

# TAX & EXCHANGE CONTROL ALERT

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INCORPORATING  
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### When sharing isn't caring: A judgment on South Africa's exchange control rules

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## When sharing isn't caring: A judgment on South Africa's exchange control rules

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However, section B.4(A)(xii) of the Manual expressly prohibits the SDA from being used to circumvent the Regulations where these Regulations would otherwise prevent a transfer of funds out of South Africa. This was the central issue in *Singh v South African Reserve Bank* (2020/35964) [2023] ZAGPPHC (*Singh*) handed down by the North Gauteng High Court on 20 February 2023. Here the High Court affirmed that where a person's SDA is concerned, sharing isn't caring.

### The law

Regulation 3(1) of the Regulations prohibits any person from transferring funds out of South Africa without the approval of the SARB, unless that transfer is exempt from this prohibition by the SARB. Section B.4(A) of the Manual is one of these exemptions. Although there are also other provisions in the Regulations that place a limitation on the transfer of funds offshore, most notably Regulation 10(1)(c), which contains the general

prohibition on the export of capital unless permitted by the SARB (including in the manner provided for in the Manual), the judgment in *Singh* only makes brief reference to Regulation 10(1)(c) and deals in greater detail with Regulation 3(1).

Section B.4(A) provides for the annual SDA granted to each South African resident natural person. This exemption recognises the need for a way to move relatively small amounts of money out of the country for travel or investment purposes without submitting an application to a bank authorised to approve exchange control applications by the SARB (authorised dealer), or the SARB itself.

However, as stated previously, this exemption comes with the caveat in section B.4(A)(xii) that the discretionary allowance cannot be used to circumvent the Regulations. In essence, this means that the discretionary allowance must be used for the purpose intended (travel, minor offshore investments



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by individual natural persons, etc.) and not as a means to sidestep South Africa's exchange control regime. In practice (although not mentioned in the judgment), each transaction involving the use of the SDA requires that the person using her SDA notifies the authorised dealer what it is being used for, which transaction is then reported to the SARB using the appropriate BOP code set out in the Manual.

Where the SARB suspects a person has contravened the provisions of the Regulations (including the exceptions and permissions in the Manual), then Regulations 22A and 22C of the Regulations allow the SARB to issue a so called 'blocking order' which prevents that person from withdrawing funds from an impugned bank account. The court explained in *Singh* that Regulation 22A allows for the issue of a blocking order in respect of funds tainted by the contravention, while Regulation 22C applies to a blocking order in respect of funds which are as yet untainted.

### Background

In *Singh* the applicant was an attorney and businessman. During 2019, the applicant transferred R80 million from his account at the Johannesburg branch of the State Bank of India to his ABSA account. Half of this he then transferred out to various other bank accounts, while the balance remained in his ABSA account.

Of the funds he had transferred out of his ABSA account, the applicant remitted roughly R20 million out of South Africa via his Bidvest Bank account. Bidvest Bank prepared a report stating that several individuals were transferring money in amounts of R1 million into the applicant's Bank of Baroda account in the UK. It appeared that the applicant did this by transferring these funds to his Bank of Baroda account situated in the UK in R1 million tranches using other individuals' single discretionary allowances under section B.4(A) of the Manual.

On suspecting this abuse of section B.4(A), and thus the contravention of section B.4(A)(xii), Bidvest Bank reported this to the Financial Surveillance Department of the SARB. The Prudential Authority also reported the initial transfer into the applicant's ABSA account to the SARB due to the source of funds not being verified. Following this, the SARB placed a blocking order on the applicant's ABSA account holding the remaining R40 million. This was done in terms of Regulations 22A and 22C of the Regulations.

The applicant took exception to this and approached the High Court for this blocking order to be set aside. The applicant argued:

- firstly, that the alleged amount remitted was less than R40 million, and thus placing a blocking order on the full R40 million was not permitted by the Regulations;

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- secondly, that he had not contravened the Regulations as the remittance of funds was done with the approval of Bidvest Bank, which is an authorised dealer; and
- thirdly, that the SARB had instituted the blocking order on the instruction of Bidvest Bank and the Prudential Authority.

### Decision

The High Court swiftly dispensed with the applicant's arguments. It found that Regulation 22C of the Regulations allows for untainted funds to also be the subject of a blocking order if it is suspected that the amounts involved in a person's contravention of the Regulations exceeds the amount of tainted funds. Therefore, the court decided that the SARB was permitted to issue a blocking order for the full R40 million in the applicant's ABSA account.

Further, the court rejected the applicant's argument that the transfers using the SDAs of other individuals were permissible as Bidvest Bank, being an authorised dealer, approved them. This was because an authorised dealer cannot permit the remittance of funds in contravention of the Regulations (including the exceptions and permissions in the Manual). Regarding the applicant's third argument, the High Court found that the SARB had not relied on the investigations by Bidvest Bank or the Prudential Authority when deciding to issue the blocking order. Rather, the SARB had been prompted by these investigations to examine the flow of funds in and out of the applicant's various bank accounts, thus making its own decision as to the blocking order.

Therefore, the court found the applicant could not rely on Bidvest Bank's approval of the transfers, as this approval was obtained through the applicant's unlawful abuse of the SDA in contravention of Regulation 3(1) of the Regulations.

### Comment

At end of the day, this decision is a reminder that if desiring to remit more than R1 million out of South Africa in a calendar year, a person should make use of lawful means of doing so. An individual can remit up to R10 million abroad annually using her foreign capital allowance (FCA), which is also provided for in the Manual. To do this, a person must first obtain a tax compliance status letter for approval of international transfers (TCS for AIT) from SARS, which letter states the amount a person seeks to transfer abroad and essentially that the person is tax compliant for purposes of the transfer. If the amount transferred is below the R10 million annual limit for the FCA, the individual's bank will likely authorise the transfer without any problems. However, if the amount exceeds the annual R10 million limit, prior SARB approval will also be required before the transfer can be authorised. While it is appreciated that the new TCS for AIT has

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made it more difficult to transfer funds abroad and that SARS has become stricter in considering TCS applications, one should make use of this process and to the extent necessary, seek professional advice. Although the TCS and exchange control application process may appear complex in certain respects, well-placed professionals have vast experience dealing with authorised dealers and the SARB, and can ensure this process runs smoothly.

South Africa's (relatively recent) greylisting by the FATF is well documented. While South Africa's exchange control rules, as contained in the Regulations, pre-date the advent of the FATF and its rules aimed

at combatting money laundering and other financial crimes, the Regulations have been used effectively by the SARB to prevent the unlawful movement of funds into and out of South Africa. The judgment in *Singh* does not indicate why the applicant moved the funds abroad but it is understandable that transfers of this nature caught the attention of the SARB and specifically its Financial Surveillance Department and prompted the issuing of the blocking orders. While South Africa remains greylisted at this stage, it is comforting that the SARB is ensuring that laws aimed at preventing the unlawful transfer of funds abroad, such as the Regulations, are being enforced.

Nicholas Carroll and Louis Botha



Cliffe Dekker Hofmeyr

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**Emil Brincker** ranked by  
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in **Band 1: Tax**.

**Gerhard Badenhorst** was awarded  
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Tax: Indirect Tax.

**Mark Linington** ranked by  
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in **Band 1: Tax: Consultants**.

**Stephan Spamer** ranked by  
**Chambers Global 2019-2023**  
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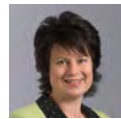
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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