



# Estate planning in the agricultural sector: a tax law perspective

**M Wallace**

 **[orcid.org/0009-0006-5980-8700](https://orcid.org/0009-0006-5980-8700)**

Mini dissertation accepted in partial fulfilment of the requirements for the degree *Master of Laws in Estate Law* at the North-West University

Supervisor: Dr MJ Preston

Graduation: May 2026

## **ACKNOWLEDGEMENTS**

This was a challenging, yet incredibly rewarding journey filled with exceptionally hard work and extra-long hours, and the following people held an instrumental role in achieving this result:

First and foremost, thank you to my supervisor, Dr MJ Preston, for your invaluable guidance, expertise and assistance. Thank you for your words of wisdom, your support, and all the time and effort you dedicated to my research. You pushed me to limits I was unaware I could achieve and it was an honour to work with you.

To my parents, and my family, thank you for your unwavering support and constant belief in my capabilities. You recognised my potential and passion and taught me the courage and dedication to pursue my dreams. At times when I doubted myself, you were always right behind me with words of encouragement and hearts filled with pride. Your unconditional love and the sacrifices made never go a day unnoticed. You are my pillar of strength.

A special thank you to my work colleagues, for your constant support, compassion and motivation. Thank you for encouraging me to persevere through, being the calm in the storm, and for making the difficult days that little bit brighter.

Lastly, to my friends, thank you for being my home away from home.

Each of you has my deepest gratitude.

## **ABSTRACT**

Within the agricultural sector, estate planning is often inadequately understood and frequently avoided due to the unique complexities and emotional conflicts that arise from it. This lack of estate planning frequently results in the failure to preserve the farmland and farming operations for future generations, which undermines the long-term goal of the individual farmer to pass the farming enterprise on to future generations. Therefore, there is a significant need for carefully considered estate planning options in the agricultural sector.

This study examines the use of a company and a trust as estate planning tools for individual farmers, as well as the methods that can be utilised to transfer ownership of farm assets to a company and/or a trust. A company and a trust are two distinct entities that help ensure the protection and preservation of farm assets as well as the future of the farming enterprise.

Taxation is an essential aspect to consider when doing estate planning and it is an inevitable component of farming. Therefore, the study further analyses the relevant tax implications that arise when estate planning is conducted for the individual farmer. A company and a trust serve as estate planning tools, and the methods used to transfer ownership of farm assets to these tools are subject to different tax implications. The tax consequences play a crucial role in determining which estate planning tool is most appropriate for the individual farmer.

In conclusion, it was established that an appropriate estate plan for an individual farmer comprises the use of a company and a trust structured together, to effectively achieve the estate planning objectives.

**Keywords:** Estate planning, agricultural sector, taxation, company, trusts

## TABLE OF CONTENTS

|               |   |
|---------------|---|
| ABSTRACT..... | I |
|---------------|---|

|                            |     |
|----------------------------|-----|
| LIST OF ABBREVIATIONS..... | VII |
|----------------------------|-----|

|                              |   |
|------------------------------|---|
| Chapter 1 Introduction ..... | 1 |
|------------------------------|---|

|                      |   |
|----------------------|---|
| 1.1 Background ..... | 1 |
|----------------------|---|

|                            |   |
|----------------------------|---|
| 1.2 Research question..... | 6 |
|----------------------------|---|

|                                       |   |
|---------------------------------------|---|
| 1.3 Research aims and objectives..... | 7 |
|---------------------------------------|---|

|                           |   |
|---------------------------|---|
| 1.4 Research method ..... | 7 |
|---------------------------|---|

|                      |   |
|----------------------|---|
| 1.5 Case study ..... | 8 |
|----------------------|---|

|                     |   |
|---------------------|---|
| 1.6 Framework ..... | 9 |
|---------------------|---|

|                                                                |    |
|----------------------------------------------------------------|----|
| Chapter 2 The use of a company as an estate planning tool..... | 11 |
|----------------------------------------------------------------|----|

|                        |    |
|------------------------|----|
| 2.1 Introduction ..... | 11 |
|------------------------|----|

|                                                   |    |
|---------------------------------------------------|----|
| 2.2 Definition and legal nature of a company..... | 12 |
|---------------------------------------------------|----|

|                                                            |    |
|------------------------------------------------------------|----|
| 2.3 The benefits and risks associated with a company ..... | 14 |
|------------------------------------------------------------|----|

|                                                      |    |
|------------------------------------------------------|----|
| 2.3.1 The separation of ownership and liability..... | 14 |
|------------------------------------------------------|----|

|                                                                                  |    |
|----------------------------------------------------------------------------------|----|
| 2.3.2 Section 3 of the Subdivision of Agricultural Land Act, 70 of 1970<br>..... | 15 |
|----------------------------------------------------------------------------------|----|

|                                                                                      |    |
|--------------------------------------------------------------------------------------|----|
| 2.3.3 The difference between a trading company and an asset<br>holding company ..... | 17 |
|--------------------------------------------------------------------------------------|----|

|                                                                                |    |
|--------------------------------------------------------------------------------|----|
| 2.3.4 The management of farming operations and the use of farm<br>assets ..... | 18 |
|--------------------------------------------------------------------------------|----|

|                  |                                                                                                       |           |
|------------------|-------------------------------------------------------------------------------------------------------|-----------|
| <b>2.4</b>       | <b><i>Methods to transfer the farm assets to a company.....</i></b>                                   | <b>20</b> |
| 2.4.1            | <i>Section 42 of the ITA: asset-for-share transactions.....</i>                                       | 20        |
| 2.4.2            | <i>The sale or donation of farm assets to a company.....</i>                                          | 26        |
| <b>2.5</b>       | <b><i>Conclusion .....</i></b>                                                                        | <b>27</b> |
| <b>Chapter 3</b> | <b>The use of trusts as an estate planning tool.....</b>                                              | <b>29</b> |
| <b>3.1</b>       | <b><i>Introduction .....</i></b>                                                                      | <b>29</b> |
| <b>3.2</b>       | <b><i>Trusts as a concept .....</i></b>                                                               | <b>30</b> |
| 3.2.1            | <i>Definition and legal nature .....</i>                                                              | 30        |
| 3.2.2            | <i>The different types of trusts .....</i>                                                            | 31        |
| <b>3.3</b>       | <b><i>The benefits and risks associated with trusts .....</i></b>                                     | <b>34</b> |
| 3.3.1            | <i>The separation of ownership and liability.....</i>                                                 | 34        |
| 3.3.2            | <i>Perpetual succession.....</i>                                                                      | 36        |
| 3.3.3            | <i>Section 3 of the Subdivision of Agricultural Land Act, 70 of 1970<br/>.....</i>                    | 37        |
| 3.3.4            | <i>The separation of enjoyment and control .....</i>                                                  | 38        |
| 3.3.5            | <i>The family business trust, the sham trust and the alter ego<br/>trust .....</i>                    | 39        |
| <b>3.4</b>       | <b><i>Methods to transfer the farm assets to trusts.....</i></b>                                      | <b>41</b> |
| <b>3.5</b>       | <b><i>Conclusion .....</i></b>                                                                        | <b>43</b> |
| <b>Chapter 4</b> | <b>The tax considerations when using a company and/or a trust<br/>as an estate planning tool.....</b> | <b>45</b> |

|                  |                                                                                  |                  |
|------------------|----------------------------------------------------------------------------------|------------------|
| <b>4.1</b>       | <b><i>Introduction .....</i></b>                                                 | <b><i>45</i></b> |
| <b>4.2</b>       | <b><i>General income tax implications.....</i></b>                               | <b><i>45</i></b> |
| 4.2.1            | <i>Section 26 of the ITA: income tax implications of farming operations.....</i> | <i>47</i>        |
| 4.2.2            | <i>Income tax implications applicable to a company.....</i>                      | <i>48</i>        |
| 4.2.3            | <i>Income tax implications applicable to a trust .....</i>                       | <i>49</i>        |
| <b>4.3</b>       | <b><i>Section 7 of the ITA: anti-avoidance implications.....</i></b>             | <b><i>52</i></b> |
| 4.3.1            | <i>Application of the anti-avoidance provisions .....</i>                        | <i>53</i>        |
| <b>4.4</b>       | <b><i>Capital gains tax .....</i></b>                                            | <b><i>55</i></b> |
| 4.4.1            | <i>Capital gains tax implications applicable to natural persons ....</i>         | <i>57</i>        |
| 4.4.2            | <i>Capital gains tax implications applicable to a company.....</i>               | <i>59</i>        |
| 4.4.3            | <i>Capital gains tax implications applicable to a trust .....</i>                | <i>60</i>        |
| <b>4.5</b>       | <b><i>Donations tax.....</i></b>                                                 | <b><i>62</i></b> |
| 4.5.1            | <i>The levying of donations tax .....</i>                                        | <i>63</i>        |
| 4.5.2            | <i>Exemptions from donations tax .....</i>                                       | <i>64</i>        |
| <b>4.6</b>       | <b><i>Section 7C of the ITA .....</i></b>                                        | <b><i>65</i></b> |
| <b>4.7</b>       | <b><i>Estate duty tax implications .....</i></b>                                 | <b><i>67</i></b> |
| <b>4.8</b>       | <b><i>Relevant VAT and transfer duty implications .....</i></b>                  | <b><i>68</i></b> |
| <b>4.9</b>       | <b><i>Conclusion.....</i></b>                                                    | <b><i>69</i></b> |
| <b>Chapter 5</b> | <b><i>Conclusion .....</i></b>                                                   | <b><i>72</i></b> |
| <b>5.1</b>       | <b><i>Findings.....</i></b>                                                      | <b><i>72</i></b> |

|                           |                                                                                                       |                  |
|---------------------------|-------------------------------------------------------------------------------------------------------|------------------|
| 5.1.1                     | <i>The legal nature and benefits and risks associated with the use of a company and a trust .....</i> | <i>73</i>        |
| 5.1.2                     | <i>The methods to transfer the farm assets to a company and/or a trust .....</i>                      | <i>75</i>        |
| 5.1.3                     | <i>The relevant tax implications applicable in the estate planning process .....</i>                  | <i>77</i>        |
| <b>5.2</b>                | <b><i>Recommendations.....</i></b>                                                                    | <b><i>80</i></b> |
| <b>BIBLIOGRAPHY .....</b> |                                                                                                       | <b>83</b>        |

## **LIST OF ABBREVIATIONS**

|        |                                                           |
|--------|-----------------------------------------------------------|
| BTCLQ  | Business Tax and Company Law Quarterly                    |
| CGT    | Capital gains tax                                         |
| FISA   | Fiduciary Institute of Southern Africa                    |
| GAAR   | General Anti-avoidance Rules                              |
| ITA    | Income Tax Act                                            |
| MOI    | Memorandum of Incorporation                               |
| SAJAE  | South African Journal of Agricultural Extension           |
| SAJBM  | South African Journal of Business Management              |
| SAJEMS | South African Journal of Economic and Management Sciences |
| SALA   | Subdivision of Agricultural Land Act                      |
| SARS   | South African Revenue Service                             |
| SATSA  | A Student's Approach to Taxation in South Africa          |
| TAA    | Tax Administration Act                                    |
| VAT    | Value-Added Tax                                           |

## Chapter 1 Introduction

### 1.1 Background

Meyerowitz<sup>1</sup> provided a refined and comprehensive definition of estate planning as:

The arrangement, management and securement and disposition of a person's estate so that he, his family and other beneficiaries may enjoy and continue to enjoy the maximum from his estate and his assets during his lifetime and after his death, no matter when death may occur.

Considering Meyerowitz's<sup>2</sup> point of view, there are two thoughts that can be highlighted, namely, the notion that the estate planner and his family should be able to enjoy the estate whilst they are still alive, but also after the estate planner's death. Tauer and Grossman<sup>3</sup> expressed the opinion that estate planning can be described as the process of determining how to appropriately distribute a person's assets after death, whilst considering the methods employed to build the estate during their lifetime.<sup>4</sup> Venter, Maas and Boshoff<sup>5</sup> emphasised that estate planning is vital to succession planning.<sup>6</sup>

According to a study conducted in 2016 by Lowder,<sup>7</sup> there are over 570 million farms worldwide, 75% of which are family-owned and operated.<sup>8</sup> Approximately 19 years ago, 65% of South African businesses were in the agricultural sector and 90% of those were family-owned.<sup>9</sup> These figures highlight the significance of family enterprises in the agricultural sector and, therefore, the need to engage in careful estate planning for farmers.<sup>10</sup> Farmers, however, tend to steer clear of estate

---

<sup>1</sup> Botha et al The South African Financial Planning Handbook 2025 (hereinafter "Botha Financial Planning") 957.

<sup>2</sup> Botha Financial Planning 957.

<sup>3</sup> Tauer and Grossman Estate and succession planning for small business owners 1; Lingani and Hough 2025 SAJAE 107.

<sup>4</sup> Lingani and Hough 2025 SAJAE 107.

<sup>5</sup> Venter, Maas and Boshoff 2003 Management Dynamics: Journal of the Southern African Institute for Management Scientists 6; Van der Merwe 2009 SAJBM 51; Lingani and Hough 2025 SAJAE 107.

<sup>6</sup> Lingani and Hough 2025 SAJAE 107.

<sup>7</sup> Lowder, Skoet and Raney 2016 *World Development* 16; Lingani and Hough 2025 SAJAE 107.

<sup>8</sup> Lowder, Skoet and Raney 2016 *World Development* 16; Lingani and Hough 2025 SAJAE 107.

<sup>9</sup> Lingani and Hough 2025 SAJAE 107.

<sup>10</sup> Lingani and Hough 2025 SAJAE 107.

planning, despite it being one of the most fundamental aspects of managing a farming business, due to the emotional issues and unique difficulties that may arise out of estate planning.<sup>11</sup> Research has indicated that decision-making of future ownership of the farming business is still inadequately understood, there are a number of businesses with no plans for the future,<sup>12</sup> and the failure of family-owned businesses is frequently associated with poor estate planning.<sup>13</sup>

A significant characteristic of the agricultural sector is the goal of a farmer to keep their farming business within their family and to transfer their farming enterprise to future generations.<sup>14</sup> The transfer of a farming enterprise may, however, prove to be more difficult than the transfer of other types of businesses, due to the unique requirements, particularly related to the transfer and inheritance of agricultural land.<sup>15</sup> A major obstacle is presented to farmers in section 3 of the *Subdivision of Agricultural Land Act 70 of 1970* (hereinafter referred to as "*SALA*"),<sup>16</sup> which provides that the subdivision of agricultural land to multiple heirs is subject to the Minister of Agriculture's consent and approval.<sup>17</sup> A study conducted in 2011 proved that 70% of farmers struggle to transfer their business operations to the second generation and 90% of the enterprises will fail to reach the third generation.<sup>18</sup> In addition, farmers generally have complex family dynamics in the sense that majority of the immediate family members plan to live off the proceeds of the farm and the farming enterprise throughout their lifetimes.<sup>19</sup> This results in the farming operations being managed by multiple family members,<sup>20</sup> and having to support and maintain multiple families.<sup>21</sup> Moreover, a sensitive and unique challenge arises for the farmer

---

<sup>11</sup> Lingani and Hough 2025 *SAJAE* 106, 108; Brönn *The Dairy Mail* 69.

<sup>12</sup> Lingani and Hough 2025 *SAJAE* 106.

<sup>13</sup> Venter and Boshoff 2007 *Management Dynamics: Journal of the Southern African Institute for Management Sciences* 44; Van der Merwe 2009 *SAJBM* 52; Lingani and Hough 2025 *SAJAE* 106.

<sup>14</sup> Lingani and Hough 2025 *SAJAE* 115; Robbertse *Stockfarm* 60.

<sup>15</sup> Veldhuizen *Farmer's Weekly* 46.

<sup>16</sup> Subdivision of Agricultural Land Act 70 of 1970.

<sup>17</sup> S 3 of *SALA*; Veldhuizen *Farmer's Weekly* 46.

<sup>18</sup> Lingani and Hough 2025 *SAJAE* 108; Visser *Finweek* 44; Van der Merwe 2009 *SAJBM* 51.

<sup>19</sup> Van Zyl *Stockfarm* 51; Lingani and Hough 2025 *SAJAE* 111; Brönn *The Dairy Mail* 69.

<sup>20</sup> This becomes problematic due to the contradictory needs, expectations and personalities of each family member. See Van der Merwe 2001 *SAJAE* 2; Brönn *The Dairy Mail* 69.

<sup>21</sup> A farmer's child may return to the farm upon completion of his studies to join the farming enterprise, the farmer's child may then also live with his spouse and his own children on the farm, and the farmer himself may continue to live on the farm after retirement until death whilst

because the interests of family members ought to align with the interests of the farming business.<sup>22</sup>

A study conducted amongst farmers in the Western Cape Province disclosed that 67% of farmers had not implemented any form of estate plan or retirement plan.<sup>23</sup> The study further revealed that 76% of farm business owners were between the ages of 41 and 60 years old.<sup>24</sup> Moreover, section 26 of the *Income Tax Act* 58 of 1962 (hereinafter referred to as the "*ITA*")<sup>25</sup> read with the First Schedule of the *ITA*,<sup>26</sup> stipulates the rules for determining a farmer's taxable income, which ultimately provides for the unique tax treatment of farmers and their farming operations.<sup>27</sup> Therefore, the unique obstacles faced by farmers regarding estate and succession planning,<sup>28</sup> and the separate tax treatment imposed on agricultural or other farming operations,<sup>29</sup> do justify the need for estate planning options that are well-considered and designed, whilst still dealing with the usual financial aspects of estate planning, such as tax restructuring and estate duty.<sup>30</sup>

Within the agricultural sector, the transfer of assets out of the farmer's ownership is a principal consideration,<sup>31</sup> along with the fact that their farming enterprise is to be passed on to future generations.<sup>32</sup> Therefore, it is imperative to consider the estate planning tools and methods,<sup>33</sup> that must be utilised to appropriately plan the estate and bypass the hurdle imposed in section 3 of *SALA*.<sup>34</sup> Another question that

---

his children continue the farming operations. This tends to carry on for generations. See Van Zyl *Stockfarm* 51; Brönn *The Dairy Mail* 69.

<sup>22</sup> Van der Merwe 2001 *SAJAE* 2.

<sup>23</sup> Lingani and Hough 2025 *SAJAE* 112.

<sup>24</sup> Lingani and Hough 2025 *SAJAE* 112.

<sup>25</sup> *Income Tax Act* 58 of 1962. See Para 4.2.1 below.

<sup>26</sup> The First Schedule of the *ITA* is hereinafter the "First Schedule". The First Schedule provides for the computation of taxable income derived from pastoral, agricultural or other farming operations.

<sup>27</sup> Du Plessis *FarmBiz* 17.

<sup>28</sup> Specifically, the hurdle contained in s 3 of *SALA* regarding the transfer of agricultural land. See Veldhuizen *Farmer's Weekly* 46.

<sup>29</sup> See Para 4.2.1 below.

<sup>30</sup> Veldhuizen *Farmer's Weekly* 46.

<sup>31</sup> See Chapters 2 and 3 below; O'Halloran *Farmer's Weekly* 32.

<sup>32</sup> Lingani and Hough 2025 *SAJAE* 115; Robbertse *Stockfarm* 60.

<sup>33</sup> Botha *Financial Planning* 964, 968.

<sup>34</sup> Molaba *The Dairy Mail* 70.

remains to be answered is: what are the tax implications of the estate planning tools utilised when the farm assets are transferred out of the farmer's ownership, and what will provide the farmer with the best estate plan.

The creation of a company<sup>35</sup> or a trust can serve as a viable estate planning tool in the estate of the farmer,<sup>36</sup> whilst still allowing the use of farm assets to generate income during the farmer's lifetime.

The *Companies Act* 71 of 2008 (hereinafter referred to as the "*Companies Act*") provides that a company is defined as:<sup>37</sup>

A juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date-

- (a) was registered in terms of the-
  - (i) Companies Act, 1973 (Act no. 61 of 1973), other than as an external company as defined in that Act; or
  - (ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;
- (b) was in existence and recognised as an "existing company" in terms of the Companies Act, 1973 (Act No. 61 of 1973); or
- (c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act.

A private company is a legal entity,<sup>38</sup> that is able to facilitate the transfer and continuation of the farming business from one generation to another.<sup>39</sup> Moreover, the creation of and functioning through a company provides continuity and flexibility to farmers and further provides a clear legal framework within which to function.<sup>40</sup>

---

<sup>35</sup> For purposes of this research, the word "company" means a private company.

<sup>36</sup> See Paras 2.2, 2.3, 3.2, 3.3 and 4.7 below; See Chapter 5 below; Veldhuizen *Farmer's Weekly* 47; Botha *Financial Planning* 965-966; Sekabate *Tax Breaks* 7.

<sup>37</sup> S 1 of the *Companies Act* 71 of 2008.

<sup>38</sup> Although close corporations may no longer be established, many close corporations do still exist and are regulated by the *Close Corporations Act* 69 of 1984. A company and a close corporation are similar in nature and are treated in the same way for tax purposes. See Stiglingh *et al* *SILKE: South African Income Tax 2025* (hereinafter "*SILKE*") 797; Bruwer *et al* *A Student's Approach to Taxation in South Africa* (hereinafter "*Bruwer SATSA*") 491.

<sup>39</sup> See Chapter 2 below.

<sup>40</sup> See Chapter 2 below.

Section 1 of the *ITA* also provides for the definition of a company for purposes of the *ITA*.<sup>41</sup>

It appears that over the past few years, more farmers have begun to utilise trusts in their estate planning due to the asset protection benefits they may provide.<sup>42</sup> A trust is one of the most prevalent tools utilised in estate planning due to the significant role it has in safeguarding the estate for future generations.<sup>43</sup> A trust is defined in the *Trust Property Control Act 57* of 1988 (hereinafter referred to as the "*Trust Act*") as:<sup>44</sup>

The arrangement through which the ownership in property of one person by virtue of a trust instrument made over or bequeathed –

- (a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
- (b) To the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,

but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of provisions of the Administration of Estates Act 66 of 1965.

In essence, a trust is a structure to which property is transferred and subsequently managed by the trustees according to the trust instrument, for the benefit of the trust beneficiaries.<sup>45</sup> A trust is considered to be legal entity for tax purposes and section 1 of the *ITA* also provides for the definition of a trust.<sup>46</sup> Although a trust attracts a higher tax rate,<sup>47</sup> a trust is also able to facilitate the transfer of the farming

---

<sup>41</sup> See Para 2.2 below.

<sup>42</sup> Maree Farmer's Weekly 30.

<sup>43</sup> Luttig Personal Finance 9.

<sup>44</sup> S 1 of the *Trust Property Control Act 57* of 1988.

<sup>45</sup> See Para 3.2.1 below; Jones *Personal Finance* 9.

<sup>46</sup> See Para 3.2.1 below.

<sup>47</sup> The tax rate applicable to a trust is currently 45%, whereas a company is taxed at the rate of 27%. See *SILKE* 769, 1005; Bruwer *SATSA* 710.

business to future generations.<sup>48</sup> A trust can serve as a means for farmers to ensure that they are involved in the day-to-day business operations, and ensures the use of farm assets for the benefit of the beneficiaries.<sup>49</sup> There are two ways in which a trust can be established: firstly, during a person's lifetime (otherwise known as an *inter vivos* trust) and secondly, when the creation of a trust is provided for in their will (referred to as a *mortis causa* trust).<sup>50</sup>

In addition to the estate planning tools, it is vital to consider the manner in which the farmer's assets can be transferred to these tools,<sup>51</sup> and whether a combination of such tools should be utilised.<sup>52</sup> Apart from the various estate planning tools, there are other imperative considerations which should be taken into account when estate planning is done, such as the tax implications imposed on each estate planning tool. The tax implications applicable to a company, a trust and the methods of transfer of ownership vary, which results in distinct benefits and risks in estate planning.

It is therefore crucial to evaluate and compare the taxation of the different estate planning tools that a farmer may use when he plans for the purposes of maximum enjoyment of his estate and preservation of farm assets during his lifetime, as well as for the transfer of the farming enterprise to future generations.<sup>53</sup>

## **1.2 Research question**

In light of the above, the research question to be pursued is:

When estate planning is done for an individual farmer, how does the tax legislation influence the choice of an estate planning tool(s) and the methods of transferring ownership of assets?

---

<sup>48</sup> See Chapter 3 below; Maree *Farmer's Weekly* 30.

<sup>49</sup> Maree *Farmer's Weekly* 30.

<sup>50</sup> Jones *Personal Finance* 9; Muller *TaxTalk* 23; Botha *Financial Planning* 911; Delport *New Entrepreneurial Law* 301; SILKE 1004; Bruwer *SATSA* 709; Maree *Farmer's Weekly* 30; Thatcher *The Dairy Mail* 47; Maree *Farmer's Weekly* 30; Brink *SAJEMS* 5.

<sup>51</sup> See Paras 2.4 and 3.4 below.

<sup>52</sup> See Chapter 5 below.

<sup>53</sup> Molaba *The Dairy Mail* 70.

### ***1.3 Research aims and objectives***

The study aims to determine the extent to which the relevant tax implications will impact the estate planning process, specifically regarding the choice of estate planning tool(s) to be employed (a company and/or a trust) and the method(s) of transferring ownership of the farm assets, whilst keeping in mind the goals of the farmer of maximum enjoyment of his estate, preservation of farm assets during his lifetime, and the transfer of the farming enterprise to future generations.

The sub-objectives which will guide the study, be utilised to reach the main objectives and to answer the research question, are as follows:

- 1.3.1 Examine the use of a company as an estate planning tool and the methods that can be utilised to transfer the farm assets into the company's ownership;
- 1.3.2 Examine the use of a trust as an estate planning tool and the methods that can be utilised to transfer ownership of the farm assets to a trust;
- 1.3.3 Analyse the impact of applicable taxation legislation on the estate planning process, the choice of estate planning tools and the methods of transferring ownership of the farm assets; and
- 1.3.4 Determine, considering the findings of the study, which estate planning tool(s) and method(s) would be the most suitable in devising an estate plan for an individual farmer similar to Mr Botha.<sup>54</sup>

### ***1.4 Research method***

The research conducted will be a desktop study by means of the literature review method. A literature review consists of a critical analysis of multiple sources that have been published regarding a specific topic. Throughout the literature review method, the researcher attempts to find, analyse and discuss relevant and recent sources that stand as authoritative sources. The sources to be reviewed include

---

<sup>54</sup> See Para 1.5 below.

specific South African legislation, journal articles and relevant, applicable electronic internet sources. Since scholarly work for purposes of this research is limited, relevant magazine and newspaper articles will have to be consulted and reviewed.

The scope of this study is limited to the use of a company, specifically a private company, and a trust, more specifically an *inter vivos* trust, as estate planning tools. This research analyses the implications of income tax, section 7 of the *ITA*, CGT, donations tax, section 7C of the *ITA*, estate duty, VAT and transfer duty within the context of estate planning for a farmer. A discussion on any further tax implications falls outside the scope of this study. This study is further limited to resident persons,<sup>55</sup> of the Republic of South Africa, as well as South African sources of income. Any reference to tax rates for purposes of this study is the tax rates applicable to the 2025/2026 year of assessment.

### **1.5 Case study**

In light of the intricacy attributed to farming enterprises and the family dynamics of farmers, it is deemed necessary to provide a case study to thoroughly understand the effect of suggested estate planning done for farmers.

Mr Botha is a farmer who currently conducts business operations in his personal name as a sole proprietor. He is the owner of his own farmland and farmed on his parent's land as the manager of their farming enterprise. His parents recently passed away and bequeathed their entire estate, consisting of farmland and many movable assets (i.e. the farming equipment), to Mr Botha as their only child. Mr Botha is married out of community of property, and he has two sons, aged 20 and 25 years old.

In addition to the transfer of the farming enterprise into Mr Botha's personal name, the inheritance of the large number of assets has raised further concerns about the future and Mr Botha has, therefore, realised the need to consider estate planning options. The first major concern is the responsibility to maintain the farming

---

<sup>55</sup> Refer to Footnote 340 below.

enterprise to eventually transfer the same to his sons in the future. More importantly, the second concern of Mr Botha is the tax implications he endures as a result of conducting farming operations in his personal name.<sup>56</sup> He has also, to a certain extent, become aware of the worrisome tax implications incurred by his father, who held farmland and movable assets in his personal name.<sup>57</sup>

Mr Botha is considering the implementation of an estate plan that will structure his estate in a manner to achieve the relevant estate planning objectives; however, he has very limited knowledge of estate planning. Mr Botha has heard of a few farmers who conduct their businesses through a company or a trust, and therefore, he requires sufficient information regarding these estate planning tools, the methods that can be used to transfer ownership of the assets, and the tax implications that are applicable in the estate planning process.

## **1.6 Framework**

This study consists of five Chapters.

Chapter 1 introduces the background to the study, provides the research question, the research aims and objectives, the research method, and provides a case study that will be utilised to explain concepts throughout the study.

Chapter 2 explains the use of a company as an estate planning tool by investigating the legal nature of a company, the benefits and risks associated with the use of a company and the methods that can be utilised to transfer the farm assets from the personal ownership of the farmer into the ownership of a company.

Chapter 3 discusses the use of a trust as an estate planning tool through examining the legal nature of a trust, the benefits and risks associated with the use of a trust

---

<sup>56</sup> The tax implications specifically referred to in s 26 of the *ITA* read with the First Schedule.

<sup>57</sup> For purposes of this study, Mr Botha's intention is to appropriately structure his estate, rather than reduce his tax liability. An in-depth discussion of the provisions of ss 80A to 80L of the *ITA*, specifically the purpose requirement of s 80G of the *ITA* (GAAR), falls outside the scope of this study.

and the methods that can be utilised to transfer ownership of the farm assets to a trust.

Chapter 4 provides a critical analysis of the tax implications and their influence in the estate planning process, with specific reference to income tax, section 7 of the *ITA*, CGT, donations tax, estate duty, section 7C of the *ITA*, VAT and transfer duty.

Chapter 5 concludes the study with a comprehensive summary of the preceding Chapters after careful consideration thereof and provides recommendations regarding the tax implications applicable in the estate planning process, as well as an indication of which tool and method would be the most suitable when estate planning is done for an individual farmer.

## Chapter 2 The use of a company as an estate planning tool

### 2.1 Introduction

Several farmers, such as Mr Botha,<sup>58</sup> currently conduct their farming operations in their personal name with the farmland also being owned in their personal capacity.<sup>59</sup> This sole proprietor structure is susceptible to significant risks and challenges<sup>60</sup> because the farming business is not a separate legal entity from the farmer.<sup>61</sup> Therefore, there is no separation between the farming business and the farm assets, and furthermore, no separation between the business assets and the personal assets of the sole proprietor.<sup>62</sup> Due to the lack of separation, the sole proprietor may face the possibility of being held liable in his personal capacity for any claims that arise against the business.<sup>63</sup> In addition, there is another set of risks and challenges that arise when the sole proprietor passes away.<sup>64</sup> The most noteworthy challenge is the ability to transfer agricultural land to future generations.<sup>65</sup> These aforementioned risks and challenges seriously hinder the ability of a farmer to maximise the full enjoyment of his assets and preserve his estate during his lifetime, as well as the ability of the farmer to successfully transfer the farming enterprise to future generations.

The creation of a company can be utilised as a viable estate planning tool in the estate of the farmer<sup>66</sup> to avoid the abovementioned risks and challenges. It is able to facilitate the transfer and continuation of the farming business, as well as the transfer of the farm assets, from one generation to another.<sup>67</sup> Furthermore a

---

<sup>58</sup> See Para 1.5 above.

<sup>59</sup> Robbertse *Stockfarm* 60.

<sup>60</sup> Maree *Farmer's Weekly* 30.

<sup>61</sup> Botha *Financial Planning* 1130; Delpont *New Entrepreneurial Law* 2.

<sup>62</sup> Botha *Financial Planning* 1130; Robbertse *Stockfarm* 60.

<sup>63</sup> Botha *Financial Planning* 2025 1130; Delpont *New Entrepreneurial Law* 2.

<sup>64</sup> In the event of the farmer's death, the farming business will cease to exist, and his deceased estate will be liable for CGT and estate duty on the value of the farm assets and the farming business. See Paras 4.4 and 4.7 below; Botha *Financial Planning* 1131; Robbertse *Stockfarm* 60; Robbertse *CHIPS* 71; Barnard and Botha *Nagel's Business Law* 330; Delpont *New Entrepreneurial Law* 2.

<sup>65</sup> S 3 of *SALA*; Veldhuizen *Farmer's Weekly* 46.

<sup>66</sup> Veldhuizen *Farmer's Weekly* 47; Botha *Financial Planning* 965-966; Sekabate *Tax Breaks* 7.

<sup>67</sup> Veldhuizen *Farmer's Weekly* 47; Molaba *The Dairy Mail* 70.

company can assist in freezing the value of the farmer's estate,<sup>68</sup> whilst also potentially providing certain other tax advantages.<sup>69</sup> In order to enjoy the benefits that a company provides as an estate planning tool, the farm assets are to be transferred from the farmer's personal ownership into the ownership of the company. The use of a company as an estate planning tool and the methods of transferring the farm assets into the company's ownership will be discussed throughout this Chapter.

## ***2.2 Definition and legal nature of a company***

The law<sup>70</sup> regulates who qualifies as a legal subject and who can be the bearer of rights and obligations.<sup>71</sup> In addition to natural persons, the law permits other entities, such as companies (which are juristic persons), to become legal subjects.<sup>72</sup> South African law recognises two main types of companies, namely, profit companies and non-profit companies.<sup>73</sup> Profit companies are further sub-divided into four categories: private companies, public companies, state-owned companies and personal liability companies.<sup>74</sup> The *Companies Act* regulates the aforementioned categories of companies. A company is a separate legal entity that exists independently of its directors and shareholders,<sup>75</sup> and therefore, there is a distinct division between ownership and control.<sup>76</sup> The *Companies Act*,<sup>77</sup> provides that a shareholder:

Subject to section 57(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register.

---

<sup>68</sup> See Para 4.7 below.

<sup>69</sup> See Chapter 4 below.

<sup>70</sup> Such as the law of persons, the common law, the *Companies Act* and the *ITA*. See Boezaart *Law of Persons* 2-5.

<sup>71</sup> Delpont New Entrepreneurial Law 16; Boezaart *Law of Persons* 2; Heaton *The South African Law of Persons* 1.

<sup>72</sup> Delpont New Entrepreneurial Law 16; Boezaart *Law of Persons* 5.

<sup>73</sup> Botha *Financial Planning* 1155; Delpont New Entrepreneurial Law 23.

<sup>74</sup> For purposes of this research, the focus will be on private companies. See Botha *Financial Planning* 1156; Delpont *New Entrepreneurial Law* 23.

<sup>75</sup> Botha *Financial Planning* 1154; Delpont New Entrepreneurial Law 18-19; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; Legwaila et al *Tax Law: An Introduction* (hereinafter "Legwaila Tax Law") 404.

<sup>76</sup> Delpont New Entrepreneurial Law 4.

<sup>77</sup> S 1 of the *Companies Act*.

The board of a private company must consist of at least one director.<sup>78</sup> The definition of a director as contained in section 1 of the *Companies Act*, reads as follows:

Director means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.

It was held in the case of *Salomon v Salomon and Co Limited*,<sup>79</sup> and further confirmed in the case of *Absa Bank Limited v Cohen*,<sup>80</sup> that the assets are owned by the company, not the shareholders, and that the company itself, as a legal subject, has the ability to incur debts for which the shareholders and directors will generally not be held personally liable.<sup>81</sup>

Furthermore, a company is considered a separate legal entity for tax purposes,<sup>82</sup> and is defined in section 1 of the *ITA* to include:<sup>83</sup>

- (a) Any association, corporation or company (other than a close corporation) incorporated or deemed to be incorporated by or under any law in force or previously in force in the Republic or in any part thereof, or any body corporate formed or established or deemed to be formed or established by or under any such law; or...
  - (f) A close corporation,
- but does not include a foreign partnership.

A company is a separate legal entity, therefore, should a shareholder or director leave their position as such or pass away, the company and its business operations will continue to exist,<sup>84</sup> which ensures a smooth transfer and continuation of the farming business, as well as the transfer of the farm assets,<sup>85</sup> from one generation to another. Historically, conducting business through a close corporation was a

---

<sup>78</sup> S 66(2)(a) of the *Companies Act*.

<sup>79</sup> *Salomon v Salomon and Co Limited* 1987 AC 22 (HL) (hereinafter the "Salomon case"); Barnard and Botha Nagel's Business Law 330; Delport New Entrepreneurial Law 18.

<sup>80</sup> *Absa Bank Limited v Cohen* (O) (unreported) case number 32870/2012 of 3 June 2014 (hereinafter the "*Cohen case*") para 21.

<sup>81</sup> Botha *Financial Planning* 1154; s 19(2) of the *Companies Act*.

<sup>82</sup> *SILKE* 766.

<sup>83</sup> S 1 of the *ITA*.

<sup>84</sup> Robbertse Stockfarm 60; Robbertse CHIPS 71; SARS Tax Guide for Small Businesses 4; Botha *Financial Planning* 1163.

<sup>85</sup> See Para 2.4 below.

favoured choice due to lower start-up and administrative costs.<sup>86</sup> However, the enactment of the *Companies Act* does not allow for the formation of new close corporations, and a private company now provides the same benefits as those of a close corporation.<sup>87</sup>

To understand how a company as a separate legal entity can serve as a viable estate planning tool for farmers like Mr Botha,<sup>88</sup> the benefits and risks associated with conducting the farming business and holding the farm assets in a company need to be carefully considered.

### ***2.3 The benefits and risks associated with a company***

The company as an estate planning tool can provide an array of benefits to ensure the enjoyment and preservation of the farmer's estate. However, it is not without its challenges when utilised specifically in the agricultural sector.

#### ***2.3.1 The separation of ownership and liability***

As previously explained, the assets of the company are owned by the company, not the shareholders or directors of the company.<sup>89</sup> Furthermore, any liabilities incurred by the company result in a claim against the company itself, for which the shareholders and directors generally will not be held personally liable.<sup>90</sup> This provides a major advantage when compared to conducting business as a sole proprietor, who faces the possibility of being held liable in his personal capacity for any claims that may arise against the business.<sup>91</sup> With reference to the case of Mr Botha,<sup>92</sup> if he transfers ownership of the farm assets to a company, such assets will be protected from any claims arising against him in his personal capacity. Shifting ownership of the farm assets into the company serves to safeguard such assets

---

<sup>86</sup> Robbertse *Stockfarm* 60; Robbertse *CHIPS* 71.

<sup>87</sup> Robbertse *Stockfarm* 60; Robbertse *CHIPS* 71.

<sup>88</sup> See Para 1.5 above.

<sup>89</sup> See Para 2.2 above.

<sup>90</sup> Botha *Financial Planning* 1154; Salomon case; Cohen case para 21; Barnard and Botha Nagel's *Business Law* 330; Delpont *New Entrepreneurial Law* 18; s 19(2) of the *Companies Act*.

<sup>91</sup> Botha *Financial Planning* 1130; SARS *Tax Guide for Small Businesses* 2-3.

<sup>92</sup> See Para 1.5 above.

from any personal liability of the farmer, which ultimately assists in the preservation of the assets in the farmer's estate.

However, the risk associated with conducting business through a company is that the shareholders and directors are not completely immune from the liabilities of the company. Shareholders have limited liability, which entails the situation that they are generally exempt from the liabilities of the company,<sup>93</sup> and the *Companies Act* provides for certain circumstances in which the directors of the company may be held personally liable.<sup>94</sup>

One of the most significant assets of the farmer is the farmland itself. However, *SALA* imposes restrictions on succession planning regarding the transfer and inheritance of agricultural land.<sup>95</sup> It is, therefore, imperative to discuss the use of a company as to hold ownership over the farm to demonstrate how the restrictions in *SALA* can be overcome.

### *2.3.2 Section 3 of the Subdivision of Agricultural Land Act, 70 of 1970*

The family farm on which all the farming operations take place and where the family resides, is often an asset with the highest value in the estate of the farmer.<sup>96</sup> Generally, the majority of the immediate family members plan to live off the proceeds of the farm throughout their lifetimes and the farming operations are put

---

<sup>93</sup> S 246 of the *Tax Administration Act* 28 of 2011 (hereinafter the "TAA") requires that a resident natural person must be appointed as the public officer of a company, who is responsible for complying with and carrying out all the 'acts, matters or things' of the company in accordance with the *ITA*. If a shareholder is appointed as the public officer and fails to comply with the obligations imposed on a company in terms of the *ITA*, the shareholder may be held personally liable. For example, should the shareholder fail to make payment to SARS as required by the *ITA*, such shareholder can be held personally liable for any unpaid tax liability incurred by the company. See Para 2.2 above; SARS *Tax Guide for Small Businesses* 4; *SILKE* 767.

<sup>94</sup> S 76 of the *Companies Act* provides for the standard of conduct which a director must exercise when acting in his capacity as such. If a director fails to act as per the prescribed standard of conduct, the director may be held personally liable under the common law for any loss and/or damages suffered by the company due to such failure. Furthermore, a director may also be held liable for any loss and/or damages suffered by the company because of the director acting recklessly, fraudulently or with gross negligence. See Para 2.2 above; s 77 read with s 22 of the *Companies Act*; Levenstein *Without Prejudice* 21-22; SARS *Tax Guide for Small Businesses* 4; Barnard and Botha *Nagel's Business Law* 331.

<sup>95</sup> Robbertse *Stockfarm* 60; Robbertse *CHIPS* 71.

<sup>96</sup> Molaba *The Dairy Mail* 70; Du Pisanie *Stockfarm* 60.

under pressure to support and maintain multiple families.<sup>97</sup> Within the agricultural sector, there are two principal considerations when estate planning is done: firstly, the goal of a farmer to keep their farming business within their family and transfer their farming enterprise to future generations,<sup>98</sup> and secondly, the transfer of the farm assets out of the farmer's personal ownership.<sup>99</sup> However, *SALA* imposes restrictions on succession planning in regard to the transfer and inheritance of agricultural land.<sup>100</sup> Section 3 of *SALA* provides as follows:

Subject to the provisions of section 2-

- (a) Agricultural land shall not be subdivided;
- (b) No undivided share in agricultural land not already held by any person, shall vest in any person;
- (c) No part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person,

unless the Minister has consented in writing to the subdivision or vesting concerned.

The main goal of *SALA* is to prevent agricultural land from being subdivided into small, unprofitable sections that will ultimately hinder the agricultural sector in the future.<sup>101</sup> However, the effect of section 3 of *SALA* is that if Mr Botha,<sup>102</sup> planned to bequeath the farm to his two sons in equal shares in his will, the executor of his deceased estate would not be able to distribute the farmland without the Minister of Agriculture's permission,<sup>103</sup> which is almost impossible to obtain.<sup>104</sup> Moreover, should the Minister of Agriculture not consent to the subdivision of the farmland, Mr Botha's sons would have to enter into a redistribution agreement;<sup>105</sup> alternatively,

---

<sup>97</sup> Van Zyl *Stockfarm* 51.

<sup>98</sup> Lingani and Hough 2025 *SAJAE* 115.

<sup>99</sup> O'Halloran *Farmer's Weekly* 32.

<sup>100</sup> Robbertse *Stockfarm* 60; Robbertse *CHIPS* 71.

<sup>101</sup> Schmidt Oilseeds Focus 64.

<sup>102</sup> See Para 1.5 above.

<sup>103</sup> Veldhuizen *Farmer's Weekly* 47; Schmidt *Oilseeds Focus* 64.

<sup>104</sup> Veldhuizen *Farmer's Weekly* 47.

<sup>105</sup> A redistribution agreement is a unique type of contract in which the heirs of the deceased may re-arrange their rights in the deceased estate assets, for example, Mr Botha's sons may reach an agreement in terms of which the whole farmland is transferred into the personal name of one son, whilst the second son receives his half share in monetary value. However, this is problematic because if the farmland is held in the personal name of one son, it defeats the

and in the event of a family dispute regarding ownership of the farm, the land would potentially have to be sold to resolve such dispute.<sup>106</sup> The transfer of the farm into the ownership of a company in which Mr Botha's sons are either shareholders and/or directors, can serve as a viable means to bypass this hurdle.<sup>107</sup> Therefore, it is necessary to consider the structure of companies that may be used to hold ownership of the farmland and farm assets, as well as how to achieve a separation between the farm assets and the farming business.<sup>108</sup>

### *2.3.3 The difference between a trading company and an asset holding company*

The separation of the farm assets and the farming business can be achieved by making use of two different companies, namely: a trading company and a holding company.<sup>109</sup> A trading company is a subsidiary of the holding company.<sup>110</sup> Section 1(1) of the *Companies Act* states that a holding company, in relation to a subsidiary company:

Means a juristic person that controls that subsidiary as a result of any circumstances contemplated in section 2(2)(a) or 3(1)(a).<sup>111</sup>

The most common structure comprising a holding company and a trading company involves the holding company having ownership over all the farm assets, whilst the business operations are conducted in a separate trading company that earns the income.<sup>112</sup> This structure of companies serves as further protection of the farm assets,<sup>113</sup> because creditors of the company will be attracted to the income-earning company, which is separate from the company that holds ownership over the farm

---

protection and preservation of the asset and hinders the transfer of the farming enterprise to future generations. See Claassens 2004 *Journal for Estate Planning Law* 36; Robbertse *Stockfarm* 60; Robbertse *CHIPS* 71; Veldhuizen *Farmer's Weekly* 47.

<sup>106</sup> A sale of the farmland would prevent the transfer of the farming enterprise to future generations. See Molaba *The Dairy Mail* 70.

<sup>107</sup> Molaba *The Dairy Mail* 70.

<sup>108</sup> Robbertse *Stockfarm* 60.

<sup>109</sup> Robbertse *Stockfarm* 60.

<sup>110</sup> S 3 of the *Companies Act*.

<sup>111</sup> S 2(2)(a) of the *Companies Act* provides the circumstance under which a person controls a juristic person or its business and s 3(1)(a) of the *Companies Act* describes what constitutes a subsidiary relationship between two and/or more companies.

<sup>112</sup> Robbertse *Stockfarm* 60.

<sup>113</sup> O'Halloran *Farmer's Weekly* 27.

assets, potentially preventing the farm assets from being subject to third-party claims of creditors.<sup>114</sup> To ensure the enjoyment of assets, the holding company and the trading company may enter into a lease agreement whereby the trading company leases the farm assets from the holding company.<sup>115</sup>

The question that then arises is: how does this shift in ownership of the farm assets from the farmer to the company still allow the farmer the continued use of such assets to generate an income during his lifetime.

#### *2.3.4 The management of farming operations and the use of farm assets*

The farmer himself, his family members, a trust established by the farmer,<sup>116</sup> or companies registered by the farmer, may purchase shares in the company and act as shareholders thereof.<sup>117</sup> Furthermore, the farmer himself or his family members can be appointed as co-directors of the company.<sup>118</sup> The board of the company is tasked with overseeing and managing the business operations of the company, and has the power to exercise and perform all the necessary functions and responsibilities of the company in accordance with the memorandum of incorporation (hereinafter referred to as "the MOI").<sup>119</sup> Therefore, although the farmer, such as Mr Botha,<sup>120</sup> may not own the farm assets in his personal capacity, the appointment of the farmer as director of the company still allows him to efficiently manage the farming operations and enjoy the use of the farm assets.<sup>121</sup>

The MOI of the company is the founding document of the company,<sup>122</sup> and provides flexibility to farmers in the creation of and the functioning through a company as it sets out *inter alia* the rights of the shareholders and the duties and powers of the

---

<sup>114</sup> Discussions around suretyships/mortgage bonds and/or any further forms of security fall outside the scope of this study due to space constraints. See O'Halloran *Farmer's Weekly* 27.

<sup>115</sup> Robbertse *Stockfarm* 60.

<sup>116</sup> See Chapter 3 below.

<sup>117</sup> Molaba *The Dairy Mail* 70; Veldhuizen *Farmer's Weekly* 47.

<sup>118</sup> See Para 2.2 above; s 1 of the *Companies Act*; Molaba *The Dairy Mail* 70; Veldhuizen *Farmer's Weekly* 47.

<sup>119</sup> S 66(1) of the *Companies Act*.

<sup>120</sup> See Para 1.5 above.

<sup>121</sup> Molaba *The Dairy Mail* 70; Veldhuizen *Farmer's Weekly* 47.

<sup>122</sup> Botha *Financial Planning* 1154.

directors (subject to the prescribed statutory,<sup>123</sup> and common law duties of directors).<sup>124</sup> Therefore, the MOI of the company plays an important role in determining how the farmer wishes to manage the farming operations and the use of the farm assets that are under the company's ownership. In addition to the MOI, the *Companies Act* provides the farmer with a clear legal framework within which to function when conducting farming operations through a company.<sup>125</sup>

It is apparent from the above that Mr Botha<sup>126</sup> and his sons may jointly, through holding shares or directorship, manage the farming operations and enjoy the use of the farm assets. However, this family-owned business structure, which is predominant in the agricultural sector, generally entails complex family dynamics which present a detrimental risk when farming operations are conducted through a company.<sup>127</sup> The risk lies in the fact that the farming operations are managed by multiple family members who possess contradictory needs, expectations and personalities,<sup>128</sup> and further, in attempting to align the interests of family members with the interests of the farming business.<sup>129</sup> In contrast to a non-family-owned business,<sup>130</sup> a family-owned business is highly susceptible to conflict arising between the family members which usually has a serious effect on both the farming business and family relationships, which ultimately hinders the sustainability of the business.<sup>131</sup> Therefore, the MOI needs to be clearly drafted to accommodate the contrasting interests of the family and the interests of the business operations to

---

<sup>123</sup> For example, the standard of the conduct of directors as contained in s 76 of the *Companies Act*; Botha *Financial Planning* 1155.

<sup>124</sup> Botha *Financial Planning* 1154-1155.

<sup>125</sup> Chapter 2, part F of the *Companies Act* specifically provides for the governance of companies.

<sup>126</sup> See Para 1.5 above.

<sup>127</sup> Van Zyl 2014 *Stockfarm* 51.

<sup>128</sup> Van der Merwe 2001 *SAJAE* 2; Brönn *The Dairy Mail* 69.

<sup>129</sup> Van der Merwe 2001 *SAJAE* 2; Visser *Finweek* 44; Brönn *The Dairy Mail* 69.

<sup>130</sup> Business and family are two distinct concepts and systems with contrasting needs and goals, therefore, operating a non-family-owned business differs significantly from operating a family-owned business. Managing a non-family-owned business entails making rational and reasonable business decisions, placing a high priority on efficiency and productivity, and emphasising the production of goods and services. However, family-owned businesses tend to be susceptible to emotional influences in decision making, and focuses on ensuring stability, nurturing and loyalty between the family members. See Van der Merwe 2001 *SAJAE* 4-5; Visser *Finweek* 44.

<sup>131</sup> Van der Merwe 2001 *SAJAE* 2.; Visser *Finweek* 44; Botha *Personal Finance* 41.

ensure these unique family challenges are efficiently managed, which will ultimately ensure the survival and optimal operation of the farming business.<sup>132</sup>

## ***2.4 Methods to transfer the farm assets to a company***

It is clear from the above that the transfer of the farm assets and the farming enterprise into the ownership of a company is a means to ensure both the enjoyment of the farm assets and farming enterprise throughout the farmer's lifetime, whilst preserving the assets for future generations. However, the methods that may be utilised to transfer ownership of the assets from the farmer to the company can give rise to certain tax implications.<sup>133</sup> The methods that can be utilised to transfer ownership are firstly, an asset-for-share transaction as regulated by section 42 of the *ITA*,<sup>134</sup> secondly, the sale of an asset to a company and lastly, the donation of an asset to a company.<sup>135</sup> These methods will be discussed in the following paragraphs.

### *2.4.1 Section 42 of the ITA: asset-for-share transactions*

A share in a company is defined as the "unit into which the proprietary interest in a profit company is divided".<sup>136</sup> It represents the ownership interest in a company, and any type of shares referred to in a company's MOI are generally regarded as shares for income tax purposes.<sup>137</sup> An asset-for-share transaction relates specifically to an equity share, which is defined in the *ITA* as any share in a company that is not a share which carries any right to participate beyond a specified amount in a distribution with regard to both returns of capital and dividends.<sup>138</sup>

---

<sup>132</sup> Van der Merwe 2007 *SAJAE* 3.

<sup>133</sup> See Chapter 4 below.

<sup>134</sup> Botha Financial Planning 966.

<sup>135</sup> Botha Financial Planning 966.

<sup>136</sup> S 1 of the *Companies Act*; s 1(1) of the *ITA*.

<sup>137</sup> *SILKE* 814.

<sup>138</sup> S 1(1) of the *ITA*; *SILKE* 814; SARS *Interpretation Note* 437; Rudnicki 2015 *BTCLQ* 23; Seligson 2019 *BTCLQ* 6.

There are two components to the definition of an asset-for-share transaction, thereby providing for two types of transactions.<sup>139</sup> Section 42(1)(a) of the *ITA*,<sup>140</sup> applies to domestic transactions and provided that all the necessary requirements are met, a transaction is a domestic transaction if a person, such as the farmer, transfers an asset that is not a personal right, to a resident company in exchange for an equity share in that company.<sup>141</sup> Section 42(1)(b) of the *ITA* enables certain cross-border transactions,<sup>142</sup> and applies when a transferor company transfers an equity share in a foreign company to another foreign transferee company.<sup>143</sup> The market value of a capital asset must be equal to or greater than its base cost,<sup>144</sup> or the market value of an asset that is trading stock must be equal to or greater than the amount contemplated in sections 11(a) or 22(1) of the *ITA*.<sup>145</sup> The farmer who transfers the asset must either have a qualifying interest in the company at date of disposal, or be a natural person who renders services on a full-time basis to the company.<sup>146</sup> A qualifying interest in the company includes equity shares held by the person in the company, and the equity shares must constitute at least 10% of the total equity shares and confer the same percentage of voting rights in that company.<sup>147</sup>

However, it is possible that a farmer may transfer an asset to a company in exchange for a consideration that is not equity shares,<sup>148</sup> in which event that disposal

---

<sup>139</sup> SILKE 840; Kriel Income Tax – Insurance and Tax 1.

<sup>140</sup> Kriel Income Tax – Insurance and Tax 1.

<sup>141</sup> SILKE 840; Rudnicki 2015 *BTCLQ* 23; Seligson 2019 *BTCLQ* 6.

<sup>142</sup> SILKE 840.

<sup>143</sup> SILKE 843.

<sup>144</sup> Mothabeng 2025

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2025/Practice/Tax-Exchange-Control/tax-and-exchange-control-alert-17-april-avoiding-pitfalls-the-impact-of-deemed-donations-on-section-42-transactions>; Rudnicki 2015 *BTCLQ* 23, 26.

<sup>145</sup> S 11(a) of the *ITA* provides that when determining the taxable income of a person due to the carrying on of a trade, a deduction is allowed of all expenditure and losses (not of a capital nature) actually incurred in the production of income. S 22(1) of the *ITA* deals with *inter alia* amounts that are to be considered in respect of values of trading stocks. See Rudnicki 2015 *BTCLQ* 26.

<sup>146</sup> SILKE 840; Rudnicki 2015 *BTCLQ* 23.

<sup>147</sup> S 42(1)(c) of the *ITA*.

<sup>148</sup> SILKE 845.

of the asset must be apportioned into a part that complies with section 42 of the *ITA* and a second part that does not qualify as an asset-for-share transaction.<sup>149</sup>

The main advantage of an asset-for-share transaction is that it aims to provide a form of 'roll-over' tax relief, which is ultimately achieved by postponing the regular income tax and CGT consequences that would normally result from the transfer or disposal of an asset, on condition that the requirements in section 42 of the *ITA* are met.<sup>150</sup> According to section 42(8A) of the *ITA*, the roll-over relief applies automatically if a transaction meets all the requirements of section 42 of the *ITA*, unless the parties to the transaction agree otherwise in writing.<sup>151</sup> The requirements of section 42 of the *ITA* provide *inter alia* that a transaction will be regarded as an asset-for-share transaction if it is a transaction:<sup>152</sup>

- (a)(i) In terms of which a person disposes of an asset (other than an asset which constitutes a restraint of trade or personal goodwill), the market value of which is equal to or exceeds–
  - (aa) in the case of an asset held as a capital asset, the base cost of that asset on the date of that disposal; or
  - (bb) in the case of an asset held as trading stock, the amount taken into account in respect of that asset in terms of section 11(a) of 22(1) or (2),
    - To a company which is a resident, in exchange for the issue of an equity share in that company and that person–
      - (A) at the close of the day on which that asset is disposed of, holds a qualifying interest in that company; or
      - (B) is a natural person who will be engaged on a full-time basis in the business of that company, or a controlled group company in relation to that company, of rendering a service; and
- (ii) as a result of which that company acquires that asset from that person–

---

<sup>149</sup> S 42(4) of the *ITA*; *SILKE* 845.

<sup>150</sup> Beukes *Income Tax – Income Tax Reporter – Tax Planning Corporate and Personal – Archive* 1; Reynders 2022 <https://www.phinc.co.za/Our-Insights/BlogDetail/BlogID/376>; Mothabeng 2025 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2025/Practice/Tax-Exchange-Control/tax-and-exchange-control-alert-17-april-avoiding-pitfalls-the-impact-of-deemed-donations-on-section-42-transactions>; Seligson 2019 *BTCLQ* 1.

<sup>151</sup> *SILKE* 843; Botha A critical analysis of the corporate restructuring rules 17.

<sup>152</sup> S 42(1)(a) of the *ITA*; Seligson 2019 *BTCLQ* 6.

- (aa) as trading stock, where that person holds it as trading stock;
- (bb) as a capital asset, where that person holds it as a capital asset;  
or
- (cc) as trading stock, where that person holds it as a capital asset and that company and that person do not form part of the same group of companies...

In the event that Mr Botha<sup>153</sup> establishes a company and he meets the requirements of an asset-for-share transaction to transfer the farm asset to such company, the company will acquire the farm asset at its original base cost in exchange for Mr Botha to receive the same value (as the farm asset) of shares in that company.<sup>154</sup> This transfer of an asset is regarded as a deemed disposal in the hands of the farmer, which results in no immediate capital gain or loss,<sup>155</sup> as the asset was disposed of at its base cost.<sup>156</sup> The CGT implications for the farmer are deferred,<sup>157</sup> as the value of the asset transferred is rolled over to the shares that the farmer acquired.<sup>158</sup> The company acquiring the farm asset is deemed to have acquired such asset at the same time and at the same cost as when originally acquired by the farmer.<sup>159</sup>

In addition to the deferral of immediate CGT and, therefore, income tax implications,<sup>160</sup> there are certain other tax advantages that are available when a transaction meets all the requirements of section 42 of the *ITA*.<sup>161</sup> Section 8(25) of the *Value-Added Tax Act* 89 of 1991 (hereinafter referred to as the "*VAT Act*"),<sup>162</sup> stipulates that if both the parties to the transaction are VAT vendors, and the

---

<sup>153</sup> See Para 1.5 above.

<sup>154</sup> S 42(2)(a)(ii) of the *ITA*; *SILKE* 844; Kriel *Income Tax – Insurance and Tax* 1, McAllister 2025 *BTCLQ* 15; Seligson 2019 *BTCLQ* 6.

<sup>155</sup> See Para 4.4 below; s 42(2)(a)(i) of the *ITA*; *SILKE* 844; Botha A critical analysis of the corporate restructuring rules 35.

<sup>156</sup> S 42(2)(a) of the *ITA*; Strampe *Income Tax – Insurance and Tax* 2; Botha A critical analysis of the corporate restructuring rules 35.

<sup>157</sup> See Para 4.4 below; Kriel *Income Tax – Insurance and Tax* 1.

<sup>158</sup> Botha A critical analysis of the corporate restructuring rules 35.

<sup>159</sup> Botha A critical analysis of the corporate restructuring rules 36; SARS Interpretation Note 43 43, Rudnicki 2015 *BTCLQ* 27-28.

<sup>160</sup> Kriel *Income Tax – Insurance and Tax* 1; Strampe *Income Tax – Insurance and Tax* 2; Seligson 2019 *BTCLQ* 1.

<sup>161</sup> See Paras 4.2 and 4.4 below; Reynders 2022 <https://www.phinc.co.za/Our-Insights/BlogDetail/BlogID/376>.

<sup>162</sup> *Value-Added Tax Act* 89 of 1991; See Para 4.8 below.

requirements of section 11(1)(e) of the *VAT Act* are complied with,<sup>163</sup> as well as the requirements of section 42 of the *ITA*, the supply is one of a going concern.<sup>164</sup> When an enterprise is disposed of as a going concern, VAT is levied on the transaction at a rate of 0%,<sup>165</sup> and consequently subject to VAT in the amount of Rnil.<sup>166</sup> Therefore, should Mr Botha<sup>167</sup> conduct his sole proprietorship business as a VAT registered vendor and the company to which he wishes to transfer the asset is also registered for VAT, the transfer of the asset will be subject to VAT at 0%.<sup>168</sup>

The *Transfer Duty Act* 40 of 1949 (hereinafter referred to as the "*Transfer Duty Act*"),<sup>169</sup> also provides two exemptions in section 9(1)(l)(i),<sup>170</sup> and 9(15A),<sup>171</sup> which provide that transfer duty will not be payable on the transfer of immovable property in terms of an asset-for-share transaction.<sup>172</sup> The transfer duty exemption is of particular importance with regard to the transfer of agricultural land.<sup>173</sup> It is also notable that a transaction is exempt from transfer duty if the transaction constitutes a taxable supply of goods in terms of the *VAT Act*.<sup>174</sup>

Section 42 of the *ITA* achieves a reduction of tax implications to a certain extent when transferring ownership of a farm asset to a company, as the CGT and income tax for the farmer are deferred.<sup>175</sup> In addition to the tax benefits, it also provides

---

<sup>163</sup> S 11(1)(e) of the *VAT Act* stipulates when a transaction will be regarded as one of a going concern. See Jones *Tax Breaks* 29; Bruwer *SATSA* 104; SARS *VAT 404 – Guide for Vendors* 45.

<sup>164</sup> S 11 of the *VAT Act*; Bruwer *SATSA* 104.

<sup>165</sup> S 11 of the *VAT Act*; Bruwer *SATSA* 104; SARS *VAT 404 – Guide for Vendors* 45; Kruger 2018 *BTCLQ* 24.

<sup>166</sup> Botha *A critical analysis of the corporate restructuring rules* 54; Kriel *Income Tax – Insurance and Tax* 2.

<sup>167</sup> See Para 1.5 above.

<sup>168</sup> Jones *Tax Breaks* 2.

<sup>169</sup> Transfer Duty Act 40 of 1949. See Para 4.8 below; Botha *A critical analysis of the corporate restructuring rules* 53; Kriel *Income Tax – Insurance and Tax* 2.

<sup>170</sup> S 9(1)(1)(i) of the *Transfer Duty Act*.

<sup>171</sup> S 9(15A) of the *Transfer Duty Act*.

<sup>172</sup> Botha *A critical analysis of the corporate restructuring rules* 53; Kriel *Income Tax – Insurance and Tax* 2; Reynders 2022 <https://www.phinc.co.za/Our-Insights/BlogDetail/BlogID/376>; Kruger 2018 *BTCLQ* 25-26; Botha *Financial Planning* 834; SARS *Transfer Duty Guide* 88.

<sup>173</sup> Transfer duty may be payable on the acquisition of immovable property. See Para 4.8 below; Botha *Financial Planning* 827; Bruwer *SATSA* 135; *SILKE* 1113.

<sup>174</sup> See Para 4.8 below; s 9(15) of the *Transfer Duty Act*; Kriel *Income Tax – Insurance and Tax* 2; SARS *Transfer Duty Guide* 30; *SILKE* 1091; Kruger 2018 *BTCLQ* 23.

<sup>175</sup> The taxable capital gains received by a farmer are included in the calculation of his taxable income, therefore, should no capital gains arise, there will be no increase in the taxable income

the farmer with the option to transfer the farm asset into a company under his control, allowing for the enjoyment and preservation of such asset.<sup>176</sup>

However, the risk associated with an asset-for-share transaction for purposes of estate planning, is that the farmer will acquire the shares in his personal name at the same value as the farm assets he transferred out of his personal ownership. In the case of Mr Botha,<sup>177</sup> he will have the option to either sell or donate a portion of the shares to his sons or a trust.<sup>178</sup> The disadvantage is that such transactions may result in CGT and donations tax respectively.<sup>179</sup> A further risk that arises in an asset-for share transaction is the following: when the transferor transfers an asset to a company at a value that is lower than its fair market value, it may be regarded as a deemed donation and donations tax will be applicable.<sup>180</sup> To retain the benefits of an asset-for-share transaction in the initial transfer of the asset, Mr Botha must ensure that the value of the asset transferred and the shares received is equal,<sup>181</sup> and he must either hold a qualifying interest in that company for at least 18 months,<sup>182</sup> or continue to render services to that company on a full-time basis.<sup>183</sup>

To determine which method of transfer would be most suitable for Mr Botha,<sup>184</sup> the sale or donation of farm assets to a company also need to be considered.

---

of the farmer and consequently, no increase in the income tax of the farmer. See Paras 4.2 and 4.4 below; *SILKE* 649, 988; Kriel *Income Tax – Insurance and Tax* 1; Seligson 2019 *BTCLQ* 1.

<sup>176</sup> Kriel *Income Tax – Insurance and Tax* 4.

<sup>177</sup> See Para 1.5 above.

<sup>178</sup> The shares may only be disposed of after a period of 18 months in accordance with s 42(1)(a) of the *ITA*. See Chapter 3 below.

<sup>179</sup> See Paras 4.4 and 4.5 below.

<sup>180</sup> See Para 4.5 below; Mothabeng 2025 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2025/Practice/Tax-Exchange-Control/tax-and-exchange-control-alert-17-april-avoiding-pitfalls-the-impact-of-deemed-donations-on-section-42-transactions>.

<sup>181</sup> Mothabeng 2025 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2025/Practice/Tax-Exchange-Control/tax-and-exchange-control-alert-17-april-avoiding-pitfalls-the-impact-of-deemed-donations-on-section-42-transactions>; Rudnicki 2015 *BTCLQ* 23, 26; Lewis *Tax Breaks* 6.

<sup>182</sup> Since this research focuses on the use of a private company, Mr Botha would have to comply with para (c) of the definition of a qualifying interest as contained in s 42(1) of the *ITA*. See s 42(1)(a) of the *ITA*; *SILKE* 848; Rudnicki 2015 *BTCLQ* 22.

<sup>183</sup> S 42(1)(a) of the *ITA*; *SILKE* 840, 848; Rudnicki 2015 *BTCLQ* 23.

<sup>184</sup> See Para 1.5 above.

### 2.4.2 The sale or donation of farm assets to a company

Firstly, a farmer may simply enter into a sale transaction with the company and sell farm assets to the company.<sup>185</sup> However, the sale of both movable (i.e. the farm implements) and immovable property (i.e. the farmland) will result in the farmer facing CGT implications in his personal capacity.<sup>186</sup> In addition to the CGT consequences on the sale of immovable property, such a sale is also susceptible to either VAT or transfer duty, but never both.<sup>187</sup> Although the value of the farm assets is removed from the farmer's estate, another disadvantage of selling an asset is that the asset is replaced with the same value of cash, which then falls into the estate of the farmer.

A further option available to the farmer is to sell the farm assets to a company on either a low-interest or an interest-free loan account.<sup>188</sup> If Mr Botha<sup>189</sup> were to sell an asset to the company by means of a loan account, the value of the loan account will fall into the personal estate of Mr Botha and be regarded as a claim in favour of himself or his deceased estate,<sup>190</sup> and therefore, included in property of his deceased estate for purposes of calculating estate duty.<sup>191</sup> There is a possibility that the sale of an asset on a loan account transaction may be accompanied by the inclusion of a trust.<sup>192</sup> In this particular event where a trust is involved and a loan is granted to the company at the instance of a connected person,<sup>193</sup> the provisions of section 7C of the *ITA*<sup>194</sup> become particularly important and the transaction may be subject to donations tax.<sup>195</sup>

---

<sup>185</sup> Botha Financial Planning 966.

<sup>186</sup> See Para 4.4 below; *SILKE* 969.

<sup>187</sup> See Para 4.8 below; *SILKE* 1091; s 9(15) of the Transfer Duty Act; Kriel Income Tax – Insurance and Tax 2; SARS Transfer Duty Guide 30.

<sup>188</sup> Botha Financial Planning 966.

<sup>189</sup> See Para 1.5 above.

<sup>190</sup> See Paras 4.6 below.

<sup>191</sup> See Para 4.7 below; Botha *Financial Planning* 762.

<sup>192</sup> See Chapter 3 below; Botha *Financial Planning* 966, 976.

<sup>193</sup> See Para 4.6 below.

<sup>194</sup> See Para 4.6 below.

<sup>195</sup> See Para 4.5 below; *SILKE* 1033.

Finally, a farmer may choose to donate the farm assets to a company, which will result in CGT and donations tax consequences for the farmer.<sup>196</sup>

## **2.5 Conclusion**

In this Chapter, the first sub-objective was pursued, addressing the question whether a company can be utilised as an estate planning tool. It further explored the methods available to transfer the farm assets to a company. This sub-objective directly links to the research question.

It was shown that a farmer who conducts farming operations and holds the farm assets in his personal capacity, is faced with several risks and challenges,<sup>197</sup> in regard to conducting business as a sole proprietor and those that are inherent within the agricultural sector.<sup>198</sup>

On examination of a company as an estate planning tool, it can be concluded that a company is a separate legal entity which is able to hold independent ownership of assets, incur its own liabilities and continue to exist after a change in shareholders or directors; all of this ensures the transfer and continuance of the farming enterprise to future generations and the preservation of the farm assets.<sup>199</sup> Furthermore, the appointment of the farmer himself, his family members or a trust established by the farmer as shareholders and/or co-directors of the company, allows for the maximum enjoyment of the farmer's estate during his lifetime and assists to overcome the obstacle in section 3 of *SALA*.<sup>200</sup>

It is further apparent that the methods that can be utilised to transfer the farm assets into the ownership of a company are subject to several tax implications.<sup>201</sup> An asset-for-share transaction, as well as the sale or donation of the farm assets to a company, offers advantages in terms of asset protection and smooth succession.<sup>202</sup>

---

<sup>196</sup> See Paras 4.4 and 4.5 below.

<sup>197</sup> See Paras 1.1 and 2.1 above.

<sup>198</sup> See Paras 1.1 and 2.1 above.

<sup>199</sup> See Paras 2.2 and 2.3 above.

<sup>200</sup> See Paras 2.3.2 and 2.3.4 above.

<sup>201</sup> See Para 2.4 above.

<sup>202</sup> See Para 2.4.1 above.

Although an asset-for-share transaction achieves a deferral of CGT implications, all three methods are subject to potential tax disadvantages which require careful analysis.<sup>203</sup> It is, therefore, not yet clear to what extent the tax legislation impacts the farmer's choice of a company as an estate planning tool, as well as the methods of transfer. It is also uncertain whether the use of a trust can serve as a viable estate planning tool as an alternative to a company. To determine which tool and methods of transfer would be the most appropriate, the use of trusts as an estate planning tool will be investigated in the following Chapter.

---

<sup>203</sup> See Chapter 4 below.

## Chapter 3 The use of trusts as an estate planning tool

### 3.1 Introduction

It is reiterated that farmers who conduct farming operations and hold assets in their personal name are presented with several obstacles regarding *inter alia* the protection and preservation of assets,<sup>204</sup> the transfer of agricultural land,<sup>205</sup> and possible tax disadvantages;<sup>206</sup> all these obstacles frustrate the farmer's estate planning process. Over the past few years, it appears as though more farmers have begun to utilise trusts in their estate planning.<sup>207</sup> A trust is one of the most commonly available tools when estate planning is being carried out, due to the vital role it plays in protecting and preserving the estate for future generations.<sup>208</sup>

In addition to a company as an estate planning tool,<sup>209</sup> the use of a trust should also be considered as a means to diversify the risk,<sup>210</sup> and effectively achieve the farmer's estate planning goals.<sup>211</sup> Furthermore, it is commonly assumed that a trust is the equivalent of a private company,<sup>212</sup> however, the two estate planning tools differ from each other.<sup>213</sup> A company and a trust are two separate estate planning tools, both of which offer their own sets of advantages and disadvantages in terms of asset protection and the way in which they are taxed.<sup>214</sup> Akin to the use of a company, ownership of the farm assets must be transferred into the ownership of the trust to reap the benefits of asset protection that are offered by a trust.<sup>215</sup> The

---

<sup>204</sup> See Paras 2.1 and 2.3 above.

<sup>205</sup> See Paras 2.1 and 2.3 above.

<sup>206</sup> See Chapter 4 below.

<sup>207</sup> Maree Farmer's Weekly 30.

<sup>208</sup> Luttig Personal Finance 9.

<sup>209</sup> See Chapter 2 above.

<sup>210</sup> It is necessary to diversify these risks as concentrating the business operations as well as the farm assets into a single business structure may be detrimental to the farmer. See Paras 2.1 and 2.3 above; O'Halloran *Farmer's Weekly* 29.

<sup>211</sup> See Para 1.1 above. The estate planning goals of the farmer include *inter alia* to ensure the maximum enjoyment of his estate during his lifetime and after his death, the protection and growth of the farming enterprise and the farm assets, and the transfer of the farming enterprise to future generations. See O'Halloran *Farmer's Weekly* 29; Botha *Financial Planning* 957; Lingani and Hough 2025 *SAJAE* 115; Veldhuizen *Farmer's Weekly* 46; Coleman *Famer's Weekly* 32.

<sup>212</sup> O'Halloran *Farmer's Weekly* 29.

<sup>213</sup> O'Halloran *Farmer's Weekly* 29.

<sup>214</sup> See Paras 2.3 above and 3.3 below and Chapter 4 below.

<sup>215</sup> See Para 2.1 above.

trust as an estate planning tool and the methods to transfer the farm assets into the ownership of the trust will be discussed throughout this Chapter.

### **3.2 Trusts as a concept**

#### *3.2.1 Definition and legal nature*

In simple terms, a trust<sup>216</sup> is described as a legal concept or relationship in which the founder of the trust transfers assets to the trust, which is administered by the trustees according to the trust deed, for the benefit of third persons (the beneficiaries of such trust).<sup>217</sup> Both natural persons and juristic persons may be a party to a trust,<sup>218</sup> which is beneficial in comparison to a company where only natural persons may be appointed as directors.<sup>219</sup> A trust is not regarded as a legal person in South African law (except for taxation purposes),<sup>220</sup> but rather a legal institution *sui generis*.<sup>221</sup> Therefore, a trust cannot be the bearer of its own rights and liabilities,<sup>222</sup> as in the case of a company, which is considered a juristic person in South African law.<sup>223</sup>

Due to the fact that a trust is not considered to be a separate legal person, all of the rights and liabilities of the trust, as well as its assets, vest in the trustee in his fiduciary capacity.<sup>224</sup> However, the trustee does not have any personal right to the

---

<sup>216</sup> See Para 1.1 above.

<sup>217</sup> Delpont New Entrepreneurial Law 300; SILKE 1003; Botha Financial Planning 908; Bruwer SATSA 709; Jones Personal Finance 9; Jones Tax Breaks 5; Du Toit 2007 Stellenbosch Law Review 469.

<sup>218</sup> There are three parties to a trust: firstly, the founder, who establishes the trust, secondly, the trustees who are responsible for controlling and administering the trust and its assets, and lastly, the beneficiaries are the persons nominated to benefit from the trust. See Botha *Financial Planning* 909 and 914; Bruwer *SATSA* 709; Muller *TaxTalk* 23.

<sup>219</sup> Delpont New Entrepreneurial Law 300.

<sup>220</sup> S 1(1) of the *ITA*.

<sup>221</sup> Braun v Blann and Botha NNO and Another 1984 2 SA 850 (A); Delpont New Entrepreneurial Law 300; Parker case para 10; Du Toit, Smith and Van Der Linde Fundamentals of South African Trust Law 33; Kenny Without Prejudice 70.

<sup>222</sup> Delpont New Entrepreneurial Law 300-301.

<sup>223</sup> This was confirmed in the case of Lupacchini No and Another v Minister of Safety and Security 2011 2 All SA 138 (SCA) (hereinafter the "Lupacchini case") para 1; Botha Financial Planning 1155; Delpont New Entrepreneurial Law 23; Parker case para 10; Du Toit, Smith and Van Der Linde Fundamentals of South African Trust Law 6.

<sup>224</sup> The office of the trustee is one of a fiduciary nature. See s 9(1) of the *Trust Act* provides that 'a trustee shall in the performance of his duties and the exercise of his powers act with care, diligence and skill which can reasonably be expected of a person who manages the affairs of

trust assets and generally will not be held liable for liabilities of the trust.<sup>225</sup> Ultimately, the trustee will have two separate estates: his private estate in his personal name and the trust estate in his official capacity as trustee.<sup>226</sup> A trustee is defined in the *Trust Act* as:<sup>227</sup>

Any person (including the founder of a trust) who acts as trustee by virtue of an authorisation under section 6 and includes any person whose appointment as trustee is already of force and effect at the commencement of this Act.

Although a trust is not recognised as a legal person, it is considered a separate and independent 'person' for tax purposes.<sup>228</sup> The *ITA* provides that a trust is defined as:<sup>229</sup>

Any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person, and includes a portfolio of a collective investment scheme and a portfolio of a hedge fund collective investment scheme.

Apart from understanding the legal nature of a trust, it is further important to understand how a trust is created and the different types that can be established, to determine which would be the most appropriate when estate planning for the farmer is carried out.

### 3.2.2 The different types of trusts

Trusts are governed by the *Trust Act*. There are two ways in which a trust can be established:<sup>230</sup> firstly, an *inter vivos* trust, established by way of a 'contract' during

---

another'. See Delpont *New Entrepreneurial Law* 301; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3-4.

<sup>225</sup> Delpont *New Entrepreneurial Law* 301; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3.

<sup>226</sup> S 12 of the *Trust Act*; Delpont *New Entrepreneurial Law* 301; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3; Lupacchini case para 1; Manie Stellenbosch *Law Review* 312.

<sup>227</sup> S 1 of the *Trust Act*; s 6 of the *Trust Act* provides for the authorisation and security of a trustee.

<sup>228</sup> The word 'person' is defined in s 1 of the *ITA* to include any trust. Furthermore, a trust is considered to be a 'person' under the *Companies Act*. S 1 of the *Companies Act* provides that the word 'person' includes a juristic person, and a juristic person is defined to include a trust. See Botha *Financial Planning* 912; Bruwer *SATSA* 710.

<sup>229</sup> S 1(1) of the *ITA*.

<sup>230</sup> The requirements that must be complied with to create a valid trust were laid down in the case of *Administrators, Estate Richards v Nichol* 1996 4 SA 253 (C) and are as follows:

a person's lifetime and secondly, a *mortis causa* trust, where the creation of a trust is provided for in a person's will and comes into existence upon the death of such person.<sup>231</sup> The case of *Crookes NO and Another v Watson and Others*,<sup>232</sup> confirmed that an *inter vivos* trust is essentially a contract concluded between the founder of the trust and the trustee, for the benefit of a third person.<sup>233</sup> In the context of estate planning, the use of an *inter vivos* discretionary trust is of particular significance as it can assist in freezing the value of the farmer's estate.<sup>234</sup>

Types of trusts are further classified based on ownership: namely, ordinary trusts and bewind trusts.<sup>235</sup> An ordinary trust is where the trustees (in their official capacity) have ownership over the assets and liabilities of the trust and administer these assets and liabilities for the benefit of the beneficiaries, according to the trust deed.<sup>236</sup> However, in a bewind trust, ownership of the trust assets vests in the beneficiaries of the trust, whilst the trustee is responsible for controlling and administering such assets.<sup>237</sup>

- 
1. the intention of the founder of the trust must be to create a trust;
  2. the intention of the founder of the trust must create a legal obligation;
  3. the trust property must be defined with reasonable certainty;
  4. the trust object must be defined with reasonable certainty; and
  5. the trust object must be lawful.'

In addition to these requirements, the requirements provided for in the *Trust Act* must also be complied with to establish a valid trust. See Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 63; Botha *Financial Planning* 912; Nel, Lawack and Van der Walt 2013 *Obiter* 121; Du Plessis 2009 *SA Mercantile Law Journal* 324-325.

<sup>231</sup> The discussion of a *mortis causa* trust falls outside the scope of this study as the focus is on planning the estate of the farmer whilst he is still alive. See Botha *Financial Planning* 911; Jones 2008 *Personal Finance* 9; Delport *New Entrepreneurial Law* 301; *SILKE* 1004; Bruwer *SATSA* 709; Maree *Farmer's Weekly* 30; Thatcher *The Dairy Mail* 47; Muller *TaxTalk* 23; Brink *SAJEMS* 5; Du Plessis 2009 *SA Mercantile Law Journal* 327; *SILKE* 1004; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 10.

<sup>232</sup> *Crookes NO and Another v Watson and Others* 1956 1 SA 277 (A); *Potgieter v Potgieter NO and Others* 2012 1 SA 637 (SCA).

<sup>233</sup> Botha *Financial Planning* 911; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 9-10.

<sup>234</sup> See Para 4.7 below; Bruwer *SATSA* 709; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 227; Botha *Financial Planning* 925; Hill *Personal Finance* 6.

<sup>235</sup> Botha *Financial Planning* 910; Du Plessis 2009 *SA Mercantile Law Journal* 327.

<sup>236</sup> Para (a) of the definition of 'trust' as contained in the *Trust Act*; Botha *Financial Planning* 910; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 9; Du Plessis 2009 *SA Mercantile Law Journal* 327.

<sup>237</sup> Para (b) of the definition of 'trust' as contained in the *Trust Act*; Botha *Financial Planning* 910; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 9; Bouwer 2024 *BTCLQ* 5; Du Plessis 2009 *SA Mercantile Law Journal* 327.

Moreover, ordinary ownership trusts can be categorised into discretionary trusts and vesting trusts, in accordance with the rights conferred upon the beneficiaries of the trust.<sup>238</sup> The beneficiaries of a discretionary trust do not receive any vested rights to receive any benefit from the trust.<sup>239</sup> Instead, the trustees are granted a discretionary power to determine when a beneficiary may receive a benefit from the trust and what that benefit will entail, according to the trust deed.<sup>240</sup> A vesting trust is different as the trust deed confers vested rights<sup>241</sup> on beneficiaries to benefit from the trust.<sup>242</sup>

Trusts may further be categorised into business trusts and family trusts.<sup>243</sup> A family trust is established for the purpose of safeguarding the assets and the interests of a specific family.<sup>244</sup> However, a business trust is established with the purpose of receiving assets and income to carry out business operations.<sup>245</sup>

The *ITA* distinguishes between two types of trusts for tax purposes: an ordinary trust and a special trust.<sup>246</sup> An ordinary trust is a trust that does not meet the requirements of a special trust, and a special trust refers to a trust created solely for the benefit of disabled persons or minor children.<sup>247</sup>

It may seem concerning that a trust is not regarded as a wholly separate legal entity as is the case with a company, and the choice of determining which type of trust to

---

<sup>238</sup> Jones *Personal Finance* 9; Du Plessis 2009 *SA Mercantile Law Journal* 327; Bouwer 2024 *BTCLQ* 5.

<sup>239</sup> Botha *Financial Planning* 910; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 10; Bouwer 2024 *BTCLQ* 5.

<sup>240</sup> Botha *Financial Planning* 910; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 10; Du Plessis 2009 *SA Mercantile Law Journal* 328.

<sup>241</sup> A vested right of a beneficiary ultimately means an unconditional personal right to a specific benefit from the trust. See Du Plessis 2009 *SA Mercantile Law Journal* 327; *SILKE* 1009; Bouwer 2024 *BTCLQ* 5-6.

<sup>242</sup> On consideration of the different types of trusts, the most favourable for purposes of estate planning is an ordinary *inter vivos* discretionary trust. See Botha *Financial Planning* 910, 925; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 10; Du Plessis 2009 *SA Mercantile Law Journal* 327; Howard *TaxTalk* 16; Bouwer 2024 *BTCLQ* 5.

<sup>243</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 10-11.

<sup>244</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 10.

<sup>245</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 10.; Du Plessis 2009 *SA Mercantile Law Journal* 328.

<sup>246</sup> See Chapter 4 below; *SILKE* 1004; Botha *Financial Planning* 929; Muller *TaxTalk* 23.

<sup>247</sup> S 1(1) of the *ITA*; *SILKE* 1005.

establish may seem daunting. However, "there is simply no form of entity that can measure up to a trust".<sup>248</sup> Therefore, to clarify such concerns, the following will be critically evaluated: understand how a trust can serve as a viable estate planning tool, determine which type of trust would be the most suitable when estate planning for a farmer, and establish the benefits and risks associated with conducting the farming business and holding the farm assets in a trust.

### ***3.3 The benefits and risks associated with trusts***

Barnard, a manager at Sanlam Ltd stated that:<sup>249</sup>

Trusts offer protection and benefits not offered by other legal entities. Trusts therefore offer a solution to a number of niggling estate planning issues, in addition to ownership of a business.

In the context of estate planning, a trust is an advantageous tool to utilise to ensure tax savings,<sup>250</sup> the protection of the farm assets,<sup>251</sup> and to facilitate the transfer of the farming business to future generations;<sup>252</sup> however, the use of a trust is not without potential risks when used in the agricultural sector.

#### ***3.3.1 The separation of ownership and liability***

Similarly to a company,<sup>253</sup> a trust<sup>254</sup> also offers a degree of separation of ownership and limited liability between the trust's estate and the farmer's personal estate,<sup>255</sup> despite the fact that a trust is not regarded as a legal person in South African law.<sup>256</sup> The trust's liabilities and assets constitute the trust's estate,<sup>257</sup> and do not form part of the personal estates of the parties to the trust.<sup>258</sup> As previously explained, the

---

<sup>248</sup> Bruwer *SATSA* 708.

<sup>249</sup> Rossouw *Stockfarm* 17.

<sup>250</sup> See Chapter 4 below; Beachen *Without Prejudice* 50; Pretorius 2011 *TaxTalk* 15.

<sup>251</sup> Maree *Farmer's Weekly* 30; Rossouw *Stockfarm* 17; Botha *Financial Planning* 925.

<sup>252</sup> Maree *Farmer's Weekly* 30; Botha *Financial Planning* 925.

<sup>253</sup> See Para 2.3.1 above.

<sup>254</sup> More specifically, an *inter vivos* discretionary trust and/or a business trust.

<sup>255</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3; Auld 2013 *De Rebus* 20.

<sup>256</sup> Braun v Blann and Botha NNO and Another 1984 2 SA 850 (A); Delport *New Entrepreneurial Law* 300; Parker case para 10; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 33.

<sup>257</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3.

<sup>258</sup> On condition that the trust is not a *bewind* or a *vested* trust. See Botha *Financial Planning* 912.

trust's estate vests in the trustee in his official capacity as trustee, and therefore, the assets and liabilities of the trust vest in the trustee as a separate entity.<sup>259</sup> Section 12 of the *Trust Act* encompasses this separation of the trust estate and the personal estate of the trustee as it provides *inter alia* that the property of the trust "shall not form part of the personal estate of the trustee".<sup>260</sup>

To understand this concept more thoroughly; should Mr Botha<sup>261</sup> establish a trust and hold the position of trustee, he will ultimately have two separate estates.<sup>262</sup> The first estate will be his personal estate comprising the assets he holds and liabilities he incurs in his personal name, and the second estate will be the trust estate comprising the assets and liabilities of the trust that are vested in him in his capacity as trustee.<sup>263</sup> Therefore, should Mr Botha transfer ownership of his farm assets to a trust,<sup>264</sup> and provided that the trust is correctly administered, these assets will be protected from any claims arising against him in his personal capacity.<sup>265</sup> This transfer of assets out of the farmer's personal name and into the ownership of a trust ensures the protection of assets, allowing for maximum enjoyment of the assets through the farmer's lifetime whilst preserving the assets for future generations.

However, the situation of ownership in a bewind trust differs. The beneficiaries of a bewind trust gain ownership of the trust assets and the trustee is merely responsible for controlling such assets.<sup>266</sup> An example of a bewind trust is if Mr Botha<sup>267</sup> were to

---

<sup>259</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3.

<sup>260</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3; Botha *Financial Planning* 910; Manie Stellenbosch *Law Review* 312.

<sup>261</sup> See Para 1.5 above.

<sup>262</sup> Delport *New Entrepreneurial Law* 301; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3; Lupacchini case para 1.

<sup>263</sup> Delport *New Entrepreneurial Law* 301; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3; Lupacchini case para 1.

<sup>264</sup> It is important to note that the methods of transfer are potentially subject to different tax implications. See Paras 3.4, 4.4, 4.5 and 4.6 below.

<sup>265</sup> See Para 1.5 above; Botha *Financial Planning* 912; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 4; Brink and Willemse *Journal of Economic and Financial Services* 798; Beachen *Without Prejudice* 50; Thatcher *The Dairy Mail* 47; Rossouw *Stockfarm* 17; Hill *Personal Finance* 6.

<sup>266</sup> Botha *Financial Planning* 910; 912; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 9.

<sup>267</sup> See Para 1.5 above.

establish a testamentary trust and bequeath farm assets to his sons in his will, subject to the condition that the farm assets are to be managed by the trustees.<sup>268</sup> In such a scenario, his sons will acquire ownership of the farm assets, placing the assets outside of the protection of the trust and into the personal estates of his sons, therefore, the assets may be susceptible to claims arising against his sons in their personal capacities.<sup>269</sup>

Although a trust is able to offer the advantage of a degree of separation and liability, the risk does exist that a trustee is not exempt from being held personally liable.<sup>270</sup> The *Trust Act* requires a trustee to act with care, diligence and skill.<sup>271</sup> In the event of a trustee's breach of this duty, the beneficiaries have the right to claim against the trustee in his personal capacity if the trust or the beneficiaries suffer financial because of the breach.<sup>272</sup> Furthermore, a trustee may also be held personally liable if he fails to comply with the duties contained in the *Trust Act* or by the Master of the High Court.<sup>273</sup>

In addition to the protection of assets offered by a trust due to the separation of ownership and liability, a trust is also able to facilitate the continuance of the farming business to future generations.<sup>274</sup>

### 3.3.2 *Perpetual succession*

The transfer of the farming enterprise and the farm assets from one generation to another is a significant characteristic of the agricultural sector. However, the majority of farmers are unable to successfully achieve this transfer to future generations.<sup>275</sup> The use of a trust as an estate planning tool is an effective way to

---

<sup>268</sup> Botha Financial Planning 910, 912; Du Toit, Smith and Van Der Linde Fundamentals of South African Trust Law 9.

<sup>269</sup> Botha Financial Planning 910, 912; Du Toit, Smith and Van Der Linde Fundamentals of South African Trust Law 9.

<sup>270</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 4.

<sup>271</sup> S 9(1) of the Trust Act; Botha Financial Planning 917; Beachen Without Prejudice 50.

<sup>272</sup> S 9(2) of the Trust Act; Botha Financial Planning 922 and 927; Du Toit, Smith and Van Der Linde Fundamentals of South African Trust Law 4; Beachen Without Prejudice 50; Manie Stellenbosch Law Review 299.

<sup>273</sup> S 19 of the *Trust Act*.

<sup>274</sup> Maree Farmer's Weekly 30; Thatcher The Dairy Mail 47; Botha Financial Planning 926.

<sup>275</sup> See Para 1.1 above; Lingani and Hough 2025 *SAJAE* 115.

ensure that the farming enterprise and the farm assets do indeed achieve continuity and reach the future generations of the farmer.<sup>276</sup> Since the assets of the trust vest in the trustee and form a separate estate to that of the trustee in his personal capacity, a beneficiary of a deceased person can inherit assets through a trust, rather than the assets constituting the personal estate of the beneficiary.<sup>277</sup> If Mr Botha<sup>278</sup> were to establish a trust in which he conducts the farming operations and transfers the farm assets, and his sons are nominated beneficiaries of such trust, his sons would bypass the issue that Mr Botha encountered when he inherited the estate of his parents upon their passing away, and they will receive the benefits of holding the assets in a trust.<sup>279</sup> Furthermore, a trust does not cease to exist when the trustees and/or the beneficiaries of the trust are amended or pass away.<sup>280</sup>

It has been discussed above,<sup>281</sup> that the farmland on which all the farming operations take place and where the family resides, is often the most significant asset in the estate of the farmer and possesses the highest value in such estate.<sup>282</sup> Therefore, to ensure the smooth transition of the farmland to future generations, it is important to understand how placing the farmland into the ownership of a trust serves to avoid the hurdle contained in section 3 of *SALA*.<sup>283</sup>

### *3.3.3 Section 3 of the Subdivision of Agricultural Land Act, 70 of 1970*

It was illustrated that *SALA* imposes restrictions on succession planning regarding the transfer and inheritance of agricultural land, which hinders the ability of the farmer to transfer their farming enterprise and the farmland to future generations.<sup>284</sup>

---

<sup>276</sup> Maree Farmer's Weekly 30; Thatcher The Dairy Mail 47; Botha Financial Planning 926; Rossouw Stockfarm 17.

<sup>277</sup> Botha Financial Planning 926.

<sup>278</sup> See Para 1.5 above.

<sup>279</sup> See Paras 1.5 and 2.1 above.

<sup>280</sup> Botha Financial Planning 926; Delport New Entrepreneurial Law 301; Thatcher The Dairy Mail 47.

<sup>281</sup> See Para 2.3.2 above.

<sup>282</sup> Molaba *The Dairy Mail* 70, Du Pisanie *Stockfarm* 60.

<sup>283</sup> See Para 2.3.2 above.

<sup>284</sup> See Para 2.3.2 above.

As an alternative to the use of a company, the transfer of the farm into the ownership of a trust can similarly serve as an effective means to bypass the obstacle contained in section 3 of *SALA*.<sup>285</sup> To illustrate how a trust ensures the smooth transition of the farmland to future generations; if Mr Botha<sup>286</sup> establishes a testamentary trust in which his sons are the trustees and/or beneficiaries of the trust, this will allow his sons the ability to jointly control and/or use the farmland.<sup>287</sup>

It is evident from the above discussion that ownership of the farm assets differs in an ordinary trust and a bewind trust, and further that the trustees and the beneficiaries of a trust have different rights in and to the assets that are placed in the trust.<sup>288</sup> A discussion on how this shift in ownership of the farm assets from the farmer to a trust, as well as the different rights of the trustees and the beneficiaries to the assets, is therefore, required to understand how a trust still allows the farmer and his family continued use of the farm assets during his lifetime.

#### *3.3.4 The separation of enjoyment and control*

The separation between the control of the trust assets which is conferred upon the trustees, and the enjoyment of the trust assets conferred upon the beneficiaries, is the foundation of a trust in South African law.<sup>289</sup> A trustee is entitled to be a co-beneficiary to the trust under which he is appointed as trustee.<sup>290</sup> However, the founder may not be the only trustee of the trust at its establishment, but is entitled to be the only beneficiary of that trust.<sup>291</sup>

The trustee is responsible for carrying out the duties imposed on him according to the trust deed, to the benefit of the trust beneficiaries.<sup>292</sup> There may be multiple

---

<sup>285</sup> See Para 2.3.2 above; Botha *Financial Planning* 926.

<sup>286</sup> See Para 1.5 above.

<sup>287</sup> Botha *Financial Planning* 926; Schmidt *Oilseeds Focus* 64.

<sup>288</sup> See Paras 3.2.2 and 3.3.1 above.

<sup>289</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 2; Parker case para 22; Du Plessis 2009 SA *Mercantile Law Journal* 326.

<sup>290</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 3 and 13; Groeschke v Trustee for the Time being of the Groeschke Family Trust 2013 3 SA 254 (GSJ).

<sup>291</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 12.

<sup>292</sup> There are further duties of the trustee contained in the *Trust Act* and the common law, and the trust deed has to be aligned with both the *Trust Act* and the common law. See Thatcher *The Dairy Mail* 47; Botha *Financial Planning* 916.

trustees and beneficiaries in a trust; this situation allows for indirect co-ownership of the assets of the trust and co-enjoyment of such assets.<sup>293</sup> In the case of Mr Botha,<sup>294</sup> although he will no longer personally own the farm assets, the appointment of Mr Botha and his sons as trustees and/or beneficiaries of the trust will ensure they are still able to manage and utilise the farm assets. Furthermore, the trust deed, similar to the MOI of a company,<sup>295</sup> will assist in determining how Mr Botha and his sons may efficiently and effectively manage the use of the farm assets owned by the trust and ensure the continuity of the farming enterprise.

This separation of ownership, enjoyment and control, however, can often be perceived as unclear in the establishment of a family business trust, and this uncertainty can be detrimental to the advantages a trust is able to offer as an estate planning tool.

### *3.3.5 The family business trust, the sham trust and the alter ego trust*

A farmer also has the option to conduct the farming operations in a business trust as an alternative to a company. The necessary functions and responsibilities of the trustees to effectively run the business operations must be provided for in the trust deed.<sup>296</sup> The Chief Master provided that a family business is a trust that possesses the following characteristics:<sup>297</sup>

- (a) the trustees have the power to contract with independent third parties, thereby creating trust creditors; and
- (b) the trustees are all beneficiaries; and
- (c) the beneficiaries are all related to one another.

---

<sup>293</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 13; Brink and Willemse *Journal of Economic and Financial Services* 799.

<sup>294</sup> See Para 1.5 above.

<sup>295</sup> See Para 2.3.4 above.

<sup>296</sup> Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 238; Delpont *New Entrepreneurial Law* 313; Auld 2013 *De Rebus* 20.

<sup>297</sup> Chief Master's Directive 2 of 2017; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 237; Delpont *New Entrepreneurial Law* 314.

A situation of inadequate separation that potentially arises in a family business trust may result in the trust being viewed as either an alter ego trust, or a sham trust.<sup>298</sup> An alter ego trust refers to a valid trust that was established, however, the founder continues to control and manage the assets of the trust as if they were assets under the founder's ownership.<sup>299</sup> A sham trust, however, is where a trust was established that was invalid because it did not meet the necessary requirements, and the founder actually intended to create a different entity such as a partnership, which could be perceived as a trust.<sup>300</sup> If a trust is considered to be either an alter ego trust or a sham trust, the trust may be disregarded as such and the creation of a valid trust will not be recognised.<sup>301</sup> Furthermore, the assets will be regarded as forming part of the founder's personal estate if creditors of the founder can prove that there was inadequate separation between the enjoyment and ownership of the assets.<sup>302</sup>

Therefore, the risk associated with conducting farming operations in a family business trust that is not properly administered, is that because the trustees and the beneficiaries are generally the same persons and/or related persons, the ownership and enjoyment of the assets may be perceived to remain as they were before such assets were transferred to the trust.<sup>303</sup> The court in the case of *Land and Agricultural Development Bank of SA v Parker and Others*,<sup>304</sup> confirmed this position when it held *inter alia* that a failure of the separation of control of the trust assets creates the inference that the trust 'is a mere cover for the conduct of business 'as before''.<sup>305</sup> It is often found in family trusts that the actual intention of the founder is to continue controlling the assets of the trust as if such assets are under his personal ownership.<sup>306</sup> Similarly, in the case of a business trust, it is often

---

<sup>298</sup> Maree Farmer's Weekly 31; Botha Financial Planning 913.

<sup>299</sup> Botha *Financial Planning* 913; Myburgh *TaxTalk* 46.

<sup>300</sup> Botha *Financial Planning* 913; Myburgh *TaxTalk* 46.

<sup>301</sup> Botha *Financial Planning* 913; Myburgh *TaxTalk* 46.

<sup>302</sup> Lamprecht *Personal Finance* 8; Rossouw *Stockfarm* 17.

<sup>303</sup> Delpont New Entrepreneurial Law 313; Botha Financial Planning 913.

<sup>304</sup> *Land and Agricultural Development Bank of SA v Parker and Others* 2005 2 SA 77 (SCA) (hereinafter the "Parker case"); Botha Financial Planning 913.

<sup>305</sup> Parker case para 37.3; Botha Financial Planning 913.

<sup>306</sup> Botha Financial Planning 913.

the actual intention of the founder to create a partnership form of business entity<sup>307</sup> rather than a trust.<sup>308</sup> The effect of this inadequate separation between ownership and enjoyment of the trust assets is that it could result in the trust being perceived as a mere extension of the founder's estate.<sup>309</sup>

It is generally advised to appoint an independent trustee,<sup>310</sup> to avoid the risk of establishing either an alter ego or sham trust and therefore, defeating the purpose<sup>311</sup> of the trust as an effective estate planning tool.

It has been established above that the use of a trust, despite the risks that may arise, indeed offers multiple advantages when used correctly as an estate planning tool.<sup>312</sup> The question that then lingers is: how does a farmer then transfer ownership of the farm assets into a trust?

### **3.4 Methods to transfer the farm assets to trusts**

The methods that can be adopted to transfer farm assets to a trust are through the sale,<sup>313</sup> or donation of an asset to a trust.<sup>314</sup> It is however, important to note that these methods are subject to different tax implications,<sup>315</sup> and therefore, it is imperative to consider these methods.<sup>316</sup>

---

<sup>307</sup> A partnership is ultimately an agreement entered into between two or more natural and/or juristic persons in terms of which the parties make a contribution toward a business enterprise with the main objective of making a profit. See Delport *New Entrepreneurial Law* 357; Botha *Financial Planning* 1132; Barnard and Botha *Nagel's Business Law* 319.

<sup>308</sup> Botha *Financial Planning* 913.

<sup>309</sup> Lamprecht *Personal Finance* 8.

<sup>310</sup> An independent trustee is ultimately an outsider who is not connected to the founder, the trustees or the beneficiaries. See Chief Master's Directive 2 of 2017; Lamprecht *Personal Finance* 8; Maree *Farmer's Weekly* 30; Botha *Financial Planning* 913; Michau *MoneyMarketing* 6; Manie *Stellenbosch Law Review* 308; Muller *TaxTalk* 23; Botha *Financial Planning* 913.

<sup>311</sup> The purpose being to ensure the protection, preservation and maximum enjoyment of the farm assets and the farming business and to allow for the smooth transition of the farm assets and the farming enterprise to future generations.

<sup>312</sup> See Paras 3.2-3.3 above.

<sup>313</sup> O'Halloran *Farmer's Weekly* 28; O'Halloran *Farmer's Weekly* 29; Hill *Personal Finance* 6; Botha *Financial Planning* 965; Van der Spuy *TaxTalk* 5; O'Halloran *Farmer's Weekly* 24.

<sup>314</sup> O'Halloran *Farmer's Weekly* 29; Van der Spuy *TaxTalk* 5; O'Halloran *Farmer's Weekly* 24.

<sup>315</sup> See Chapter 4 below.

<sup>316</sup> A person may stipulate in his will that his assets are to be bequeathed to a *mortis causa* trust, however, the focus of this study is on methods the farmer can employ during his lifetime to transfer the farm assets to a trust. The method of testamentary bequests therefore falls outside

The first way in which a farmer may sell an asset to a trust is to enter into a sale transaction with the trust in terms of which the trust will use its own funds to purchase the asset.<sup>317</sup> However, such sale of assets will result in CGT consequences for the farmer,<sup>318</sup> as well as VAT, or transfer duty implications in respect of a sale of immovable property.<sup>319</sup> In addition to the tax implications of the sale of assets, the capital amount of proceeds received remains in the farmer's estate as a potential growth asset.

The most common method is through the sale of an asset, at its market value, to a trust on either a low-interest or an interest-free loan account.<sup>320</sup> In the past, interest-free loan accounts were mostly used to save on income tax, donations tax and estate duty.<sup>321</sup> However, SARS noticed the use of an interest-free loan as a means to reduce tax and, therefore, section 7C was introduced into the *ITA* in 2017 as a tax anti-avoidance measure.<sup>322</sup> Section 7C of the *ITA* provides *inter alia* that where a loan is made by a connected person<sup>323</sup> to a trust, and if the interest charged on such loan is lower than the official rate of interest, then the shortfall in the interest amount is deemed to be a donation and subject to donations tax.<sup>324</sup>

If Mr Botha<sup>325</sup> sold an asset to a trust on an interest-free loan account before 2017, the position would have been as follows: firstly, due to the fact that no interest was charged on the loan, Mr Botha would not have received any interest income, resulting in no effect on his income tax liability; secondly, because the transaction

---

the scope of this study. Van der Spuy *TaxTalk* 5; O'Halloran *Farmer's Weekly* 28; Bruwer *SATSA* 709; *SILKE* 1004; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 10.

<sup>317</sup> See Para 2.4.2 above; Botha *Financial Planning* 966.

<sup>318</sup> See Para 4.4 below; *SILKE* 969.

<sup>319</sup> See Para 4.8 below; *SILKE* 1091; s 9(15) of the *Transfer Duty Act*; SARS *Transfer Duty Guide* 30.

<sup>320</sup> O'Halloran *Farmer's Weekly* 24; O'Halloran *Farmer's Weekly* 29; Brink 2017 *SAJEMS* 1; Botha *Financial Planning* 965; *SILKE* 1014.

<sup>321</sup> See Paras 4.2, 4.5 and 4.7 below; O'Halloran *Farmer's Weekly* 24; Brink 2017 *SAJEMS* 1; Van der Spuy *TaxTalk* 7; Farrand *TaxTalk* 32; Brincker and Botha *Tax Breaks* 1.

<sup>322</sup> See Para 4.6 below; Bruwer *SATSA* 727; Farrand *TaxTalk* 32; Jones *Tax Breaks* 5.

<sup>323</sup> See Para 4.6 below.

<sup>324</sup> See Para 4.5 below; Jones *Tax Breaks* 5; Botha *Financial Planning* 965; *SILKE* 1014-1015; Farrand *TaxTalk* 33; Myburgh *TaxTalk* 46; O'Halloran *Farmer's Weekly* 29.

<sup>325</sup> See para 1.5 above.

was a sale rather than a donation, no donations tax would arise and only CGT implications would be applicable; and lastly, the sale of the asset would result in the value of the asset moving out of Mr Botha's personal estate and placed into the estate of the trust, therefore, reducing the value of his estate for estate duty purposes.<sup>326</sup> However, with the introduction of section 7C of the *ITA*, if Mr Botha now sells an asset to a trust on either an interest-free loan or a low-interest loan, the difference between the amount of interest actually charged and the market-related interest or official rate of interest,<sup>327</sup> is deemed to be the amount of interest income that he would have earned on the transaction, which is subject to donations tax.<sup>328</sup>

Lastly, a farmer has the option to donate the farm assets to a company,<sup>329</sup> which results in CGT and donations tax for the farmer who donated the asset.<sup>330</sup>

### **3.5 Conclusion**

The second sub-objective was addressed in this Chapter, consulting the question whether a trust can be utilised as an estate planning tool and examining the methods that can be used to transfer the farm assets to a trust, which is directly connected to the research question.

The investigation on the use of a trust as an estate planning tool infers that an *inter vivos* trust offers quite significant benefits regarding the protection and preservation of the farm assets, and the transfer of the farm assets and the farming enterprise to future generations.<sup>331</sup> Furthermore, the specific benefits in relation to the separation of ownership, liability, enjoyment and control can further serve as a

---

<sup>326</sup> See Paras 4.2, 4.5 and 4.7 below; O'Halloran *Farmer's Weekly* 24; Van der Spuy *TaxTalk* 7; Farrand *TaxTalk* 32; Brincker and Botha *Tax Breaks* 1.

<sup>327</sup> Market-related interest is used for normal tax purposes, and the official rate of interest is used for donations tax purposes. See Para 4.6.1 below; *SILKE* 1015.

<sup>328</sup> See Paras 1.5 above and 4.5 below; Jones *Tax Breaks* 5; Botha *Financial Planning* 965; *SILKE* 1014-1015; Farrand *TaxTalk* 33; Myburgh *TaxTalk* 46; O'Halloran *Farmer's Weekly* 29.

<sup>329</sup> O'Halloran *Farmer's Weekly* 29; Van der Spuy *TaxTalk* 5; O'Halloran *Farmer's Weekly* 24.

<sup>330</sup> See Paras 4.4 and 4.5 below.

<sup>331</sup> See Paras 3.2.2 and 3.3 above.

means for the farmer to avoid the risks of conducting the farming enterprise in a sole proprietorship business form.<sup>332</sup>

In consideration of Chapters 2 and 3 above, although the operation of a company and a trust as estate planning tools differ, both tools, despite their unique risks, offer similar estate planning advantages for the farmer. Furthermore, the methods to transfer ownership are similar and evidently subject to various tax implications.<sup>333</sup>

The questions that then remain are: to what extent the tax legislation influences the farmer's choice in deciding whether to make use of a company and/or a trust when devising an estate plan and how do the tax implications influence the choice of method of transfer. Therefore, the relevant tax implications will be analysed in the following Chapter to establish which estate planning tool(s) and method(s) would be the most appropriate for the farmer, such as Mr Botha.<sup>334</sup>

---

<sup>332</sup> See Paras 3.3.1 and 3.3.4 above.

<sup>333</sup> See Paras 2.4 and 3.4 above.

<sup>334</sup> See Para 1.5 above.

## **Chapter 4 The tax considerations when using a company and/or a trust as an estate planning tool**

### **4.1 Introduction**

The levying of tax is an inevitable aspect of conducting a business, including farming operations,<sup>335</sup> and an inherent consideration in estate planning.<sup>336</sup> Apart from the estate planning objectives of the farmer to keep the farming enterprise within their family, the transfer of the farming enterprise to future generations, and the enjoyment and preservation of the farm assets,<sup>337</sup> a further major objective of estate planning is to achieve a minimisation of taxes in a lawful manner.<sup>338</sup> Furthermore, section 26 of the *ITA* read with the First Schedule provides for the distinct tax treatment of farmers and their operations.<sup>339</sup> To determine which estate planning tool and method is best suited for an individual farmer who is planning his estate, such as Mr Botha,<sup>340</sup> the relevant tax implications and their impact on the estate planning process in the agricultural sector will be analysed throughout this Chapter.

### **4.2 General income tax implications**

Section 5(1) of the *ITA* provides that income tax<sup>341</sup> is payable annually on the taxable income of any person<sup>342</sup> at the end of a person's year of assessment, which ends on the last day of February,<sup>343</sup> and for any company,<sup>344</sup> at its financial year end.<sup>345</sup> A progressive tax table is used to determine the normal tax of a natural person,<sup>346</sup>

---

<sup>335</sup> Lombard *Stockfarm* 2015.

<sup>336</sup> Botha *Financial Planning* 959.

<sup>337</sup> See Para 1.1 above.

<sup>338</sup> Botha *Financial Planning* 959; Du Pisanie *Stockfarm* 60.

<sup>339</sup> See Para 4.2.1 below.

<sup>340</sup> See Para 1.5 above.

<sup>341</sup> Income tax is interchangeably referred to as normal tax. See s 1(1) of the *ITA* states that normal tax means income tax referred to in s 5(1) of the *ITA*. See *SILKE* 14; SARS 2025 <https://www.sars.gov.za/types-of-tax/personal-income-tax/>.

<sup>342</sup> A person is defined in s 1(1) the *ITA* to include an insolvent estate, a deceased estate, any trust and any portfolio of a collective investment scheme and excludes a foreign partnership. Furthermore, taxable income is defined in s 1(1) of the *ITA* to mean the aggregate of income less allowable deductions. See SARS *Guide on the Taxation of Farming Operations* 4.

<sup>343</sup> Lombard *Stockfarm* 2015; *SILKE* 157; Botha *Financial Planning* 671.

<sup>344</sup> Bruwer *SATSA* 9; Botha *Financial Planning* 667; Legwaila *Tax Law* 20.

<sup>345</sup> S 5(1) of the *ITA*; Bruwer *SATSA* 9; Botha *Financial Planning* 667, 674.

<sup>346</sup> Bruwer *SATSA* 10; *SILKE* 22; Botha *Financial Planning* 668; O'Halloran *Farmer's Weekly* 28.

which table contains tax rates ranging from 18% to 45%.<sup>347</sup> Therefore, in the case of Mr Botha,<sup>348</sup> as his taxable income increases, so will his tax rate charged on such taxable income.<sup>349</sup>

A person's taxable income calculation begins with the determination of gross income.<sup>350</sup> The *ITA* states *inter alia* that gross income of any resident, in relation to any year or period of assessment, means "the total amount, in cash or otherwise, received by or accrued to" such resident, excluding capital receipts or accruals.<sup>351</sup> A natural person will be regarded as a resident of South Africa for tax purposes if he is ordinarily resident in the Republic of South Africa, or provided that he satisfies the requirements laid down in the physical presence test.<sup>352</sup> Although the calculation of gross income excludes receipts and accruals of a capital nature, such receipts and accruals may be subject to CGT.<sup>353</sup> Once gross income is calculated, exempt income is deducted from such amount to determine income.<sup>354</sup> Exempt income is not subject to income tax as such amounts do not form part of a person's taxable income.<sup>355</sup> There are certain allowable deductions<sup>356</sup> in respect of expenditure incurred in carrying on the farming enterprise that may be subtracted from the income amount, which then results in the final taxable income.<sup>357</sup>

---

<sup>347</sup> *SILKE* 22; SARS 2025 <https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/>; Botha *Financial Planning* 668, 671.

<sup>348</sup> See Para 1.5 above.

<sup>349</sup> Legwaila *Tax Law* 20.

<sup>350</sup> *SILKE* 26; Bruwer *SATSA* 168; Botha *Financial Planning* 685; Legwaila *Tax Law* 20.

<sup>351</sup> S 1(1) of the *ITA*; Botha *Financial Planning* 685; *SILKE* 26; Bruwer *SATSA* 168.

<sup>352</sup> *SILKE* 27; Legwaila *Tax Law* 29; Botha *Financial Planning* 689; Jones *Tax Breaks* 6; Du Plessis 2009 *SA Mercantile Law Journal* 322.

<sup>353</sup> See Para 4.4 below; *SILKE* 26; Botha *Financial Planning* 691.

<sup>354</sup> *SILKE* 84; Bruwer *SATSA* 252; Legwaila *Tax Law* 21; O'Halloran *Farmer's Weekly* 27; Botha *Financial Planning* 701-702; SARS *Guide on the Taxation of Farming Operations* 4.

<sup>355</sup> Exempt income is first included as an amount in gross income before it is deducted. For purposes of this study, there are two noteworthy exemptions. Firstly, a portion of interest income received from a South African source is exempt in terms of s 10(1)(i) of the *ITA* and such exemption is only available to natural persons. Secondly, dividends received from a South African resident company are exempt in full in terms of s 10(1)(k)(i) and all persons are entitled to this exemption. S 10 of the *ITA*; *SILKE* 84; Botha *Financial Planning* 701; Bruwer *SATSA* 251.

<sup>356</sup> S 11(a) of the *ITA* read with s 23(g) of the *ITA*; s 11 to 18A and 22-24 of the *ITA*.

<sup>357</sup> *SILKE* 130; Legwaila *Tax Law* 21; Du Plessis *Farmer's Weekly* 41; O'Halloran *Farmer's Weekly* 27; Lombard *Stockfarm* 8.

Farmers are subject to these ordinary tax provisions of the *ITA*; however, the calculation of their taxable income must be determined in accordance with the First Schedule.<sup>358</sup>

#### *4.2.1 Section 26 of the ITA: income tax implications of farming operations*

According to section 26 of the *ITA*:<sup>359</sup>

The taxable income of any person carrying on pastoral, agricultural or other farming operations shall, in so far as it is derived from such operations, be determined in accordance with the provisions of this Act but subject to the provisions of the First Schedule.

Therefore, it is emphasised that the taxable income of a farmer received from farming operations<sup>360</sup> is calculated separately from the income that is received from other sources.<sup>361</sup> Section 26 of the *ITA* applies to farmers who conduct farming operations as a sole proprietor or through a company.<sup>362</sup>

A farmer's primary sources of income are typically from the sale of crops they grow and harvest and/or the breeding or sale of livestock.<sup>363</sup> Most farmers,<sup>364</sup> however, are unaware that the First Schedule obliges a farmer to include in his income tax return the standard value<sup>365</sup> of all livestock and produce that is not sold and is held by him at the end of the year of assessment.<sup>366</sup> Moreover, the value all livestock and produce that is not sold and is held by him at the beginning of the year of

---

<sup>358</sup> S 26(1) of the *ITA*; *SILKE* 960.

<sup>359</sup> S 26(1) of the *ITA*; *SILKE* 960; Du Plessis *FarmBiz* 17; Rogers *FarmBiz* 22; SARS Guide on the Taxation of Farming Operations 3.

<sup>360</sup> The *ITA* does not provide a definition for farming operations, however, it includes only those activities that are related to the revenue that a farmer derives from the land that he owns or to which he enjoys a right. Therefore, there must be a direct connection between the income and the farming operations. See *SILKE* 962.

<sup>361</sup> *SILKE* 960; SARS Guide on the Taxation of Farming Operations 4.

<sup>362</sup> SARS Guide on the Taxation of Farming Operations 4.

<sup>363</sup> SARS Guide on the Taxation of Farming Operations 9.

<sup>364</sup> Rogers *FarmBiz* 22.

<sup>365</sup> The standard value is considerably lower than the market value of livestock. See para 5 of the First Schedule; *SILKE* 964; SARS Guide on the Taxation of Farming Operations 16; Rogers *FarmBiz* 22.

<sup>366</sup> Paras 2 and 3 of the First Schedule; s 11(a) of the *ITA*; Rogers *FarmBiz* 25; *SILKE* 963; Rogers *FarmBiz* 22; SARS Guide on the Taxation of Farming Operations 15; Du Plessis *Farmer's Weekly* 41; Krause *FarmBiz* 25.

assessment will be an allowable deduction from income.<sup>367</sup> Livestock and produce are regarded as revenue in nature, and therefore, not treated as capital assets.<sup>368</sup>

The main point that is to be highlighted in consideration of the income tax of natural persons and section 26 of the *ITA*, is that natural persons are taxed at progressive rates ranging from 18% to 45%,<sup>369</sup> but the taxable income received from farming operations is calculated separately, and then added to the taxable income that is received from other sources of the sole proprietor farmer.<sup>370</sup> However, it has been indicated above that companies are subject to different tax rates,<sup>371</sup> and it is therefore, necessary to consider the income tax implications of a company.

#### *4.2.2 Income tax implications applicable to a company*

It has been established that a company is regarded as a separate legal entity for tax purposes.<sup>372</sup> A company will be a resident company for taxation purposes if such company:<sup>373</sup>

Is incorporated, established or formed in the Republic or which has its place of effective management in the Republic.

The profits earned by a company are subject to two levels of taxation, the first one being that the company is liable for income tax on the profits generated.<sup>374</sup> The taxable income of a company follows the same calculation as that of a natural person.<sup>375</sup> However, in contrast to the tax rates applicable to natural persons, a company is subject to income tax at a fixed rate of 27%.<sup>376</sup>

---

<sup>367</sup> Paras 2 and 3 of the First Schedule; s 11(a) of the *ITA*; *SILKE* 963; Rogers *FarmBiz* 22; SARS *Guide on the Taxation of Farming Operations* 15.

<sup>368</sup> SARS *Guide on the Taxation of Farming Operations* 3; *SILKE* 963.

<sup>369</sup> *SILKE* 22; SARS 2025 <https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/>; Botha *Financial Planning* 668, 671.

<sup>370</sup> *SILKE* 960, 962; SARS *Guide on the Taxation of Farming Operations* 4.

<sup>371</sup> See Para 1.1 above.

<sup>372</sup> See Para 2.2 above; s 1(1) of the *ITA*; *SILKE* 766; Botha *Financial Planning* 1154; Delpont *New Entrepreneurial Law* 18-19; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; Bruwer *SATSA* 16; Legwaila *Tax Law* 404.

<sup>373</sup> S 1(1) of the *ITA*; Legwaila *Tax Law* 408.

<sup>374</sup> *SILKE* 766; SARS *Comprehensive Guide to Dividends Tax* 2.

<sup>375</sup> See Para 4.2 above; *SILKE* 767; Bruwer *SATSA* 493; Legwaila *Tax Law* 407.

<sup>376</sup> *SILKE* 769; Bruwer *SATSA* 494; SARS 2025 <https://www.sars.gov.za/tax-rates/income-tax/companies-trusts-and-small-business-corporations-sbc/>; Botha *Financial Planning* 668.

The second level of taxation on the profits earned by a company is when the remaining profits of the company are distributed in the form of dividends<sup>377</sup> to its shareholders.<sup>378</sup> The *ITA* provides that a dividend *inter alia* means an amount that is transferred or applied by a resident company, for the benefit or on behalf of any person, with regard to any shares in the company, either through a distribution or as payment for acquiring any share in the company.<sup>379</sup> Income received by a person in the form of dividends is subject to dividends tax levied at the rate of 20%.<sup>380</sup>

It is demonstrated that the use of a company may prove to serve as a viable estate planning tool in terms of asset protection and the removal of assets out of the farmer's personal estate, and a company indeed offers lower tax rates than those levied on a natural person. However, the shares owned by the farmer in his capacity as shareholder of the company form part of his personal estate. Therefore, it is necessary to discuss the income tax implications of a trust to draw a comparison between a company and a trust, to ultimately determine what would be the most appropriate estate planning tool and method.

#### *4.2.3 Income tax implications applicable to a trust*

Although a trust is not recognised as a separate legal person in South African law, it is regarded as a person in the *ITA* for tax purposes.<sup>381</sup> Akin to a company, a trust is regarded as a resident trust if it complies with the definition of resident provided for in the *ITA*.<sup>382</sup> The *ITA* recognises two types of trusts for tax purposes, an ordinary

---

<sup>377</sup> All references made to 'dividends' for purposes of this study are in respect of local dividends.

<sup>378</sup> *SILKE* 766; Bruwer *SATSA* 504; Legwaila *Tax Law* 411.

<sup>379</sup> It excludes a dividend that constitutes a distribution of an asset *in specie*. See s 1(1) of the *ITA*; *SILKE* 773; Bruwer *SATSA* 504-505; Robb *TaxTalk* 50; SARS *Comprehensive Guide to Dividends Tax* 28.

<sup>380</sup> Depending on the nature of the dividend distributed, the liability for dividends tax will rest on either the company or the beneficial owner (who is usually the shareholder of the company). See s 64D, 64EA(a) and 64G(1) of the *ITA*, *SILKE* 776, 778, 779; Bruwer *SATSA* 495, 513, 522; SARS *Comprehensive Guide to Dividends Tax* 3, 49, 128; De Villiers and Van der Zanden *MoneyMarketing* 5; Brand *TaxTalk* 20; Ntombela *Without Prejudice* 76.

<sup>381</sup> S 1(1) of the *ITA*; Botha *Financial Planning* 912; Legwaila *Tax Law* 411; Bruwer *SATSA* 710; Du Plessis 2009 *SA Mercantile Law Journal* 322.

<sup>382</sup> S 1(1) of the *ITA* provides *inter alia* that a trust will be a resident if it is established or formed in the Republic or has its place of effective management in the Republic. See Para 4.2.2 above; Legwaila *Tax Law* 408; Du Plessis 2009 *SA Mercantile Law Journal* 329.

trust and a special trust, which are subject to different tax rates and rules.<sup>383</sup> An ordinary trust is subject to income tax at a fixed rate of 45%,<sup>384</sup> which is much higher than the tax rate applicable to a company.<sup>385</sup> The calculation of the taxable income of a trust also differs compared to that of natural persons and a company.

Income that is received by or accrued to a trust may either be retained in the trust or distributed to a beneficiary of such trust.<sup>386</sup> However, before determining who is liable for tax on the income received by the trust or distributed to a beneficiary, it is crucial to ascertain the nature of the income received.<sup>387</sup> A trust is regarded as a mere conduit pipe through which the income it receives flows.<sup>388</sup> Therefore, income that is received by the trust and subsequently distributed to the beneficiaries within the same year, retains its identity in the hands of the beneficiaries to whom it is distributed.<sup>389</sup>

The common law conduit pipe principle was legislated under section 25B of the *ITA*, which provides the manner in which a trust and its beneficiaries are liable for income tax.<sup>390</sup> It stipulates that trust income received by a trustee (excluding receipts of a capital nature) is deemed to accrue to an ascertained resident beneficiary, and therefore, taxable in the beneficiary's hands, provided that the beneficiary has a vested right to it, or acquires such right as a result of the trustees exercising their

---

<sup>383</sup> See Para 3.2.2 above; *SILKE* 1004; Botha *Financial Planning* 929; Muller *TaxTalk* 23.

<sup>384</sup> A special trust, however, is subject to the same progressive tax rates applicable to natural persons. See *SILKE* 1005; Bruwer *SATSA* 710; SARS 2024 <https://www.sars.gov.za/businesses-and-employers/trusts/types-of-trust/>; SARS *Guide to the Taxation of Special Trusts* 1; Botha *Financial Planning* 929, 930.

<sup>385</sup> See Para 4.2.2 above.

<sup>386</sup> Bruwer *SATSA* 711.

<sup>387</sup> It is imperative to determine the nature of the income received as natural persons and trusts are subject to different taxation rules in terms of *inter alia* tax rates, exemptions and exclusions. See *SILKE* 1006; Sevenster *Tax Breaks* 5-6.

<sup>388</sup> The principle that income of the trust retains its identity when it is distributed to beneficiaries was confirmed in the cases of *Armstrong v Commissioner for Inland Revenue* 1983 10 SATC 1 and *Secretary for Inland Revenue v Rosen* 32 SATC 249. See *SILKE* 1006; Brink and Willemse 2014 *Journal of Economic and Financial Sciences* 799; Bruwer *SATSA* 739.; Sevenster *Tax Breaks* 5.

<sup>389</sup> *SILKE* 1006; Brink and Willemse 2014 *Journal of Economic and Financial Sciences* 799; Brink 2017 *SAJEMS* 6; Horak 2018 *BTCLQ* 21; Bruwer *SATSA* 739.; Sevenster *Tax Breaks* 5.

<sup>390</sup> S 25B(1) and (2) of the *ITA*; *SILKE* 1006; Bruwer *SATSA* 739; Legwaila *Tax Law* 408; Horak 2018 *BTCLQ* 21-22; Brink 2017 *SAJEMS* 5.

discretion.<sup>391</sup> Furthermore, if the income is not deemed accrued to a beneficiary, but rather retained in the trust, it will be deemed to accrue to the trust and therefore, taxable in the trust's hands.<sup>392</sup> Section 25B of the *ITA* is subject to the provisions of section 7 of the *ITA*, and will therefore, only be applicable in the event that section 7 does not apply.<sup>393</sup>

To explain the conduit pipe principle and the above provisions of section 25B of the *ITA*, assume Mr Botha,<sup>394</sup> created an *inter vivos* ordinary trust that derives interest income from its assets, and this interest income is distributed to his wife and his sons as beneficiaries of the trust. The income will retain its identity as interest in the hands of the beneficiaries and taxed in their hands, subject to the tax rates and rules applicable to natural persons.<sup>395</sup> If the beneficiaries, being natural persons, receive interest income, they should include the income in their gross income,<sup>396</sup> and it will be exempt, subject to the provisions of section 10(1)(i) of the *ITA*.<sup>397</sup>

If Mr Botha's trust earned R450,000 interest income which is distributed to the three beneficiaries in equal shares, each beneficiary will receive interest income in the amount of R150,000 [R450,000 ÷ 3]. Each beneficiary will be entitled to an exemption in terms of section 10(1)(i) of the *ITA* in the amount of R23,800. Therefore, the amount of R126,200 [R150,000 – R23,800] will be taxable in each of the beneficiaries' hands. However, if none of the beneficiaries obtained a vested right to the interest income, and such income is retained in the trust, the trust will

---

<sup>391</sup> S 25B(1) and (2) of the *ITA*.

<sup>392</sup> S 25B of the *ITA*; Brink 2017 *SAJEMS* 5; Legwaila *Tax Law* 394; Bruwer *SATSA* 712; Sekabate *Tax Breaks* 6.

<sup>393</sup> See Para 4.3 below; Bruwer *SATSA* 712; *SILKE* 1008.

<sup>394</sup> See Para 1.5 above.

<sup>395</sup> *SILKE* 1006; Bruwer *SATSA* 739; Brink and Willemse 2014 *Journal of Economic and Financial Sciences* 799; Brink 2017 *SAJEMS* 6.

<sup>396</sup> Gross income definition in s 1(1) of the *ITA*.

<sup>397</sup> S 10(1)(i) of the *ITA* provides that a person who is under the age of 65 years is entitled to an exemption of interest to a maximum amount of R23,800 and persons aged 65 years or older are entitled to an exemption to a maximum amount of R34,500. See *SILKE* 1006; Bruwer *SATSA* 739; Brink and Willemse 2014 *Journal of Economic and Financial Sciences* 799, 801; Brink 2017 *SAJEMS* 6.

be liable for income tax in the amount of R202,500 [R450,000 x 45%].<sup>398</sup> In the event that the trustees of a discretionary trust fail to specify the source of the income that is to be distributed in their vesting decision, the income distributed to the relevant beneficiary will be deemed to comprise *pro rata* of the various forms of income received by the trust.<sup>399</sup>

Although a trust offers significant advantages in estate planning for farmers,<sup>400</sup> the disadvantage is that a trust is subject to a higher tax rate than a company for income tax purposes. Due to the fact that section 25B of the *ITA* is subject to section 7 of the *ITA*, the provisions of section 7 of the *ITA* will be discussed in the following paragraph to obtain a clear understanding of the income tax implications of trusts.

### **4.3 Section 7 of the ITA: anti-avoidance implications**

Section 7 of the *ITA* was introduced as an anti-avoidance measure<sup>401</sup> to prevent tax avoidance,<sup>402</sup> which was *inter alia* allowed (to a certain extent) by section 25B of the *ITA*.<sup>403</sup> It is designed to combat potential tax avoidance strategies in which a person disposes of their property or income in an attempt to avoid the usual tax liability arising from such income, whilst retaining all the benefits of such property or income.<sup>404</sup> Therefore, it deems certain income to be that of the donor, rather than income of the person to whom it is distributed.<sup>405</sup> Section 7 of the *ITA* applies in the

---

<sup>398</sup> If the asset producing the interest income was not placed into a trust, but is rather still in Mr Botha's personal ownership, Mr Botha would be taxed on the interest income rather than the beneficiaries to whom the interest income accrues through the trust.

<sup>399</sup> *SILKE* 1006.

<sup>400</sup> See Para 3.3 above.

<sup>401</sup> More specifically, ss 7(2) to 7(8) of the *ITA* contains the anti-avoidance provisions. See *SILKE* 1010.

<sup>402</sup> Tax avoidance refers to the minimisation of tax payable in a lawful manner as opposed to tax evasion, which entails deliberately concealing or falsifying information to reduce tax payable. See Dippenaar and van Wyk 2017 *SAJEMS* 1; Legwaila *Tax Law* 395; Brink 2017 *SAJEMS* 5; Bruwer *SATSA* 714; *SILKE* 1228.

<sup>403</sup> S 25B of the *ITA* makes provision for potential income splitting opportunities which can result in tax savings. It allows the income earned by a trust to flow through to the beneficiaries, who may be taxed at a lower rate than the trust and are afforded advantageous exemptions. See Para 4.2.3 above; Brink 2017 *SAJEMS* 6.

<sup>404</sup> Bruwer *SATSA* 714.

<sup>405</sup> *SILKE* 1009; Botha *Financial Planning* 935; Dippenaar and van Wyk 2017 *SAJEMS* 1; Brink 2017 *SAJEMS* 6.

event that a 'donation, settlement or other disposition' has been made.<sup>406</sup> This ultimately means that there must have been a disposition made gratuitously, for no consideration, or where there is a noticeable element of generosity. Therefore, it includes a standard donation, as well as the sale of an asset at a considerably lower value than the market value of such an asset.<sup>407</sup>

The provisions of section 7 of the *ITA* are similar to the attribution rules applicable to CGT.<sup>408</sup> Paragraph 73 of the Eighth Schedule of the *ITA*,<sup>409</sup> provides that the total value of a person's income in terms of section 7 of the *ITA*, and the capital gain under the Eighth Schedule that is attributed to a donation, may not exceed the value of the benefit obtained from such donation.<sup>410</sup>

#### *4.3.1 Application of the anti-avoidance provisions*

Section 7(2) of the *ITA* applies when a donor donates an income-producing asset to a trust, the spouse of such person obtains a vested right to the income received as a consequence of the donated asset, and the sole or main purpose of such donation was to avoid or minimise the tax liability of the donor.<sup>411</sup> In such event, the income received is deemed to be income of the donor rather than the beneficiary spouse, and the donor is therefore, liable for tax on the income received.<sup>412</sup>

The provisions of section 7(3) and 7(4) of the *ITA* apply where a parent, as the donor, donates an income-producing asset to a trust, and a minor child, as a beneficiary of the trust, obtains a vested right to the income received from the

---

<sup>406</sup> *SILKE* 1010; Bruwer *SATSA* 714; Botha *Financial Planning* 935.

<sup>407</sup> The sale of an asset at a consideration less than the market value of the asset is regarded as a deemed donation in terms of s 58 of the *ITA*. See *SILKE* 1010; Bruwer *SATSA* 730; Botha *Financial Planning* 935.

<sup>408</sup> See Para 4.4.3 above; *SILKE* 1010; Bruwer *SATSA* 757.

<sup>409</sup> The Eighth Schedule of the *ITA* is hereinafter the "Eighth Schedule".

<sup>410</sup> *SILKE* 732; Bruwer *SATSA* 758; Botha *Financial Planning* 806; SARS Comprehensive Guide to Capital Gains Tax (hereinafter the "Guide to CGT") 652-653.

<sup>411</sup> S 7(2)(a) of the *ITA*; *SILKE* 1010; Bruwer *SATSA* 717; Dippenaar and van Wyk 2017 *SAJEMS* 4. SS 80A to 80L of the *ITA*, specifically GAAR may apply, however such discussion falls outside the scope of this study.

<sup>412</sup> S 7(2)(a) of the *ITA*; *SILKE* 1010; Bruwer *SATSA* 717; Dippenaar and van Wyk 2017 *SAJEMS* 4.

donated asset.<sup>413</sup> Section 7(3) of the *ITA* provides that the income is deemed to be income received by the parent of the minor child and included in the parent's income for tax purposes.<sup>414</sup>

According to section 7(5) of the *ITA*, if the income received as a consequence of the donation of an income-producing asset does not vest in a beneficiary due to a condition imposed,<sup>415</sup> but is instead retained in the trust, the income is deemed to be that of the donor until the condition is fulfilled.<sup>416</sup> Upon the condition being fulfilled and therefore, the beneficiary obtaining a vested right to the income, these provisions will no longer be applicable<sup>417</sup> and the rules pertaining to trust income in the remainder of sections 7 and 25B of the *ITA* must be consulted.<sup>418</sup>

In contrast to the above provision, section 7(6) of the *ITA* applies when a beneficiary obtains a vested right to the income received as a result of the donation of an income-producing asset; however, the donor retains the power to revoke the vested right of a beneficiary or confer such right on another person.<sup>419</sup> The income received is deemed to be income of the donor and, therefore, taxable in his hands whilst the he retains such power.<sup>420</sup>

Whilst any person may establish the condition referred to in section 7(5) of the *ITA*, it is only the donor who may retain the power to either revoke a beneficiary's vested right or confer such right on another in terms of section 7(6) of the *ITA*.<sup>421</sup>

---

<sup>413</sup> A minor child includes a stepchild. See S 7(3) and 7(4) of the *ITA*; *SILKE* 1010; Bruwer *SATSA* 721; Botha *Financial Planning* 936.

<sup>414</sup> *SILKE* 1010; Bruwer *SATSA* 721; Dippenaar and van Wyk 2017 *SAJEMS* 5; Botha *Financial Planning* 935.

<sup>415</sup> A condition refers to the happening of a future event. An example can be illustrated in the case of a discretionary trust, where the beneficiaries of the trust do not have vested rights to benefit from the trust until the trustees exercise their discretion to vest a certain benefit in a beneficiary. The exercising of the trustees discretion is regarded as a condition. See *SILKE* 1010; Bruwer *SATSA* 722, 724; Botha *Financial Planning* 937; Legwaila *Tax Law* 397.

<sup>416</sup> *SILKE* 1010; Bruwer *SATSA* 722; Botha *Financial Planning* 937; Dippenaar and van Wyk 2017 *SAJEMS* 6; Legwaila *Tax Law* 395.

<sup>417</sup> *SILKE* 1010; Bruwer *SATSA* 722; Botha *Financial Planning* 937.

<sup>418</sup> *SILKE* 1010; Bruwer *SATSA* 722.

<sup>419</sup> *SILKE* 1012; Botha *Financial Planning* 937; Dippenaar and van Wyk 2017 *SAJEMS* 7; Legwaila *Tax Law* 396.

<sup>420</sup> Botha *Financial Planning* 938; Legwaila *Tax Law* 397.

<sup>421</sup> *SILKE* 1012.

Section 7(7) of the *ITA* applies when a donor either retains ownership of an asset or retains the right to reclaim ownership of the asset, but cedes his right to receive income from such asset, resulting in the income accruing to another person, known as the cessionary.<sup>422</sup> It provides that the income received is deemed to be that of the donor and is not regarded as income received by the cessionary.<sup>423</sup>

Section 7(8) of the *ITA* provides that if a non-resident receives income as a consequence of the donation of an income-producing asset by a resident donor, the income is deemed to be income of the resident donor and taxable in his hands.<sup>424</sup>

In the case of Mr Botha,<sup>425</sup> and for purposes of planning his estate, it seems as though sections 7(2) and 7(5) of the *ITA* may be the most noteworthy of the above anti-avoidance provisions.<sup>426</sup>

To reach a proper finding on the income tax implications of a company and a trust, it is also necessary to analyse the CGT implications, as CGT is included in the calculation of income tax.<sup>427</sup>

#### **4.4 Capital gains tax**

Prior to the implementation of CGT into South African tax law, persons were only subject to tax on income received or accrued and not on profits earned from the disposal of capital assets.<sup>428</sup> However, the position changed from 1 October 2001

---

<sup>422</sup> *SILKE* 1013; Botha *Financial Planning* 938; Legwaila *Tax Law* 397; Dippenaar and van Wyk 2017 *SAJEMS* 7.

<sup>423</sup> *SILKE* 1013; Botha *Financial Planning* 938; Legwaila *Tax Law* 397.

<sup>424</sup> *SILKE* 1013; Botha *Financial Planning* 938; Legwaila *Tax Law* 399; Bruwer *SATSA* 548; Dippenaar and van Wyk 2017 *SAJEMS* 7.

<sup>425</sup> See Para 1.5 above.

<sup>426</sup> It is important to note that if Mr Botha's sole or main purpose is to save tax, it might be true that the provisions of section 7 of the *ITA* will be applicable and GAAR will be implemented. However, Mr Botha's main intention in accordance with this study is to structure his estate and devise an estate plan, rather than to minimise his tax liability. Therefore, a discussion on GAAR falls outside the scope of this study.

<sup>427</sup> S 26A of the *ITA*; O'Halloran *Farmer's Weekly* 27; *SILKE* 649; O'Halloran *Farmer's Weekly* 30; Legwaila *Tax Law* 335; Haiden and Bikram *Tax Breaks* 6.

<sup>428</sup> The gross income calculation of a person excludes receipts or accruals of a capital nature. See Para 4.2 above; s 1(1) of the *ITA*; *SILKE* 649; Jones *Tax Breaks* 2014.

with the introduction of CGT into the *ITA*.<sup>429</sup> The implications of CGT are regulated by the Eighth Schedule read with section 26A of the *ITA*,<sup>430</sup> and apply to a gain or a loss obtained when a capital asset is disposed of<sup>431</sup> by a person.<sup>432</sup> CGT is a form of tax levied on income and is therefore, included in the taxable income calculation and consequently subject to normal tax.<sup>433</sup>

CGT implications only arise upon the disposal,<sup>434</sup> or deemed disposal,<sup>435</sup> of an asset.<sup>436</sup> The definition of a disposal in the Eighth Schedule,<sup>437</sup> includes *inter alia* the sale, donation or any other transfer of ownership of an asset,<sup>438</sup> the waiver of an asset,<sup>439</sup> and an interest in a trust asset vesting in a beneficiary.<sup>440</sup> The method to ascertain whether the disposal of an asset constitutes a capital gain subject to CGT, is to determine whether or not the proceeds arising from such disposal are revenue or capital in nature.<sup>441</sup> The *ITA* does not define the term 'capital' and therefore, certain guidelines have been established by South African courts to determine what is regarded as revenue or capital in nature for gross income and CGT purposes.<sup>442</sup>

---

<sup>429</sup> CGT only applies to the disposal of assets on or after 1 October 2001. If the asset being disposed of was acquired before 1 October 2001, the increase in the value of such asset up until 1 October 2001 is disregarded for purposes of CGT. See *SILKE* 649, 654; Haiden and Bikram *Tax Breaks* 6; Bruwer *SATSA* 421; Legwaila *Tax Law* 334, 336; O'Halloran *Farmer's Weekly* 30; SARS *Guide to CGT* 4; SARS *ABC of Capital Gains Tax for Companies* 1.

<sup>430</sup> *SILKE* 649; Haiden and Bikram *Tax Breaks* 6; Bruwer *SATSA* 421; Legwaila *Tax Law* 335, 338; SARS *ABC of Capital Gains Tax for Companies* 1.

<sup>431</sup> Bruwer *SATSA* 421; *SILKE* 650.

<sup>432</sup> Para 2 of the Eighth Schedule; Haiden and Bikram *Tax Breaks* 6; Legwaila *Tax Law* 335; *SILKE* 651.

<sup>433</sup> *SILKE* 649; O'Halloran *Farmer's Weekly* 30; Legwaila *Tax Law* 335; Haiden and Bikram *Tax Breaks* 6; O'Halloran *Farmer's Weekly* 27.

<sup>434</sup> Para 11 of the Eighth Schedule; *SILKE* 660; Bruwer *SATSA* 426-427; SARS *ABC of Capital Gains Tax for Companies* 3.

<sup>435</sup> In the event of a deemed disposal, the asset must be treated as if it were disposed of at its market value at the time of the transaction. See Para 12 of the Eighth Schedule; *SILKE* 661; Bruwer *SATSA* 426; SARS *ABC of Capital Gains Tax for Companies* 3.

<sup>436</sup> Para 1 of the Eighth Schedule provides for the definition of an asset for CGT purposes. See *SILKE* 660; Bruwer *SATSA* 425; SARS *Guide to CGT* 442; SARS *ABC of Capital Gains Tax for Companies* 3.

<sup>437</sup> Para 11(1) of the Eighth Schedule.

<sup>438</sup> Para 11(1)(a) of the Eighth Schedule; Lombard *Stockfarm* 8.

<sup>439</sup> Para 11(1)(b) of the Eighth Schedule; Lombard *Stockfarm* 8.

<sup>440</sup> Para 11(1)(d) of the Eighth Schedule.

<sup>441</sup> A discussion on the guidelines regarding revenue or capital in nature falls outside the scope of this study. See *SILKE* 47, 650; Bruwer *SATSA* 421; SARS *Guide to CGT* 12.

<sup>442</sup> *SILKE* 47, 650; Bruwer *SATSA* 426; SARS *Guide to CGT* 12.

When the proceeds from the disposal of an asset are greater than the base cost of such asset, it results in a capital gain;<sup>443</sup> however, when the base cost of an asset exceeds the proceeds received from the disposal of an asset, it results in a capital loss.<sup>444</sup> In the event that a person disposes of multiple assets during a year of assessment, the capital gain or loss of such disposals is required to be calculated separately for each asset.<sup>445</sup> The capital gains or losses of each individual asset are added together to determine the total of all capital gains,<sup>446</sup> whereafter the annual exclusions (applicable only to natural persons) are to be deducted, resulting in the aggregate capital gains.<sup>447</sup> A natural person, a company and a trust are subject to CGT at different inclusion tax rates. Furthermore, it is clear from the above that the methods to transfer the farm assets to a company or a trust are subject to CGT implications.<sup>448</sup> Therefore, it is vital to conduct a comparison thereof to efficiently understand the impact of CGT implications when estate planning is done for a farmer.

#### *4.4.1 Capital gains tax implications applicable to natural persons*

Natural persons are entitled to an annual exclusion in the amount of R40,000,<sup>449</sup> and is subject to CGT at the inclusion rate of 40%<sup>450</sup> of the net capital gains or losses for a year of assessment.<sup>451</sup> Therefore, assuming that Mr Botha<sup>452</sup> acquired farmland on 1 January 2002 for the amount of R500,000, and he sells the land in 2025 for

---

<sup>443</sup> The determination of base cost falls outside the scope of this study as the focus is on CGT implications in estate planning. See Para 3 of the Eighth Schedule; Legwaila *Tax Law* 338; *SILKE* 655; Bruwer *SATSA* 430; Haiden and Bikram *Tax Breaks* 6; SARS *ABC of Capital Gains Tax for Companies* 3.

<sup>444</sup> Para 4 of the Eighth Schedule; Legwaila *Tax Law* 338; *SILKE* 655; Bruwer *SATSA* 431; Haiden and Bikram *Tax Breaks* 6.

<sup>445</sup> Legwaila *Tax Law* 338; *SILKE* 655.

<sup>446</sup> *SILKE*: South African Income Tax 2025 656; Legwaila *Tax Law* 338.

<sup>447</sup> Paras 6 and 7 of the Eighth Schedule; *SILKE* 656; Legwaila *Tax Law* 339.

<sup>448</sup> See Paras 2.4 and 3.4 above.

<sup>449</sup> A natural person is entitled to an annual exclusion in the amount of R300,000 in the year of assessment in which such person passes away. See Para 5 of the Eighth Schedule; *SILKE* 656; Legwaila *Tax Law* 340-341; Bruwer *SATSA* 473; Haiden and Bikram *Tax Breaks* 7.

<sup>450</sup> If it is assumed that Mr Botha is taxed at the maximum marginal rate of 45%, the effective tax rate is  $40\% \times 45\% = 18\%$ . See Para 4.2 above.

<sup>451</sup> A special trust is also entitled to the annual exclusion and is taxed at the same rate as that of a natural person. See Paras 8, 9, 10 of the Eighth Schedule; *SILKE* 657; Haiden and Bikram *Tax Breaks* 7; Curr *TaxTalk* 122.

<sup>452</sup> See Para 1.5 above.

R20,000,000, then Mr Botha will realise a capital gain in the amount of R19,500,000 [R20,000,000 – R500,000]. He is entitled to an annual exclusion of R40,000, therefore, his net capital gain is R19,460,000 [R19,500,000 – R40,000]. Mr Botha's taxable capital gain to be included in his taxable income calculation is the amount of R7,784,000 [R19,460,000 x 40%].

A natural person is also entitled to a primary residence exclusion in the amount of R2,000,000 when the residence is sold.<sup>453</sup> The *ITA* stipulates that a primary residence:<sup>454</sup>

Means a residence –

- (a) in which a natural person or a special trust holds an interest; and
- (b) which that person or beneficiary of that special trust or a spouse of that person or beneficiary –
  - (i) ordinarily resides or resided in as his or her main residence; and
  - (ii) uses of used mainly for domestic purposes.

If Mr Botha<sup>455</sup> acquired his primary residence for an amount of R1,000,000 and subsequently sold it in 2025 at a price of R1,800,000, the capital gain in the amount of R800,000 [R1,800,000 – R1,000,000] will be disregarded for CGT purposes.<sup>456</sup> However, if Mr Botha acquired his primary residence at a base cost of R1,000,000 and sold it at a sale price of R3,500,000, he will realise a capital gain in the amount of R2,500,000 [R3,500,000 – R1,000,000]. The new capital gain in the amount of R500,000 [R2,500,000 – R2,000,000], after the primary residence exclusion has been taken into account, will be included in the calculation of his taxable capital gain at the inclusion rate of 40%.<sup>457</sup>

---

<sup>453</sup> *SILKE* 709; *SARS Guide to CGT* 454; *Curr TaxTalk* 123; Haiden and Bikram *Tax Breaks* 7; Jones *Tax Breaks* 6.

<sup>454</sup> Para 44 of the Eighth Schedule; Bruwer *SATSA* 460; Jones *Tax Breaks* 6.

<sup>455</sup> See Para 1.5 above.

<sup>456</sup> Para 45(1)(b) of the Eighth Schedule; *SILKE* 709; Baines *Tax Breaks* 7; *Curr TaxTalk* 123; Bruwer *SATSA* 460.

<sup>457</sup> Para 45(1)(a) of the Eighth Schedule; *SILKE* 709; Baines *Tax Breaks* 7; *Curr TaxTalk* 123; Bruwer *SATSA* 461.

A further advantage in the form of roll-over relief is granted to natural persons in section 9HB of the *ITA*.<sup>458</sup> It stipulates that when a person transfers ownership of an asset to his spouse, the capital gain or capital loss obtained on such disposal must be disregarded for CGT purposes.<sup>459</sup> The CGT implications are effectively rolled over to the spouse who receives the asset.<sup>460</sup> Therefore, if Mr Botha<sup>461</sup> transfers a farm asset to his wife, he will not be liable for any CGT on such disposal, and his wife will be deemed to have acquired the asset at the same base cost when initially acquired by Mr Botha.<sup>462</sup>

A company and a trust are, in comparison to a natural person, subject to different taxation rules for purposes of CGT. Therefore, it is necessary to analyse the CGT implications applicable to a company and a trust.

#### *4.4.2 Capital gains tax implications applicable to a company*

A company is subject to CGT at the inclusion rate of 80% of the net capital gains or losses for a year of assessment.<sup>463</sup> Should Mr Botha<sup>464</sup> establish a company and transfer ownership of the farm assets to the company either through a sale or donation, he will be liable for CGT, as previously explained.<sup>465</sup> However, if Mr Botha utilised an asset-for-share transaction, the CGT implications for Mr Botha will be deferred until the company disposes of such assets.<sup>466</sup> If it is assumed that the company acquired one of the farm assets for R500,000 by way of an asset-for-share transaction, and later sells such asset in 2025 for R20,000,000, the company will realise a capital gain in the amount of R19,500,000 [R20,000,000 – R500,000]. The annual exclusion<sup>467</sup> applicable to Mr Botha is not offered to a company,<sup>468</sup> therefore,

---

<sup>458</sup> Bruwer *SATSA* 462.

<sup>459</sup> S 9HB(1)(a) of the *ITA*; *SILKE* 728; Bruwer *SATSA* 462.

<sup>460</sup> Jones *Tax Breaks* 3.

<sup>461</sup> See Para 1.5 above.

<sup>462</sup> S 9HB(1) of the *ITA*; *SILKE* 728; Bruwer *SATSA* 462.

<sup>463</sup> The effective tax rate is 80% x 27% = 21,6%. See Para 4.2.2 above; para 10 of the Eighth Schedule; *SILKE* 657; Jones *Tax Breaks* 6; Krause *Stockfarm* 62.

<sup>464</sup> See Para 1.5 above.

<sup>465</sup> See Paras 2.4 and 4.4 above.

<sup>466</sup> See Para 2.4.1 above.

<sup>467</sup> See Para 4.4.1 above; Para 5 of the Eighth Schedule; *SILKE* 656; Legwaila *Tax Law* 340-341; Bruwer *SATSA* 473; Haiden and Bikram *Tax Breaks* 7.

<sup>468</sup> Para 5 of the Eighth Schedule; *SILKE* 656.

the net capital gain of the company is R19,500,000. The amount of taxable capital gains to be included in the company's taxable income is the amount of R15,600,000 [R19,500,000 x 80%]. If Mr Botha donated the asset to the company instead, his taxable capital gain to be included in his taxable income is the amount of R184,000 [(R500,000 – R40,000)<sup>469</sup> x 40%].

To clarify which estate planning tool would be the most suitable for Mr Botha insofar as the income tax implications are concerned, the CGT implications applicable to a trust need to be considered.

#### *4.4.3 Capital gains tax implications applicable to a trust*

Similar to a company, an ordinary trust is also subject to CGT at the inclusion rate of 80% of the net capital gains or losses for a year of assessment,<sup>470</sup> and the exclusions applicable to natural persons do not apply to an ordinary trust.<sup>471</sup> As explained above, a trust is a mere conduit pipe through which the income it receives, flows into the hands of the beneficiaries.<sup>472</sup> Paragraph 80 of the Eighth Schedule, subject to the attribution rules in paragraphs 68, 69 and 71,<sup>473</sup> determines the CGT consequences of a trust (similarly to section 25B of the *ITA* subject to section 7 of the *ITA*).<sup>474</sup> Therefore, a trust will be liable for CGT, unless the attribution rules are applicable and direct otherwise.<sup>475</sup>

Different scenarios give rise to different CGT consequences in trusts.<sup>476</sup> In the case of a vesting trust, the beneficiaries of the trust receive an unconditional personal

---

<sup>469</sup> See Para 4.4.1 above.

<sup>470</sup> The effective tax rate is 80% x 45% = 36%. See Para 4.2.3 above; para 10 of the Eighth Schedule; *SILKE* 657; Bruwer *SATSA* 731.

<sup>471</sup> Para 5 of the Eighth Schedule; *SILKE* 656.

<sup>472</sup> See Para 4.2.3 above; *SILKE* 1006; Brink and Willemse 2014 *Journal of Economic and Financial Sciences* 799; Bruwer *SATSA* 739; Sevenster *Tax Breaks* 5.

<sup>473</sup> Paras 68 to 71 of the Eighth Schedule.

<sup>474</sup> See Para 4.2.3 above; Bruwer *SATSA* 732.

<sup>475</sup> Paras 68 to 71 of the Eighth Schedule; *SILKE* 1021; Bruwer *SATSA* 731; SARS *Guide to CGT* 606.

<sup>476</sup> Botha *Financial Planning* 931.

right to benefit from the trust,<sup>477</sup> which constitutes a disposal for CGT purposes in terms of paragraph 11(1)(d) of the Eighth Schedule.<sup>478</sup> The trust is regarded as a taxpayer of "last resort",<sup>479</sup> provided that no beneficiary has a vested right and/or there is no resident beneficiary and the attribution rules are inapplicable.<sup>480</sup> However, in the case of a discretionary trust,<sup>481</sup> two situations result in a disposal of an asset by a trust for CGT purposes: firstly, through the disposal of an asset to a third party,<sup>482</sup> and secondly, through vesting an asset in a beneficiary.<sup>483</sup>

The first set of attribution rules are contained in paragraph 80 of the Eighth Schedule, which provides that the capital gain in the hands of the trust must be disregarded when an interest in a trust asset,<sup>484</sup> or a capital gain,<sup>485</sup> vests in a beneficiary. The beneficiary who acquires the vested right will be liable for CGT as the capital gain received is attributed to the beneficiary.<sup>486</sup>

The second set of attribution rules is contained in paragraphs 68 to 72 of the Eighth Schedule,<sup>487</sup> and only applies when a person (the "donor") has donated an asset to the trust. In the event that a donor donated an asset to a trust, and either the asset or an interest in the capital gain vests in the spouse or minor child as a beneficiary, the capital gain must be taxed in the hands of the donor spouse or parent.<sup>488</sup> Furthermore, the donor will be liable for CGT where a donation of an asset is made to a trust, subject to the condition that the capital gain attributed to the donation

---

<sup>477</sup> See Para 3.2.2 above; Botha *Financial Planning* 910, 931; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 10; Du Plessis 2009 *SA Mercantile Law Journal* 327; Bouwer 2024 *BTCLQ* 5-6; *SILKE* 1009.

<sup>478</sup> Para 11(1)(d) of the Eighth Schedule; *SILKE* 1020; SARS *Guide to CGT* 606.

<sup>479</sup> Botha *Financial Planning* 2025 931.

<sup>480</sup> Botha *Financial Planning* 2025 931; SARS *Guide to CGT* 602-603.

<sup>481</sup> See Para 3.2.2 above.

<sup>482</sup> Para 11(1)(a) of the Eighth Schedule; *SILKE* 2025 1020; SARS *Guide to CGT* 605.

<sup>483</sup> Para 11(1)(d) of the Eighth Schedule; *SILKE* 2025 1020; SARS *Guide to CGT* 606.

<sup>484</sup> Para 80(1) of the Eighth Schedule; *SILKE* 1021; Bruwer *SATSA* 733; Horak 2018 *BTCLQ* 22.

<sup>485</sup> Para 80(2) of the Eighth Schedule; *SILKE* 1021; Bruwer *SATSA* 733; Brink *SAJEMS* 5; Horak 2018 *BTCLQ* 22.

<sup>486</sup> Paras 80(1) and 80(2) of the Eighth Schedule; *SILKE* 1021; Bruwer *SATSA* 733.

<sup>487</sup> These attribution rules correspond with s 7 of the *ITA* and only apply in the same circumstances. See Para 4.3 above; SARS *Guide to CGT* 605.

<sup>488</sup> Paras 68 and 69 of the Eighth Schedule respectively. See *SILKE* 731; Bruwer *SATSA* 757; Botha *Financial Planning* 804; SARS *Guide to CGT* 644, 646.

will not vest in a beneficiary until the occurrence of a fixed or contingent event.<sup>489</sup> The donor will also be liable for CGT where a donation is made, subject to the right of the donor to revoke a beneficiary's right to receive a capital gain, or entitle another person to such right.<sup>490</sup> Lastly, when the capital gains of a trust result from a donation, and such capital gains vest in a non-resident, the capital gains must be taxed in the hands of the donor.<sup>491</sup> Any capital gain that is not distributed to a beneficiary but rather retained in the trust will be taxed in the hands of the trust at the inclusion rate of 80%.<sup>492</sup>

In addition to the CGT implications imposed on the donation of an asset to a company or a trust,<sup>493</sup> donations tax is also applicable and therefore, is discussed in the following paragraph.

#### **4.5 Donations tax**

Donations tax is levied on the transfer of assets from one person to another by means of a donation,<sup>494</sup> and is regarded as a separate tax on the transfer of wealth, rather than a tax levied on income earned.<sup>495</sup> It has been emphasised in the above discussion that the methods that can be utilised to transfer the farmer's farm assets are potentially exposed to donations tax.<sup>496</sup> Therefore, it is crucial to identify the specific transactions and the donations tax implications applicable when conducting estate planning for a farmer.

---

<sup>489</sup> Both the donor and the beneficiary are regarded as residents. See para 70 of the Eighth Schedule; *SILKE* 731; Bruwer *SATSA* 757; Botha *Financial Planning* 805; SARS *Guide to CGT* 647.

<sup>490</sup> Both the donor and the beneficiary must be residents. See para 71 of the Eighth Schedule; *SILKE* 732; Bruwer *SATSA* 757; Botha *Financial Planning* 806; SARS *Guide to CGT* 648.

<sup>491</sup> It is required that the donor is a resident of the Republic of South Africa. See para 72 of the Eighth Schedule; *SILKE* 732; Bruwer *SATSA* 757; Botha *Financial Planning* 806; SARS *Guide to CGT* 649.

<sup>492</sup> Para 10 of the Eighth Schedule; *SILKE* 657; Bruwer *SATSA* 731.

<sup>493</sup> See Paras 2.4 and 3.4 above.

<sup>494</sup> S 54 of the *ITA*; *SILKE* 1042; Bruwer *SATSA* 764; Thongo *Tax Breaks* 2.

<sup>495</sup> *SILKE* 1042; Bruwer *SATSA* 764.

<sup>496</sup> See Paras 2.4 and 3.4 above.

#### 4.5.1 The levying of donations tax

Sections 54 to 64 of the *ITA* regulate donations tax,<sup>497</sup> and apply to any resident person.<sup>498</sup> The *ITA* provides that a donation means "any gratuitous disposal of property including any gratuitous waiver or renunciation of a right".<sup>499</sup> Furthermore, property is defined in the *ITA* to include "any right in or to property movable or immovable, corporeal or incorporeal, wheresoever situated".<sup>500</sup> A person will be deemed to have donated his property if he disposes of such property at a consideration that is regarded as inadequate according to SARS.<sup>501</sup>

Donations tax is levied at the tax rate of 20% on the total taxable value<sup>502</sup> of all the donated property, provided that the value is less than R30,000,000.<sup>503</sup> As of 1 March 2018, any excess amount above R30,000,000 in respect of the value of the donated property is taxed at a rate of 25%.<sup>504</sup> The donor is the person who is liable for donations tax.<sup>505</sup> For purposes of this study, assume that the farm assets owned by Mr Botha<sup>506</sup> are valued at R20,000,000 and he donates these assets to a company and/or a trust; in this scenario, he will be liable for donations tax in the amount of R4,000,000 [R20,000,000 x 20%].<sup>507</sup> A significant advantage offered by the donation of the farmland is that the fair market value of immovable property on which *bona fide* farming operations are conducted is reduced by 30% in determining the taxable

---

<sup>497</sup> *SILKE* 1042; Bruwer *SATSA* 764; O'Halloran *Farmer's Weekly* 28; Botha *Financial Planning* 759.

<sup>498</sup> See Footnote 340 above; S 54 of the *ITA*; Thongo *Tax Breaks* 2; Bruwer *SATSA* 765; *SILKE* 1042; Botha *Financial Planning* 759, 762.

<sup>499</sup> S 55(1) of the *ITA*; *SILKE* 1043; Bruwer *SATSA* 765; Botha *Financial Planning* 760; Leon and Van Rensburg *Tax Breaks* 8.

<sup>500</sup> S 55(1) of the *ITA*; *SILKE* 1043; Bruwer *SATSA* 765; Botha *Financial Planning* 760.

<sup>501</sup> S 58(1) of the *ITA*; *SILKE* 1044; Botha *Financial Planning* 760.

<sup>502</sup> Donations tax is payable separately on each donation, however, the tax rate applicable is determined according to the aggregate value of all the property donated. See *SILKE* 1043.

<sup>503</sup> S 64(1)(a) of the *ITA*; Bruwer *SATSA* 765; *SILKE* 1042-1042; Leon and Van Rensburg *Tax Breaks* 8; Thongo *Tax Breaks* 2; O'Halloran *Farmer's Weekly* 28; Botha *Financial Planning* 759.

<sup>504</sup> Donations made prior to 1 March 2018 will not be taken into account when determining the aggregate value. See S 64(1)(b) of the *ITA*; Bruwer *SATSA* 765; *SILKE* 1043; Leon and Van Rensburg *Tax Breaks* 8; Thongo *Tax Breaks* 2; O'Halloran *Farmer's Weekly* 28; Botha *Financial Planning* 759.

<sup>505</sup> S 59 of the *ITA*; Botha *Financial Planning* 767.

<sup>506</sup> See Para 1.5 above.

<sup>507</sup> Furthermore, the donation of an asset will also result in CGT consequences as it is included in the definition of a disposal for purposes of CGT in para 11(1)(a) of the Eighth Schedule. Para 38 of the Eighth Schedule provides that if a person disposes of an asset by means of a donation, the asset will be disposed of at its market value.

value for donations tax purposes.<sup>508</sup> If Mr Botha owns farmland on which he conducts *bona fide* farming operations with a fair market value of R20,000,000, the value of the farmland for donations tax purposes is R14,000,000 [R20,000,000 x 70%]. Mr Botha will therefore be liable for donations tax in the amount of R2,800,000 [14,000,000 x 20%].<sup>509</sup>

#### 4.5.2 Exemptions from donations tax

A further advantage of using a donation to transfer assets out of the farmer's personal ownership, is that there are several exemptions that exclude specific donations from donations tax.<sup>510</sup> A natural person is entitled to a general exemption in the amount of R100,000 when determining the total taxable value during a specific year of assessment for donations tax purposes.<sup>511</sup> A company and a trust, on the other hand, are entitled to a general exemption in the amount of R10,000.<sup>512</sup> In addition to the general exemptions, section 56 of the *ITA* contains several specific exemptions. It is noteworthy that a donation made to or for the benefit of a spouse either in terms of an antenuptial or post-nuptial contract,<sup>513</sup> or provided that there is no notarial deed of separation or court order separating the parties,<sup>514</sup> such a donation is exempt from donations tax.<sup>515</sup> Furthermore, the spousal exemption also applies when a person donates an asset to a trust in which his spouse is the only nominated beneficiary of such trust.<sup>516</sup> Another noteworthy exemption for the farmer is contained in section 56(1)(m) of the *ITA*, which provides that a donation to the farmer's child of a right to use or occupy the farming property is exempt from donations tax.<sup>517</sup> Whilst it is advantageous that these donations are considered 'tax-

---

<sup>508</sup> S 55(1) of the *ITA*; *SILKE* 1049; Botha *Financial Planning* 762.

<sup>509</sup> Bruwer *SATSA* 767.

<sup>510</sup> *SILKE* 1045; O'Halloran *Farmer's Weekly* 28.

<sup>511</sup> S 56(2)(b) of the *ITA*; *SILKE* 1047; Bruwer *SATSA* 772; Botha *Financial Planning* 764; O'Halloran *Farmer's Weekly* 28.; Leon and Van Rensburg *Tax Breaks* 8; Van der Spuy *TaxTalk* 5; Jones *Tax Breaks* 5.

<sup>512</sup> S 56(2)(a) of the *ITA*; *SILKE* 1046; Bruwer *SATSA* 772; Botha *Financial Planning* 764.

<sup>513</sup> S 56(1)(a) of the *ITA*; *SILKE* 1045; Bruwer *SATSA* 769; Botha *Financial Planning* 765.

<sup>514</sup> S 56(1)(b) of the *ITA*; *SILKE* 1045; Bruwer *SATSA* 769; Botha *Financial Planning* 765.

<sup>515</sup> *SILKE* 1045; Bruwer *SATSA* 769; Botha *Financial Planning* 765.

<sup>516</sup> S 56(1)(b) of the *ITA*; *SILKE* 1045; Bruwer *SATSA* 769.

<sup>517</sup> S 56(1)(m) of the *ITA* does not apply to a limited interest. See S 56(1)(m) of the *ITA*; *SILKE* 1046; Bruwer *SATSA* 771; Botha *Financial Planning* 766.

free',<sup>518</sup> this is of limited value to the farmer, as the goal of the farmer is to transfer the farm assets and the farming enterprise out of his estate to a tool that will provide for future generations.<sup>519</sup>

In addition to the tax implications of section 7 of the *ITA*, section 7C of the *ITA* was introduced as a further anti-avoidance measure and plays a crucial role in the estate planning process, as it may result in donations tax.

#### **4.6 Section 7C of the ITA**

The sale of an asset to a trust (and/or a company) on a low-interest or interest-free loan account is one of the most common methods utilised to transfer assets into the ownership of the trust.<sup>520</sup> The advantage of transferring assets into a trust through the use of a such loan before March 2017 was that it did not result in immediate donations tax. It also served as a means to place growth assets into the trust, thereby freezing the value of the seller's estate.<sup>521</sup> However, the position has changed, and these loans may now be subject to donations tax.<sup>522</sup>

Section 7C of the *ITA* applies when a loan, credit, or advance is provided to a trust by a natural person or a company (upon request by a natural person who is regarded as a connected person).<sup>523</sup> The provision will also be applicable when a loan, advance, or credit is provided by a natural person or a company (upon request of a connected person) to a company in which the trust holds at least 20% of the voting rights or equity shares.<sup>524</sup> Section 1 of the *ITA* establishes criteria for determining

---

<sup>518</sup> O'Halloran *Farmer's Weekly* 28; Leon and Van Rensburg *Tax Breaks* 8.

<sup>519</sup> See Para 1.1 above; O'Halloran *Farmer's Weekly* 28; Lingani and Hough 2025 *SAJAE* 115; Robbertse *Stockfarm* 60.

<sup>520</sup> O'Halloran *Farmer's Weekly* 24; O'Halloran *Farmer's Weekly* 29; Brink 2017 *SAJEMS* 1; Botha *Financial Planning* 965; *SILKE* 1014; Hughes *TaxTalk* 28; Farrand *TaxTalk* 32.

<sup>521</sup> See Para 3.4 above; Wessels *MoneyMarketing* 22; Hughes *TaxTalk* 28; Farrand *TaxTalk* 32; Bruwer *SATSA* 727.

<sup>522</sup> *SILKE* 1054; Farrand *TaxTalk* 32; Joubert *Tax Professional* 20.

<sup>523</sup> S 7C(1)(a)(i) and 7C(1)(b)(i) of the *ITA*; *SILKE* 1054; Bruwer *SATSA* 727; Coetsee *TaxTalk* 37; Jones *Tax Breaks* 5; Harrand *TaxTalk* 33; Botha *Financial Planning* 761, 968-969.

<sup>524</sup> The trust must hold the 20% voting rights or equity shares on its own, or hold the 20% together with a connected person, such as a beneficiary of the trust or a person connected to a beneficiary. See para (d)(iv) of the definition of a connected person in s 1 of the *ITA*; s 7C(1)(a)(ii) and 7C(1)(b)(ii) of the *ITA*; *SILKE* 1054; Bruwer *SATSA* 727; Harrand *TaxTalk* 33; Botha *Financial Planning* 968-969.

who is a 'connected person'. For an individual, the definition of a related party includes any relative of that individual. When considering a trust, the criteria includes the beneficiaries of the trust and extends to any related party of those beneficiaries.<sup>525</sup>

The provisions of section 7C of the *ITA* stipulate that if an interest-free or a low-interest loan is granted to a trust or a company, the difference between the amount of interest actually charged and the official rate of interest must be treated as a donation, and therefore, subject to donations tax.<sup>526</sup> Assume that Mr Botha<sup>527</sup> wishes to sell a farm asset with a market value of R20,000,000 to a company or a trust on an interest-free loan account;<sup>528</sup> however, the official rate of interest (market-related interest) that should have been charged on the loan account is 9%.<sup>529</sup> The difference in the interest charged amounting to R1,800,000 [ $R20,000,000 \times (9\% - 0\%)$ ], is regarded as a deemed donation made by Mr Botha to the trust or company. Therefore, Mr Botha donations tax liability will amount to R360,000 [ $R1,800,000 \times 20\%$ ]. However, if Mr Botha were to sell the same valued asset to a trust or a company subject to a 2% interest-bearing loan account (low-interest loan),<sup>530</sup> and the official rate of interest is 9%, the donations tax implications are slightly different. The difference in the interest charged in the amount of R1,400,000 [ $R20,000,000 \times (9\% - 2\%)$ ] must be treated as a donation, and Mr Botha will be liable for donations tax amounting to R280,000 [ $R1,400,000 \times 20\%$ ]. Upon consideration of the above calculations, it can be concluded that the use of a low-interest loan seems to be a more viable option as it results in less donations tax payable for the farmer.

It has been established above that the value of the loan account will be included in the farmer's estate during his lifetime and upon death.<sup>531</sup> There are two ways in

---

<sup>525</sup> A natural person and a company may be a beneficiary of the trust. See para (b) of the definition of a connected person in s 1(1) of the *ITA*.

<sup>526</sup> S 7C(3) of the *ITA*; Bruwer *SATSA* 727; Jones *Tax Breaks* 5; Harrand *TaxTalk* 33; Schubert *TaxTalk* 37; Botha *Financial Planning* 761.

<sup>527</sup> See Para 1.5 above.

<sup>528</sup> Subject to the provisions of s 7C of the *ITA*.

<sup>529</sup> SARS Interest Rates – Table 3 3; Bruwer *SATSA* 728.

<sup>530</sup> Subject to s 7C of the *ITA*.

<sup>531</sup> See Paras 2.4 and 3.4 above; Van der Spuy *TaxTalk* 5; Botha *Financial Planning* 762; Hughes *TaxTalk* 29; Coetsee *TaxTalk* 36.

which the farmer can reduce the value of this loan account during his lifetime: firstly, the farmer may write off the loan,<sup>532</sup> resulting in a gratuitous waiver of a right that is subject to donations tax,<sup>533</sup> or secondly, the farmer may utilise the general donations tax exemption in the amount of R100,000 to reduce the value of the loan account, by waiving the amount of R100,000 of the loan every year.<sup>534</sup>

Apart from the loan account that is to be included in the farmer's deceased estate, which will influence his estate duty liability upon death, there are further estate duty implications that need to be considered.

#### **4.7 Estate duty tax implications**

Thorough estate planning makes provision for the fact that estate duty is payable on the taxable value of the farmer's estate upon death. Estate duty is regulated by the *Estate Duty Act* 45 of 1955 (hereinafter referred to as the "*Estate Duty Act*"),<sup>535</sup> and is levied at 20% of the dutiable amount exceeding R3,500,000, but does not exceed the dutiable value of R30,000,000.<sup>536</sup> For purposes of estate duty, although it is favourable to note that the value of the asset bequeathed to the surviving spouse of a deceased person is allowed as a deduction when determining the estate duty payable,<sup>537</sup> this is of limited value to the farmer as the goal of the farmer is to transfer the farm assets out of his personal ownership during his lifetime.<sup>538</sup>

It has been noted above that a company and/or a trust can serve as viable estate planning tools because they serve as a means to freeze the value of the estate.<sup>539</sup> In essence, estate freezing means to peg the growth of the assets in an estate for

---

<sup>532</sup> The waiver of the loan will result in CGT implications. See para 11(1)(b) of the Eighth Schedule.

<sup>533</sup> S 55(1) of the *ITA*; Botha *Financial Planning* 761.

<sup>534</sup> See Para 4.5.2 above; Botha *Financial Planning* 762; Farrand *TaxTalk* 34; Coetsee *TaxTalk* 38.

<sup>535</sup> Estate Duty Act 45 of 1955. See Botha *Financial Planning* 837.

<sup>536</sup> Estate duty is levied at 25% on the value that exceeds R30,000,000. See Botha *Financial Planning* 837; *SILKE* 1079; Bruwer *SATSA* 789; McAllister *Tax Breaks* 6; Du Pisanie *Stockfarm* 60.

<sup>537</sup> S 4(q) of the *Estate Duty Act*; Botha *Financial Planning* 857; Bruwer *SATSA* 813; *SILKE* 1093.

<sup>538</sup> See Para 1.1 above.

<sup>539</sup> See Paras 2.1, 3.2.2 above and 4.7 below; Veldhuizen *Farmer's Weekly* 47; Botha *Financial Planning* 925; 965-966; Sekabate *Tax Breaks* 7; Bruwer *SATSA* 709; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 227; Hill *Personal Finance* 6.

estate duty purposes.<sup>540</sup> The transfer of ownership of growth assets out of the farmer's personal ownership and into the ownership of a company and/or a trust through the use of the methods discussed above,<sup>541</sup> means that the growth in value of the asset will occur in the company and/or the trust rather than in the farmer's estate, therefore, 'freezing' the farmer's estate.<sup>542</sup>

In addition to the aforementioned tax implications, the final tax considerations that must be considered to determine which estate planning tool and method is most suitable for the farmer who is planning his estate, are those of VAT and transfer duty.

#### **4.8 Relevant VAT and transfer duty implications**

It has been illustrated above that the implications of VAT and transfer duty must be considered when transferring the farm assets, more particularly immovable property, to a company or a trust.<sup>543</sup> VAT is an indirect tax that is levied at the rate of 15% on the delivery of goods and services.<sup>544</sup> It is compulsory for a person to register as a VAT vendor if such person is carrying on an enterprise, and the annual turnover with regard to the taxable supplies of such enterprise exceeds the threshold of R1,000,000.<sup>545</sup> If Mr Botha<sup>546</sup> is a registered VAT vendor, and he transfers the farming enterprise to a company or a trust that is also a registered VAT vendor, the supply may be one of a going concern, provided that all the requirements of section 11(1)(e) of the *VAT Act* are met.<sup>547</sup> The sale of the farming

---

<sup>540</sup> Botha *Financial Planning* 925; 965; Sekabate *Tax Breaks* 7; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 227; Hill *Personal Finance* 6.

<sup>541</sup> See Paras 2.4 and 3.4 above.

<sup>542</sup> Botha *Financial Planning* 965-966; Du Toit, Smith and Van Der Linde *Fundamentals of South African Trust Law* 228.

<sup>543</sup> See Paras 2.4 and 3.4 above.

<sup>544</sup> The *VAT Act* also provides for zero-rated supplies, subject to VAT at the rate of 0% and exempt supplies, which supplies are not subject to VAT implications. See s 11 and 12 of the *ITA*; *SILKE* 1136, 1152, 1158; Bruwer *SATSA* 25, 57, 75; Botha *Financial Planning* 813-814, 819; SARS *VAT 404 – Guide for Vendors* 1, 42, 44, 52.

<sup>545</sup> This requirement, however, excludes once-off transactions such as the sale of an asset. See Botha *Financial Planning* 818; Lombard *Stockfarm* 58; SARS *Vat 404 – Guide for Vendors* 11.

<sup>546</sup> See Para 1.5 above.

<sup>547</sup> See Para 2.4.1 above; s 11(1)(e) of the *ITA*; Bruwer *SATSA* 69.

enterprise as a going concern will result in VAT being levied on the transfer at a rate of 0%.<sup>548</sup>

Transfer duty, on the other hand, is a separate tax that is payable by a purchaser when acquiring *inter alia* immovable property from a person who is not a registered VAT vendor, or when the transaction is not one subject to VAT.<sup>549</sup> Transfer duty is payable on the value of the immovable property, and the tax rate ranges from 0% to 13%, depending on the value of such property.<sup>550</sup> It is of particular importance in respect of the sale of immovable property, such as the farmland, that if the farmer is a registered VAT vendor and the farmland constitutes part of his farming enterprise, the transaction will be subject to VAT. However, if the farmland does not fall within the farming enterprise, or the farmer is not a registered VAT vendor, the sale of the farmland will be subject to transfer duty.<sup>551</sup> The company or the trust as the purchaser of the asset will be liable to pay the transfer duty.<sup>552</sup>

#### **4.9 Conclusion**

It has been illustrated above that natural persons, companies and trusts are subject to different income tax implications.<sup>553</sup> Moreover, the differences highlighted between the income tax implications of a company and a trust are that a company distributes its income earned to the shareholders in the form of dividends, which is subject to dividends tax at the rate of 20%;<sup>554</sup> however, the income of a trust that is distributed to the beneficiaries retains its identity and therefore, is subject to the taxation rules applicable to the specific beneficiary.<sup>555</sup> With specific reference to a trust, it is important to be aware of the fact that the provisions of section 7 of the *ITA* may deem certain income to be that of the farmer when an asset is donated to

---

<sup>548</sup> See Para 2.4.1 above; s 11(1)(e) of the *ITA*; Bruwer *SATSA* 69; *SILKE* 1156.

<sup>549</sup> For purposes of this study, transfer duty will be discussed in relation to immovable property as the family farm is often the most significant asset in the estate of the farmer. See Para 2.4.1 above; Botha *Financial Planning* 827; Bruwer *SATSA* 135; *SILKE* 1113.

<sup>550</sup> Botha *Financial Planning* 827-828; *SILKE* 1113-1114.

<sup>551</sup> S 9(15) of the Transfer Duty Act; Botha *Financial Planning* 821, 828, 835; Bruwer *SATSA* 134; *SILKE* 1118; SARS Transfer Duty Guide 86; SARS VAT 404 – Guide for Vendors 56.

<sup>552</sup> Botha *Financial Planning* 827; Bruwer *SATSA* 135; *SILKE* 1113.

<sup>553</sup> See Para 4.2 above.

<sup>554</sup> See Para 4.2.2 above.

<sup>555</sup> See Para 4.2.3 above.

a trust.<sup>556</sup> The income that is retained in a company is taxed at a fixed rate of 27%,<sup>557</sup> whereas the income retained in a trust is taxed at a much higher fixed rate of 45%.<sup>558</sup>

Moreover, all persons are subject to CGT on the sale or donation of an asset.<sup>559</sup> Whilst a natural person is subject to CGT at the inclusion rate of 40%,<sup>560</sup> a company and a trust are subject to CGT at a higher inclusion rate of 80%.<sup>561</sup> An asset-for-share transaction between the farmer and a company, however, provides an advantage to the farmer because his CGT consequences are deferred.<sup>562</sup> As with the income tax implications of a trust, it is similarly important to note that the attribution rules may deem certain capital gains taxable in the hands of the farmer.<sup>563</sup>

In addition to CGT, donations tax is also levied at the tax rate of 20% when an asset is donated.<sup>564</sup> There are, however, certain benefits available specifically to the farmer in terms of the reduction of the value of farmland for donations tax purposes, as well as the general and specific exemptions which exclude certain donations from donations tax.<sup>565</sup>

The farmer may also sell an asset to a company and/or a trust on a low-interest or interest-free loan, which may be subject to the implications of section 7C of the *ITA*.<sup>566</sup> According to the above discussion, it seems that a low-interest loan may be a more favourable option for the farmer, and the donations tax exemption is a practical way to minimise the value of the loan account that falls into the farmer's estate.<sup>567</sup>

---

<sup>556</sup> See Para 4.3 above.

<sup>557</sup> See Para 4.2.2 above.

<sup>558</sup> See Para 4.2.3 above.

<sup>559</sup> See Para 4.4 above.

<sup>560</sup> See Para 4.4.1 above.

<sup>561</sup> See Paras 4.4.2 and 4.4.3 above.

<sup>562</sup> See Paras 2.4.1 and 4.4.2 above.

<sup>563</sup> See Para 4.4.3 above.

<sup>564</sup> See Para 4.5.1 above.

<sup>565</sup> See Para 4.5 above.

<sup>566</sup> See Para 4.6 above.

<sup>567</sup> See Para 4.6 above.

Concerning estate duty, which is an inevitable tax payable upon death, the use of a company or a trust can serve as a viable means to freeze the value of the farmer's estate for estate duty purposes.<sup>568</sup>

Finally, it is important to note for purposes of estate planning for the farmer, and in respect of the transfer of ownership of agricultural land, that such a transfer will be subject to either VAT or transfer duty, depending on whether the farmer is a registered VAT vendor.<sup>569</sup> If the farmer is a registered VAT vendor, he may have the advantage of transferring his farming enterprise as a going concern.<sup>570</sup>

In this Chapter, the impact of the relevant tax legislation on the estate planning process and the choice of estate planning objectives and methods was analysed, therefore, addressing the third sub-objective which directly links to the research question. The final question that remains to be answered is which estate planning tool would be the most appropriate for the individual farmer in planning his estate. In the following Chapter, the findings of the preceding Chapters are summarised and recommendations are provided, with reference to the case study of Mr Botha,<sup>571</sup> to effectively answer the research question.

---

<sup>568</sup> See Para 4.7 above.

<sup>569</sup> See Para 4.8 above.

<sup>570</sup> See Para 4.8 above.

<sup>571</sup> See Para 1.5 above.

## Chapter 5 Conclusion

### 5.1 Findings

The need for carefully considered and well-designed estate planning in the agricultural sector is of paramount importance due to several factors presented in this study, which are briefly summarised as follows: the figures presented in Chapter 1, specifically that 65% of South African businesses were in the agricultural sector, 90% of which were family-owned, 70% of farmers have difficulty transferring their business operations to the second generation, 90% of those enterprises are unsuccessful in reaching the third generation, and 67% of farmers had not implemented any form of estate plan; the complex family dynamics;<sup>572</sup> the unique challenges faced by farmers in relation to the restrictions on the transfer of agricultural land as contained in section 3 of *SALA*;<sup>573</sup> the separate tax treatment of farming operations;<sup>574</sup> and lastly, the fact that several farmers currently conduct their farming operations as a sole proprietor and hold personal ownership over the farm assets.<sup>575</sup> Moreover, it has been emphasised throughout the study that the goal of a farmer to keep the farming enterprise within their family and transfer it to future generations, as well as the transfer of assets out of the farmer's personal ownership, are significant attributes of the agricultural sector.<sup>576</sup>

On consideration of the above, it was deemed necessary to raise the research question in Chapter 1 of this study.<sup>577</sup> The research question aims to determine how the tax legislation influences the estate planning process of the individual farmer, specifically with regard to the choice of estate planning tools and the methods to transfer ownership of assets, whilst ensuring the enjoyment and preservation of the farm assets during the farmer's lifetime and the transfer of the farming enterprise to future generations.

---

<sup>572</sup> See Para 1.1 above.

<sup>573</sup> See Paras 1.1, 2.3.2 and 3.3.3 above.

<sup>574</sup> See Paras 1.1 and 4.2.1 above.

<sup>575</sup> See Para 2.1 above.

<sup>576</sup> See Para 1.1 above.

<sup>577</sup> See Para 1.2 above.

The use of a company and a trust as estate planning tools was explored in Chapters 2 and 3 by examining their legal nature,<sup>578</sup> the benefits and risks associated with the use thereof,<sup>579</sup> and the methods to be utilised to transfer the farm assets from the personal ownership of the farmer into the ownership of a company and/or a trust.<sup>580</sup> Chapter 4 provided a critical analysis of the tax implications that must be considered when conducting estate planning for the individual farmer, and the extent to which these tax implications influence the estate planning process. The following paragraphs will draw a comparison between these aspects in relation to the use of a company and a trust as estate planning tools.

#### *5.1.1 The legal nature and benefits and risks associated with the use of a company and a trust*

A company is regarded as a separate entity, independent from its shareholders and directors,<sup>581</sup> yet a trust, on the other hand, is not considered to be a separate legal person in South African law, but rather an institution *sui generis*.<sup>582</sup> Nonetheless, both tools offer the advantage of separating ownership and liability.<sup>583</sup> The assets and liabilities of the company and/or the trust constitute the estate of the company and/or the trust, which is separate from the personal estate of the farmer.<sup>584</sup> Therefore, shifting ownership of the farm assets to a company and/or a trust allows the assets to be safeguarded from any personal liability of the farmer, ultimately ensuring the preservation and protection of the farm assets.<sup>585</sup> It is, however, important to remember the circumstances in which a shareholder, director or trustee may be held personally liable to avoid potential disadvantages.<sup>586</sup>

Furthermore, conducting farming operations or holding farm assets in a company and/or a trust offers the advantage of perpetual succession, therefore, a change in

---

<sup>578</sup> See Paras 2.2 and 3.2 above.

<sup>579</sup> See Paras 2.3 and 3.3 above.

<sup>580</sup> See Paras 2.4 and 3.4 above.

<sup>581</sup> See Para 2.2 above.

<sup>582</sup> See Para 3.2.1 above.

<sup>583</sup> See Paras 2.3.1 and 3.3.1 above.

<sup>584</sup> See Paras 2.3.1 and 3.3.1 above.

<sup>585</sup> See Paras 2.3.1 and 3.3.1 above.

<sup>586</sup> See Paras 2.3.1 and 3.3.1 above.

shareholders or directors of a company, or trustees or beneficiaries of a trust has no effect on the continued existence of the company or the trust.<sup>587</sup> This ensures the smooth and successful transfer of the farming enterprise from one generation to another.<sup>588</sup>

The restrictions on the transfer of agricultural land contained in section 3 of *SALA* ultimately hinder the estate and succession planning of the farmer who owns the farmland in his personal name.<sup>589</sup> However, the transfer of farmland into the ownership of a company and/or a trust serves as an effective means to bypass this hurdle, as it allows multiple persons to jointly control and/or use the farmland, thereby further ensuring the smooth transition of the farmland to future generations.<sup>590</sup>

The use of a company and/or a trust as estate planning tools enables multiple family members involved in the farming enterprise to jointly own, enjoy and manage the farming enterprise and its assets.<sup>591</sup> The farmer and his family members, as well as a trust established by the farmer or companies registered by the farmer, may act as shareholders and/or co-directors of the company.<sup>592</sup> Likewise, the aforementioned persons may be appointed as trustees and/or beneficiaries of the trust.<sup>593</sup> The MOI of the company, similar to the trust deed of a trust, will assist in determining the way in which the farmer and his family members may efficiently and effectively manage the farming operations and the use of the farm assets.<sup>594</sup> The potential disadvantage of operating a family trust is that the trust may be perceived as being either an alter ego trust or a sham trust, and the appointment of an independent trustee is therefore, of particular importance to avoid the consequences thereof.<sup>595</sup>

---

<sup>587</sup> See Paras 2.2 and 3.3.2 above.

<sup>588</sup> See Paras 2.2 and 3.3.2 above.

<sup>589</sup> See Paras 2.3.2 and 3.3.3 above.

<sup>590</sup> See Paras 2.3.2, 2.3.4 and 3.3.3 above.

<sup>591</sup> See Paras 2.3.4 and 3.3.4 above.

<sup>592</sup> See Para 2.3.4 above.

<sup>593</sup> See Para 3.3.4 above.

<sup>594</sup> See Paras 2.3.4, 3.3.4 and 3.3.5 above.

<sup>595</sup> See Para 3.3.5 above.

An advantage of the use of a company is the ability to utilise a trading company and a holding company structure.<sup>596</sup> This structure ultimately separates the farming business from the farm assets, which serves as further protection of the farm assets.<sup>597</sup> It ensures the enjoyment of farm assets by entering into a lease agreement.<sup>598</sup>

In addition to the choice of estate planning tools, a determination must be made regarding which method is most suitable for transferring ownership of the farm assets to a company and/or a trust.

#### *5.1.2 The methods to transfer the farm assets to a company and/or a trust*

The farmer may use an asset-for-share transaction to transfer the farm assets into the ownership of a company, as the farmer transfers the asset to the company, in exchange for shares in that company.<sup>599</sup> The benefit of utilising an asset-for-share transaction is that the CGT implications, and income tax implications, of the farmer are deferred.<sup>600</sup> There are further tax advantages that are granted to the farmer in respect of VAT and transfer duty.<sup>601</sup> It is important to remember that to achieve the advantages of an asset-for-share transaction, the value of the asset transferred must be equal to the value of shares acquired, and the farmer must either hold a qualifying interest in that company for at least 18 months or continue to render services to the company on a full-time basis.<sup>602</sup> There are two disadvantages that are associated with the use of an asset-for-share transaction: firstly, the shares acquired by the farmer fall in the estate of the farmer, and secondly, the transaction may be viewed as a deemed donation if the asset is transferred at a value lower than its fair market value.<sup>603</sup>

---

<sup>596</sup> See Para 2.3.3 above.

<sup>597</sup> See Para 2.3.3 above.

<sup>598</sup> See Para 2.3.3 above.

<sup>599</sup> See Para 2.4.1 above.

<sup>600</sup> See Para 2.4.1 above.

<sup>601</sup> See Para 2.4.1 above.

<sup>602</sup> See Para 2.4.1 above.

<sup>603</sup> See Para 2.4.1 above.

The sale of an asset to a company and/or a trust will result in CGT for the farmer and may also be subject to VAT if the farmer is a registered VAT vendor, or transfer duty if the asset is immovable property.<sup>604</sup> Whilst it may seem disadvantageous that the proceeds received from the sale of the asset fall into the estate of the farmer,<sup>605</sup> the growth asset is transferred into the ownership of the company and/or the trust which freezes the value of the farmer's estate.<sup>606</sup>

A further option that is available to the farmer to transfer farm assets to a company and/or a trust, and which is more commonly used with a trust, is the sale of an asset at its market value on either a low-interest or interest-free loan account.<sup>607</sup> Although the value of the loan account is included in the personal estate of the farmer,<sup>608</sup> the farmer may reduce such value by making use of the annual donations tax exemption.<sup>609</sup> The provisions of section 7C have the effect that the difference in the amount of interest actually charged and the official rate of interest is treated as a deemed donation and subject to donations tax.<sup>610</sup> It has been established that the use of a low-interest loan serves as the more favourable option available to the farmer.<sup>611</sup>

The last method available to the farmer is to donate the farm assets to a company and/or a trust.<sup>612</sup> Although, the donation of an asset results in CGT and donations tax for the farmer,<sup>613</sup> it seems favourable in comparison to the regular sale or sale on a loan, where the proceeds received or the value of the loan will fall into the estate of the farmer.<sup>614</sup>

---

<sup>604</sup> See Paras 2.4.2 and 3.4 above.

<sup>605</sup> See Paras 2.4.2 and 3.4 above.

<sup>606</sup> See Para 4.7 above.

<sup>607</sup> See Paras 2.4.2 and 3.4 above.

<sup>608</sup> See Paras 2.4.2, 3.4 and 4.6 above.

<sup>609</sup> See Paras 4.5 and 4.6 above.

<sup>610</sup> See Paras 2.4.2, 3.4, 4.5 and 4.6 above.

<sup>611</sup> See Para 4.6 above.

<sup>612</sup> See Paras 2.4.2 and 3.4 above.

<sup>613</sup> See Paras 2.4.2, 3.4, 4.4 and 4.5 above.

<sup>614</sup> See Paras 2.4.2 and 3.4 above.

The choice of determining which estate planning tool and method of transfer is most suitable is highly influenced by tax legislation, which is summarised in the following paragraph.

### *5.1.3 The relevant tax implications applicable in the estate planning process*

The following table is presented to adequately demonstrate and compare the relevant tax implications in the estate planning process when a company and/or a trust are used as estate planning tools, and different transfer methods.<sup>615</sup> The table is based on the assumption that Mr Botha's<sup>616</sup> estate consists of the farm assets (including the farmland and movable assets) that he acquired at a base cost of R10,000,000, and which have a current market value of R20,000,000.

| The use of a company and a trust                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|-------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Asset-for-share transaction (only applicable to a company): | <p>In exchange for the transfer of an asset to a company, Mr Botha will acquire shares in the company at the same base cost value of the asset of R10,000,000. The advantage is that the transaction will result in no CGT, donations tax, VAT or transfer duty for Mr Botha. The CGT consequences will be 'rolled-over' to the company should the company dispose of the asset at a later stage.</p> <p>The shares valued at R10,000,000, will fall into Mr Botha's personal estate. However, Mr Botha can dispose of the shares within 19 months after he acquires them, or sooner, provided that he renders services on a full-time basis to the company, resulting in no related asset in his estate.</p> |

<sup>615</sup> See Paras 2.4 and 3.4 above.

<sup>616</sup> See Para 1.5 above.

|                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|----------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Regular sale of assets:                | <p>The sale of the assets will result in CGT.</p> <p>The capital gain on the sale amounts to R10,000,000 [R20,000,000 – R10,000,000].</p> <p>After taking into account the annual exclusion, Mr Botha's net capital gain amounts to R9,960,000 [R10,000,000 – R40,000].</p> <p>The taxable capital gain amounts to R3,984,000 [R9,960,000 x 40%]. Assuming that Mr Botha is taxed at the maximum marginal tax rate of 45%, his income tax payable will potentially amount to R1,792,800 [R3,984,000 x 45%].</p> <p>The disadvantage resulting from the regular sale of an asset is that the proceeds received fall into the personal estate of the farmer.</p> |
| Sale of assets on a low-interest loan: | <p>The sale of an asset on a low-interest loan will result in donations tax and CGT. Assume that it is a 2% interest-bearing loan account and the official rate of interest is 9%.</p> <p>The difference in the amount of interest charged constitutes a deemed donation in the amount of R700,000 [R10,000,000 x (9% - 2%)]. Mr Botha's donations tax liability will be R140,000 [R700,000 x 20%].</p> <p>The capital gain on the sale amounts to R10,000,000 [R20,000,000 – R10,000,000].</p>                                                                                                                                                                |

|                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|---------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                     | <p>After taking into account the annual exclusion, Mr Botha's net capital gain amounts to R9,960,000 [R10,000,000 – R40,000].</p> <p>The taxable capital gain amounts to R3,984,000 [R9,960,000 x 40%]. If it is assumed that Mr Botha is taxed at the maximum marginal tax rate of 45%, he will potentially pay R1,792,800 [R3,984,000 x 45%] income tax on this transaction. Therefore, the total tax payable by Mr Botha is R1,932,800 [R140,000 + R1,792,800].</p> <p>The disadvantage is that the value of the loan account in the amount of R20,000,000.00 will fall into Mr Botha's personal estate. Although, Mr Botha may use the donations tax exemption to reduce the value of the loan account by R100,000 each year, the provisions of section 7C will be applicable for as long as the loan capital is outstanding. This means that donations tax will be payable every year on the deemed donation, the total of which may potentially in the future exceed the donations tax that would have been payable if the asset had been donated and not sold on a loan account.</p> |
| Donation of assets: | <p>The donation of the assets will result in a donation tax being payable as well as CGT.</p> <p>After taking into account the general exemption, Mr Botha will be liable for donations tax on the value of R19,900,000 [R20,000,000 – R100,000].</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

|  |                                                                                                                                                                                                                               |
|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  | <p>The donations tax payable amounts to R3,980,000 [R19,900,000 x 20%].</p> <p>The CGT consequences that arise from the regular sale of an asset as explained above, will also be applicable on the donation of an asset.</p> |
|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

The transfer of high-net-worth assets out of the farmer's ownership to effectively lower the value of his estate, is a principal consideration of estate planning.<sup>617</sup> It is illustrated from the above table that whilst an asset-for-share-transaction can be utilised to achieve this transfer of ownership, the asset removed is ultimately replaced by another asset in the form of shares. The situation is similar when assets are transferred to a company and/or a trust in terms of a regular sale, where the asset is replaced with cash, or under a sale on a low-interest loan, where the value of the loan account falls into the personal estate of the farmer. It can, however, be assumed that the asset transferred to the company and/or the trust will be expected to grow more in value than the replacement shares, cash or loan value. The donation of an asset, although subject to donations tax and CGT, seems to be the more suitable option as the asset is transferred out of the farmer's estate and no asset consequently falls into his estate. The tax implications that arise from the donation of an asset are, therefore, once-off as compared to the deemed donation of section 7C of the *ITA*, and ultimately a small price to pay in exchange for a major benefit.

## **5.2 Recommendations**

The two main objectives of estate planning for a farmer are to remove farm assets, potentially high in value, out of the farmer's personal estate and to preserve them for future generations.<sup>618</sup> After careful consideration of the above research, the

---

<sup>617</sup> See Para 1.1 above.

<sup>618</sup> See Para 1.1 above.

following recommendations are provided for an individual farmer and are explained with reference to the context of Mr Botha.<sup>619</sup>

One of the major concerns highlighted in the table above,<sup>620</sup> is the fact that certain methods will result in Mr Botha replacing the farm asset with another asset in his personal estate. Furthermore, whilst a company and a trust offer similar advantages to Mr Botha in terms of the protection of assets and the preservation and transfer of the farming enterprise to future generations, the taxation of the tools differ.<sup>621</sup> Therefore, it appears favourable for Mr Botha to devise an estate plan utilising a combination of a company and a trust, which will result in a minimisation of the high net worth of assets in his estate and taking into account the taxation implications linked to a specific tool.

Firstly, the farming operations can be conducted through a trading company, as the taxable income earned by the company will be taxed at a lower fixed rate of 27%, compared to the tax rates applicable to natural persons and trusts.<sup>622</sup> Mr Botha and his sons can be appointed as co-directors in the company to ensure their involvement in the day-to-day business of the farming operations.<sup>623</sup> The use of a company will also allow the farming operations to continue in the event of Mr Botha's death, which achieves a smooth transition of the farming enterprise to future generations.<sup>624</sup>

Mr Botha should donate the farm assets to a holding company, to ensure the protection and preservation of the assets and the smooth transfer of the assets to future generations.<sup>625</sup> To ensure the maximum enjoyment of the farm assets, the trading company can lease the farm assets from the holding company.<sup>626</sup> A further

---

<sup>619</sup> See Para 1.5 above.

<sup>620</sup> See Para 5.1.3 above.

<sup>621</sup> See Paras 4.2 and 4.4 above.

<sup>622</sup> See Paras 4.2 and 4.4 above.

<sup>623</sup> See Paras 1.1 and 2.3.4 above.

<sup>624</sup> See Para 2.2 above.

<sup>625</sup> See Paras 2.3.3, 2.4 and 4.6 above.

<sup>626</sup> See Para 2.3.3 above.

advantage is that rental income earned by the holding company from the lease agreement will be subject to the lower tax rate of 27%.<sup>627</sup>

To avoid the shares of the trading and holding companies from forming part of the Mr Botha's personal estate, an ordinary *inter vivos* trust should be established to purchase the shares and be appointed as the sole shareholder of both companies.<sup>628</sup> The profits earned from the companies will be distributed to the trust in the form of dividends.<sup>629</sup> Mr Botha's sons and his wife should be the nominated beneficiaries of the trust, with vested rights to the dividend income received by the trust.<sup>630</sup> The effect is that the dividend income will be distributed to Mr Botha's sons and his wife,<sup>631</sup> and such income will be exempt from income tax in the hands of the beneficiaries.<sup>632</sup> The use of a trust in this manner will ensure that income is not retained in the trust and taxed at the fixed rate of 45%.<sup>633</sup> Therefore, it is concluded that using the structure of a company and a trust as estate planning tools would be best suited for an individual farmer planning his estate, as the combination allows for the maximum enjoyment of the farmer's estate during his lifetime, ensures the protection and preservation of the farm assets, achieves a lawful minimisation of taxes and finally, allows for the smooth transfer of the assets and the farming enterprise to future generations.<sup>634</sup>

---

<sup>627</sup> See Para 2.3.3 above

<sup>628</sup> See Paras 1.1 and 2.3.4 above.

<sup>629</sup> See Para 4.2.2 above.

<sup>630</sup> See Para 3.2.2 above.

<sup>631</sup> This will ensure the maintenance of Mr Botha's wife in the event of his death.

<sup>632</sup> The provisions of section 7 of the *ITA* will not be applicable because it was not the main objective of Mr Botha to reduce his tax liability, but rather to appropriately plan and structure his estate; and secondly, Mr Botha's two sons are major persons. See Para 4.2.3 above.

<sup>633</sup> See Para 4.2.3 above.

<sup>634</sup> See Para 1.1 above.

## **BIBLIOGRAPHY**

### ***Literature***

Auld 2013 *De Rebus*

Auld K "How trustworthy is a trading trust?" 2013 *De Rebus* 20-23

Baines 2017 *Tax Breaks*

Baines D "Selling your primary residence?" *Tax Breaks* (9 June 2017) 7

Barnard and Botha "Nagel's Business Law"

Barnard J and Botha MM *Nagel's Business Law* 7<sup>th</sup> ed (LexisNexis Durban 2024)

Beachen 2013 *Without Prejudice*

Beachen D "Can you trust your trust?: financial law" *Without Prejudice* (1 November 2013) 50-51

Beukes "Asset-for-share transaction"

Beukes C "Asset-for-share transaction" in *Income Tax – Income Tax Reporter – Tax Planning Corporate and Personal - Archive* (LexisNexis Durban updated June 2011 – Volume 25 No 3)

Boezaart "Law of Persons"

Boezaart T *Law of Persons* 7<sup>th</sup> ed (Juta Cape Town 2020)

Botha *et al* "The South African Financial Planning Handbook 2025"

Botha M et al *The South African Financial Planning Handbook 2025* 22<sup>nd</sup> ed (LexisNexis Durban 2025)

Botha *A critical analysis of the corporate restructuring rules*

Botha PH *A critical analysis of the corporate restructuring rules* (LLM-dissertation University of the Witwatersrand 2023)

Bouwer 2024 *Business Tax and Company Law Quarterly*

Bouwer A "Beneficial ownership disclosure and trusts" 2024 *Business Tax and Company Law Quarterly* 1-8

Brand 2012 *TaxTalk*

Brand A "Dividends withholding tax – the importance of identifying the beneficial owner of a dividend" *TaxTalk* (1 July 2012) 20-22

Brink and Willemse 2014 *Journal of Economic and Financial Services*

Brink S and Willemse L "An investigation into the future of discretionary trusts in South Africa – an income tax perspective" 2014 *Journal of Economic and Financial Services* 795-816

Brink 2017 *South African Journal of Economic and Management Sciences*

Brink S "An investigation into the future of discretionary trusts in South Africa: an income tax perspective: part 2" 2017 *South African Journal of Economic and Management Sciences* 1-12

Brincker and Botha 2016 *Tax Breaks*

Brincker E and Botha L "Will trusts still be the way to go?: trusts" *Tax Breaks* (1 September 2016) 1-2

Brönn 2023 *The Dairy Mail*

Brönn P "Handing over the baton to the next generation" *The Dairy Mail* (1 August 2023) 68-70

Bruwer *et al* "A Student's Approach to Taxation in South Africa"

Bruwer L *et al A Student's Approach to Taxation in South Africa* 5<sup>th</sup> ed (LexisNexis Durban 2025)

Claassens 2004 *Journal for Estate Planning Law*

Claassens SJ "Herverdelingsooreenkomste in die beredderingsproses van bestorwe boedels" 2004 *Journal for Estate Planning Law* 1-102

Coetsee 2017 *TaxTalk*

Coetsee J "Killing the kindest of loans" *TaxTalk* (1 January 2017) 36-39

Coleman 2016 *Farmer's Weekly*

Coleman A "Financial advice for farmers: bottom line – finance" *Farmer's Weekly* (8 April 2016) 32-33

Curr 2020 *TaxTalk*

Curr S "Selling your primary residence" *TaxTalk* (1 January 2020) 122-125

Delport "New Entrepreneurial Law"

Delport P *New Entrepreneurial Law* 2<sup>nd</sup> ed (LexisNexis Durban 2020)

De Villiers and Van der Zanden 2021 *MoneyMarketing*

De Villiers DW and Van der Zanden HD "When dividends turn to shares, your return turns to tax" *MoneyMarketing* (1 October 2021) 5

Dippenaar and Van Wyk 2017 *South African Journal of Economic and Management Sciences*

Dippenaar M and Van Wyk D "A critical analysis of the meaning of the term 'income' in Sections 7(2) to 7(8) of the Income Tax Act No. 58 of 1962" 2017 *South African Journal of Economic and Management Sciences* 1-9

Du Pisanie 2020 *Stockfarm*

Du Pisanie K "Good estate planning is necessary" *Stockfarm* (1 May 2020) 6

Du Plessis 2025 *Farmer's Weekly*

Du Plessis C "Essential accounting concepts every farmer should know" *Farmer's Weekly* (14 February 2025) 38-41

Du Plessis 2009 *SA Mercantile Law Journal*

Du Plessis I "The residence of a trust for South African income tax purposes" 2009 *SA Mercantile Law Journal* 322-343

Du Plessis 2020 *FarmBiz*

Du Plessis K "The Income Tax Act: the implications of farming in your own name" *FarmBiz* (1 September 2020) 17

Du Toit 2007 *Stellenbosch Law Review*

Du Toit F "The fiduciary office of trustee and the protection of contingent trust beneficiaries" 2007 *Stellenbosch Law Review* 469-485

Du Toit, Smith and Van der Linde "Fundamentals of South African Trust Law"

Du Toit F, Smith BS and Van Der Linde A *Fundamentals of South African Trust Law* 2<sup>nd</sup> ed (LexisNexis Durban 2023)

Farrand 2017 *TaxTalk*

Farrand H "Fun(ding) times for trusts!" *TaxTalk* (1 September 2017) 46-47

Farrand 2018 *TaxTalk*

Farrand H "Interest-free loans to trusts: does the compliance burden outweigh the benefits?" *TaxTalk* (1 August 2018) 32-35

Haiden and Bikram 2024 *Tax Breaks*

Haiden D and Bikram A "A capital gains tax refresher" *Tax Breaks* (1 November 2024) 6-7

Heaton "The South African Law of Persons"

Heaton J *The South African Law of Persons* 6<sup>th</sup> ed (LexisNexis Durban 2021)

Hill 2012 *Personal Finance*

Hill C "Seven reasons to consider setting up a trust: trusts" *Personal Finance* (1 August 2012) 6-7

Horak 2018 *Business Tax and Company Law Quarterly*

Horak W "Taxation of trusts: continued application of the conduit-pipe principle?" 2018 *Business Tax and Company Law Quarterly* 20-30

Howard 2011 *TaxTalk*

Howard C "Estate planning: wills and trusts" *TaxTalk* (1 July 2017) 16-17

Hughes 2021 *TaxTalk*

Hughes N "Continuing crackdown on loan funding to trusts" *TaxTalk* (1 January 2021) 28-19

Jones 2014 *Tax Breaks*

Jones S "CGT demystified: capital gains tax" *Tax Breaks* (1 January 2014) 6-8

Jones 2008 *Personal Finance*

Jones S "Forming a trust: different types: trusts" *Personal Finance* (9 February 2008) 9-10

Jones 2015 *Tax Breaks*

Jones S "Forming a trust: horses for courses: trusts" *Tax Breaks* (1 January 2015) 5-6

Jones 2024 *Tax Breaks*

Jones S "Inter-spouse donations: the CGT implications" *Tax Breaks* (1 January 2024) 2-4

Jones 2024 *Tax Breaks*

Jones S "Pitfalls of donating your income" *Tax Breaks* (1 January 2024) 4-5

Jones 2009 *Tax Breaks*

Jones S "Selling your business as a going concern – how SARS sees it: value-added tax" *Tax Breaks* (1 January 2009) 28-30

Jones 2025 *Tax Breaks*

Jones S "The consequences of making loans to trusts" *Tax Breaks* (1 October 2025) 5-7

Jones 2017 *Tax Breaks*

Jones S "The implications of changing your tax residency" *Tax Breaks* (1 September 2017) 5-7

Jones 2022 *Tax Breaks*

Jones S "Your primary residence and CGT" *Tax Breaks* (1 January 2022) 6-7

Joubert 2022 *Tax Professional*

Joubert P "There's no avoiding anti-avoidance" *Tax Professional* (1 September 2022) 19-21

Kenny 2015 *Without Prejudice*

Kenny A "Call a trust a trust: trust law" *Without Prejudice* (1 September 2015) 70

Krause 2019 *Stockfarm*

Krause F "Different business entities and tax" *Stockfarm* (1 June 2019) 62

Krause 2017 *FarmBiz*

Krause F "Income tax – produce held and not disposed of" *FarmBiz* (1 April 2017) 25

Kriel "Section 42 – Asset for shares transactions and possible pitfalls"

Kriel P "Section 42 – Asset for shares transactions and possible pitfalls" in *Income Tax - Insurance and Tax* (LexisNexis Durban updated September 2025 – Volume 40 No 3)

Kruger 2018 *Business Tax and Company law Quarterly*

Kruger D "Sale of immovable property: selected transfer duty and value-added tax implications" 2018 *Business Tax and Company Law Quarterly* 22-30

Lamprecht 2019 Personal finance

Lamprecht I "Why it's important to appoint an independent trustee" *Personal Finance* (13 May 2019) 8-9

Legwaila *et al* "Tax Law: An Introduction"

Legwaila T *et al Tax Law: An Introduction* 2<sup>nd</sup> ed (Juta Cape Town 2019)

Leon and Van Rensburg 2025 *Tax Breaks*

Leon J and Van Rensburg R "Donations tax in just over 300 words" *Tax Breaks* (1 January 2025) 8

Levenstein 2011 *Without Prejudice*

Levenstein E "The personal liability of directors: company law" *Without Prejudice* (1 June 2011) 21-23

Lewis 2014 *Tax Breaks*

Lewis A "Asset-for-share transactions: the rules have changed: anti-avoidance measures" *Tax Breaks* (1 October 2014) 6-7

Lingani and Hough 2025 *South African Journal of Agricultural Extension*

Lingani M and Hough EC "An Investigation of Estate Planning Among Farming Business in the Western Cape Province, South Africa" 2025 *South African Journal of Agricultural Extension* 106-119

Lombard 2017 *Stockfarm*

Lombard M "Everything producers need to know about tax" *Stockfarm* (1 February 2017) 8-9

Lombard 2015 *Stockfarm*

Lombard M "The tax year and the farmer & technology" *Stockfarm* (1 March 2015) 61

Lombard 2014 *Stockfarm*

Lombard M "The VAT Act and the farmer & technology" *Stockfarm* (1 March 2014) 58

Lowder, Skoet and Raney 2016 *World Development*

Lowder SK, Skoet J and Raney T "The Number, Size, and Distribution of Farms, Smallholder Farms, and Family Farms Worldwide" 2016 *World Development* 16-29

Luttig 2016 *Personal Finance*

Luttig JD "Trusts aren't dead yet: estate planning" *Personal Finance* (1 April 2016) 9

Manie 2020 *Stellenbosch Law Review*

Manie L "Curbing the abuse of the trust form: the inclusion of penalty and prohibition provisions as well as compulsory audits in the Trust Property Control Act 57 of 1988" 2020 *Stellenbosch Law Review* 297-314

Maree 2017 *Farmer's Weekly*

Maree D "Carefully consider your farming business structure" *Farmer's Weekly* (7 April 2017) 30-31

McAllister 2025 *Business Tax and Company Law Quarterly*

McAllister D "Asset-for-share transactions: the number-of-shares conundrum" 2025 *Business Tax and Company Law Quarterly* 14-19

McAllister 2023 *Tax Breaks*

McAllister D "Deducting Income Tax and CGT for Estate Duty" *Tax Breaks* (1 June 2023) 6-8

Michau 2020 *MoneyMarketing*

Michau M "How to protect trust assets" *MoneyMarketing* (31 January 2020) 6

Molaba 2022 *The Dairy Mail*

Molaba D "The Importance of Proper Estate Planning for Farmers" *The Dairy Mail* (1 February 2022) 69-71

Muller 2024 *TaxTalk*

Muller K "Do you want to pay tax at 45%, no tax or somewhere in between?" *TaxTalk* (1 May 2024) 22-25

Myburgh 2024 *TaxTalk*

Myburgh H "Trust as an asset protection device" *TaxTalk* (1 May 2024) 45-46

Nel, Lawack and Van der Walt 2013 *Obiter*

Nel E, Lawack V and Van der Walt A "The trust as special-purpose institution" 2013 *Obiter* 111-124

Ntombela 2013 *Without Prejudice*

Ntombela N "Dividends withholding tax implications: tax" *Without Prejudice* (1 May 2013) 76

O'Halloran 2018 *Farmer's Weekly*

O'Halloran P "Estate planning: are trusts still worthwhile?" *Farmer's Weekly* (23 February 2018) 29

O'Halloran 2018 *Farmer's Weekly*

O'Halloran P "Estate planning: more about trusts" *Farmer's Weekly* (9 March 2018) 24

O'Halloran 2018 *Farmer's Weekly*

O'Halloran P "How to avoid capital gains tax" *Farmer's Weekly* (23 October 2018) 30

O'Halloran 2018 *Farmer's Weekly*

O'Halloran P "How to avoid donations tax" *Farmer's Weekly* (23 November 2018) 28

O'Halloran 2018 *Farmer's Weekly*

O'Halloran P "How to place assets into trust" *Farmer's Weekly* (24 April 2018) 28

O'Halloran 2018 *Farmer's Weekly*

O'Halloran P "Keep your assets safe and save on tax" *Farmer's Weekly* (13 April 2018) 28

O'Halloran 2019 *Farmer's Weekly*

O'Halloran P "Strategy for safety" *Farmer's Weekly* (19 July 2019) 27

O'Halloran 2019 *Farmer's Weekly*

O'Halloran P "The difference between income tax and VAT" *Farmer's Weekly* (10 May 2019) 28

O'Halloran 2018 *Farmer's Weekly*

O'Halloran P "The importance of estate planning" *Farmer's Weekly* (26 January 2018) 32

O'Halloran 2019 *Farmer's Weekly*

O'Halloran P "Think strategically to protect your wealth" *Farmer's Weekly* (5 July 2019) 29

O'Halloran 2016 *Farmer's Weekly*

O'Halloran "Understanding income tax and capital gains tax: tax advice" *Farmer's Weekly* (1 July 2016) 27

Pretorius 2011 *TaxTalk*

Pretorius H "Taking trust administration seriously" *TaxTalk* (1 July 2011) 14-15

Robb 2015 *TaxTalk*

Robb D "Buying back shares from shareholders: dividends tax liability: business income tax" *TaxTalk* (1 November 2015) 50-51

Robbertse 2023 *CHIPS*

Robbertse G "Business entities: Options for farmers" *CHIPS* (1 May 2023) 71

Robbertse 2023 *Stockfarm*

Robbertse G "Business entities: Options for producers" *Stockfarm* (1 May 2023) 60

Robbertse 2023 *Stockfarm*

Robbertse G "Why change current business structures?" *Stockfarm* (1 October 2023) 60

Rogers 2017 *FarmBiz*

Rogers J "Changes in the Income Tax Act: impact on farming income and disposal of assets on death" *FarmBiz* (31 March 2017) 22-25

Rossouw 2016 *Stockfarm*

Rossouw J "The benefits of using a trust for your financial planning issues" *Stockfarm* (1 July 2016) 17

Rudnicki 2015 *Business Tax and Company Law Quarterly*

Rudnicki M "Asset-for-share and amalgamation roll-over relief provisions – a comparison" 2015 *Business Tax and Company Law Quarterly* 22-29

SARS *ABC of Capital Gains Tax for Companies*

SARS *ABC of Capital Gains Tax for Companies* Issue 11 (Legal Policy and Division Pretoria 2025)

SARS *Comprehensive Guide to Capital Gains Tax*

SARS *Comprehensive Guide to Capital Gains Tax* Issue 9 (Legal Policy and Division Pretoria 2020)

SARS *Comprehensive Guide to Dividends Tax*

SARS *Comprehensive Guide to Dividends Tax* Issue 5 (Legal Policy and Division Pretoria 2022)

SARS *Guide on the Taxation of Farming Operations*

SARS *Guide on the Taxation of Farming Operations* Issue 1 (Legal Policy and Division Pretoria 2023)

SARS *Guide on the Taxation of Special Trusts*

SARS *Guide on the Taxation of Special Trusts* Issue 3 (Legal Policy and Division Pretoria 2020)

SARS *Interest Rates – Table 3*

SARS *Interest Rates – Table 3* (Legal Policy and Division Pretoria 2025)

SARS *Transfer Duty Guide*

SARS *Transfer Duty Guide* Issue 6 (Legal Policy and Division Pretoria 2023)

SARS *VAT 404 – Guide for Vendors*

SARS *VAT 404 – Guide for Vendors* Issue 15 (Legal Policy and Division Pretoria 2024)

Schmidt 2021 *Oilseeds Focus*

Schmidt S "The subdivision of agricultural land: What to consider" *Oilseeds Focus* (March 2021) 64

Schubert 2023 *TaxTalk*

Schubert M "Chasing interest rates" *TaxTalk* (1 March 2023) 37-39

Sekabate 2017 *Tax Breaks*

Sekabate N "Section 7C's impact on your estate planning" *Tax Breaks* (1 May 2017) 6-8

Seligson 2019 *Business Tax and Company Law Quarterly*

Seligson M "Restructuring companies via the corporate rules: tax methodology and analysis" 2019 *Business Tax and Company Law Quarterly* 1-12

Sevenster 2014 *Tax Breaks*

Sevenster R "CGT: trusts vs individuals: capital gains tax" *Tax Breaks* (1 February 2014) 5-6

Stiglingh *et al* "SILKE: South African Income Tax 2025"

Stiglingh M *et al* *SILKE: South African Income Tax 2025* 27<sup>th</sup> ed (LexisNexis Durban 2024)

Strampe "Section 42 of the Income Tax Act – Estate planning considerations and pitfalls"

Strampe A "Section 42 of the Income Tax Act – Estate Planning Considerations and Pitfalls" in *Income Tax - Insurance and Tax* (LexisNexis Durban updated September 2025 – Volume 40 No 3)

SARS "Interpretation Note 43 (Issue 8)"

SARS Interpretation Note 43 (Issue 8) (2021) available at <https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-43-Circumstances-Disposal-Shares-Capital-Nature-Amounts.pdf> accessed 3 November 2025

SARS "Tax Guide for Small Business"

SARS Tax Guide for Small Businesses (2025) available at <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/Legal-Pub-Guide-Gen09-Tax-Guide-for-Small-Businesses.pdf> accessed 24 September 2025

Tauer and Grossman *Estate and succession planning for small business owners*

Tauer W and Grossman DA *Estate and succession planning for small business owners* (Research Paper Cornell University 1998)

Thongo 2016 *Tax Breaks*

Thongo S "What you need to know: donations tax" *Tax Breaks* (1 April 2016) 2-3

Thatcher 2018 *The Dairy Mail*

Thatcher E "Can you trust a trust?" *The Dairy Mail* (1 November 2018) 44-49

Van der Merwe 2009 *South African Journal of Business Management*

Van der Merwe SP "An investigation of the determinants of estate and retirement planning in intergenerational family businesses" 2009 *South African Journal of Business Management* 51-64

Van der Merwe 2007 *South African Journal of Agricultural Extension*

Van der Merwe SP "Evaluation of the factors that ensure long-term sustainability of family farms" 2007 *South African Journal of Agricultural Extension* 1-27

Van der Spuy 2024 *TaxTalk*

Van der Spuy P "Funding the trust: Donation, loan, bequest or settlement of obligation" *TaxTalk* (1 May 2024) 5-7

Van Zyl 2014 *Stockfarm*

Van Zyl R "Retirement planning and the farmer & technology" *Stockfarm* (1 December 2014) 51

Veldhuizen 2024 *Farmer's Weekly*

Veldhuizen PJ "Estate Planning Sowing seeds for the future: unravelling estate planning challenges for farmers" *Farmer's Weekly* (3 May 2024) 46-47

Venter, Maas and Boshoff 2003 *Management Dynamics: Journal of the Southern African Institute for Management Scientists*

Venter E, G Maas G and Boshoff C "The influence of organisational factors on successful succession in family businesses" 2003 *Management Dynamics: Journal of the Southern African Institute for Management Scientists* 2-17

Venter and Boshoff 2007 *Management Dynamics: Journal of the Southern African Institute for Management Scientists*

Venter E and Boshoff C "The influence of organisation-related factors on the succession process in small and medium-sized family businesses" 2003 *Management Dynamics: Journal of the Southern African Institute for Management Scientists* 42-55

Visser 2019 *Finweek*

Visser A "How to avoid conflict in a family business" *Finweek* (25 July 2019) 44-45

Wessels 2024 *MoneyMarketing*

Wessels B "The good, the bad and the ugly of trust distribution" *MoneyMarketing* (1 September 2024) 22

### **Case law**

*Absa Bank Limited v Cohen* (O) (unreported) case number 32870/2012 of 3 June 2014

*Armstrong v Commissioner for Inland Revenue* 1983 10 SATC 1

*Administrators, Estate Richards v Nichol* 1996 4 SA 253 (C)

*Crookes NO and Another v Watson and Others* 1956 1 SA 277 (A)

*Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530

*Groeschke v Trustee for the Time being of the Groeschke Family Trust* 2013 3 SA 254 (GSJ)

*Land and Agricultural Development Bank of SA v Parker and Others* 2005 2 SA 77 (SCA)

*Lupacchini No and Another v Minister of Safety and Security* 2011 2 All SA 138 (SCA)

*Potgieter v Potgieter NO and Others* 2012 1 SA 637 (SCA)

*Salomon v Salomon and Co Limited* 1987 AC 22 (HL)

*Secretary for Inland Revenue v Rosen* 32 SATC 249

### ***Legislation***

*Administration of Estates Act* 66 of 1965

*Close Corporations Act* 69 of 1984

*Companies Act* 71 of 2008

*Estate Duty Act* 45 of 1955

*Income Tax Act* 58 of 1962

*Subdivision of Agricultural Land Act* 70 of 1970

*Tax Administration Act* 28 of 2011

*Transfer Duty Act* 40 of 1949

*Trust Property Control Act* 57 of 1988

*Value-Added Tax Act* 89 of 1991

### ***South African Government publications***

Chief Master's Directive 2 of 2017

### ***Internet sources***

Mothabeng 2025

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2025/Practice/Tax-Exchange-Control/tax-and-exchange-control-alert-17-april-avoiding-pitfalls-the-impact-of-deemed-donations-on-section-42-transactions>

Mothabeng P 2025 *Avoiding pitfalls: the impact of deemed donations on section 42 transactions*

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2025/Practice/Tax-Exchange-Control/tax-and-exchange-control-alert-17-april-avoiding-pitfalls-the-impact-of-deemed-donations-on-section-42-transactions>  
accessed 3 November 2025

Reynders 2022 <https://www.phinc.co.za/Our-Insights/BlogDetail/BlogID/376>

Reynders C 2022 *Using S42 to restructure your company tax efficiently*  
<https://www.phinc.co.za/Our-Insights/BlogDetail/BlogID/376> accessed 3 November 2025

SARS 2025 <https://www.sars.gov.za/tax-rates/income-tax/companies-trusts-and-small-business-corporations-sbc>

SARS 2025 *Companies, Trusts and Small Business Corporations (SBC)*  
<https://www.sars.gov.za/tax-rates/income-tax/companies-trusts-and-small-business-corporations-sbc/> accessed 5 November 2025

SARS 2025 <https://www.sars.gov.za/types-of-tax/personal-income-tax/>

SARS 2025 *Personal Income Tax* <https://www.sars.gov.za/types-of-tax/personal-income-tax/> accessed 4 November 2025

SARS 2025 <https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/>

SARS 2025 *Rates of Tax for Individuals* <https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/> accessed 4 November 2025

SARS 2025 <https://www.sars.gov.za/tax-rates/transfer-duty/>

SARS 2025 *Transfer Duty* <https://www.sars.gov.za/tax-rates/transfer-duty/>  
accessed 16 November 2025

SARS 2024 <https://www.sars.gov.za/businesses-and-employers/trusts/types-of-trust/>

SARS 2024 *Types of Trust* <https://www.sars.gov.za/businesses-and-employers/trusts/types-of-trust/> accessed 6 November 2025