

Emerging farmers' court triumph over SARS

South Africa's embattled emerging farmers are celebrating an historic victory over the South African Revenue Services (SARS).

Grain SA organises Nampo Harvest Day, which showcases many facets of agriculture.

Grain SA's members are the nation's grain farmers. It is a non-profit, autonomous and independent organisation, which strives ensure the wellbeing of the grain industry.

Grain SA's recent tussle with SARS culminated in a court case on 29 July 2010 in the Free State High Court, heard by Judge Jordaan.

Johan Kotze, head of tax dispute resolution at law firm Bowman Gilfillan, explains that the issue was whether funds donated by The Maize Trust for Grain SA's Farmer Development Programme should be subject to VAT.

"If SARS was correct in its belief that the donation should incur VAT, the amount earmarked for the Programme, which contributes to the commercialisation of black farmers, would have been 14% less.

"Self-evidently, the need for black farming training, skill development and support has never been greater, as more and more farmers of colour access agricultural land without the necessary financial and technical support."

Kotze says that the problem for Grain SA was compounded by having to face the dread of being assessed on the last five years' donations from the Trust, with possible interest and penalties implications.

The Maize Trust, which has its roots in the old Maize Board, was founded in August 1998 to promote the South African maize industry, which it serves through financial support for institutions and organisations with programmes aimed at:

- market and production-related research;
- the assimilation and dissemination of market information;
- broader market access.

Anyone active in the maize industry can apply for funding from the Trust if the contemplated programme will benefit the maize industry as a whole.

Since its establishment, the Trust has awarded funds to a variety of organisations and institutions involved in research, development and information programmes in the South African maize industry.

The grants are paid out of the Trust's annual income, which is derived from dividends and interest earned on donations received by the Trust from the Maize Board. The Trust does not have any other income, nor does it have any assets other than income from the funds donated by the Maize Board.

Grain SA's projects comprise input, production and marketing in the maize industry.

The funds Grains SA receives from the Trust are used for:

- acquisition, assimilation and dissemination of information to schools via a

programme on grain and the importance of the grain industry to the South African economy;

- enhanced market access by providing market- and production-related research information;
- market- and production-related research and the acquisition, assimilation and dissemination of market (input) information for maize producers and the broader maize industry; and
- providing marketing infrastructure, training and assistance in rural areas, which objective Grain SA refers to 'The Farmer Development Programme'.

The Programme is solely funded by the Trust, and Grain SA has been receiving funding from the Trust for this programme since it was founded in August 1998.

The Trust does not specify who should be trained as part of the Programme. This is at the discretion of Grain SA, which reports back to the Trust upon the completion of each programme.

Kotze points out that although individual emerging maize farmers selected by Grain SA are trained by Grain SA using funds awarded to it by the Trust, there is no connection between the individual emerging farmers and the Trust.

"Indeed, the Trust is unaware of the identity of the individual emerging maize farmers at times when payments were, and are, made by it to Grain SA in terms of the Programme."

Kotze says that the VAT Act generally provides that a supply of goods and services would be subject to 14% VAT unless it would otherwise be exempt.

“The 14% has to be based on the consideration for the supply of goods and services. The term ‘consideration’ is defined in the Act, which excludes any payment made as a ‘donation’ to an association not for gain.”

The term ‘donation’ is defined as “a payment whether in money or otherwise voluntarily made to any association not for gain for the carrying on or the carrying out of the purposes of that association and in respect of which no identifiable direct valuable benefit arises or may arise in the form of a supply of goods or services to the person making that payment or in the form of a supply of goods or services to any other person who is a connected person in relation to the person making the payment ...”.

In 2008, on advice from its auditors, Grain SA approached SARS to provide a ruling on whether SARS agrees that the funding it receives from the Trust is donations for purposes of the VAT Act and therefore exempt from VAT.

SARS replied that the amounts Grain SA received from the Trust were all subject to VAT; that the payments Grains SA received from the Trust were not ‘donations’ as defined in the Act.

Grain SA then approached law firm Bowman Gilfillan, which put together and submitted another representation to SARS, which thereupon withdrew its first ruling and issued a new ruling.

According to Kotze: “SARS’s rethink concluded that all monies received from the Trust for the first three objectives were ‘donations’ for purposes of VAT and

therefore exempt from VAT. Yet SARS was adamant that payments by the Trust to Grain SA for the Programme would remain subject to VAT.”

He relates that Grain SA then approached the Free State High Court for an order declaring that SARS was wrong to have ruled that payments to the Trust were subject to VAT.

Judge Jordaan held that the amounts were indeed donations in terms of the VAT Act, because the payments were made voluntary by the Trust to Grain SA. No ‘identifiable direct valuable benefit’ arose to the Trust or anyone connected to the Trust.

SARS is not appealing against Judge Jordaan’s decision and must have accepted their folly.