



Law matters for farmers

How to keep the farm in the family

I have received many emails and telephone calls from readers who want to know how one goes about keeping a farm in the family after the death of a farmer. The first hurdle for the children of the farmer is the subdivision of Agricultural Land Act 70 of 1970. The Act has the effect of preventing co-ownership of agricultural land, unless the minister consents thereto. In other words, one farm may only be registered in the name of one person or one legal entity. This of course is what is causing concern and frustration for many children whose parents own a farm. It is often the case that the children do not want the farm to be sold, but to be kept in the family. If a farmer bequeaths his farm to a close corporation or a company (with the idea of all the children becoming shareholders of the entity), the Agricultural Land Act, 6 of 1995 determines the government has a right to purchase the farm from the estate in terms of Section 17(1) and (2) of the latter mentioned Act. A 2014 regulation relating to the exemptions to Section 17(1) and (2) of the Act states when agricultural land is alienated in accordance with the

administration of a deceased estate to an heir or legatee of such estate, there is no pre-emptive right in favour of government, except where that heir or legatee is a company or a close corporation. The effect of this regulation is that when a farmer bequeaths his farm to a company or a close corporation in his will, the government has a pre-emptive right to buy the farm from the estate. My interpretation of the 2014 Regulation is that if you bequeath your farm in your will to a testamentary trust, the estate will not have to apply to government to obtain a waiver. Thus, there is no pre-emptive right in favour of government that comes into effect when the farm is bequeathed to a testamentary trust. This brings me to my proposed solution for the children of farmers who want to keep the farm in the family after the farmer's death. I suggest that the farmer in his will creates a testamentary trust and he bequeaths the farm to the testamentary trust for the benefit of all his children, in equal shares. The farmer will obviously have to appoint trustees to the trust in his will and set out their powers and duties.

Furthermore, I propose that the will should stipulate that should the farm be sold, the trust terminates. The will should also stipulate each child receives an equal share of the capital and income upon the termination of the trust. Thus, when the farm is eventually sold, each child shall receive a share of the proceeds of the sale of the farm. A word of caution regarding trusts: The Master has revamped the whole process of administration and management of trusts and the formalities for trustees must be strictly complied with. For example, the trust must have its own bank account and annual financial statements of the trust must be lodged with the Master each year. After the farmer has died and the administration of his estate is completed, the farm will be held in trust by the trustees in terms of the conditions set out in the will for the benefit of the children. I would advise the beneficiaries should register a close corporation which will take over the management of the farm and enter into an agreement with each other regarding the farm. The agreement should contain terms dealing with rental of the farm by the close

corporation and terms regulating the farming operations between beneficiaries and responsibilities and liabilities of the farm and of the corporation. A word of caution: This is a sophisticated solution which will require the assistance of your attorney, your accountant and ultimately at least one of the trustees should preferably be in the business of the administration of trusts.



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