

Dispute Resolution and Tax & Exchange Control

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SOUTH AFRICA

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**DISPUTE RESOLUTION AND TAX & EXCHANGE CONTROL
ALERT**

What's in a name? The status of Tax Courts as courts of law

The South African legal system is host to a number of quasi-judicial decision-making bodies which, while having the power to make decisions which are authoritative and may be binding on parties and while conducting proceedings in a judicial manner, cannot be described as courts of law in the proper sense. The High Court in the case of *Poulter v The Commissioner for the South African Revenue Service (A88/2023)* [2024] ZAWCHC had to determine whether the Tax Court was a court of law for the purposes of deciding whether a taxpayer could be represented by a layperson in the Tax Court. It should be noted that the Tax Court first considered the issue of a layperson's right of appearance before it in 2016 (see our [Tax & Exchange Control Alert of 9 September 2016](#)), which we refer to below.

Background

The matter concerns an appeal to the Western Cape High Court (High Court) against an order of the Tax Court confirming a taxpayer's assessment by the Commissioner for the South African Revenue Service (SARS), which was made without hearing the taxpayer's representative on account of the representative not being a legal practitioner. Despite the representative possessing a power of attorney from the taxpayer, the Tax Court invoked Rule 44(7) of the

Tax Court Rules. This rule provides that if a party or person authorised to appear on their behalf fails to appear at the hearing, the Tax Court may decide the appeal upon the request of the party that does appear and proof that the absent party or their representative had been notified of the hearing. Because the representative was not a legal representative (legal practitioner), the Tax Court did not consider him authorised to appear for the taxpayer.

The question therefore arose as to whether the Tax Court was correct in finding that the taxpayer's representative had to be a **legal practitioner**.

The legislative framework

In laying the foundations for its decision, the High Court first dealt with the Legal Practice Act 28 of 2014 (LPA). Section 25 provides that any person who has been admitted and enrolled to practice as a legal practitioner has the right to do so throughout South Africa and can appear on behalf of any person in any court or before any board, tribunal or similar institution in South Africa. Section 33 of the LPA prohibits any person who is **not a legal practitioner** from appearing in any **court of law**, board, tribunal or similar institution at which only legal practitioners may appear in expectation of a fee, commission, gain or reward.

The High Court also considered section 125(1) of the Tax Administration Act 28 of 2011 (TAA), which when read together with section 12, provides for a senior SARS official to appear before the Tax Court. Pursuant to amendment in 2017, section 125 did not expressly address who could appear on a taxpayer's behalf.

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The taxpayer's principal argument was that the taxpayer's representative before the Tax Court, being her father, was authorised to act on her behalf before the Tax Court in terms of a power of attorney that had been issued to him. In the context of section 25 of the LPA, the taxpayer's argument was that it supported the taxpayer's representative appearing on her behalf in the Tax Court as he did not expect a reward for doing so. SARS' argument in this context was that the taxpayer's representative was not entitled to appear in the Tax Court, as it is a "court of law" and only legal practitioners may appear in courts of law.

As a result, the main issue to be decided was whether the Tax Court is a court of law in the requisite sense to bar the taxpayer's father from representing her.

The meaning of "court of law"

The High Court considered several factors in determining whether the Tax Court constitutes a court of law, the most pertinent of which are discussed below.

Firstly, it looked at the inherent power of superior courts to regulate their own proceedings in terms of section 173 of the Constitution. In this regard, the High Court held that the Tax Court is not a superior court in that it does not possess this power which is reserved only for the High Court, Supreme Court of Appeal and Constitutional Court.

Secondly, the High Court looked to foreign case law dealing with so-called local courts of valuation in the United Kingdom, which were not courts of law and which decisions, amongst other things, did not create binding

precedent. The High Court stated that the position of the Tax Court was similar in that its jurisdiction is limited to determining a taxpayer's tax liability in the case before it and thus it cannot decide general points of law or create binding precedent.

Thirdly, section 166 of the Constitution lists the courts that form part of the South African judicial system, being the superior courts listed above, the Magistrates' Court and any court of similar status to the High Court established by an act of Parliament. It was held that the Tax Court is none of these as Parliament could not have intended to elevate a body performing an administrative function to that of a court, despite acting judicially. Furthermore, considering the provisions of the TAA, the High Court held that the Tax Court is established by a proclamation by the President, not an act of Parliament. Accordingly, because the Tax Court does not form part of the constitutionally created judicial system, it cannot be properly characterised as a court of law.

The court's finding

Ultimately, it was held that although the Tax Court has the trappings of a court, it is an administrative decision-maker and ought to be conceived of as a "court of revision" and not a court of law. This finding was largely based on the fact that this was how the Tax Court's predecessor, the special tax court, was described. Accordingly, a Tax Court's functions are essentially that of an administrative tribunal.

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Additionally, the High Court considered the language employed in the TAA which mentions the taxpayer's "authorised representative" but does not say legal representative (or legal practitioner). The court held that this comes from an understanding that there is no limitation on who can appear, meaning that laypeople are entitled to represent natural persons in the Tax Court.

A critical aspect that the High Court considered is the impact of an amendment to section 125 of the TAA. As noted above, section 125, read with section 12, expressly provides for a senior SARS official to appear before the Tax Court. The High Court acknowledged that prior to its deletion, with effect from 18 December 2017, section 125(2) of the TAA stated that "the appellant or the appellant's authorised representative may appear at the hearing of an appeal in support of the appeal". There was no limitation on whom the appellant (taxpayer) might appoint as its representative. Although section 125(2) was repealed, it was significant that the High Court held that:

"[T]he mere deletion of the provision cannot tacitly imply an indication that an appellant is not entitled to representation before a Tax Court. A provision excluding any right of representation for an appellant would, in any event, probably be unconstitutional on grounds of unfairness, which is a further reason to discount the deletion of s125(2) as having such an effect."

The reason for the repeal of this section was reflected in the explanatory memorandum to the amendment act as a technical correction, which in the High Court's view supported this interpretation. While it is unclear whether the Tax Court's judgment that is the subject of this appeal dealt with the now repealed section 125(2) of the TAA, it appears that the High Court addressed this issue, as in a related interlocutory application before the Tax Court (presided over by another judge), the repeal of this section was the reason for disqualifying the taxpayer's representative from appearing on her behalf.

What follows is that because the Tax Court is not a court of law and representation is not limited to legal practitioners, the prohibition restricting rights of appearance to legal practitioners did not apply and the taxpayer was entitled to be represented by her father in the Tax Court. Accordingly, the High Court overturned the Tax Court's finding that the appellant had to be represented by a person with a right of appearance in the High Court as an attorney or an advocate and remitted the matter to the Tax Court for hearing *de novo*.

Comment

As noted previously, the Tax Court stated in *RTCC v Commissioner for the South African Revenue Service* [2016] (VAT 1345) ZATC 5, seemingly as an obiter statement, that given the wording of section 125(2) of the TAA, which had not yet been repealed at the time, a potential inequality of

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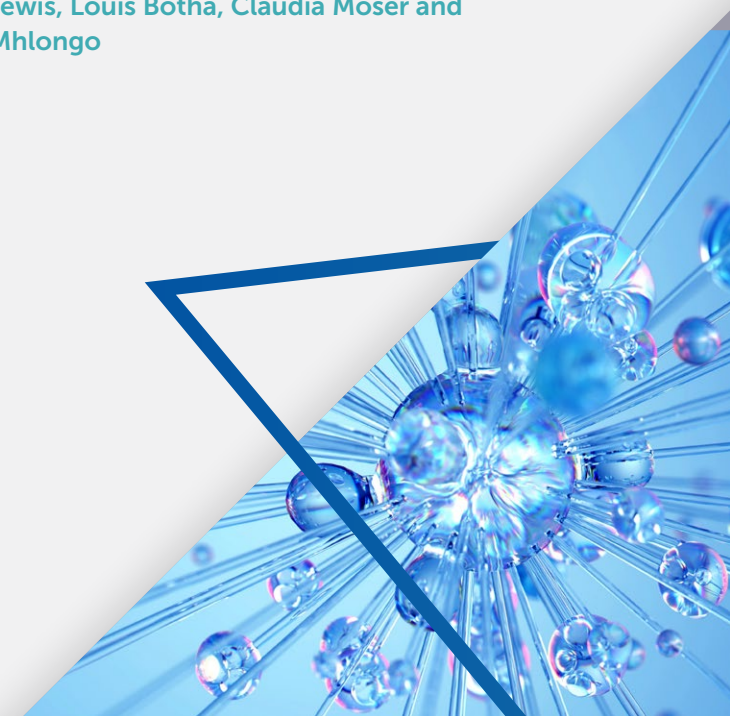
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arms between the taxpayer and SARS was created. However, the Tax Court in that case held that any amendment should be “to ensure that the representatives have some expertise in the field of tax law”. While the explanatory memorandum that addressed the reason for section 125(2)'s repeal did not refer to this judgment, it seems that this statement by the Tax Court may have been part of the reason for the repeal of section 125(2). This is important because although the LPA came into effect in 2018 to alter some of the rules regulating the legal profession, it appears that the repeal of section 125(2) of the TAA was the main reason for the *Poulter* matter ending up before the High Court. While the judgment in *RTCC* expressed concern around the potential inequality in representation of the parties before the Tax Court, one is inclined to agree with the High Court's finding that expressly disallowing a taxpayer from appointing an authorised representative who is not an admitted attorney, would have potentially been unconstitutional.

Considering the judgment in *RTCC*, the repeal of section 125(2) of the TAA and the subsequent commencement of the LPA, the High Court's judgment has provided welcome certainty. In addition to setting out the characteristics of what constitutes a court of law, this judgment also highlights that taxpayers appearing before the Tax Court can appoint someone to appear on their behalf who may not necessarily be a legal practitioner.

While it is important to appreciate that most tax disputes are resolved prior to reaching the Tax Court, it would likely be unfair for a taxpayer that may have limited resources, to have to incur costs to appoint a legal representative if the dispute is not resolved earlier. While it is acknowledged that SARS has been in the process of rebuilding its capacity in recent years, it generally has more resources, such as in-house admitted legal practitioners and the capability to brief external legal counsel. One should take into account that even if a taxpayer decides to represent themselves in the Tax Court or to appoint someone other than an admitted legal practitioner, it is not without risk. This is evident from the 2023 judgment in *U Taxpayer v Commissioner for the South African Revenue Service* (IT24502) [2023] ZATC 7, where the Tax Court allowed the taxpayer to represent himself in an interlocutory application, but still awarded a cost order in SARS' favour.

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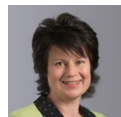
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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