

## THE PILLARS OF THE EXCHANGE CONTROL TEMPLE CRUMBLING?

For a long time, exchange controls in South Africa (SA) have been the source of great frustration for people bringing money into the country, and South Africans wishing to take their money and other assets abroad.

The controls are governed by regulations initially issued in 1961 pursuant to the Currency and Exchanges Act, No 9 of 1933 (Act). The regulations are enforced by a department of the SA Reserve Bank (SARB) with the Orwellian name of the Financial Surveillance Department, or FinSurv for short. SARB outsources most of the day to day administration to local retail banks who charge their clients a fee for the privilege of complying with the regulations.

The rules governing exchange controls are opaque. Business people who wish to pay suppliers abroad must sometimes wait days to get approval to remit funds. Even small local internet 'start-ups' are hounded because they ostensibly 'export' intellectual property without permission from FinSurv.

The Minister of Finance regularly announces that exchange controls are being liberalised, but the impenetrable and harsh rules remain.

Enter Mark Shuttleworth, the well-known SA internet billionaire. After making his fortune, Shuttleworth wanted to take some of his money out of the country. Sure, said the SARB, but only if you pay us a 10% 'exit charge'. Shuttleworth paid the levy under protest but wanted the money back. He launched a court application against the SARB, the Minister of Finance and the President. The outcome of the application is reported as *Shuttleworth v South African Reserve Bank and Others* (30709/2010) [2013] ZAGPPHC 200 (18 July 2013).

The court proceedings, which were closely followed by the media, pitted two of SA's greatest legal minds against each other: Gilbert Marcus SC, for Shuttleworth, and Jeremy Gauntlett SC,

### IN THIS ISSUE

- **The pillars of the exchange control temple crumbling?**
- **The Tax Administration Act – where's the redress for taxpayers?**

for the respondents. As far as I am aware, this was the first time that any person seriously challenged the entire exchange control regime in a court of law.

By his own admission, Shuttleworth is not against the idea of exchange control (view the *Shuttleworth* judgement at paragraph 27). He really only wanted a refund of the 10% levy. However, while denying the refund, in the process the court struck down chunks of the legislation as being unconstitutional.

Unfortunately, the judgment in the *Shuttleworth* case contains numerous editing and spelling errors, and the reasoning is often unclear. However, if nothing else, it does provide an interesting insight into the government's philosophy with respect to exchange controls. In the papers provided to the court, the State's deponent said that "[t]he very stability and sustainability of the financial system and economy of [SA] may be, and indeed has often in the past, been at stake...The flexibility, and ability to change the applicable exchange control regime very quickly, are necessary in this particular sphere...[T]his constitutes an important means whereby our country can adequately safeguard itself, its economy and the public against the vicissitudes of the dynamic world market."

In other words, says the State, we need exchange controls to protect you from the big bad global market wolf.

*continued*

The court appeared to have simply accepted this view. For instance, said Judge Legodi (at paragraph 114 of his judgement), "imagine what will happen to this country if the wealthiest men and women in the country were allowed to take their wealth out of the country without [sic] impunity every time when the country is in economic grief or when there is a change of government or leaders in government. It could have a devastating effect on the country as whole."

And, equally dramatically, advocate Gauntlett is reported to have said in his address to the court, "[h]e [Shuttleworth] quite deliberately decided to attack the heart of the scheme and seeks to bring down the pillars of the temple."

Speaking as a lawyer with little knowledge of economics, my view is that it is time that the exchange control edifice be toppled. The State is bluffing itself if it thinks that it can protect us against "the vicissitudes of the dynamic world market." The market is a different place to that which existed in 1933 or 1961. Events like a financial crisis in the United States or a volcanic eruption in Iceland, for instance, have startling and immediate world-wide effects which governments have very little power to control.

Give us freedom to take and invest our money where we want; we will take our chances in the global economy. Spend your energy instead on creating an economic environment in SA which will encourage us, and foreign investors to keep our money in this country.

Having found that the policy of keeping exchange control is important in principle, the court in the *Shuttleworth* case held that the manner in which the 10% exit charge was legislated and imposed, was not unconstitutional. However, the court then proceeded to strike down certain of the provisions of the Act and the regulations. In particular, the provisions of s9(3) of the Act, which give the President the sweeping power, simply by regulation, to suspend any law, including an act of Parliament, affecting currency, banking or exchange was found to be inconsistent with the Constitution of South Africa, 1996. Of great importance is the finding of the judge that regulation 3(1)(c), which prohibits payments abroad without approval, offend the constitutional rights of freedom of expression and privacy. The court also held that certain of the other regulations were unconstitutional. However, the declaration of invalidity was suspended for a period of 12 months to enable the government to attend to the cause of the invalidity – or, in the words of the court, to 'panel-beat' the regulations.

In my view, a properly motivated attack on the exchange control rules has been long overdue. Mark Shuttleworth has struck a blow for freedom in SA. Hopefully, the Minister of Finance will use the case as an opportunity to further liberalise – or, even better, scrap – exchange controls.

*Ben Strauss*

## THE TAX ADMINISTRATION ACT – WHERE'S THE REDRESS FOR TAXPAYERS?

The Tax Administration Act, No 28 of 2011 (TAA) took effect on 1 October 2012..

At a recent TAA conference the first question asked was how taxpayers and advisers could get the South African Revenue Service (SARS) and officialdom to abide by timelines and to follow prescribed procedures. And what are the remedies should these be ignored?

Reference was made to the Tax Ombud. The 2012 Budget Speech announced that office as a "...low-cost mechanism to address administrative difficulties that cannot be resolved by SARS." The Minister of Finance has to appoint the Tax Ombud by 30 September 2013. The TAA deals extensively with the Tax Ombud in s14 – 21. However, tax practitioners have mixed feelings about its mandate and powers. One observed that the Tax Ombud "... is

addressing very narrowly-defined administrative complaints but has no powers to compel SARS to do anything." Accordingly, there is no effective relief and taxpayers would still have to approach a court to compel SARS to administratively comply with the law. This same point was made at the TAA conference.

Internationally there are interesting examples of what could be done to give taxpayers some degree of redress. Australia has "The Scheme for Compensation for Detriment caused by Defective Administration" (CDDA Scheme). The CDDA Scheme is an administrative, not a statutory (legislative) scheme. It has been established under the executive power of s61 of the Australian Constitution. The scheme allows Government agencies to

*continued*

compensate persons who have experienced detriment as a result of an agency's defective actions or inaction. Payments are discretionary, ie there is no automatic entitlement to a payment. The scheme is generally an avenue of last resort and is used only where there is no other viable avenue to provide redress.

The following constitutes 'defective administration':

- a specific and unreasonable lapse in complying with existing administrative procedures; or
- an unreasonable failure to institute appropriate administrative procedures; or
- an unreasonable failure to give to (or for) an applicant, the proper advice that was within the officer's power and knowledge to give (or reasonably capable of being obtained by the officer to give); or
- giving advice to (or for) an applicant that was, in all the circumstances, incorrect or ambiguous.

'Detriment' means quantifiable financial loss that an applicant (eg a taxpayer) has suffered. There are three types of detriment:

- detriment relating to a personal injury including mental injury (personal injury loss);
- economic detriment that is not related to a personal injury (pure economic loss); and
- detriment relating to damage to property.

Claims for the following types of losses would not be considered by the Australian Tax Office (ATO) under the CDDA scheme:

- claims for personal time spent resolving an issue;
- claims for stress, anxiety, pain and suffering or other emotional distress;
- claims for delay in receiving funds from the ATO where statutory interest has been paid;
- claims for costs associated with complying with the tax system including costs associated with audits, objections and appeals, ie even where the taxpayer is ultimately found to have complied with his obligations;

- costs of putting in a claim or conducting a claim for compensation; and
- claims for taxation or other Commonwealth liabilities that have substantive review rights that can be or could have been pursued.

Financial losses having a direct connection to the action/inaction of the ATO and which give rise to a finding of legal liability or defective administration could, however, be compensated. These include:

- professional fees, where evidence of payment of such fees is provided and the fees are considered by the decision maker to be reasonable (the ATO makes this assessment);
- interest for delays in providing funds in cases where no statutory interest has been paid; and
- bank or other administrative fees a taxpayer has incurred because of the ATO's actions.

The ATO aims to acknowledge receipt of a claim in writing within three business days. Provided that all the required information supporting the claim has been provided, the ATO aims to process same within 56 days. The ATO publishes compensation statistics on its website. During 2011–2012 it paid 108 claims in full with the compensation amounting to AUD 155,547 (approximately ZAR 1.3m). 54 claims were partially paid and the compensation amounted to AUD 618,310 (ZAR 5.6m).

The Tax Administration Laws Amendment Bill was recently published. Taxpayers would certainly welcome seeing some redress mechanism incorporated into the TAA to provide for compensation in instances where TAA timelines and procedures are not complied with. The Tax Ombud could administer such a redress mechanism concurrently with its review of a complaint under s18 of the TAA (eg s18(e)). Giving individual taxpayers some compensatory redress would be a start.

*Johan van der Walt*

## CONTACT US

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



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



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



**Danielle Botha**  
Associate  
T + 27 (0)11 562 1380  
E [danielle.botha@dcladh.com](mailto:danielle.botha@dcladh.com)



**Johan van der Walt**  
Director  
T +27 (0)11 562 1177  
E [johan.vanderwalt@dcladh.com](mailto:johan.vanderwalt@dcladh.com)



**Heinrich Louw**  
Associate  
T +27 (0)11 562 1085  
E [heinrich.louw@dcladh.com](mailto:heinrich.louw@dcladh.com)



**Ruaan van Eeden**  
Director  
T +27 (0)11 562 1086  
E [ruaan.vaneeden@dcladh.com](mailto:ruaan.vaneeden@dcladh.com)



**Tessmerica Moodley**  
Associate  
T +27 (0)21 481 6397  
E [tessmerica.moodley@dcladh.com](mailto:tessmerica.moodley@dcladh.com)



**Andrew Lewis**  
Senior Associate  
T +27 (0)11 562 1085  
E [andrew.lewis@dcladh.com](mailto:andrew.lewis@dcladh.com)



**Carmen Moss-Holdstock**  
Associate  
T + 27 (0)11 562 1614  
E [carmen.moss-holdstock@dcladh.com](mailto:carmen.moss-holdstock@dcladh.com)



**Nicole Paulsen**  
Associate  
T + 27 (0)11 562 1386  
E [nicole.paulsen@dcladh.com](mailto:nicole.paulsen@dcladh.com)

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

#### 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@dcladh.com](mailto:jhb@dcladh.com)

#### CAPETOWN

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@dcladh.com](mailto:ctn@dcladh.com)