodology which affected parties saw for the first time when Notice 382 was published. This was furthermore premised on the draft 2021 SOP, and contained a new fee structure which was not

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[67] Fourth Appellant's Heads of Argument, pg. 4, para 11. In this regard the Fourth Appellant referred to ***Bertie van Zyl.***

previously presented, and in respect of which there had been no opportunity to comment;

111.5. In the parallel process relating to the draft 2021 SOP, the executive officer had on **17 June 2021** published same for comment by **25 June 2021**. This latter date was the same day that the Respondent had published Notice 382. On **7 July 2021** meetings were called for between DALRRD and stakeholders in connection with the draft 2021 SOP, which had not been finalized.

112. The Fifth Appellant accordingly contended that Notice 382 published on **25 June 2021**, was significantly different to the earlier two Notices (being those published on **5 February 2021** and **23 April 2021**), and that the failure to afford an opportunity to comment on that new methodology and decision was unlawful. For that reason, the administrative process that had been followed was procedurally unfair and Notice 382 stood to be set aside.

113. The substantive grounds of appeal raised by the Fifth Appellant related to the methodology and the tariff components of Notice 382.

114. The Fifth Appellant contended that the methodology adopted in Notice 382 was unlawful, as it was contrary to, and not consistent with the 2017 SOP, in that the 2017 SOP prescribed that the initial frequency of inspections for the first year would be a maximum number of inspections, being those imposed in respect of a high risk FBO; the 2017 SOP prescribed that the initial frequency of inspections was to be agreed by the Respondent with affected industry stakeholders; that it was envisaged that a Service Level Agreement be concluded. In addition, that imported products would not be inspected against the local regulations upon arrival at the port of entry.[68]

115. The 2021 draft SOP differed from the 2017 SOP. The initial frequency of inspections was set at a minimum level (ie. that of a Low risk FBO) rather than a maximum level as before. Imported products were to be inspected against the provision of the local Regulations upon arrival at the port of entry.

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[68] This is a reference to the provisions of 2017 SOP, and in particular para 11 relating to the provisions relating to imported raw grains, and in particular para 11.6 which stated that the imported product was not to be inspected against the provision of the local regulations upon arrival at the port of entry. Para 11.1 provided that risk profiling was not apply to imported raw grains. Para 11.2 provided that for all imported raw grains the regulatory specifications of the grades (classes of the exporting country would be used, subject to the provisos contained in the paragraph. These provisions with regard to the inspection of imported products appear, as was also pointed out by the Executive Officer, to have been superseded by the provisions of Regulation 1269 of 4 October 2019 dealing with imported regulated agricultural products intended for sale in the Republic.

116. The methodology relied upon in Notice 382 was erroneously based on the draft 2021 SOP and was adopted in that Notice contrary to the executive officer's directive in the form of the 2017 SOP, which required that frequency of inspections be agreed between the assignee and the stakeholders (which had not taken place).

117. Fifth Appellant contended that the 2017 SOP had not been replaced or amended and remained of full force and effect; that the initial frequency had not been agreed between the Respondent and affected parties as required by that SOP; that no Service Level Agreement was in place; and that no submission had been made to the Minister of Finance in terms of Section 15(4) of the APS Act.

118. The Fifth Appellant also contended that the methodology was also *ultra vires* and inconsistent with the APS Act, because functions of an assignee such as the Respondent under the APS Act were limited to powers of inspection and testing of products, not of FBO's. The Fifth Appellant referred to the language of Section 3A(1)(c) of the APS Act, which referred to that which was to be inspected or tested for compliance with the Act was the "*product*" in question, and not the FBO. It was the prescribed product, and not the FBO itself, which might be inspected and tested, and that the powers under the APS Act did not include the power to monitor a grading consistency at an FBO level, as a proxy for monitoring compliance of grading of products. The Fifth Appellant submitted that the APS Act required that a product's non-compliance be identified, before inspection of management control systems could be resorted to in terms of Section 3A(2)(c) of the APS Act.[69]

119. With regard to the tariff of fees imposed by the Respondent, the Fifth Appellant contended that this was:

    119.1. Irrational, unlawful and *ultra vires*; and

    119.2. Not based on a fee for services rendered, as required by the APS Act;

    119.3. Purportedly imposed on a cost recovery basis, whilst was the Respondent was in fact operating on a profit basis.

120. With regard to the contended unlawfulness of the fee, Fifth Appellant elaborated that:

    120.1. It was determined without a methodology first having been determined by way of a gazette, and that the tariff was dependent

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[69] As appears below, it would appear that these contentions and submissions are based on an incorrect interpretation of the APS Act.

on methodology. Tariff determination (properly calculated) could not begin without the methodology being determined first;[70]

120.2. The volume basis of the tariff was *ultra vires* the APS Act because it was based entirely on production volumes, and not the performance by the Respondent of any inspection or testing services. It was charged per ton, irrespective of whether or not inspections took place;

120.3. The Respondent had no power to impose a levy by way of a value based fee. A charge for per ton was not a consideration for inspection, instead it was a tax, similar to that in terms of the MAP Act.

121. In the result, the tariff was irrational and arbitrary because it had no link with the work to be undertaken by the Respondent, or its powers under the APS Act. That the tariff was calculated on a profit basis, and not a cost recovery basis which was not permissible.[71]

THE RESPONDENT'S CONTENTIONS

122. The Respondent chose to structure its Heads of Argument by dealing separately, and individually, with the grounds of appeal raised by each of the five Appellants. It is accordingly convenient to summarise the contentions contained in the Respondent's Heads of Argument, in the same format.

123. The Respondent approached the five appeals, in paragraphs 2 to 71 of each response, in a generic fashion. It then, in the separate dedicated responses to the contentions of the individual Appellants.

The Generic response

124. In this generic response, the Respondent contended *inter alia* that:

124.1. There had been two previous notices, in February 2021 and April 2021, and pursuant to the notice and comment method, submissions had been received to those notices;

124.2. No consensus had been obtained with regard to the structuring of fees per units sold, rather than a fee per inspection. Only the

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[70] Reliance was placed upon ***Woodlands Dairy (Proprietary) Ltd & Another v Minister of Agriculture, Forestry and Fisheries in the Government of the Republic of South Africa & Others*** [2021] 3 All SA 619 (GP).

[71] Reliance was placed upon ***Woodlands Dairy (Proprietary) Ltd & Another v Minister of Agriculture, Forestry and Fisheries in the Government of the Republic of South Africa & Others*** [2021] 3 All SA 619 (GP).

South African National Consumer Union had supported the argument of the Respondent for a unit-based fee;[72]

124.3. That Respondent contended that, although the fees required to be calculated on a cost recovery basis, a reasonable return should be allowed commensurate with the investment that was required by Respondent and the risks taken by it.[73] It did not agree that the fees based on cost recovery should include absolutely no profit;[74]

124.4. That the calculation of fees based on a 75% recovery rate, allowed a maximum of 25% of potential income to guard against contingencies, build up a reserve, and provide a "*reasonable return for investors*".

The response to the First Appellant

125. The Respondent answered the *ultra vires* argument raised by the First Appellant, by contending that an assignee is mandated in terms of the APS Act, to *inter alia* ensure compliance with section 3(1) of the APS Act, and that the purpose of the fees charged were to ensure compliance with the provisions of section 3 of that Act. It was incorrect to argue that the Respondent was only entitled, for the purposes of the exercise of its duties and exercise of its powers, to charge a fee once it had conducted an inspection at the premises of a particular FBO.

126. Leaf was empowered in terms of the APS Act to ensure compliance with section 3(1) of the APS Act, more specifically grading in terms of section 3(1)(a)(i) and (ii), and the fact that some FBO's employed their own graders for the products concerned did not detract from this power.[75]

127. That the Respondent contended that the fees charged were indeed based on a cost-recovery model, which included a provision for contingencies,[76] and referred to its Business Plan.[77]

128. Insofar as the First Appellant had contended that the inspection fees had been informed by an inspection frequency that had not been agreed to by industry, the Respondent contended that the SOP was a "guiding document" only, and did not have legislative force.[78] The initial inspection frequency recommended by the Respondent had been eight, which had subsequently been reduced to four. Stakeholders were the regulated and

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[72] Bundle A, Respondent's response, page 64, para 18.
[73] Bundle A, Respondent's response, page 64, para 19.
[74] Bundle A, Respondent's response, page 75 to 76, para 65 to 71.
[75] Bundle A, Respondent's response, page 81 to 82, para 102 to 110.
[76] Bundle A, Respondent's response, page 75 to 76, para 67 to 70.
[77] Bundle A, Respondent's response, page 83, para 111 to 114.
[78] Bundle A, Respondent's response, page 83 to 85, para 115 to 122.

not the regulator, and that the Respondent had followed a proper procedure in determining what the inspection frequency should be, but that the final decision as the initial frequency of inspections was that of the Respondent, and that four inspections per annum was a reasonable number.[79]

129. That there had been two previous notices inviting comments, followed by meetings with stakeholders, and that a notice and comment and public participation procedure "could not go on ad infinitum and the final decision on the inspection frequency lies within the powers of the assignee.[80]

130. The Respondent contended that the Respondent had followed a procedurally fair process, and that what mattered at the end of the day was that a reasonable opportunity had been afforded to members of the public, and all interested parties, to know what the issues were, and to have an adequate say therein. It was contended that the Respondent had in fact complied with the requirements for procedural fair action, in terms of PAJA, and had steered clear of the pitfalls identified in Judgments of the Courts, such as those relating to the assignee's Prokon, Impumelelo and Nejahmogul.[81] Accordingly, the Respondent denied that Notice 382 was not preceded by a procedurally fair process, and contended that the Respondent had complied with the minimum requirements for procedurally fair administrative action.

131. That Notice 382 and the 'Leaf Services Methodologies and Inspection Fees June 2021' were "*not documents to be commented on and is the final product of comments received and meetings held between Leaf and stakeholders. Final decisions are not for the purpose of comment and do not undermine a party's rights to a fair process*."[82]

132. The Respondent contended that it could not be disputed that the calculation of the fees was reasonable, and that it had been undertaken in a rational manner.[83] It was contended that stakeholders would not be paying for an inspector, stationed at its premises, and paying for each and every inspection conducted, on each and every consignment. In the circumstances, the volume-based approach, where fees were charged

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79 Bundle A, Respondent's response, page 84, para 120.

80 Bundle A, Respondent's response, page 84, para 121; Respondent's Heads of Argument, pg. 42-43, para 143-149.

81 In the case of ***Bertie van Zyl***, ***South African Fruit and Vegetable Canners Association*** and ***Woodlands Dairy***. It should however be noted that the process was engaged in by the Respondent prior to the decision in ***Bertie van Zyl*** on appeal, which was only delivered on **14 July 2021.**

82 Bundle A, Respondent's response, page 87 to 88, para 141

83 Respondent's Heads of Argument, pg. 52, para 185.

not only for the inspections performed but also, broadly speaking, for the maintenance of standards and for the benefit of dealing with products that had been regulated, rendered the volume-based approach reasonable, and that there was rationality in the decision to do so.[84]

133. The Respondent attached the calculation of its fees, entitled "Annexure B: Cost recovery calculation,"[85] and explained that it had calculated its fees on a breakeven basis of 75%, and that it needed to recover more than 75% of the fees on products produced to provide for contingencies and provide shareholders with a return on the significant capital investment that they had made. It contended that it was appropriate to include in the calculation salaries at the levels indicated, the rental of office space and other expenses.[86]

134. The Respondent also contended that the 75% weighted average collection rate was justified. It stated that it had established, from information received from the Grain Trust in the effectiveness of the collection of statutory levies (which Respondent then used to shape its collection model) that the weighted average collection rate achieved overall on grains was 89%. The best collection rate for yellow maize was only at a maximum of 75%. White and yellow maize contributed 72% of all the grains consumed in the Republic. The Respondent accordingly had used a 75% recovery rate as the breakeven rate.[87]

The response to the Second Appellant

135. The Respondent addressed the Second Appellant's argument that the Notice was *ultra vires* the APS Act, and the reliance by the Second Appellant on the passage in ***South African Fruit and Vegetable Canners Association***.[88]

136. In the text the passage from this case, in which the Judge indicated that, in his view, it was only rational that the proposed fees must be considered having regard to the frequency of inspections, the quantity of products to be inspected, the amounts of samples to be taken, what equipment is required, and the costs involved in considering each inspection (which would typically be contained in an SOP) was merely a *obiter dictum*, and that the Respondent did not agree therewith. The Respondent contended that he brought out an inspection methodology, and fees dealing with the frequency of inspection. He had also dealt with

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84 Respondent's Heads of Argument, pg. 50, para 173 to pg. 51, para 179.
85 Bundle A, Respondent's response, page 90, para 161 and at page 102.
86 Bundle A, Respondent's response, page 92, para 167.
87 Bundle A, Respondent's response, page 92, para 168 to 169.
88 ***South African Fruit and Vegetable Canners Association v Impumelelo Agribusiness Solutions (Pty) Ltd*** (supra) at para 41.

the volumes, the amounts or samples to be tested were dealt with in the relevant Regulations relating to the products concerned. The Respondent also dealt with the equipment or, stated otherwise, the methodology of its inspection. In the circumstances, the Respondent contended that it complied with a rational consideration of the inspection fees.[89]

137. In respect of the argument relating to the method of inspection, more particularly where and how often inspections could take place, was contended to have been determined with reference to a baseline of four inspections per annum. In this regard the Respondent contended that the final decision on the frequency of inspections was the decision of the Respondent, and had been determined by the Respondent after considering the input from the industry. The initial frequency had been determined by the Respondent in the positive method of four initial base frequency inspections. It contended that the issue of reaching agreement with regard to the frequency of inspections, did not relate to the initial base frequency, applicable during the first year after commencement, but only took place after sufficient facts had been established during the first year after the commencement. At the end of the day, the final decision on the frequency of the inspections was that of the Respondent, and that public participation, and the participation process, could not detract from this.

The response to the Third Appellant

138. The Respondent contended that the Third Appellant had supported the methodology employed by the Respondent, as also the collection of fees at the first point of sale. The Respondent further contended that many of the further grounds relied upon by the Third Appellant were not grounds of appeal directed against a decision or direction of the Respondent, and were therefore not competent as grounds of appeal against Notice 382.[90]

The response to the Fourth Appellant

139. The Respondent contended that the Fourth Appellant had raised two grounds of appeal, being the money bill argument, and the *ultra vires* argument, in that the fees may not take the form of levies. The Respondent further contended that these arguments had already been dealt with.[91]

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[89] Respondent's Heads of Argument, pg. 54, para 195-199.

[90] Respondent's Heads of Argument, pg. 60, para 223 to pg. 64 para 242 where the Respondent addressed the specific grounds relied upon by the Third Appellant.

[91] Respondent's Heads of Argument, pg. 65, para 243 where the Respondent briefly addressed the specific grounds relied upon by the Fourth Appellant.

The response to the Fifth Appellant

140. The Respondent responded that the process of notice and comment that had been followed satisfied the requirements for procedural fairness.

141. It was contended that the amended basis for the inspection regime was fully dealt with following the publication of the second Notice on 23 April 2021, and that this changed basis for the inspection regime was fully dealt with long before a decision was taken by the Respondent, and Notice 382 published. Notice 382 was not one open to comment, and represented the culmination of all information received and was the final decision of the Respondent. Respondent argued that the Fifth Appellant's contention that it was entitled to an opportunity to comment on the final Notice (Notice 382) was completely misplaced, because it had been afforded the opportunity to deal with the changes to the April Notice.[92]

142. With regard to the SOP argument, the Respondent conceded that the draft 2021 SOP had not been finalized, which failure it attributed to the grain industry. The Respondent however contended that the 2017 SOP was no more than a guiding document, was not binding, and could never supersede the APS Act or the Regulations thereto.[93] The Respondent contended that the methodology in Notice 382 had been arrived at after industry comments had been accommodated.[94]

143. The Respondent also took issue with the contentions that the methodology adopted in Notice 382 was irrational, and stated that the tariffs were determined by the Respondent, following an extensive participation process, culminating in the methodology adopted by the Respondent.[95]

THE STRUCTURE OF THE APS ACT BEFORE AND AFTER THE 1998 AMENDMENT

144. It is instructive to consider the APS Act prior to the 1993 and 1998 Amendments. In terms of the original 1990 Act:

    144.1. The Minister, in terms of Section 3(1) of the unamended Act, might prohibit the sale of a product, in the same circumstances as the present Section 3(1)(a), save that Section 3(1)(iii) was amended to include the requirement that a sale of a product could be prohibited where the prohibitions of a management control system had not been complied with;

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92 Respondent's Heads of Argument, pg. 68, para 258-261.
93 Respondent's Heads of Argument, pg. 69, para 262-266.
94 Respondent's Heads of Argument, pg. 69, para 263.
95 Respondent's Heads of Argument, pg. 71, para 274.

144.2. No fee was provided for the executive officer, or for the assignee, for the exercise of powers, or the performance of duties, to ensure compliance with Section 3(1)(a). The concept of fees being charged for the exercise of these powers and performance of these duties, was introduced in 1998, in the new Section 3(1A)(a) and (b);

144.3. The powers of entry, investigation and sampling were previously provided for in Section 7 of the Act, as amended, and in particular Section 7(2)(1)(a) to (e), contained similar powers to classify, examine, test and inspect and take samples, that are now contained in Section 3A(1)(a) to (e);

144.4. Section 7(5) of the unamended Act, provided for the owner of the product concerned, being required to pay fees for the performance of an action contained in Section 7(2)(a) or (f);

144.5. Section 3A was introduced in the amended Act, for inspection grading sampling and quality control, which included the power to classify, inspect, test and take samples, and introduced a fee to be paid by the owner in a case of any of the actions contained in Section 3A(1)(b), (c), (d), or (e). These were more extensive actions than those for which the owner was required to pay in terms of the unamended Act.

145. Accordingly, in the amended Act as at 1998, both Section 3(1A)(a) and (b), and Section 4A(4) were introduced, both of which introduced references to and/or liabilities for fees, which did not previously exist.

RELEVANT RECENT CASE LAW REGARDING FEES IN TERMS OF THE APS ACT

146. Fees for performing functions by assignees have, as the Appellants and Respondent submitted in argument, been the subject matter of four recent Court decisions, more particularly:

146.1. ***Bertie van Zyl (Pty) Ltd trading as ZZ2 & Others v Minister of Agriculture, Forestry and Fisheries & Others***;[96]

146.2. ***Woodlands Dairy (Proprietary) Ltd v Minister of Agriculture, Forestry and Fisheries in the Government of the Republic of South Africa***;[97]

146.3. ***Top Lay Egg Co-Op Limited & 3 Others v Minister of Agriculture, Forestry and Fisheries & 4 Others***;[98] and

[96] [2021] 4 All SA 1 (SCA).
[97] [2021] 3 All SA 599 (GJ).

146.4. ***South African Fruit and Vegetable Canners Association & Another v Impumelelo Agribusiness Solutions (Pty) Ltd & Others***.[99]

147. In all four of the above matters, aggrieved parties sought to impugn notices published in the Government Gazette by assignees, appointed in terms of section 2(3)(a) of the APS Act, in which they sought to impose fees. These Notices can be summarised as follows:

147.1. In ***Bertie van Zyl***, a notice was published[100] in terms of which an assignee (Prokon) imposed what it described as "*inspection fees*" in terms of Section 3(1A)(a)(ii) of the APS Act, in respect of certain categories of prescribed products (fruit and vegetables) to be sold in the Republic. The fees, which were described as "*inspection fees*" were divided into three categories, and were charged in various amounts per kilogram, though the rate per kilogram for many fruit and vegetables types were identical;

147.2. In ***Woodlands Dairy***, a notice[101] was published by an assignee (Nejahmogul Technologies and Agri Services), in respect of various dairy products, imposed what was described as fees in terms of Section 3(1A)(a)(ii) of the APS Act. The fee structure for a large processing facility (with more than 1 000 000 units per annum), and for importers, were stipulated at a set cost per inspection visit; a kilometer rate for travelling; and a cost for laboratory testing. Fees for small processing facilities (less than 1 000 000 units per annum) were on a different basis, and were set at a cost per unit value, described as **R0.02** per unit. In addition, in the notice it stated that any service request outside normal working hours would be charged at the normal fee, plus a surcharge of 20%;

147.3. In ***Top Lay Egg Co-Op***, a notice[102] was published by an assignee in terms of which that assignee (Agency for Food Safety (Pty) Ltd)) did not specify the section of the APS Act pursuant to which the fees were imposed, save that the notice stated that the assignee had been appointed to apply sections 3(1) and 4A of the APS Act. The inspection fees for abattoirs, production and packaging plants, were based on a rate per carcass or per egg produced or packaged per month in respect of further processing/packing facilities, in respect of poultry, meat and eggs, an hourly rate, a

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[98] (82759/2018) [2019] ZAGPPHC 221 (3 June 2019).
[99] (15066/18) [2020] ZAGPPHC 48 (6 March 2020).
[100] Notice 1 of 2017, published in Government Gazette 40537 dated 6 January 2017.
[101] Notice 267 of 2018, published in Government Gazette 41650 dated 25 May 2018.
[102] Notice 356 of 2017, published in Government Gazette 40847 dated 19 May 2017.

kilometer rate, and separate invoicing for laboratory costs were provided for. The point of inspection was at abattoirs, production and packaging plants. With regard to ports of entry, a fee was charged based upon the number of containers per month, and was a monthly tariff. For example, in the case of fewer than 10 containers per month, the tariff was **R2 000.00** per month, whereas, by way of example, where there were 10 to 24 containers per month, the tariff was **R2 500.00** per month. With regard to retailers in the informal sector, it was stated that same would be exempt from fees, but that inspections would take place from time to time, and samples might be taken at retail level, from road stalls, home industries, informal shops, roadside vendors, etc.

147.4. In ***South African Fruit and Vegetable Canners Association*** the notice,[103] stated that the assignee (Impumelelo) was assigned to apply Sections 3(1) and 4A of the APS Act, but did not specify in respect of which section of the APS Act the fees were being charged. The notice described the inspection fees were divided into local manufacturing and imported regulated products. For local manufacturing (in respect of products such as fruit juices and drinks, frozen food, jelly, jam, rooibos, vinegar, cat food and so forth), the inspection fee was an amount of **R1 672.00** per product inspection, and provision was made for the number of inspections per annum. In respect of imported regulated products, an inspection fee in Rands was quoted per container. If the container carried homogenous products, the inspection fee was **R1 495.00** per container, and the fee increased depending on whether the container was carrying mixed products, and how many mixed products. By way of example, a container carrying six different mixed products, would attract an inspection fee of **R2 392.00** per container.

148. What the four notices have in common, is that all four assignees sought to impose what was described as "*inspection fees*" (or albeit on different bases), in the context of there having been assigned to apply sections 3(1) and 4A of the APS Act. In the case of ***Top Lay Egg Co-Op***, and ***South African Fruit and Vegetable Canners***, the notice did not stipulate in terms of which section of the APS Act the fees were imposed. In ***Woodlands Dairy*** and ***Bertie van Zyl***, the assignee stated in both instances that the fee was imposed in terms of section 3(1A)(a)(ii) of the APS Act. This is similar to Notice 382, in terms of which the Respondent, imposed an inspection fee in terms of Section 3(1A) of the Act. In none of the four cases referred to, and also not in the case of The Respondent,

[103] Notice 509 of 108, published in Government Gazette 41870 dated 31 August 2018.

was there any reference in the notice to a fee being imposed in terms of section 3A(4) of the APS Act.

149. The approach adopted by the Courts in each of the four decided cases will be briefly considered below.

Bertie van Zyl

150. In ***Bertie van Zyl*** the Appellants had brought an application for the Gauteng Division of the High Court, for Orders in the following terms:

150.1. Declaring section 3(1A)(b)(ii) read with section 3A(4) of the APS Act, unconstitutional and invalid; and

150.2. Reviewing and setting aside the determination of the inspection fees by Prokon.

151. The Court held that the Act permitted the executive officer and an assignee to conduct inspections aimed at ensuring that certain agricultural products met the prescribed classifications and standards. The Court then went on to state:

> "*They charge fees to do so. In the case of the executive officer the fee is prescribed. In the case of the assignee, the Act stipulates, in section 3(1A)(b)(ii), that "the fee determined by such assignee shall be payable." I shall refer to this provision read with section 3A(4), which requires the owner of the product to pay the fee, as "the challenged provision"*."

152. The Court rejected the constitutional challenge to an assignee being permitted to charge fees in terms of section 3(1A). The challenge to section 3(1A) was that it infringed section 25 of the Constitution, in that it amounted to deprivation of property. The Court observed that the fees were charged for the service rendered by executive officers and assignees. Owners thus received consideration for the payment of fees, being the inspection of their products, to ensure that they may be sold in compliance with the Act. To receive a service for a fee did not amount to a deprivation of property.[104]

153. The Appellants also sought to review Prokon's determination of inspection fees in terms of section 3(1A)(b)(ii) of the APS Act. The Appellants challenged Prokon's determination of fees on two principle grounds being:

153.1. The determination was procedurally unfair; and

153.2. The determination was irrational.

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[104] ***Bertie van Zyl*** (supra) at para 2-12, and in particular at para 6.

154. With regard to the challenge that the determination was procedurally unfair, the Court approached the matter as follows:

154.1. The challenged provision, which had been identified as section 3(1A)(b)(ii) read with section 3A(4), did not prescribe a procedure to be followed so as to determine a fee;

154.2. In the absence of a procedure being prescribed, the determination of the fee must comply with the requirements of procedural fairness. It was common cause that the determination of the fee amounted to administrative action, and that section 4 of PAJA was of application. That section set out what the administrator must decide so as to give effect to the right to procedurally fair administrative action;

154.3. The assignee (Prokon) had decided to follow a notice and comment procedure;

154.4. The Appellants in that matter complained that the notice and comment procedure that had been followed by the assignee had failed to result in a fee determination that was procedurally fair. This argument was advanced on the following grounds:

154.4.1. The Regulations on fair administrative procedures, made in terms of section 10 of PAJA, required (amongst other matters) that the notice calling for comment by the public must be published in the Government Gazette (and elsewhere), and that the notice must contain sufficient information about the proposed administrative action to enable members of the public to submit meaningful comment.

154.4.2. Section 4(3)(a) of PAJA required the administrator to take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;

154.4.3. The publication of the proposed fees did not disclose the basis or methodology used to determine the proposed fees. In particular, the assignee had failed to provide information as to whether the proposed fees were determined so as to recover costs or allowed also for a profit to be earned. They contended that, for the public to make meaningful comment, the public was required to be given sufficient information. In the

absence thereof, the notice and comment procedure was not fair;[105]

154.4.4. The assignee contended that there was indeed an extensive consultative process that was followed. However, the Appellants contended that the yield of this process by way of comments did not meet their principal complaint as to fairness. Two notices had been published, inviting comments. There were various differences between the two notices, which included differences in inspection fees.

155. The Court concluded, with regard to the notices that:

> "*What is entirely absent from the two notices was any indication as to how the inspection fee was arrived at. Nor was there any explanation as to what to determine the differential in the rates as between the categories in the first notice, and within the categories in the second notice. The first notice, as indicated, does reference the risk that the levies may not cover costs. But nothing is said as to whether the fees are fixed to recover costs or make a profit, and if so, how the rate expressed in cents per kilogram, in different categories, achieves that end*."

156. With regard to the questions that had been raised, which included the basis upon which the assignee had used a rate per kilogram, when products had different values unrelated to weight, the Court stated that:

> "*What was required of Prokon in the notices calling for comment was information as to the basis of a fee based on weight, the rationale for the fee structure, the logic underpinning the categories, rate differentials and their relation to cost recovery*."

157. Finally, with regard to the issue of procedural fairness, the Court concluded that, absent the above information, those affected by the proposed fee determination were not placed in the position to make meaningful and informed comments, and as a result the consultative process did not meet the requirements of procedural fairness. Accordingly, the fee determination made by Prokon could not stand, since it was the outcome of an unfair process.

158. The Appellants had complained that the charging of fees in different categories, according to weight, meant that products that weighed more attracted a higher fee than products that weighed less, although the services to be rendered in respect of the products were the same. They contended that there was not any evident basis for the differentiation in fees as between and within categories and that the determination of the fees was accordingly "*irrational, arbitrary and capricious*".

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[105] ***Bertie van Zyl*** (supra) at para 23.

159. The Court approached this substantive issue on the following basis:

159.1. The exercise of public power, including the power to determine inspection fees by an assignee, must have a rational basis;

159.2. The assignee's power to determine a fee was a public power, conferred to permit the assignee to carry out a public function, being to enforce the regulatory scheme of the Act. The Court then stated that:

> "*The purpose of the power of the assignee to determine a fee is to permit the assignee to be compensated for the cost of carrying out its duties in a competent and efficient manner. The question is then whether the fees determined by Prokon are rationally related to this purpose*."

159.3. The assignee had sought to explain that it had calculated its costs for each of the markets to be served, estimated the anticipated volumes of product in each market expressed in kilograms, and then calculated the anticipated income it would each derive, expressed as a rate of cents per kilogram, so as to break even. The Court considered that this exposition by the assignee failed to explain how the anticipated number of inspections and the costs associated with those inspections, was rationally expressed by reference to the weight of the anticipated sales of products in each of the markets. The Court pointed out that:

> "*While the volume of the products that require inspection is of relevance to a determination of cost, wholly unexplained is how that cost increases with the unit weight of a particular product. Nor does the deponent make intelligible how different products come to be categorised in categories 1, 2 or 3 and the differences in the fee, expressed in cents per kilogram, both within and between categories*."

159.4. The Court accordingly found that the inspection fees, expressed in cents per kilogram, for each product arranged in three categories, with differential fees within and between categories, had no discernible or cognizable connection to the costs incurred by Prokon to carry out its duties in a competent and efficient manner. In the result, the rationality review had also been established.

Woodlands Dairy

160. The decision in ***Woodlands Dairy***, by Swanepoel AJ, was delivered on **22 February 2021**, prior to the Judgment of the Supreme Court of Appeal in ***Bertie van Zyl***, dated **14 July 2021**.

161. Nejahmogul had been designated by the Minister as assignee for dairy and related products. Thereafter, there were month-long attempts by the assignee and the dairy industry to find common ground on the manner in which the assignee would fulfill its obligations and exercise its powers, more specifically regarding the cost of inspections and the testing of

products. During the course of the process, the executive officer had undertaken that the inspection fees would not be published until they had been approved by the executive officer, and an SOP was in place. Although work was undertaken on an SOP, there was disagreement and the SOP was not finalised. The draft SOP that had been arrived at was generally acceptable to the industry, but there remained strong disagreement with regard to the proposed frequency of inspections, and the proposed inspection fees. Eventually, the executive officer had indicated that he would not become involved in formulating an SOP, and that the assignee could determine the frequency of inspections as it saw fit. The Court subsequently also found that the executive officer also "reneged" on his undertaking that the proposed fees would not be published until DALRRD had approved an SOP. The executive officer had expressed the view that it was unnecessary to implement an SOP before the inspections could commence, and that the assignee could proceed to implement the APS Act, without being "*encumbered*" by an SOP or a Service Level Agreement. In the absence of any consensus having been reached, the assignee published its fee structure in Notice 267 of 2018. This was at a time there was no SOP or any Service Level Agreement in place, and no agreement had been reached on the frequency of inspections.

162. The Court set aside the notice published by Nejahmogul (as assignee), on two bases:

162.1. Firstly, that the process by which the fees was determined was procedurally unfair, and stood to be set aside under section 6(2)(b) of PAJA;

162.2. Secondly, that the determination of the fees by the assignee was arbitrary, not rationally connected to the information before the assignee, or was so unreasonable that no reasonable person could have exercised the power in that way. The determination of the fees was not rationally connected to the purpose of the APS Act, which was the proper inspection and sampling of dairy products in order to determine whether the APS Act and the Regulations had been complied with. In particular, if the assignee had not determined what frequency of inspection was required to achieve that purpose, it would be unable to determine what infrastructure and personnel it required, and it followed that it could not compile a budget. The Court also found that the fee structure itself was irrational, not addressing, *inter alia*, the difference between a large and small processor, and how small processors were to be charged.[106]

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[106] ***Woodlands Dairy*** at para 82.

Top Lay Egg Co-Op

163. The judgment in ***Top Lay Egg Co-Op*** was delivered on **3 March 2020**, prior to both ***Woodland Dairy*** and the decision on appeal in ***Bertie van Zyl***.[107]

164. The principal attack on the notice in that matter was directed at the power to determine and levy the fees. The Applicant's principal complaints had been directed to the fact that they were, after various inspections, required to pay fees which they claimed were determined arbitrarily and capriciously, by persons who were not entitled to do so.

165. In considering the purposes of the APS Act, Davis J concluded that the purpose of section 3(1) thereof was, (in the context of that case), to prohibit the sale of poultry, meat and eggs unless it was sold according to the prescribed class or grade, the prescribed quality standards and accordingly packaged and labelled, as determined by the Minister.[108] In answering the question as to how the assignee was to determine whether a product in question complies with the Minister's determinations, the Court found the answer to lie in section 3A of the APS Act, which provided for numerous ways in which access could be had to products, and the products assessed in order to determine compliance with the determined standards of quality, labelling and packaging. Section 3A expressly stated "*in the case of control*" for the purposes of all three categories of products (ie. locally produced, exported or imported). **In the circumstances, the Court held that section 3(1) and 4A could not be logically severed from section 3A, or to put it differently, control over the compliance of products with the requirements determined in sections 3(1) and 4A could only take place by way of the powers created by section 3A.**[109]

166. With regard to the powers granted to the assignee, the Court held that when the Minister designated the assignee to perform the functions of quality control provided for in section 3(1), the rights and powers of inspection provided for in section 3A were by necessary implication afforded in order to enable the assignee to perform those functions. The same applied to the due designation in terms of section 4A relating to imported products.[110]

167. With regard to the fees payable for the performance of these functions by the assignee, the Court concluded that the answer was to be found in

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[107] The Respondent advised the Appeal Board that the decision in ***Top Lay Egg Co-Op*** was subject to a pending appeal.
[108] At para 7.9.
[109] At para 7.10 and 7.11.
[110] At para 7.13.

section 3(1A)(a), which provided that fees might be charged in respect of the powers exercised and duties performed by the executive officer or the assignee, as the case might be, to ensure compliance with section 3(1).

168. In answering the question as to who was liable to pay these fees, the Court concluded that section 3A(4) provided that in the case of actions under section 3A(1)(b), (c), (d) or (e), the owner of the products in question was required to pay the fees.

The Court was not required to undertake a review of the determination of fees in terms of PAJA, because it was of the view that internal remedies in section 10 of the APS Act had not been pursued.[111]

South African Fruit and Vegetable Canners Association

169. This Judgment was delivered by Molefe J in the Gauteng Division, Pretoria on **14 May 2021**. This Judgment was therefore delivered after that in ***Woodlands Dairy***, but prior to the Judgment on appeal in ***Bertie van Zyl***. The Appeal Board was informed that this decision is subject to a pending appeal. The Applicants in that matter challenged the imposition of the inspection fees by the assignee on the grounds that the determination of the fees were, *inter alia*, procedurally unfair and also that they were not rationally connected to the information before the assignee. In that matter the assignee had elected to follow the notice and comment procedure, prescribed in section 4(3) of PAJA when determining the fees.

170. The Court concluded,[112] after considering the process that:

> "*In my view, it is only irrational that the proposed fees must be considered having regard to the frequency of inspections, the quantity of products to be inspected, the amounts of samples to be taken, what equipment is required, and the costs involved in conducting each inspection. All this information would typically be contained in the Standard Operating Procedure (SOP) and/or business plan*."

CONCLUSIONS WITH REGARD TO THE PROVISION OF FEES IN TERMS OF THE APS ACT

171. The APS Act, as mentioned above, envisages control in three contexts, being control over the sale of products in South Africa (Section 3), control over export of products (section 4) and control over the sale of imported products (section 4A).

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[111] At para 9.4. In ***Bertie van Zyl***, the Court held that the failure by the Appellants to appeal under section 10(1) of the APS Act, even if it was an available remedy, should not frustrate the Appellants' review.

[112] At para 41.

172. Section 3A, provides for inspection, grading and sampling for quality control, and importantly states that the executive officer or the assignee may, during business hours of the industry in question in the case of "*control in terms of section 3(1)*", or at any time in the case of "*control in terms of section 4(1) and 4A(1)*", and to any place, premises or conveyance, and conduct the actions set out in section 3(1)(a) to (f).

173. There is accordingly a clear link between sections 3(1), 4(1) and 4A(1), in that the functions/actions provided for in section 3A, may be carried out by the executive officer or the assignee (as the case may be) for the purposes of control, as envisaged in any of section 3(1), 4(1) and 4A(1). This is also logical, as it is difficult to conceive of the manner in which the executive officer or assignee (as the case might be) would be in a position to carry out the control provided for in Sections 3, 4 and 4A, without performing one or more of the actions such as inspections provided for in section 3A(1). Accordingly, when acting under these sections, the executive officer or the assignee (as the case may be) is empowered to do so through the performance of the listed actions in Section 3A.

174. An illustration that the performance of duties in terms of section 3(1) of the APS Act (including in the case of those duties being performed by an assignee) may include an inspection of the prescribed product, which may also involve the taking of samples for which cost the owner of the product is responsible, is contained in Regulation 1259 published in Government Gazette 42726 dated 27 September 2019. This regulation made provision for the **payment of a prescribed fee** in circumstances in which an inspection was performed in terms of Section 3(1) of the APS Act (in respect of analysis, inspections and audits (**local and import**), and such inspection required that samples of a product be submitted for analysis to a Departmental laboratory. In that event the owner of the product was responsible to pay for the courier and analysis fees as gazetted in the Regulation. If the inspection in terms of section 3(1) was performed by an assignee, then the analyses fees were payable to the relevant assignee, who would in turn be responsible for payment of the prescribed fees to the Department. The prescribed products listed in the Tables to the Regulation **included grains**.

175. Notwithstanding the link between section 3(1), 4 and 4A, it is clear that there are four kinds of fees that may be charged in terms of the APS Act, and these appear to be as follows:

    175.1. The first kind of fees are those charged for the control over the sale of products, and is that referred to in Section 3(1A)(a) and (b), which are fees which may be charged in respect of the powers exercised and duties performed by the executive officer or the assignee, as the case may be, "*to ensure compliance with this section*" (which is compliance with section 3). The fees are either

prescribed by the executive officer or, if an assignee has been designated, are determined by the assignee (section 3(1A)(a) read with (b)(i) and (ii));

175.2. The second kind of fees are those charged in respect of control over export of products. In section 4(1)(a), it is required that a prescribed product may not be exported from the Republic, unless each quantity of that product, intended for export, has been approved by the executive officer for that purpose. Where an application is made for approval in terms of section 4(1)(a), and where an assignee has been designated under section 2(3)(a), the application for the approval must, in terms of section 4(2)(a) be accompanied with payment of the fees determined by the assignee. If no assignee has been designated, then in terms of section 4(2)(b), the application for approval of the product must be accompanied by payment of the prescribed fee in the prescribed manner and at the prescribed time;

175.3. The third kind, in the case of the control of the sale of imported products, the Minister may prohibit the sale of a prescribed product, unless each quantity of such product intended for sale in the Republic, complies with the provisions of section 3(1). In terms of section 4A(1)(b), the Minister may determine by notice in the Gazette that a particular prescribed product imported for sale in the Republic, shall not be removed from the prescribed port of entry or such other place as may be determined, unless each quantity of such a product intended for sale in the Republic has been approved by the executive officer for that purpose. A fee is payable for such an application for approval, and in terms of section 4A(3), an application for approval of a quantity of an imported product referred to in section 4A(1)(b)(i) shall be made in the prescribed manner, and the prescribed fee shall, in respect of such application, be payable in the prescribed manner and at the prescribed time;

175.4. There is a significant difference between the fees charged in terms of section 4 and 4A:

175.4.1. In terms of section 4, the application for approval of the product intended for export, must be accompanied by payment to the assignee (if an assignee has been designated), of the fees that the assignee determines, or in the absence of an assignee being designated, the prescribed fee shall be paid in the prescribed manner;

175.4.2. Section 4A, does not make provision for the payment of a fee determined by an assignee, and does not refer to an assignee at all. In the case of a person seeking an application for approval of a product referred to in sub-

section 4A(1)(b)(i), payment is required of the prescribed fee, payable in the prescribed manner and at the prescribed time. No provision is made for a fee being determined by an assignee who is appointed to perform this particular function;

175.5. The fourth kind are the fees provided for in section 3A(4), in respect of actions under sub-sections 3A(1)(b), (c), (d) or (e), which fees are to be paid by the owner of the product in question, and which person is required to pay the prescribed fees or the amount determined by the assignee, as the case may be, for such action. Within this kind, are the above actions that are taken in the case of control in terms of section 3(1), or section 4(1), or section 4A(1). This is because section 3A(1) envisages the actions being performed:

> *"**3A. Inspection, grading and sampling for quality control**.–(1) The executive officer or the assignee may, during business hours of the industry in question in the case of control in terms of section **3(1)**, or at any time in the case of control in terms of sections **4(1)** and **4A(1)**, enter any place, premises …".*
>
> (highlighting added)

176. What is immediately apparent is the distinction between the four kinds of fees that may be charged in the APS Act, as to:

176.1. The function for which those fees are charged;

176.2. The person or entity which is required to pay those fees;

176.3. Whether the fee is one determined by the assignee (if an assignee is designated in terms of section 2(3)(a) of the APS Act), alternatively is a prescribed fee.

177. In considering the above three questions, it appears that:

177.1. The fees provided in section 3(1A)(a) and (b) of the APS Act, are charged in connection with the exercise of powers and performance of duties by the executive officer or the assignee, for the performance of the control over the sale of products, as provided in section 3(1). If an assignee is designated, the fee as determined by the assignee shall be payable. There is no mention in Section 3(1A) as to who or what entity is required to pay those fees;

177.2. The fee in section 4(2), in respect of an application being made for the approval of a quantity of a product intended for export, is to be paid when the application is made for approval, and in the case of the designation of an assignee, the payment must be made at the time and in the manner determined by the assignee, and the fees

are those that the assignee determines. The fee is clearly paid by the person making the application for the approval;

177.3. The fee in section 4A(3), in respect of an application for approval of a quantity of an imported product intended for sale in the Republic, before that product may be removed from the port of entry, is the prescribed fee provided for in section 4A(3). However, differing from the position of an application for approval of a prescribed product intended for export, in the case of an application for the approval of an imported product there is no provision for an assignee determining the fee. Under section 4A(3) the application must be made in the prescribed manner, and what is payable is the prescribed fee. The fee is paid by the person making the application for the approval;

177.4. The fee provided for in Section 3A(4), is one in respect of the actions provided for in section 3A(1)(b), (c), (d) or (e), taken for the purposes of control in terms of Section 3(1), 4 and 4A, and that fee is payable by the owner of the product in question. The fee that must be paid by the owner is the prescribed fee, or the amount determined by the assignee, as the case may be, for such action.

178. The result of the above analysis appears to be, in the context of the interplay between section 3(1A) and 3A read with 3A(4), is that:

178.1. The fee in section 3(1A)(a) and (b), relates to powers exercised and duties performed to ensure compliance with Section 3, which relates to the control over the sale of prescribed products in the Republic;

178.2. For the purposes of the powers in Section 3A(1)(b) to (e) being exercised for the purposes of control in terms of section 3, or section 4 or section 4A, an additional fee is provided for in section 3A(4) payable by the owner of the product, over and above the fee for the general exercise of powers and duties with regard to control, for the purpose of section 3(1). It therefore appears possible that the performance of the function in section 3(1), being the case of control of the sale of products, may attract two kinds of fees, one fee being that in terms of section 3(1A), and the other being the fee in respect of an action performed as provided for in section 3A(1) read with 3A(4).

179. Where different fees are paid, it would appear that the fee is paid for one or a combination of three purposes, namely:

179.1. A fee relating to the control over the sale of prescribed products, for the purposes of section 3 of the APS Act;

179.2. A fee in respect of specific actions taken in respect of prescribed products, for the purpose of control under either section 3, 4 or 4A,

payable by the owner as envisaged in section 3A(4) in connection with the product in respect of which such action was taken;

179.3. A fee payable pursuant to an application being made, by an applicant, for the approval of a prescribed product intended for export in terms of section 4, or for the approval of a prescribed product that is imported into South Africa for sale in the Republic, in terms of section 4A.

180. The above approach is supported by the Courts that have held that:

180.1. Section 3(1A)(a) and (b), must be read together with section 3A(4); and[113]

180.2. A fee in terms of section 3(1A) may include the fees for actions taken in the case of control in terms of section 3(1), in which case the fee must be paid by the owner.

FINDINGS AS TO PROCEDURAL FAIRNESS OF THE ADMINISTRATIVE PROCESS

181. It is common cause that the determination of fees in terms of the APS Act, by an assignee, amounts to administrative action, and accordingly that a fair administrative process was required in terms of PAJA. This aspect was discussed in detail in ***Bertie van Zyl***.

182. In the present instance the Respondent (as was the case of Prokon in ***Bertie van Zyl***) adopted the notice and comment procedure. The Appellants contend that the Respondent fell short in this regard.

183. In considering the requirement of procedural fairness in decision making, in the context of the adoption of the notice and comment method, it has been held by the Courts that where new documentation is relied upon, or where there is a material change in methodology or the like, a further opportunity must be afforded for notice and comment.[114]

184. It would appear that, notwithstanding the publication of the previous notices by the Respondent on **5 February 2021** and **23 April 2021**, Notice 382 *inter alia* relied upon a different inspection methodology than had been the case in the two previous notices, and that the fees were different. This included the departure from the methodology contained in the 2017 SOP and the adoption of the new methodology in the Respondent's "Inspection Methodology and Fees June 2021" document

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[113] Discussed above in paragraph 165 with reference to the judgement in ***Top Lay Egg Co-Op***.

[114] ***Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism and Another*** 2006 (10) BCLR 1179 (C).

(which was in line with the unfinalized draft 2021 SOP), and also made provision for the initial (base) inspection frequency of four per annum. These changes in turn also had a bearing on the calculation of the fees.

185. The above material differences notwithstanding, no notice and comment procedure was adopted prior to the publication of Notice 382 in which the fees were imposed. The Respondent contended that there had been sufficient prior engagement with affected stakeholders following the publication of the second Notice on **23 April 2021**, and that it was not necessary to publish the changes effected in Notice 382 for comment prior to the final notice in which the fees were imposed.

186. The Appeal Board finds that the procedure adopted by the Respondent fell short of what was required for the purposes of a fair administrative process prior to the decision being made by the Respondent as to the fees contained in Notice 382, in at least two respects:

    186.1. Firstly, because of the material changes, a further notice and comment procedure ought to have been followed, and the notice in its final form (as also the changed methodology) ought to have been published for further public comment; and

    186.2. Secondly, because engagements that may have taken place between the Respondent and certain affected industry stakeholders, subsequent to the publication of the second notice on **23 April 2021**, could not replace the requirement of publishing a further notice affording the opportunity for comment from the public as a whole to the materially changed fee regime.

187. The Appeal Board also notes that, to make meaningful comment on the changed fee regime (including the amount of the fee and the inspection frequency), the public (as also the Appellants) were entitled to be placed in a position, through the provision of information, to make meaningful and informed comments thereon. In the absence thereof, the consultative process would also not meet the requirements of procedural fairness.

188. In addition to the above, the parallel process for the discussion of the draft 2021 SOP was still ongoing at the time that Notice 382 was published by the Respondent. The methodology under discussion in that draft 2021 SOP formed the basis for the methodology adopted in Notice 382, and the publication of Notice 382 on the same day (25 June 2021) that comment was called for on the draft SOP, also compromises the fairness of the process of decision making with regard to the fees as published in Notice 382.

Sub-conclusion with regard to Procedural Fairness

189. The Appeal Board accordingly concludes that the fee determination contained in Notice 382 is the outcome of the unfair process, and Notice 382 stands to be set aside.

FINDINGS AS TO THE LAWFULNESS OF NOTICE 382

Introduction

190. At the outset, it should be pointed out that the present Appeal is not a challenge to the decision of the Minister to appoint the Respondent as an assignee. The Appeal Board is also not called upon to consider whether the Respondent, after taking on a foreign shareholder, still qualifies as assignee. The Appeal Board refrains from making any finding at all on these issues.

191. The Respondent, having been appointed by the Minister as assignee for the purpose of the application of, inter alia, sections 3(1) and 4A, it is also not for the Appeal Board to consider whether the exercise of such control was necessary, or whether fees ought to be imposed.

192. **What the Appeal Board is required to do is to consider the appeals against Notice 382 and the fee imposed in that notice**.

The nature of the fee

193. The Respondent expressly stated in the Notice 382 that the fee was imposed in terms of section 3(1A) of the APS Act. (This had also been the case of the notices published by Prokon in ***Bertie van Zyl***, and Nejahmogul in the case of ***Woodlands Dairy***). No express mention was made in Notice 382 of fees imposed in terms of section 3A(4).

194. Although the fee imposed by the Respondent in Notice 382 is described as an "*inspection fee*", it is a fee imposed in respect of the powers exercised and duties performed by the Respondent, to ensure compliance with section 3.

195. The Respondent does not, however, in Notice 382 make express provision for any further fees, covered by other sections, and in particular:

    195.1. Separate fees for actions taken under section 3A(1), even if taken for the purpose of control in terms of section 3(1), and which would be payable by the owner of the product in terms of section 3A(4);

    195.2. Any fee in respect of actions taken in terms of Section 3A(1), in pursuance of the exercise of the powers of control in terms of section 4A(1), which would be charged to the owner of the product in terms of section 3A(4). The Respondent, although appointed as an assignee for the purpose of section 4A (imported products), has also not in Notice 382 provided for a fee in respect of applications for approval of imported products. For the reasons mentioned above, this latter fee would require to be a prescribed fee.

196. It would appear that where an imported product is to be sold in the Republic, the imported product would fall into the net of fees that may be charged by the Respondent in terms of section 3(1A).

197. **In the circumstances, the Appeal Board concludes that the challenge by the Appellants that the fee imposed by the Respondent in Notice 382 in terms of Section 3(1A) of the APS Act can only be imposed in respect of the performance of specific actions (and in particular inspections of product), and is only payable if inspections are actually carried out, is not sustainable.** This is because the carrying out of inspections in terms of Section 3A appears to be simply one (but not the only) way in which the powers and duties in Section 3 can be exercised and performed.

The rationality and reasonability challenge to the fees

198. The Appellants challenged the rationality and reasonableness of the fees contained in Notice 382 on various grounds, which have been summarised above. These are considered below.

The issue of the SOP

199. The Appellants sought to impugn the fee imposed by the Respondent, *inter alia*, on the ground that was imposed in a manner contrary to the 2017 SOP (which it was common cause had not yet been amended or replaced by the draft 2021 SOP), and further that the initial (base) inspection frequency had been determined without the agreement of affected stakeholders.

200. The Court in ***Woodlands Dairy*** addressed the consequences of a fee imposed pursuant to a draft SOP, in circumstances in which it appeared that there was no existing SOP (unlike the 2017 SOP in this matter). The Court held that it was only rational that the proposed fees to be charged by the assignee had to be considered having regard, *inter alia*, to the frequency of inspections, the amounts of samples to be taken, what equipment is required, and the costs involved in conducting the inspections. All this would typically be contained in the Standard Operating Procedure (SOP). In the absence of agreement on these aspects, or even a finalised SOP, the Court had held that it was difficult to see how the proposed fees could be rationally determined.

201. In the present matter, the fees were not determined by the Respondent in terms of the 2017 SOP. The initial (base) inspection frequency had not been agreed with affected stakeholders. The basis of the determination of the fees, and the underlying methodology as to number of inspections (and accordingly the cost thereof to the Respondent), was reliant on the methodology in the unfinalized draft 2021 SOP that was still subject to comment and possible change, alternatively the new methodology in the Respondent's "Inspection Methodology and Fees June 2021" document.

It also made provision for the first time for an initial (base) inspection of four per annum. This all affects the rationality of the determination of the quantum of the fees charged by the Respondent.

202. The rationality of the change in methodology, from that of maximum initial (base) frequencies, with a percentage reduction depending upon classification as to High, Medium or Low risk FBO, to the methodology of minimum initial (base) inspections, with percentage increases depending upon profiling and classification, is not explained or justified. There was also no or insufficient evidence made available as to why the new methodology was rationally related to the purpose.

Whether fees are determined on a cost-recovery or profit basis and what this means

203. It was common cause that the Respondent was required to calculate the fees on a cost-recovery basis. There appeared to be two broad areas of dispute between the parties, namely:

    203.1. What the cost-recovery method meant, and whether it amounted to a recovery of actual costs incurred, alternatively allowed for the assignee to make a profit, and to provide a return to investors;

    203.2. Whether the fee as calculated by the Respondent, as set out in the document entitled "*Cost recovery calculations*"[115] amounted to the calculation of a fee on the cost-recovery basis.

204. In In ***Bertie van Zyl***,[116] it was held that the assignee is entitled to be "*compensated*" for the cost of carrying out its duties in a "*competent and efficient*" manner. The Court then examined the question as to whether the fees determined by the assignee were rationally related to this purpose.

205. The Appeal Board is inclined to the view that the concept of the cost-recovery method is precisely that, to recover the cost of performing the service and not to make a profit or generate a return for investors. Even were this view not the correct one, the question remains as to whether the fees that have in fact been calculated by the Respondent are rationally related to the exercise of the public power assigned to the Respondent by the Minister, and further whether the fee calculation is a reasonable one.

206. The Appellants attacked the calculation of the fees on various grounds, including that:

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[115] Bundle "D" page 45,
[116] At para 32.

206.1. The quantum of the fee had not been rationally linked to the costs that would be incurred by the Respondent in undertaking the activities that would be required to exercise its assigned powers and perform its duties;

206.2. The Fee calculation included items that did not relate to the cost of the Respondent in undertaking its function, because it included provisions for items such as depreciation, other fixed costs, and bad debt;

206.3. The costs allocated to employees such as remuneration for executives, was excessive;

206.4. The provision for non-recovery of up to 25% of all fees was not rational nor justified;

206.5. The possibility of higher recovery rates referred to therein, at either 85% or 100%, if achieved, would result in significant profits.

207. The Appeal Board finds that there is considerable merit in certain of these criticisms, and concludes that it does not appear that the calculation of the cost of the fees has been shown to be rationally connected to the purpose, and/or is reasonable.

The application of fees on different products based on units of volume

208. The fees imposed by the Respondent for grains of various different kinds are **R1.80** per ton across the board. In the case of maize and wheat products (excluding bread), they are **R4.00** per ton. Although the density of a ton of the different grain types would clearly be different, the rate of the fee per ton remains the same.

209. There is also no indication from the Respondent whether the costs required to be incurred in connection with the exercise of powers and performance of duties relating to the control of the different grain types is the same or different. The consequence is that, by charging the same fee per ton, without any regard for the cost of inspection, or the value of the product, products that weigh more attract a higher fee than products that weigh less, even if the services to be rendered in respect of the different product types may be the same. There is no indication, for example, that the cost to the Respondent of exercising its powers of control, and performing its assigned duties, (and if necessary, conducting inspections to that end) of a ton of sunflower seeds, or ground nuts, is the same as a ton of maize. If the cost is different, then it is not apparent why there is no differentiation in the fee structure between products. The Respondent has not made it intelligible why different fees are not imposed for different products, and instead the same fee per ton is imposed.

210. A further concern, in considering whether the fee structure for products is rational, and in particular the imposition of the same fee for all product

types, is the use of a weighted average collection rate of 75% as a breakeven. This has the apparent intention of cross-subsidization of product types (in particular yellow maize) where there is an indicated likely low level of compliance in the payment of fees, by product types (and their owners) where there are higher indicated levels of compliance.

211. These concerns all impact on the rationality and reasonableness of the decision with regard to the rate of the fees imposed by the Respondent.

Sub-conclusion with regard to lawfulness, rationality and reasonableness

212. For the above reasons, the Appeal Board finds that the determination of the quantum of the fees, as set out in Notice 382, was not rationally connected to the purpose, and on this further ground Notice 382 stands to be set aside.

The claim in Notice 382 that failure or refusal to pay the fees may constitute an offence

213. A further matter of concern to the Appeal Board is the content of paragraph 3 of Notice 382, under the head "*Sanction*", which suggests that the failure of an Affected Party responsible to pay the inspection fee levied in terms of Notice 382, may render the affected person liable in terms of Section 11 of the APS Act. As mentioned above (and conceded by the Respondent during the hearing), it is only an offence in terms of Section 11(1)(b), to refuse or fail to pay prescribed fees (being fees prescribed by Regulation), *inter alia* in terms of Section 3(1A)(b)(i) or 3A(4). The fees imposed by the Respondent in Notice 382, in terms of Section 3(1A) of the APS Act, have not been published as a regulation by the Minister in terms of Section 15(1)(g) of the APS Act, and accordingly no criminal sanction applies.

The lawfulness of a fee that amounts to a levy

214. The Appellants raised the issue as to whether or not the inspection fees imposed in terms of Section 3(1A) of the APS Act, being levied across the board for all grain sold in the Republic, amounted to a levy as opposed to a fee. Certain of the Appellants also raised the issue that, unlike in the case of the MAP Act, the APS Act did not make provision for what amounted to statutory levies. It was also suggested that, in the case of such a levy, same ought to have been contained in a regulation published by the Minister in terms of Section 15(1)(g) of the APS Act, and made with the concurrence with the Minister of Finance, as provided in Section 15(4). It is not necessary for the Appeal Board to decide this question, by reason of the findings already reached by the Appeal Board with regard to the Appellants' challenges to Notice 382 in respect of procedural fairness, and rationality/reasonableness.

DECISION OF THE APPEAL BOARD

215. The Appeal Board unanimously finds that the procedure followed by the Respondent with regard to the requirement for public consultation and comment prior to the decision being taken was, for the reasons set out above, unfair and accordingly unlawful. On this ground alone Notice 382 requires to be set aside.

216. The Appeal Board further unanimously finds that the fees contained in Notice 382 are not, for the reasons set out above, rationally connected with the powers to be exercised and duties performed in terms of section 3(1)(a) and/or section 4(A)(1)(a) of the APS Act and in respect of which the fees purport; to be imposed in terms of section 3(1A). On this further ground Notice 382 requires to be set aside.

217. The unanimous decision of the Appeal Board is accordingly that Notice 382 is set aside.

218. The prescribed fee paid by the Appellants, as was required by section 10(2) of the APS Act, must be refunded to each of the First to Fifth Appellants as provided for in section 10(9)(a) of the APS Act.

219. The decision of the Appeal Board is to be made available, on **10 December 2021**, to all the Appellants, the Respondent, the Executive Officer: Agricultural Product Standards, and the Chief Director: Policy Development and Planning.

RECOMMENDATION TO THE DIRECTOR GENERAL

220. In the light of the above findings and decision by the Appeal Board, it does not appear necessary that the Appeal Board in addition make any recommendations to the Director-General with regard to the merits of the appeals.

221. The Appeal Board however notes that Regulation R1260 of 27 September 2019, "*Regulations Regarding Appeal Procedures*" was not of great assistance to the Appeal Board when it was required to address procedural matters for the conduct of this appeal.

222. An example of potential difficulty is the requirement in paragraph 5(8) of the Regulation, which requires the Appeal Board to decide on an appeal within a period of 21 days after the appeal has been lodged, unless otherwise arranged and agreed with the Appellant/s in writing. No provision is made for the circumstance that an Appellant does not agree to such extension. In appeals of the present nature, it is difficult, if not impossible, to finalise the appeal hearing and give a decision within the prescribed 21 day period after the appeal has been lodged, particularly in the light of the need to give all parties concerned a fair hearing. (Fortunately, in the present matter all the Appellants and the Respondent were agreeable to the necessary extension of the period). It is

recommended that consideration be given to provision being made in further regulations for this kind of appeal.

ACKNOWLEDGEMENTS

223. The Appeal Board is grateful to all the legal representatives for the Appellants and the Respondent, and Mr. W. Lemmer, for their professional engagement, co-operation and valuable contributions in making representations to the Appeal Board.

224. The Appeal Board would like to thank Ms. T. Chipane for her diligent and courteous assistance to the Appeal Board throughout the process.

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10 December 2021

Ms. Gabriele Gess

Chairperson

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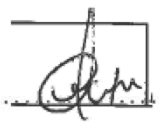
10 December 2021

Mr. Malose Daniel Matlala

(Member of Appeal Board)



10 December 2021

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Ms Maphuti Kutu

(Member of Appeal Board)