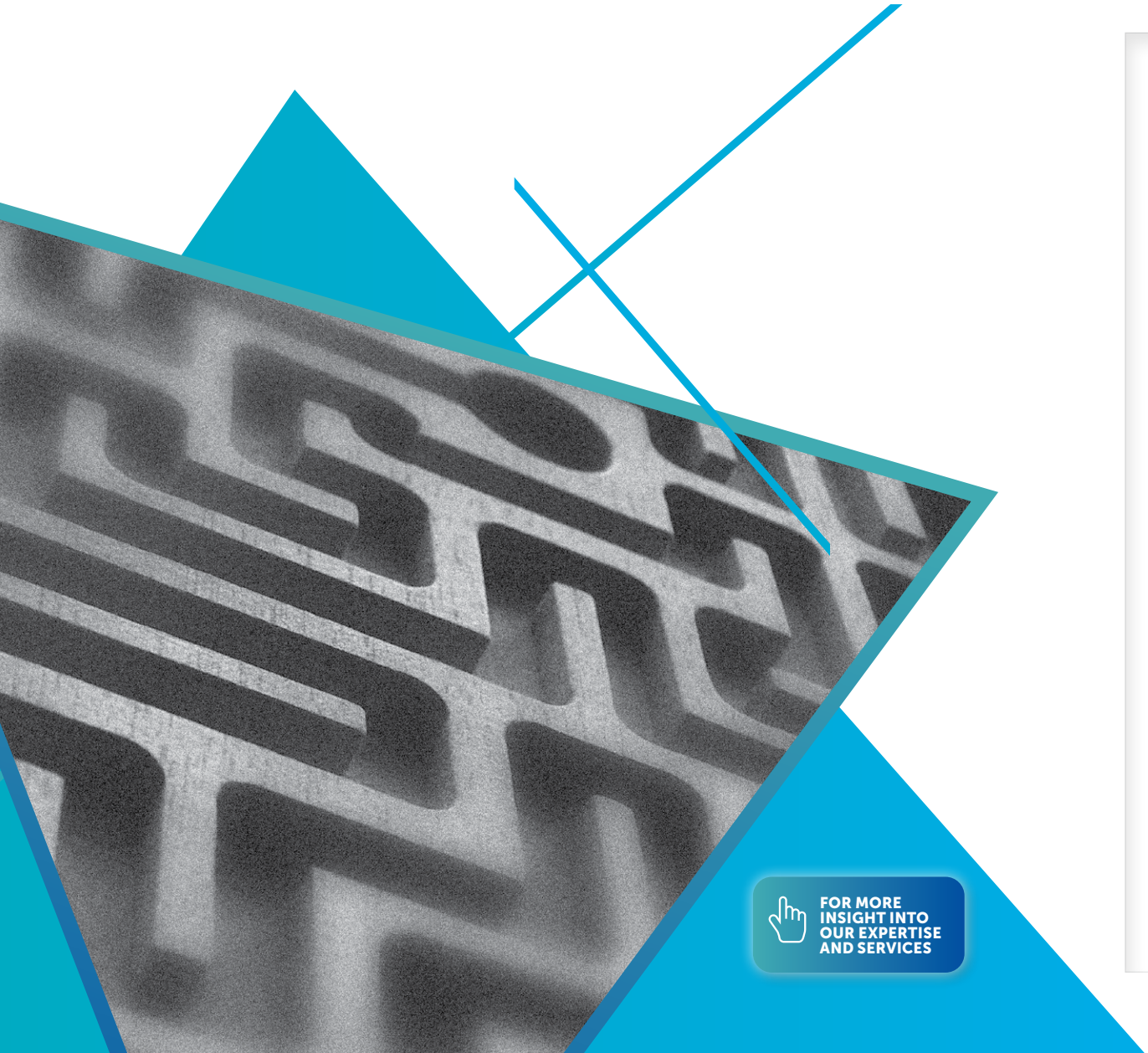
Tax & Exchange Control

ALERT

14 JULY 2023

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA



FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

IN THIS ISSUE

Measuring Good Cause – A discussion on the case of *Taxpayer N v The Commissioner for the South African Revenue Service*

Adhering to court processes, no matter how trivial the compliance procedure may be, has always been paramount to one's expression of respect to the court and the overall facilitation of smooth litigious proceedings. But the waters often get murky when an overstep of court procedure on the one side is countered by an argument of lack of merit on the other side.

While both sides present equally topical issues to the court's table, the question thus becomes whether a party's misstep in court procedure trumps the merits in their case. This question was faced in the Tax Court (Court) in the case of *Taxpayer N v the Commissioner for the South African Revenue Service* (Case No 2022/37). In this case, the Court was faced with ascertaining whether the South African Revenue Service's (SARS) delay in its submission of a Rule 31 statement was of good cause such that a default judgment order may be granted against the appellant.

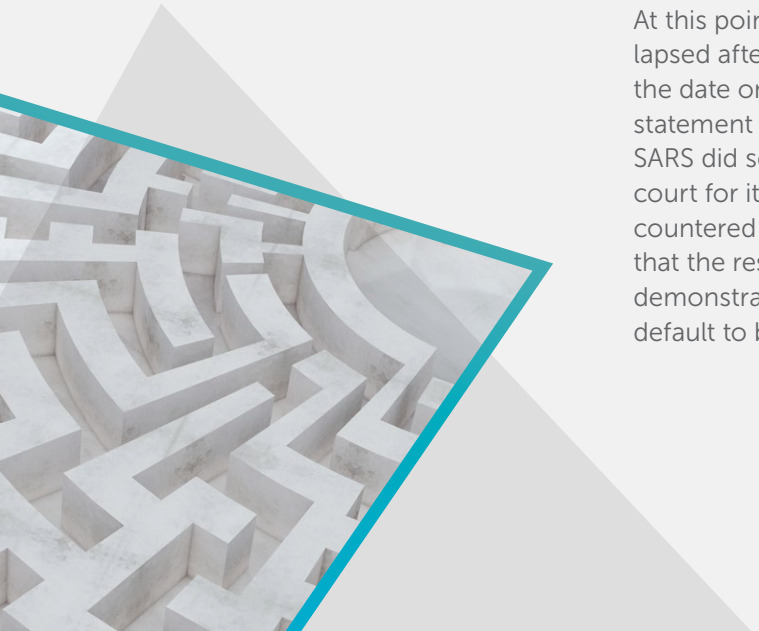
The appellant is a private company and had conducted its routine payroll taxes for each of the one-month periods from April 2019 until February 2021. In completing these taxes, the appellant claimed Employment Tax Incentive allowances for these periods in terms of the Employment Tax Incentive Act, Act 26 of 2013 (ETI Allowances).

SARS subsequently issued the appellant with revised assessments in which it disallowed the ETI Allowances claimed by the appellant.

The appellant disputed the revised assessments and objected to same on 27 September 2021. Its objection was disallowed on 12 October 2021. The appellant then appealed against the disputed assessment on 12 November 2021. Both parties elected not to refer the dispute to alternative dispute resolution proceedings in terms of rule 10(2)(e) and rule 13(2) of the Rules promulgated under section 103 of the Tax Administration Act, 2011 (**TAA**). As such, the respondent's Rule 31 statement detailing the grounds on which it disputed the assessment and opposed the appeal was due within 45 days from 12 November 2021 which would be by 15 February 2022. Following the expiry of these 45 days, the appellant delivered a notice in terms of rule 56(1)(a) to SARS.

Measuring Good Cause – A discussion on the case of *Taxpayer N v The Commissioner for the South African Revenue Service*

CONTINUED



This notice afforded SARS with an additional 15 days from the date of notice to remedy its failure to file its Rule 31 statement.

When the respondent failed to remedy its default, the appellant proceeded to file a notice in terms of rule 56(1)(a), in terms of which it sought an order:

1) for its appeal against the assessments in respect of its payroll taxes to be upheld in terms of rule 56(2)(a) of the Rules; and

2) to direct SARS to issue reduced assessments in respect of each of the assessments.

At this point, 133 business days had lapsed after 15 February 2022, being the date on which SARS' Rule 31 statement was initially due. While SARS did seek condonation from the court for its late filing, the appellant countered this request on the basis that the respondent had failed to demonstrate good cause for this default to be condoned.

Findings

This led the court down a rabbit hole of understanding just what it takes for good cause to be effectively established, and in this case, whether same was established well enough for the court to grant the appellant default judgment. In this deep dive, the court considered varying positions taken by other courts on similar issues. It began by first considering what Rule 56(2) provides which is that in the absence of good cause demonstrated by the defaulting party for the default in issue, an order may be made under section 129(2) of the TAA. With reference to case law, the TAA and the Rules, the court took into account the reasoning behind the delay, the prospects of success of SARS' case and the overriding interest of justice in determining good cause in this matter and came to the following conclusion.

The Court found that there was not sufficient explanation to explain the delay in the delivery of the Rule 31 statement. SARS' legal representative too conceded that there was no adequate explanation for the delay in the delivery of the Rule 31 statement. When considering the prospects of success, respondent was of the opinion that the appellant did not qualify for this allowance for various reasons. Further to this, SARS requested the appellant in terms of rule 7(2)(b)(iii) to furnish documents to further substantiate its claim to the ETI Allowance. However, the appellant did not deliver the requested documents. If SARS' grounds for assessment and opposing the appellant's appeal were to be upheld, it would demonstrate that the appellant fraudulently claimed allowances in terms of the ETI Act.

Measuring Good Cause – A discussion on the case of *Taxpayer N v The Commissioner for the South African Revenue Service*

CONTINUED

With the above in mind, the overall consideration was whether it would be in the interest of justice to condone the default. Considering the reason behind the delay, SARS' prospects of success and the overarching interests of justice, the court was of the view that SARS demonstrated good cause as to why the default judgment should not be granted in favour of the appellant. However, adhering to court processes is just as important and the court still wanted to demonostrate this fact. As such, due to the delay in the delivery of the Rule 31 statement, the court ordered costs on an attorney client scale.

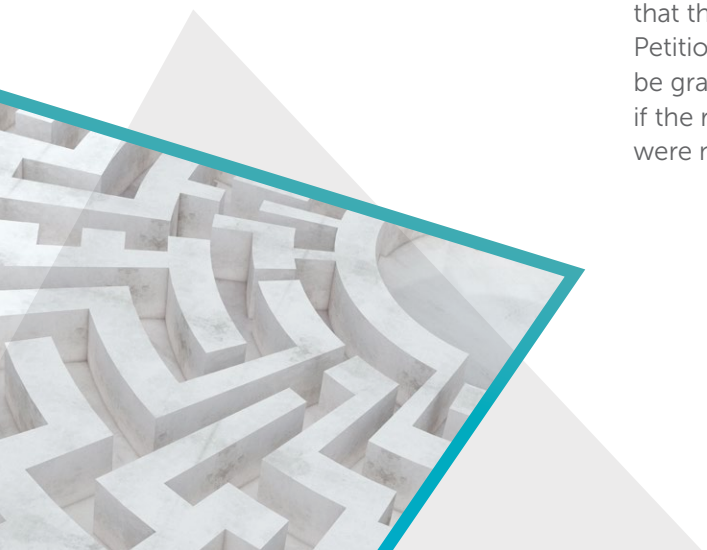
With respect, while one appreciates some of the issues raised in the judgment, the court's interpretation of the "*good cause*" criterion raises the risk of watering down the utility of the default judgment procedure. However, one must keep in mind that Tax Court judgments are not binding and that the court's finding was likely influenced by the facts, potentially including facts not referred to in the judgment.

Esther Ooko and Louis Botha

KENYA

Analysis of the High Court ruling in Petition No. E181 of 2023 on the suspension of the Finance Act, 2023

On 26 June 2023, the President of Kenya assented to the Finance Bill, 2023 (Bill) and the resultant Finance Act, 2023 (Act), which was to come into operation or be deemed to have come into operation on 1 July 2023.



On the same day, Petition No. E181 of 2023 (Petition) was filed by the Okiya Omtata Okoiti and six others (Petitioners), on the grounds that the Act is unconstitutional as it was enacted in violation of the Constitution and the Public Finance Management Act, 2012.

The Petitioners argued that the Act was processed in a manner that violated the express provisions of Article 110(3) of the Constitution, as it was not subjected to the preliminary mandatory concurrence of the two speakers of Parliament, as required under the article, and that as a result certain sections in the Act were irregularly and unconstitutionally enacted into law.

Further to this, the Petitioners argued that the constitutional rights of the Petitioners and Kenyans overall would be gravely compromised and violated if the requested orders in the Petition were not granted.

The Cabinet Secretary for the National Treasury and Planning, the Attorney General, the National Assembly and the Speaker of the National Assembly (Respondents) argued that the Bill followed due procedure in being enacted into the Act. The Respondents further argued that they considered all views received from the public and stakeholders, and as a result, some amendments were proposed to the Bill, as contained in the report by the National Assembly's Departmental Committee on Finance and National Planning.

Issues for determination by the High Court

The High Court summarised the issues for determination as follows:

- whether the orders of 30.6.23 should be set aside;
- whether the test of conservatory orders had been met; and
- whether the matter should be certified as raising a substantial question of law under Article 165(4) of the Constitution.

Whether the orders of 30.6.23 should be set aside

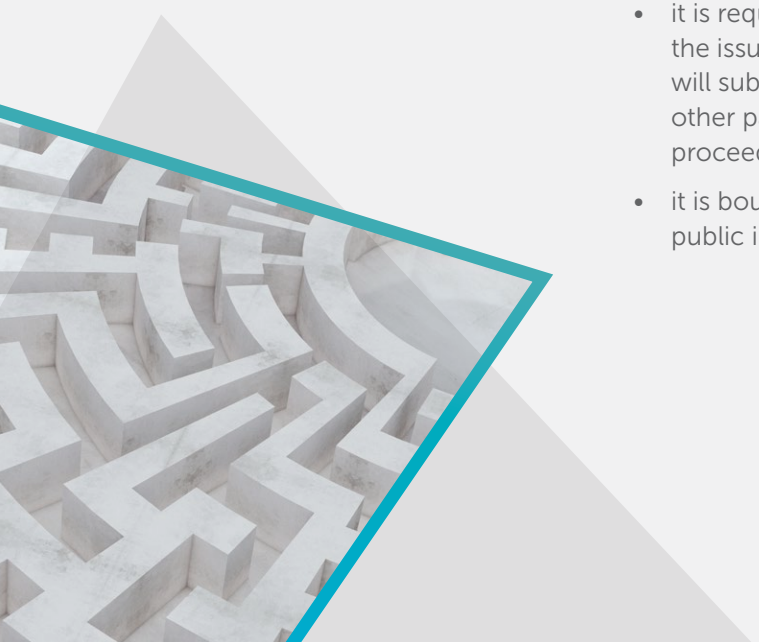
The Petitioners sought the Court to issue the following:

- a conservatory order suspending the Act;
- an interim order of prohibition, prohibiting the respondents and interested parties or their agents from giving effect to the Act;
- conservatory orders suspending certain provisions of the Act;
- an interim order prohibiting the respondents and interested parties from giving effect to certain provisions of the Act;
- confirmation that the Petition raised substantial questions of law and referral of the case the Chief Justice for the enrolment of a bench of an uneven number of judges, not less than three, pursuant to Article 165(4) of the Constitution;
- placement of the Petition for an urgent interpartes hearing before the Chief Justice; and

KENYA

Analysis of the High Court ruling in Petition No. E181 of 2023 on the suspension of the Finance Act, 2023

CONTINUED



- issuing of further directions and orders as may be necessary to give effect to these orders and/or favour the cause of justice.

In determining whether the orders of 30.6.23 should be set aside, the High Court considered a similar application for the setting aside of conservatory orders, in the case *Okiya Omtata Okoiti v Commissioner General, Kenya Revenue Authority and Two Others* [2017] eKLR, the Court held that:

- to set aside conservatory orders, the Court must be satisfied that the applicant will be irreparably injured, absent of a stay;
- it is required to consider whether the issuance of a stay order will substantially injure the other parties interested in the proceedings; and
- it is bound to consider where the public interest lies.

The High Court held that it was satisfied that the Petitioners satisfied the tests for granting conservatory orders. The Court held that it was necessary to issue conservative orders to preserve the substratum of the Petition pending the hearing and determination of the same, and that without the conservatory orders as sought, the Petition was at risk of being rendered a mere academic exercise. The Court observed that it has a constitutional mandate to protect the supremacy of the Constitution by ensuring that all laws conform to the Constitution.

Whether the test of conservatory orders has been met

A conservatory order is one of the appropriate reliefs available to a party who alleges and proves denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The High Court observed the purpose of conservatory orders is to preserve the substratum of the Petition before the Court pending the hearing and determination of the same. The Court further noted that in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji and Two Others* [2014] eKLR, the Supreme Court set out the test for the granting of conservatory orders with three components. A party seeking conservatory orders must demonstrate to the Court that:

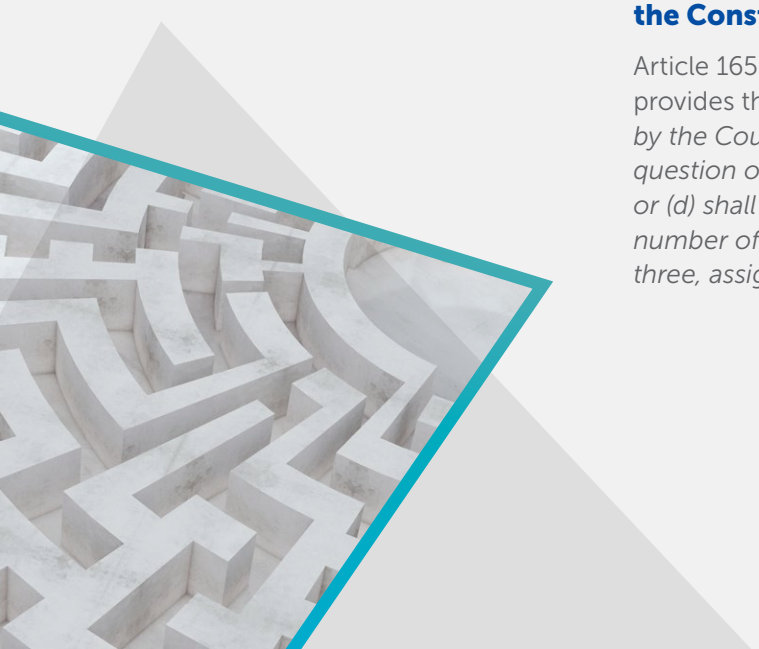
- the Petition is arguable and not frivolous;
- unless the orders sought are granted in the suit, were it to succeed, it would be rendered nugatory; and
- it is in the public interest that the orders are granted.

In satisfying the above requirements, the Court found that the Petitioners had established a *prima facie* case with a probability of success.

KENYA

Analysis of the High Court ruling in Petition No. E181 of 2023 on the suspension of the Finance Act, 2023

CONTINUED



The Court also found that if the substratum of the Petition is not preserved by having conservatory orders in place, there is imminent danger of rendering the Petition nugatory. The Court further observed that this would militate against public interest as there was a real risk of the public being subjected to an unconstitutional law, should the Petition succeed. Based on this, the Court found that there was merit in granting conservatory orders in respect of the Act under challenge.

Whether the matter should be certified as raising a substantial question of law under Article 165(4) of the Constitution

Article 165(4) of the Constitution provides that: *"Any matter certified by the Court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."*

The matters referred to in Article 165(4), are matters that raise a question of:

- whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- whether any law is inconsistent with, or in contravention of the Constitution;
- whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution;
- any matter relating to constitutional powers of state organs in respect of county Governments;
- any matter relating to the constitutional relationship between the levels of Government; and
- relating to conflict of laws under Article 191 of the Constitution.

TOP RANKED
Chambers
Global
2023

Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2018 - 2023 ranked our Tax & Exchange Control practice in **Band 1**: Tax.

Emil Brincker ranked by **Chambers Global 2003 - 2023** in **Band 1**: Tax.

Gerhard Badenhorst was awarded an individual spotlight table ranking in **Chambers Global 2022 - 2023** for Tax: Indirect Tax.

Mark Linington ranked by **Chambers Global 2017 - 2023** in **Band 1**: Tax: Consultants.

Stephan Spamer ranked by **Chambers Global 2019-2023** in **Band 3**: Tax.

KENYA

Analysis of the High Court ruling in Petition No. E181 of 2023 on the suspension of the Finance Act, 2023

CONTINUED

The High Court made an order to certify that this matter raises a substantial question of law and the file be transmitted to the Chief Justice for assignment of a bench of not less than three judges to hear and determine the Petition.

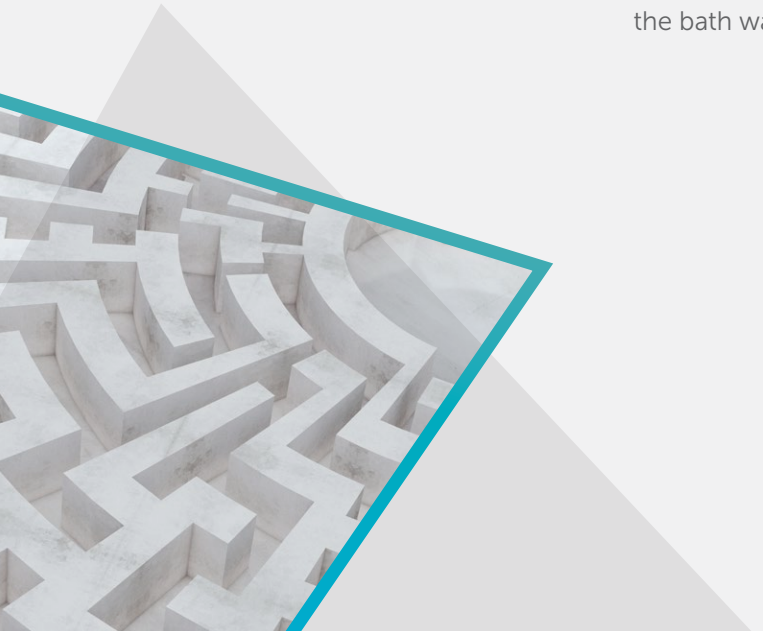
Comment

The suspension of the Act comes at a time when the Government is under immense pressure to collect additional tax revenue to support its ambitious 2023/2024 budget of KES 3,6 trillion. The Act has a mix of wins and losses for taxpayers, and therefore suspending or throwing away all the provisions of the Act is akin to throwing the baby away with the bath water.

The matter is set to be heard by a three-judge bench, however, there is no indication of when the legal challenge on the Act will be finally determined. We do, however, expect that the Petition will be heard on a priority basis considering the weighty issues that it raises and the significant impact on taxpayers and revenue collection.

At the moment, taxpayers are encouraged to take a conservative approach because the Court may, at its own discretion, decide that the Act is constitutional and effective from 1 July 2023. This conservative approach includes making provision for additional taxes introduced by the Act. You can read our analysis of the Act, the effective date of its provisions and the implications in our alert here.

Alex Kanyi and Joan Kamau



OUR TEAM

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

Emil Brincker
Practice Head & Director:
Tax & Exchange Control
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com

Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Mark Linington
Director:
Tax & Exchange Control
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com

Gerhard Badenhorst
Director:
Tax & Exchange Control
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com

Jerome Brink
Director:
Tax & Exchange Control
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com

Petr Erasmus
Director:
Tax & Exchange Control
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com

Dries Hoek
Director:
Tax & Exchange Control
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com

Alex Kanyi
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E alex.kanyi@cdhlegal.com

Heinrich Louw
Director:
Tax & Exchange Control
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com

Howmera Parak
Director:
Tax & Exchange Control
T +27 (0)11 562 1467
E howmera.parak@cdhlegal.com

Stephan Spamer
Director:
Tax & Exchange Control
T +27 (0)11 562 1294
E stephan.spamer@cdhlegal.com

Tersia van Schalkwyk
Tax Consultant:
Tax & Exchange Control
T +27 (0)21 481 6404
E tersia.vanschalkwyk@cdhlegal.com

Louis Botha
Senior Associate:
Tax & Exchange Control
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com

Varusha Moodaley
Senior Associate:
Tax & Exchange Control
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com

Abednego Mutie
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E abednego.mutie@cdhlegal.com

Nicholas Carroll
Associate:
Tax & Exchange Control
T +27 (0)21 481 6433
E nicholas.carroll@cdhlegal.com

Joan Kamau
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E joan.kamau@cdhlegal.com

Puleng Mothabeng
Associate:
Tax & Exchange Control
T +27 (0)11 562 1355
E puleng.mothabeng@cdhlegal.com

Esther Ooko
Associate Designate:
Tax & Exchange Control
T +27 (0) 11 562 1778
E esther.ooko@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
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.

PLEASE NOTE
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.

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

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

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

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

©2023 12490/JULY

CLIFFE DEKKER HOFMEYR | cliffedekkerhofmeyr.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA