

WITZENBERG PALS

1. EXECUTIVE SUMMARY

The Witzenberg Initiative was launched by the community of the Witzenberg in collaboration with the Witzenberg Local Municipality. The main points of departure that underlie the Initiative is the National Development Plan proposals for land reform and job creation; the municipal Integrated Development Plan; and the socio-economic realities that confront the community.

The Witzenberg Local Municipality is responsible for service provision to the towns of Ceres, Tulbagh, Prince Alfred's Hamlet, Wolseley and Op-Die-Berg and to the rural areas of Warm Bokkeveld, Koue Bokkeveld, Agter-Witzenberg and the northern portion of the Breede River Valley around Tulbagh. The area is well watered and an important centre of agricultural production for export in South Africa. Agriculture and its related industries that contribute some 44% of the GGP of the area.

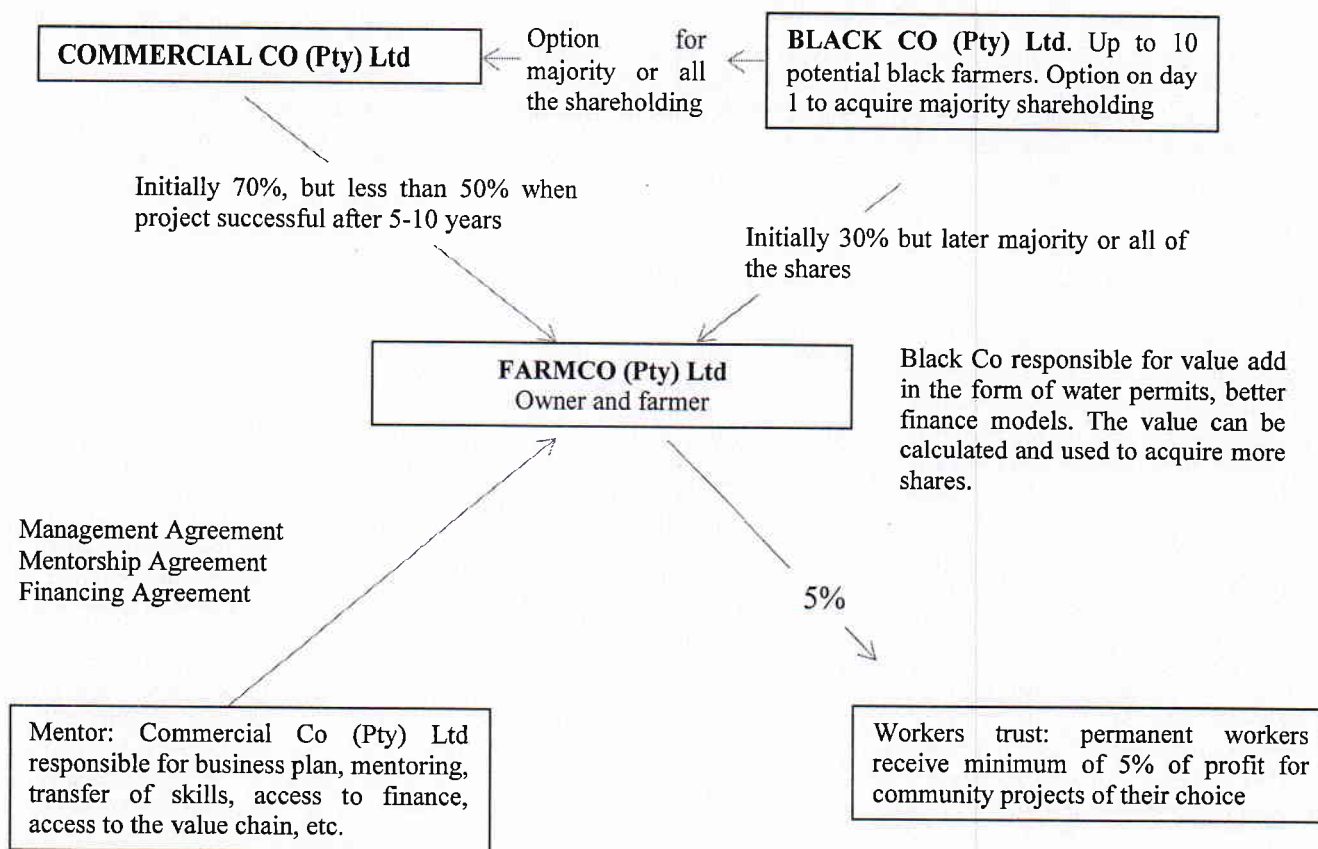
An Agreement has been reached between the Witzenberg Municipality, agricultural producers and other stakeholders that binds them to work together to establish successful black farmers, involve the whole community in an inclusive process, extend the initiative to other areas and other agri related activities, create the Witzenberg Centre as one-stop shop and focus on training and mentorships. The resulting Witzenberg Initiative will be implemented in accordance with the principles of the National Development Plan and the Integrated Development Plan of the Municipality.

The PALS framework represents a radical departure from past land reform in South Africa:

1. Participant commercial farmers donate 30% of the shares in the project to the beneficiary farmer(s) to ensure that the latter have a veto over all major decisions.
2. The relationship between the beneficiary and the partner farmer gives the former better access to finance, and guarantees access to markets.
3. The beneficiary farmer is indemnified from debts of the new venture while a minority shareholder.
4. The Worker Trust receives 5% of profits for community projects of their choice.
5. The beneficiaries have an option to purchase all the shares.
6. The One-Stop shop provides a physical location where the coordination, facilitation and mentoring functions can be implemented.

Most of the projects require some intermediation from the State in order for them to be implemented in the form of either permission to build or enlarge a dam, rights to acquire unused water allocations, and subdivision rights. The other projects also require one or more of a long list of other types of suspensive conditions.

2. PALS Framework:



3. With reference to Dr Louis Kuyler's e-mail dated 19 June 2015, we answer as follows:

i) Detailed explanation of the proposed transactions relating to the transfer of shares and farms between parties

- The participant commercial farmer (in the form of a company, CC or trust) buys a new farm or transfer a current farm or subdivided portion of its current farm to a new company, being FARMCO.
 - If a new farm is bought, the Commercial farmer donates 30% of the shares in the new company that acquires the farm land. FARMCO is therefore registered with 30% black shareholding before transfer of the land in the name of FARMCO.
 - If a current or subdivided portion of land of the Commercial farmer is used, the Commercial farmer donates 30% of the shares in the owner entity (Company or CC) to BLACK CO.

- FARMCO's shareholders are COMMERCIAL CO/CC/TRUST (70%) and BLACK CO (30%).
- BLACK CO's shareholders are 1-10 black individuals (farm workers or black partner) elected on objective criteria.
- BLACK CO on day one has an option to buy the majority (51%) or all the shares in FARMCO.
- After 5-10 years the BLACK CO can buy out the Commercial farmer in FARMCO and will become the majority or sole shareholder of FARMCO which entity owns and farms the land.
- Should the BLACK CO facilitate value for FARMCO in the form of water rights, grants etcetera, the value may be converted into extra shares for the BLACK CO in FARMCO.
- FARMCO undertakes to annually allocate at least 5% of its profits to a Workers Trust in which the permanent farm workers of FARMCO, BLACK CO and COMMERCIAL CO and their families are the beneficiaries.

ii) Parties involved in the transactions, the connections between these parties as well as their legal and tax status

- Commercial farmer: Private company, Closed Corporation or Trust
RSA taxpayer
- Black Co: Private Company
RSA taxpayer
- Farm Co: Private Company
RSA taxpayer
- Workers Trust: Participation Trust
RSA taxpayer
- As indicated above, the Commercial farmer and Black Co will be the shareholders in Farm Co, which entity owns and farms the agricultural land and which entity will donate 5% of its annual profits to the Workers Trust whose beneficiaries are the permanent employees of aforementioned entities as well as their families.

iii) **All necessary contracts or proposed contracts and documentation relating to the transactions**

- ❖ Sale of Share Agreement OR Donation Agreement for at least 30% shares in Farm Co between Commercial farmer and Black Co
- ❖ Sale of Land Agreement between Commercial Farmer and Farm Co
- ❖ Option Agreement between Commercial farmer and Black Co to purchase/obtain the majority or all the shares in Farm Co after a period of time (5 to 10 years)
- ❖ Mentorship Agreement between Commercial farmer and Black Co to ensure transfer of skills to the shareholders and directors of Black Co and to give them access to finance, markets and the value chain
- ❖ Management Agreement between Commercial farmer and Farm Co to assist the black shareholders in Farm Co with management an the successful operation of the farming business of Farm Co to expedite the success of the new farming project and transfer thereof to the black shareholder – Black Co.
- ❖ Shareholders Agreement between the shareholders of Farm Co regarding monitoring of directors, rights of first refusal etcetera.
- ❖ Shareholders Agreement between the shareholders of Black Co regarding rights of first refusal, monitoring of skills transfer and development etcetera.
- ❖ Finance Agreement between the Commercial farmer and the Black Co or with Landbank/ Commercial bank in terms of which the Commercial farmer signs surety/gives security for Farm Co (the entity in which the farming project is operating).
- ❖ In the above contracts the parties subject themselves to regular monitoring by and training through the Witzenberg PALS Centre which centre will act as watch dog to ensure that proper transfer of skills and training takes place and that all disputes are resolved swiftly through a mediation and arbitration forum.

4. We have obtained a legal/tax opinion from Grayston Elliot, a copy of which we attach hereto as requested.

We look forward to receiving your guidance to enable us to successfully implement these land reform projects with minimal tax liability to enable the parties to rather allocate the tax saving for the furtherance of their goals, being to establish successful and sustainable black commercial farmers, grow the economy, create jobs and promote social harmony.

(b) by the addition of the following subsection:

“(3) Any person that pays withholding tax on interest in terms of section 50E in respect of interest due and payable but not actually paid, must submit a return by the last day of the month following the month during which the interest became due and payable.”.

(2) Subsection (1) is deemed to have come into operation on 1 March 2015.

Substitution of section 50G of Act 58 of 1962, as inserted by section 98 of Act 31 of 2013

59. (1) The following section is hereby substituted for section 50G of the Income Tax Act, 1962:

“Refund of withholding tax on interest

50G. (1) Notwithstanding Chapter 13 of the Tax Administration Act, if—

- (a) an amount is withheld from a payment of an amount of interest as contemplated in section 50E(1);
 - (b) a declaration contemplated in section 50E(2)(b) or (3) in respect of that interest is not submitted to the person paying that interest by the date of the payment of that interest; and
 - (c) a declaration contemplated in section 50E(2)(b) or (3) is submitted to the Commissioner within three years after the payment of the interest in respect of which the declaration is made,
- so much of that amount as would not have been withheld had that declaration been submitted by the date contemplated in the relevant subsection is refundable by the Commissioner to the person to which the interest was paid.

(2) Notwithstanding Chapter 13 of the Tax Administration Act, if—

- (a) an amount of withholding tax on interest is paid as contemplated in section 50E(1) in respect of an amount of interest that became due and payable; and
- (b) the amount of interest subsequently becomes irrecoverable, so much of that amount as would not have been paid had the interest not become due and payable is refundable by the Commissioner to the person who paid the tax.”.

(2) Subsection (1) is deemed to have come into operation on 1 March 2015.

Repeal of Part IVC of Chapter II of Act 58 of 1962

60. (1) Part IVC of Chapter II of the Income Tax Act, 1962, is hereby repealed.

(2) Subsection (1) comes into operation on 1 January 2017.

Amendment of section 56 of Act 58 of 1962, as amended by section 18 of Act 90 of 1964, section 25 of Act 55 of 1966, section 33 of Act 89 of 1969, section 38 of Act 85 of 1974, section 21 of Act 113 of 1977, section 13 of Act 101 of 1978, section 23 of Act 96 of 1981, section 31 of Act 94 of 1983, section 4 of Act 30 of 1984, section 28 of Act 121 of 1984, section 18 of Act 96 of 1985, section 21 of Act 85 of 1987, section 26 of Act 90 of 1988, section 28 of Act 141 of 1992, section 32 of Act 113 of 1993, section 18 of Act 36 of 1996, section 39 of Act 30 of 1998, section 38 of Act 30 of 2000, section 41 of Act 59 of 2000, section 45 of Act 60 of 2001, section 24 of Act 30 of 2002, section 35 of Act 74 of 2002, section 56 of Act 45 of 2003, section 38 of Act 32 of 2004, section 45 of Act 31 of 2005, section 27 of Act 9 of 2006, section 38 of Act 8 of 2007, section 67 of Act 7 of 2010, section 67 of Act 43 of 2014 and section 72 of Act 25 of 2015

61. (1) Section 56 of the Income Tax Act, 1962, is hereby amended by the substitution in subsection (1)(o) for subparagraphs (i) and (ii) of the following subparagraphs respectively:

- “(i) (aa) such immovable property was acquired by any beneficiary entitled to any grant or services in terms of the Land Reform Programme, as contemplated in the White Paper on South African Land Policy, 1997; and

- (bb) the Minister of Land Affairs or a person designated by him has, on such terms and conditions as such Minister may in consultation with the Commissioner prescribe, approved the particular project in terms of which such immovable property is so acquired; or
- (ii) such immovable property was acquired by a person in terms of land reform initiatives by virtue of the measures as contemplated in Chapter 6 of the National Development Plan: Vision 2030 of 11 November 2011 released by the National Planning Commission, Presidency of the Republic of South Africa.”

(2) Subsection (1) is deemed to have come into operation on 1 March 2016 and applies in respect of any donation made on or after that date.

Amendment of paragraph 1 of Second Schedule to Act 58 of 1962, as amended by section 31 of Act 90 of 1962, section 23 of Act 90 of 1964, section 34 of Act 88 of 1971, section 34 of Act 69 of 1975, section 26 of Act 113 of 1977, section 17 of Act 104 of 1979, section 27 of Act 104 of 1980, section 28 of Act 96 of 1981, section 46 of Act 94 of 1983, section 24 of Act 65 of 1986, section 43 of Act 101 of 1990, section 35 of Act 21 of 1995, section 41 of Act 28 of 1997, section 47 of Act 30 of 1998, section 82 of Act 45 of 2003, section 43 of Act 32 of 2004, section 46 of Act 8 of 2007, section 61 of Act 35 of 2007, section 36 of Act 3 of 2008, section 58 of Act 60 of 2008, section 56 of Act 17 of 2009, section 79 of Act 7 of 2010 and section 91 of Act 22 of 2012

62. (1) Paragraph 1 of the Second Schedule to the Income Tax Act, 1962, is hereby amended by the substitution for the definition of “public sector fund” of the following definition:

“**‘public sector fund’** means a fund referred to in paragraph (a) [or], (b) or (d) of the definition of ‘pension fund’ or paragraph (b) or (c) of the definition of ‘provident fund’ in section 1(1);”

(2) Subsection (1) comes into operation on 1 March 2018 and applies in respect of years of assessment commencing on or after that date.

Amendment of paragraph 4 of Second Schedule to Act 58 of 1962, as amended by section 20 of Act 72 of 1963, section 24 of Act 90 of 1964, section 36 of Act 21 of 1995, section 41 of Act 3 of 2008, section 63 of Act 60 of 2008, section 60 of Act 17 of 2009, section 83 of Act 7 of 2010, section 91 of Act 24 of 2011, section 97 of Act 22 of 2012, section 71 of Act 43 of 2014 and section 85 of Act 25 of 2015

63. (1) Paragraph 4 of the Second Schedule to the Income Tax Act, 1962, is hereby amended by the substitution for subparagraph (3) of the following subparagraph:

“(3) If a person who is a member of a provident fund retires from such fund before he or she reaches the age of 55 years on grounds other than ill-health, any lump sum benefits received by or accrued to such person in consequence of or following upon such retirement shall, unless the Commissioner on application by the [person] fund and having regard to the circumstances of the case otherwise directs, be assessed to tax not in accordance with the provisions of paragraph 5 but in accordance with the provisions of paragraph 6 as though it were a lump sum benefit derived by such person in consequence of or following upon such person’s withdrawal or resignation from such fund.”

(2) Subsection (1) comes into operation on 26 October 2016.

Amendment of paragraph 1 of Sixth Schedule to Act 58 of 1962, as amended by section 85 of Act 7 of 2010 and section 88 of Act 25 of 2015

64. Paragraph 1 of the Sixth Schedule to the Income Tax Act, 1962, is hereby amended by the substitution in subparagraph (1) in the definition of “qualifying turnover” for paragraph (b) of the following paragraph:

“(b) amount exempt from normal tax in terms of section 10(1)(zK) or 12P;”

Subject: WITZENBERG PALS: Proposed Tax Legislation Amendments

Importance: High

Good day,

Ons 19 July 2016 Mr Louis Kuyler of SARS informed us of the proposed amendments to the undermentioned sections of the Income Tax Act. The e-mail correspondence in this regard is attached hereto for ease of reference.

We have made some suggestions pertaining to the wording of the proposed amendments, but have not yet received any response thereto.

Our inputs were as follows:

In respect of the proposed amendment to Section 56(1)(o), the wording of the whole section (now) reads as follows:

Section 56(1): "Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation"

Section 56(1)(o): "...where such property consists of **full ownership** in immovable property, if"

Section 56(1)(o)(i)(aa) – wording of old Section 56(1)(o)(i) and

Section 56(1)(o)(i)(bb) – wording of old Section 56(1)(o)(ii) or

Section 56(1)(o)(ii) "such immovable property was acquired by a person in terms of land reform initiatives by virtue of the measures as contemplated in Chapter 6 of the National Development Plan: Vision 2030 of 11 November 2011 released by the National Planning Commission, Presidency of the Republic of South Africa."

An example of the PALS transfers are: Commercial Farmer donates 30% shares in FarmCo to BlackCo. FarmCo is the owner of immovable property. When the BlackCo exercise its option to acquire all of or further shares in FarmCo and/or as the BlackCo facilitates grants/cheaper funding/water rights etcetera, the Commercial Farmer will transfer further shares in FarmCo to the BlackCo. These transfers should also be exempted from donations and capital gains tax.

We therefore foresee two problems with the current proposed wording of the amendment:

1. The words "full ownership" in Section 56(1)(o) which is read with the amended Section 56(1)(o)(ii) creates a problem for PALS projects. The National Development Plan and PALS does not require that full ownership has to be transferred. The NDP and PALS promotes partnerships. PALS producers will therefore in most instances transfer a minimum of 30% up to 70%-100% over time. The wording of the proposed amendment must therefore cater for the transfer of an interest (less than 100%) in immovable property/a company as owner of immovable property.
2. We are not sure if "ownership" is defined in the Income Tax Act. The definition of "property" (in Section 55) is "any right in or to property movable or immovable, corporeal or incorporeal, wheresoever situated." In the light of the aforementioned definition, would

a share in a company which is the owner of immovable property, qualify as "ownership in immovable property"?

To prevent any interpretation issues in future, the following wording for Section 56(1)(o) is proposed:

56(1) Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation -

56(1)(o) where **if ownership in such** property consists of full ownership in immovable property, if -

(i)(aa) ~~such immovable property~~ was acquired by any beneficiary entitled to any grant or services in terms of the Land Reform Programme, as contemplated in the White Paper on South African Land Policy, 1997; and

(i)(bb) the Minister of Land Affairs or a person designated by him has, on such terms and conditions as such Minister may in consultation with the Commissioner prescribe, approved the particular project in terms of which such immovable property is so acquired; or

(ii) "such immovable property was acquired by a person in terms of land reform initiatives by virtue of the measures as contemplated in Chapter 6 of the National Development Plan: Vision 2030 of 11 November 2011 released by the National Planning Commission, Presidency of the Republic of South Africa."

Our proposed wording, being "ownership in such property ... in terms of land reform initiatives by virtue of the measures as contemplated in Chapter 6 of the National Development Plan...", will not trigger donations tax when shares in a company, which company is the owner of immovable property (and in most cases a farming business) is transferred to beneficiaries in terms of the National Development Plan. This wording would also encourage donations of machinery and other movable farming assets to the FarmCo.

We would appreciate your input on our proposal and if you would liaise with the relevant contact person at National Treasury in this regard.

The proposed amendments to **paragraphs 64A and 64D** are in order as long as "a right to land" is interpreted to include a share in a company which owns land. If not, "a right to **property..**" is our proposed wording as the definition of "property" is wide enough to cover land and shares in land.

We would be pleased to receive your response and an indication on when the amendments would be finalised.

Should you have any questions, you are most welcome to contact writer.

Kind regards,

Reinette van Staden

Prokureur/ Attorney



Joubert van Vuuren Ing. / Inc.

Prokureurs/ Attorneys

Voortrekkerstraat 84/ 84 Voortrekker Street

Posbus 79/ P O Box 79

Docex 1

CERES

6835

Tel: 023 3123 152

Faks/ Fax: 023 3123 083

Direkte Faks/ Direct Fax : 086 647 2419

e-pos/ e-mail: reinette@jvanvuuren.co.za

Webwerf/ Website: www.jvanvuuren.co.za

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