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# TAX & EXCHANGE CONTROL ALERT

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### The trying times of COVID-19: How does it affect South Africans' tax obligations?

In response to the spread of the Coronavirus (COVID-19) around the world, many governments have announced and implemented measures to mitigate the adverse impact of the virus on the health and financial circumstances of their citizens, and on their respective economies. Here in South Africa, the government has declared the COVID-19 outbreak a national disaster, under the Disaster Management Act 57 of 2002. The South African government is also considering the approval of an economic stimulus package.

### New case on section 164 suspension of payment requests: A good time to assess the balance between SARS' powers and taxpayers' rights

Section 164 of the Tax Administration Act 28 of 2011 (TAA) is one of the most contentious provisions governing tax administration in South Africa, particularly given the current poor economic climate. At its essence, it watches over the balance between SARS' powers to collect tax and taxpayers' rights to request postponement of the payment of tax under appropriate circumstances.

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CLIFFE DEKKER HOFMEYR

## The trying times of COVID-19: How does it affect South Africans' tax obligations?

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South African taxpayers who will be most affected by the COVID-19 outbreak in the short term, are those who are liable for employees' tax (PAYE) and value-added tax (VAT).

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In response to the spread of the Coronavirus (COVID-19) around the world, many governments have announced and implemented measures to mitigate the adverse impact of the virus on the health and financial circumstances of their citizens, and on their respective economies. Here in South Africa, the government has declared the COVID-19 outbreak a national disaster, under the Disaster Management Act 57 of 2002. The South African government is also considering the approval of an economic stimulus package.

Another issue that's arisen, is how the outbreak affects persons and businesses in meeting their tax obligations. From a tax perspective, South African taxpayers who will be most affected by the COVID-19 outbreak in the short term, are those who are liable for employees' tax (PAYE) and value-added tax (VAT). In this article, we discuss South African taxpayers' obligations in respect of PAYE and VAT and look at some of the measures introduced by countries around the world.

### VAT

Certain jurisdictions have provided drastic relief for VAT vendors so as to assist businesses with the knock-on effects stemming from the Coronavirus pandemic. Some examples are the following:

- Norway reduced its VAT rate on 16 March 2020 from 12% to 8% retrospectively, to 1 January 2020 for passenger transport, public broadcast

companies, admission to cinemas, sports events, amusement parks and museums, and accommodation in hotels, cabins, holiday apartments, etc. Air passenger tax is abolished for the period 1 January 2020 to 31 October 2020;

- The New Zealand Revenue Authority announced that whilst it is unable to grant extensions for the filing of goods and services tax (VAT) returns, penalties for the late filing thereof may be remitted, and penalties for late payments due to the effects of the Coronavirus may also be remitted. To assist cash-flow, government agencies have been requested to speed up payment times when acquiring goods and services from small businesses.
- The relief measures announced by Greece include the extension of the deadline for VAT payment, suspension of the collection of VAT debts for businesses affected by COVID-19, extension of the deadline or suspension of payment of certified tax debts and instalments of tax debt arrangements.
- From 16 March 2020, the Slovak Republic extended the deadline for VAT payments and introduced an exemption from penalties for the late payment of taxes. It also temporarily abolished social and health insurance contributions for self-employed entrepreneurs from March until May 2020, which contributions will be payable over the following 18 months.

## The trying times of COVID-19: How does it affect South Africans' tax obligations?...continued

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A temporary reduction in the VAT rate seems unlikely in view of the current fiscal position of the country at this stage.

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- Indonesia introduced relief measures on 13 March 2020, for six months from April 2020, which include accelerated VAT refunds for 19 specific sectors.
- In Thailand, VAT refunds have been expedited, and various VAT exemptions have been granted in respect of certain industries affected by the virus. For example, income derived by transporting key emergency supplies have been exempted from VAT.

Given the alarming rate at which the Coronavirus has been spreading in South Africa since the first case was announced on 5 March 2020, and following the President's indication that Cabinet is finalising an economic stimulus package to counter the impact of the Coronavirus on the economy; on the basis that a temporary reduction in the VAT rate seems unlikely in view of the current fiscal position of the country at this stage, we consider the possible avenues of VAT relief that SARS may afford to South African VAT vendors.

The accelerated processing of VAT refunds for vendors which was mentioned by President Ramaphosa on 18 March 2020 as a possible relief measure would be welcomed by all and will go a long way to assist businesses who experience cash flow difficulties as a result of the impact of COVID-19.

Where businesses experience severe cash flow difficulties, SARS may in terms of section 167 of the Tax Administration Act 28 of 2011 (TAA) allow the business to

settle its VAT liabilities in instalments over an agreed period. Section 168 of the TAA allows SARS to enter into an instalment payment agreement if, amongst others, the taxpayer suffers from a deficiency of liquidity which is reasonably certain to be remedied in future, if collection activity is harsh in the particular case and the deferral is unlikely to prejudice tax collection.

In terms of the VAT Act read with the TAA, a vendor is subject to a 10% penalty for the late payment of tax, and interest levied at the prescribed rate. In terms of section 215 of the TAA, a person who is aggrieved by a penalty assessment notice may request SARS to remit the 10% late payment penalty. There are specific grounds for remittance in respect of 'nominal' or 'first incidence of non-compliance' in section 217. Section 218 of the TAA provides that SARS may remit a late payment penalty if satisfied that one or more of the circumstances as listed under that section rendered the person incapable of complying with its obligations under a tax Act. These circumstances include, amongst others, a natural or human-made disaster, a serious illness or accident or any other circumstance of analogous seriousness.

Similarly, in terms of section 187(6) of the TAA, interest may only be remitted if payment was postponed due to circumstances beyond the vendor's control. In terms of section 187(7), the qualifying circumstances are limited to a

## The trying times of COVID-19: How does it affect South Africans' tax obligations?...*continued*

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The provisions applicable to the payment of employees' tax and the circumstances under which interest and penalties are imposed, are similar to those applicable to VAT, with a few small differences.

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natural or human-made disaster, a civil disturbance or a disruption in services, or a serious illness or accident. In terms of SARS Interpretation Note 61 dealing with the remission of interest, it is stated that 'circumstances beyond a person's control' are generally those that are external, unforeseeable, unavoidable or in the nature of an emergency, such as an accident, disaster or illness which resulted in the person being unable to make payment of VAT due.

Based on the provisions of the TAA, read with the VAT Act, it seems that where a vendor's inability to make payment on time is as a result of such vendor having contracted a severe illness such as COVID-19, the vendor may request the remittance of late payment penalties and interest in terms of sections 218 and 187(6) of the TAA. This would be based on the grounds of having a 'serious illness', specifically in view of the COVID-19 outbreak being declared a pandemic and a national state of disaster being declared in terms of section 27(1) of the Disaster Management Act. Although a juristic person itself cannot suffer a 'serious illness', one could argue that where a juristic person's inability to comply with its obligations under the VAT Act stem from an operational inability as a result of the impact of the Coronavirus on its staff; that such juristic person may also qualify for the relief provided for under sections 218 and 187(6) of the TAA.

### Employees' tax (PAYE)

The provisions applicable to the payment of employees' tax and the circumstances under which interest and penalties are imposed, are similar to those applicable to VAT, with a few small differences.

In terms of paragraph 2 of the Fourth Schedule to the Income Tax Act 58 of 1962 (ITA), every resident who is an employer must pay employees' tax to SARS within seven days after the month in which the tax was withheld. Where the employees' tax is not paid timeously, a 10% penalty may be imposed on the unpaid employees' tax. As is the case with VAT, sections 215, 217 and 218 of the TAA are to be applied where a taxpayer seeks to have the 10% penalty remitted.

As is the case with VAT, interest is also payable where PAYE is not paid timeously. Section 89*bis* of the ITA states that interest shall be levied on late payments of employees' tax, "...unless the Commissioner having regard to the circumstances of the case otherwise directs." Section 89*bis* should be read with sections 187(6) and 187(7) of the TAA. As stated in the VAT section of this article, interest will only be remitted if one of the circumstances in section 187(7) of the TAA are present.

The arguments that a taxpayer (individual or juristic person) can raise in support of remittance of penalties and interest on late payment of VAT (see above), would also apply where a taxpayer seeks to have late payment interest and penalties in respect of employees' tax remitted.

## The trying times of COVID-19: How does it affect South Africans' tax obligations?...continued

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In making a request under paragraph 10 of the Fourth Schedule to the ITA, employers can argue that the COVID-19 outbreak and the declaration of a national state of disaster, constitute circumstances warranting a reduction/variation of the amount of employees' tax payable to SARS.

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In the context of employees' tax, there is at least one other useful measure that taxpayers can consider using, to manage their employees' tax obligations to SARS, which may also be to the benefit of their employees. In this regard, paragraph 10(1) of the Fourth Schedule to the ITA states the following:

*"If the Commissioner is satisfied that the circumstances warrant a variation of the basis provided in paragraph 9 for the determination of amounts of employees' tax to be deducted or withheld from remuneration of employees in the case of any employer, the Commissioner may agree with such employer as to the basis of determination of the said amounts to be applied by that employer, and the amounts to be deducted or withheld by that employer in terms of paragraph 2 shall, subject to the provisions of paragraph 11 and section 95 of the Tax Administration Act, be determined accordingly."*

Paragraph 11 of the Fourth Schedule to the ITA states that the Commissioner may, having regard to the circumstances, issue a directive to an employer authorising that employer:

- to refrain from deducting or withholding any amount under paragraph 2 by way of employees' tax from any remuneration due to any employee of that employer; or

- to deduct or withhold by way of employees' tax from any remuneration in terms of paragraph 2, a specified amount or an amount to be determined in accordance with a specified rate or scale.

Paragraph 11 of the Fourth Schedule to the ITA further states that such a directive may be issued, amongst other reasons, to alleviate hardship to that employee due to circumstances outside the control of the employee. Section 95 of the TAA deals with estimated assessments and states that SARS must make any estimate based on information readily available to it.

In other words, these provisions make it possible for taxpayers to approach SARS and request that they are permitted to withhold from the remuneration due to their employees, an amount less than the amount(s) stipulated in the employees' tax tables published by SARS for the 2021 tax year. Where such an agreement is in place, the difference between the actual amount withheld and paid over to SARS as employees' tax and the amount stipulated in the employees' tax tables, will not be subject to late payment penalties and interest.

In making a request under paragraph 10 of the Fourth Schedule to the ITA, employers can argue that the COVID-19 outbreak and the declaration of a national state of disaster, constitute circumstances warranting a reduction/variation of the amount of employees' tax payable to SARS.

## The trying times of COVID-19: How does it affect South Africans' tax obligations?...*continued*

In respect of employees' tax, SARS needs to appreciate that many employers may be unable to pay the full amount of remuneration due to an employee in terms of his/her contract, while the state of national disaster due to the COVID-19 outbreak persists.

### Practical considerations and proposals

A mechanism for the remittance of late payment penalties and interest arising in circumstances of severe illness or circumstances of analogous seriousness already exist in our legislation. Although we are unlikely to see any additional exemptions or VAT rate adjustments in response to the COVID-19 pandemic, considering its economic impact, SARS should at the very least follow the tax relief measures afforded by other jurisdictions and of its own accord remit late payment penalties and interest whilst everyone battles to come to terms with this pandemic.

In respect of employees' tax, SARS needs to appreciate that many employers may be unable to pay the full amount of remuneration due to an employee in terms of his/her contract, while the state of national disaster due to the COVID-19 outbreak persists. In these circumstances, if an employee receives only a portion of

his/her remuneration, but employees' tax is still paid on the full amount due, which accrued to him/her under the contract, it may have a significant impact on such employee's livelihood. Any request that is made under paragraph 10 of the Fourth Schedule to the ITA, to reduce the amount of employees' tax payable due to the impact of COVID-19, should be favourably considered by SARS.

SARS could also protect vendors and its staff during this time to introduce a system whereby the application for VAT registration and supporting documentation can be submitted electronically as opposed to physically at a SARS branch office, similar to the VAT registration process already in place for foreign suppliers of electronic services. There does not seem to be any reason why such submissions must be made in person.

*Gerhard Badenhorst,  
Varusha Moodaley, Louis Botha  
and Ndzalama Dumisa*

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## New case on section 164 suspension of payment requests: A good time to assess the balance between SARS' powers and taxpayers' rights

It is prudent to consider the judgment, not only with reference to the specific facts and circumstances, but also to reflect on the current application and interpretation of section 164 with particular reference to its underlying purpose and rationale.

Section 164 of the Tax Administration Act 28 of 2011 (TAA) is one of the most contentious provisions governing tax administration in South Africa, particularly given the current poor economic climate. At its essence, it watches over the balance between SARS' powers to collect tax and taxpayers' rights to request postponement of the payment of tax under appropriate circumstances.

The High Court (Gauteng Local Division) handed down judgment on 31 May 2019 in the matter of *Anthony Charles Peter v C:SARS* (Case No 3158/2018) in respect of the application and interpretation of section 164 of the TAA. *Peter v C:SARS* is one of a handful of reported and/or published judgments on the "pay-now-argue-later" rule contained in section 164(1) of the TAA and its predecessors in the Income Tax Act 58 of 1962 (ITA) and Value-Added Tax Act 89 of 1991 (VAT Act).

It is thus prudent to consider the judgment, not only with reference to the specific facts and circumstances, but also to reflect on the current application and interpretation of section 164 with particular reference to its underlying purpose and rationale.

### Context: Statutory Framework

Section 164(1) states that, unless a senior SARS official directs otherwise in terms of section 164(3), the obligation to pay tax; and the right of SARS to receive and recover tax, will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133. The constitutionality of the "pay-now-argue-later" principle in respect of its predecessor in the VAT Act was discussed and confirmed in, amongst others, *Metcash Trading Ltd v C:SARS* 63 SATC 13.

Section 164(2) provides that a taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9. Notably, a taxpayer is not required to have lodged its objection before it can submit a section 164 request for suspension of payment. For example, where a taxpayer requests reasons for the assessment prior to lodging its objection, it is still well within its rights to request suspension of payment of the tax debt as a parallel process.

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## New case on section 164 suspension of payment requests: A good time to assess the balance between SARS' powers and taxpayers' rights...*continued*

It should be appreciated that a taxpayer does not have rights to object and/or appeal against a decision by SARS not to suspend payment of the tax debt.

Section 164(3) empowers a senior SARS official to suspend the payment of tax and sets out the factors that should be taken into account when deciding whether to suspend or not. The list of factors is not exhaustive, but includes the following prescriptive factors:

- whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- the compliance history of the taxpayer with SARS;
- whether fraud is *prima facie* involved in the origin of the dispute;
- whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or
- whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.

In terms of section 164(5) of the TAA, a senior SARS official may deny a request for suspension or revoke a decision to suspend payment with immediate effect if satisfied that:

- after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
- the taxpayer is employing dilatory tactics in conducting the objection or appeal;
- on further consideration of the factors referred to above, the suspension should not have been given;

- there is a material change in any of the factors referred to above, upon which the decision to suspend payment of the amount involved was based.

It should be appreciated that a taxpayer does not have rights to object and/or appeal against a decision by SARS not to suspend payment of the tax debt. Instead, taxpayers' remedies are limited to taking the matter to the High Court on review. This is not only a costly exercise, but also provides for narrower grounds on which a court may potentially set aside the decision, being that, amongst others, no due process was followed and/or SARS did not properly consider the matter.

### *Peter v C:SARS*

In *Peter v C:SARS*, SARS refused to grant the Applicant's request to suspend payment in terms of section 164 of the TAA and the Applicant thus approached the High Court to review and set aside SARS' decision to deny the suspension of payment request. The Applicant raised various grounds of review, including, amongst others, the following key grounds discussed below.

- That the relevant SARS Committee that made the decision was not authorised to do so given that it did not have the requisite authority and was not empowered to do so.
- That the SARS Committee acted irrationally in finding that the Applicant's tax appeal was frivolous and vexatious and being employed for dilatory purposes.

## New case on section 164 suspension of payment requests: A good time to assess the balance between SARS' powers and taxpayers' rights...*continued*

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Of most interest, was the court's finding in respect of the second mentioned ground of review.

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- In taking into account that the Applicant failed to offer payment of security, the SARS Committee acted irregularly in that the Applicant was demonstrably unable to provide security.

Pillay AJ upheld the first mentioned ground of review on the basis that SARS failed to show that the relevant SARS Committee was empowered to take the decision and thus it lacked the necessary requisite authority. This is notable for taxpayers in the sense that section 164 decisions must be made by a duly delegated official, which delegation must comply with, amongst others, section 10 of the TAA. This is not always clear from the section 164 notices issued by SARS. In respect of the third mentioned ground of review, the High Court held that it must fail on the basis that the Applicant failed to provide complete and accurate financial information and thus SARS would have been unable to assess the Applicant's net asset position with reference to whether he could provide security.

Of most interest, was the court's finding in respect of the second mentioned ground of review. The Applicant contended that SARS' reliance on sections 164(5)(a) and 164(5)(b) to deny the suspension of payment request due to the Applicant's appeal being frivolous or vexatious and being employed solely to delay the process was irrational. In fact, the

Applicant contended, that there were good prospects of success on appeal (in the main dispute) given the possibility of prescription of a number of years in dispute and that SARS was in fact delaying the finalisation of the appeal.

In considering the application of section 164(5)(a) of the TAA, Pillay AJ held that SARS failed to show that the Applicant's appeal was an abuse of process or lacking any serious purpose. Instead, SARS focused on proving that the appeal was lacking in merit which was not the test for considering whether an appeal was frivolous or vexatious. On the basis that there was no evidence placed before the court to show that the appeal was an abuse of process and/or was purely intended to cause annoyance, Pillay AJ held that there was no rational connection between the decision made by the relevant SARS Committee in denying the suspension of payment in terms of the factor listed in section 164(5)(a) of the TAA, being a frivolous or vexatious appeal, and the material placed before it. Pillay AJ thus upheld this ground of review.

Given that the High Court upheld several of the Applicant's grounds of review, Pillay AJ ordered that SARS' decision not to grant suspension of payment was reviewed and set aside and remitted back to SARS for reconsideration. SARS was also ordered to pay costs, save for the costs incurred in respect of an interlocutory issue.

## New case on section 164 suspension of payment requests: A good time to assess the balance between SARS' powers and taxpayers' rights...continued

Given the finding of the High Court in *Peter v C:SARS* it is sensible to assess the balance between SARS' powers and taxpayers' rights in the context of section 164 requests for suspension of payment.

The finding of the High Court in *Peter v C:SARS* was notably in favour of the taxpayer and it was interesting that the court found that a taxpayer, in terms of section 164(5)(a) of the TAA, is not required to prove good prospects of success on appeal but rather that SARS must show that the taxpayer is appealing for no serious purpose and is abusing the process. It thus follows that where a taxpayer is able to demonstrate that its appeal is based on legitimate and reasonable grounds, SARS would be hard pressed to invoke section 164(5)(a) of the TAA in denying the suspension of payment request. The merits are therefore an important consideration.

### SARS' powers and taxpayer's rights within the context of section 164 of the TAA

Given the finding of the High Court in *Peter v C:SARS* it is sensible to assess the balance between SARS' powers and taxpayers' rights in the context of section 164 requests for suspension of payment. In particular, the question arises whether section 164 is being used by SARS and taxpayers alike, within the confines of the initial purpose and rationale for the provision. This is especially important given the rationality test in our law and the grounds of review contained in sections 6(2)(f)(ii)(aa) to (dd)

of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which states that a decision will be reviewable in terms of sections 6(2)(f)(ii)(aa) to (dd) of PAJA if:

- (f) the action itself – [...]
- (ii) is not rationality connected to –
  - (aa) the purpose with which it was taken;
  - (bb) the purpose of the empowering provision;
  - (cc) the information before the administrator; or
  - (dd) the reasons given for it by the administrator.

Binns-Ward J summed up the purpose and rationale for section 164 succinctly in *Capstone 556 (Pty) Ltd and Another v C:SARS 74 SATC 20* wherein the following was stated:

*The considerations underpinning the 'pay now, argue later' concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes.*

## New case on section 164 suspension of payment requests: A good time to assess the balance between SARS' powers and taxpayers' rights...*continued*

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The current, poor economic climate that may extend into the future, will likely place ever increasing pressure on SARS to consider denying requests for suspension of payment to meet budgeted targets.

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It is fundamental to the sustainability of a constitutional democracy that it has the ability to collect taxes that fund public finances. SARS performs a critical function in this regard and the empowering provisions in the TAA provide the framework for SARS to undertake this important public prerogative, including in particular the "pay-now-argue-later" principle in section 164 of the TAA. There are potentially taxpayers who object/appeal for strategic and tactical reasons, including to delay the matter in the possible hope that SARS may agree to settle the matter on terms more favourable to the taxpayer. Section 164 of the TAA therefore enables SARS to deal with those taxpayers accordingly by demanding payment upfront notwithstanding that the taxpayer disputes the tax debt.

On the other hand, taxpayers are entitled to just administrative action that is lawful, reasonable and procedurally fair and, furthermore, that the decision must be rationally connected to the purpose of the empowering provision. Where there is a legitimate dispute between SARS and taxpayers (particularly compliant, honest and reputable taxpayers), concerning the interpretation and/or application of an especially complex provision in a fiscal statute, SARS would likely be hard pressed to show that a taxpayer is employing

objection/appeal procedures solely for strategic reasons. In fact, the argument would be that those circumstances are exactly what was envisaged when the suspension of payment provisions in section 164(3) of the TAA were introduced. This argument is likely supported by the judgment in *Peter v C:SARS* and the fact that SARS will in any event be paid interest at an attractive rate on the outstanding tax debt to the extent that the taxpayer is ultimately unsuccessful in respect of the merits. Furthermore, from a SARS perspective, the rate at which interest is charged on amounts due to SARS is always in excess of the rate charged in respect of refunds due to taxpayers.

The current, poor economic climate that may extend into the future, will likely place ever increasing pressure on SARS to consider denying requests for suspension of payment to meet budgeted targets. However, one should always balance this against taxpayers' rights in an open and democratic society governed by the Constitution of the Republic of South Africa, 1996, which is the supreme law of the land. It will be interesting to assess whether the favourable judgment for taxpayers in *Peter v C:SARS* has any impact on the practical application and interpretation of section 164 by SARS.

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*Jerome Brink*

## OUR TEAM

For more information about our Tax & Exchange Control practice and services, please contact:



**Emil Brincker**  
National Practice Head  
Director  
T +27 (0)11 562 1063  
E [emil.brincker@cdhlegal.com](mailto:emil.brincker@cdhlegal.com)



**Mark Linington**  
Private Equity Sector Head  
Director  
T +27 (0)11 562 1667  
E [mark.linington@cdhlegal.com](mailto:mark.linington@cdhlegal.com)



**Stephan Spamer**  
Director  
T +27 (0)11 562 1294  
E [stephan.spamer@cdhlegal.com](mailto:stephan.spamer@cdhlegal.com)



**Gerhard Badenhorst**  
Director  
T +27 (0)11 562 1870  
E [gerhard.badenhorst@cdhlegal.com](mailto:gerhard.badenhorst@cdhlegal.com)



**Ben Strauss**  
Director  
T +27 (0)21 405 6063  
E [ben.strauss@cdhlegal.com](mailto:ben.strauss@cdhlegal.com)



**Petr Erasmus**  
Director  
T +27 (0)11 562 1450  
E [petr.erasmus@cdhlegal.com](mailto:petr.erasmus@cdhlegal.com)



**Louis Botha**  
Senior Associate  
T +27 (0)11 562 1408  
E [louis.botha@cdhlegal.com](mailto:louis.botha@cdhlegal.com)



**Dries Hoek**  
Director  
T +27 (0)11 562 1425  
E [dries.hoek@cdhlegal.com](mailto:dries.hoek@cdhlegal.com)



**Jerome Brink**  
Senior Associate  
T +27 (0)11 562 1484  
E [jerome.brink@cdhlegal.com](mailto:jerome.brink@cdhlegal.com)



**Heinrich Louw**  
Director  
T +27 (0)11 562 1187  
E [heinrich.louw@cdhlegal.com](mailto:heinrich.louw@cdhlegal.com)



**Varusha Moodaley**  
Senior Associate  
T +27 (0)21 481 6392  
E [varusha.moodaley@cdhlegal.com](mailto:varusha.moodaley@cdhlegal.com)



**Howmera Parak**  
Director  
T +27 (0)11 562 1467  
E [howmera.parak@cdhlegal.com](mailto:howmera.parak@cdhlegal.com)



**Louise Kotze**  
Associate  
T +27 (0)11 562 1077  
E [louise.kotze@cdhlegal.com](mailto:louise.kotze@cdhlegal.com)

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E [cdhstellenbosch@cdhlegal.com](mailto:cdhstellenbosch@cdhlegal.com)

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