

TAX & EXCHANGE CONTROL ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

A matter of review and the High Court's jurisdiction in tax disputes: Will the ConCourt have the final say?

In our [Tax and Exchange Control Alert](#) of 20 April 2023, we discussed the approach followed by the Supreme Court of Appeal (SCA) regarding the High Court's jurisdiction to review the South African Revenue Service's (SARS) decisions made in respect of assessments.



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In our [Tax and Exchange Control Alert of 20 April 2023](#), we discussed the approach followed by the Supreme Court of Appeal (SCA) regarding the High Court's jurisdiction to review the South African Revenue Service's (SARS) decisions made in respect of assessments.

We explained that in the *United Manganese of Kalahari and Rappa Resources* decisions, the SCA found in SARS' favour and held that in terms of section 105 of the Tax Administration Act 28 of 2011 (TAA), it is required that a taxpayer must first apply to the High Court to direct that it has jurisdiction to hear an application for review of an assessment, before the application can be heard. In these cases, it was essentially held that section 105 of the TAA will only apply in exceptional circumstances. We noted at the time that the judgments may be appealed to the Constitutional Court (CC), but that it would be interesting to see what the outcome was in the *Absa Bank Limited* case, where SARS had appealed to the SCA after the High Court found in the taxpayer's favour regarding the application of section 105 of the TAA and the review application.

On 29 September 2023, the SCA handed down judgment in the long-awaited case now cited as *The Commissioner for the South African Revenue Service v Absa Bank Limited and Another* (596/2021) [2023] ZASCA 125. In this case, SARS had indicated its intention to apply the general anti-avoidance rules (GAAR) in the Income Tax Act 58 of 1962, which were not the tax provisions at issue in the other cases. In *Absa Bank Limited*, the SCA has now also found in SARS' favour and overturned the High Court decision. Considering the complexity of the matter as it involves the application of the GAAR, we will leave discussing the judgment for another day, but for purposes of this article, we note the SCA's finding that as "*the dispute did not involve solely a question of law, no exceptional circumstances existed to justify the high court assuming jurisdiction in the matter*".



A matter of review and the High Court's jurisdiction in tax disputes: Will the ConCourt have the final say?

CONTINUED

Constitutional Court the final arbiter?

Since the publication of our previous article, it appears from the CC's website that the taxpayers in *United Manganese of Kalahari and Rappa Resources*, have applied to the Constitutional Court for leave to appeal the SCA judgments. Another interesting development, is that the taxpayer in *Forge Packaging (Pty) Ltd v Commissioner for the South African Revenue Service* ZAWCHC 119 (13 June 2022), discussed in our [Tax and Exchange Control](#) Alert of 21 July 2022, has also applied for leave to appeal to the CC, which matter also involved the application of section 105 of the TAA.

Given the SCA's judgment in *Absa Bank Limited*, which may also be appealed, it is possible that the CC will hear four appeals (possibly jointly) all dealing with the application of section 105 of the TAA. Of course, this also depends on whether leave to appeal is granted in each case, and one should also appreciate that the CC may direct that the issue of leave to appeal is addressed during oral arguments, with the merits of the appeals. The CC's final decision as to these appeals remains to be seen, but there is little doubt that considering the importance of the issue at hand, it will be helpful for the CC to have the final say regarding the application of section 105 of the TAA and how it should be interpreted.

Louis Botha



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
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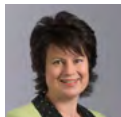
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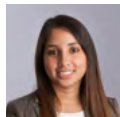
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

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