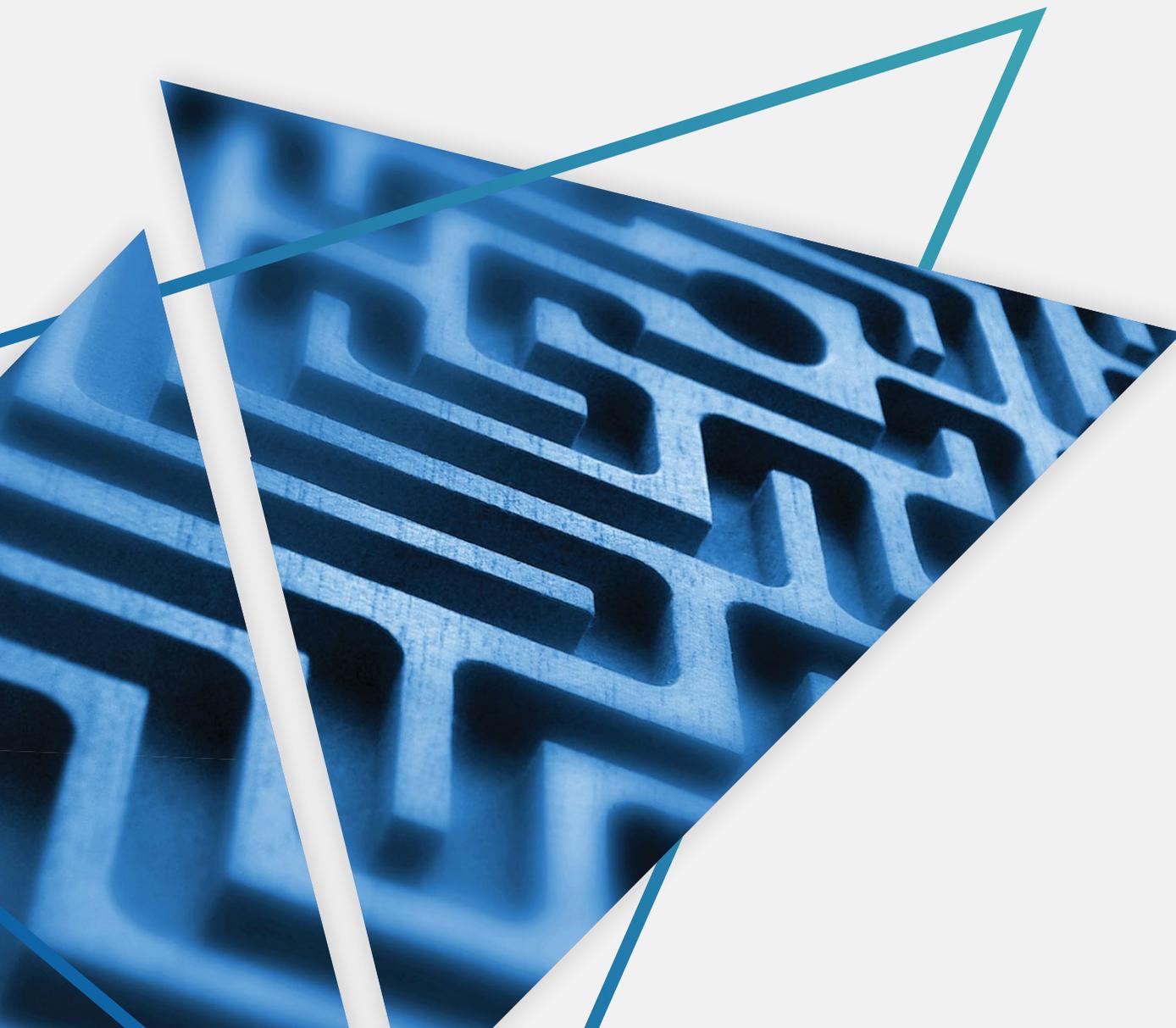


Tax & Exchange Control

ALERT | 10 April 2025



In this issue

SOUTH AFRICA

- Determining whether review proceedings can be instituted in conjunction with tariff appeal proceedings
- Bringing (and keeping) home the bacon: SARS' repatriation and collection powers affirmed



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Determining whether review proceedings can be instituted in conjunction with tariff appeal proceedings

The Constitutional Court recently handed down its judgment in *Commissioner for the South African Revenue Service and Another V Richards Bay Coal Terminal (Pty) Ltd* (CCT 104/23) [2025] ZACC 3 (31 March 2025) (RBCT).

Focal points of the matter

The case dealt with tariff determinations in the Customs and Excise Act 91 of 1964 (Customs Act). Section 47(9)(e) of the Customs Act states that an appropriate remedy in a tariff dispute is a tariff appeal to the High Court (although it does not confine remedies to a tariff appeal). However, in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) (read with section 33 of the Constitution of South Africa), or alternatively, the principle of legality, the right to administrative action which is lawful, reasonable and procedurally fair is guaranteed. It is notable that PAJA and the Constitution were enacted **after** the Customs Act.

In this regard, Rule 53 of the South African High Court Proceedings facilitates and regulates review applications, requiring the decision-maker to deliver a complete record of the proceedings to the court (and the applicant). This is so that the aggrieved person can have sight of the record in order to establish whether the decision was taken lawfully, reasonably and procedurally fairly. The judgment in RBCT deals with whether review proceedings (and provision of a record by the decision-maker) are allowed in tariff disputes in conjunction with a tariff appeal.

The order

The matter was heard before nine Constitutional Court judges on 5 August 2024 and the judgment was delivered on 31 March 2025, stating as follows:

"On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, KwaZulu-Natal Division, Durban):

1. *Leave to appeal is granted.*
2. *The appeal is upheld.*
3. *The orders of the High Court and the Supreme Court of Appeal are set aside*

and substituted with the following:

- '(a) The application in terms of rule 30A is referred to the High Court for redetermination and, in doing so, the High Court is required to:*
 - (i) determine whether, regard being had to the existence of a wide appeal under section 47(9)(e) of the Customs and Excise Act 91 of 1964, the respondent has made out a case justifying the exercise of that court's review jurisdiction.*
 - (ii) make an order arising from that determination and of the kind contained in [145] of this judgment.'*
4. *The parties are ordered to pay their own costs in this court, the Supreme Court of Appeal and the High Court."*

The full judgment can be found [here](#).

**TAX & EXCHANGE CONTROL
ALERT**

Determining whether review proceedings can be instituted in conjunction with tariff appeal proceedings

CONTINUED



Overview

The South African Revenue Service (SARS) submitted that a taxpayer seeking to challenge a tariff determination under the Customs Act is confined to the remedy of an appeal under section 47(9)(e), and may not challenge the tariff determination by way of judicial review (which review includes the request from the decision-maker of the record in taking its decision). This matter is of general public importance because it will impact the rights of all taxpayers wanting to challenge a tariff determination and also has vast implications for the administration of justice, the efficiency of trade, revenue for the fiscus and judicial resources.

The High Court and the Supreme Court of Appeal both disposed of the matter on the basis that the High Court's review jurisdiction was not ousted, and that nothing precluded Richards Bay Coal Terminal (RBCT) from seeking review relief together with the wide tariff appeal. It was on this basis that those courts found that RBCT was entitled to a record under Rule 53.

The Constitutional Court found that it would have been incumbent upon the High Court to determine whether to exercise its review jurisdiction, and, in doing so, satisfy itself that RBCT had advanced sufficient reasons why it would have been entitled to proceed by way of review. The High Court would also have had an opportunity to determine which rule RBCT ought to rely on to obtain documents from SARS flowing from its conclusion relating to the exercise of its review jurisdiction.

The Constitutional Court further found that the High Court did not undertake such an enquiry, largely because it laboured under the belief that it did not have discretion as to how it could exercise its review jurisdiction.

Under those circumstances, the question of whether review is applicable in the circumstances must first be made by the High Court. The Constitutional Court would not be in a position to do so, largely because it has not had the benefit of argument or submissions on that issue. Under these circumstances it would be appropriate to set aside the orders of the High Court and the Supreme Court of Appeal and, in their place, make an order remitting the matter to the High Court to deal with in accordance with the principles set out in this judgment.

Therefore, it remains uncertain whether review proceedings may be instituted in conjunction with tariff appeal proceedings as the court must take a decision in each case on the merits as to whether review proceedings are applicable in the circumstances.

Petr Erasmus and Savera Singh

**TAX & EXCHANGE CONTROL
ALERT**

Bringing (and keeping) home the bacon: SARS' repatriation and collection powers affirmed

Sections 180, 184(2) and 186(3) of the Tax Administration Act 28 of 2011 (TAA) grant the South African Revenue Service (SARS) significant powers to recover tax debts from third parties responsible for a taxpayer's failure to pay outstanding tax debts. In the recent case of *Greyvensteyn v Commissioner for South African Revenue Service and Others (B2495/2023) [2025] ZAGPPHC 128*, the applicant unsuccessfully challenged the constitutionality of these provisions. The High Court dismissed the application and emphasised that, while SARS' powers and duties of recovery of taxes are not absolute, the recovery of taxes is crucial to ensure that the public benefit and public interest are served.

Background

SARS sought to hold the applicant, Mr Greyvensteyn, personally liable for approximately R3 billion of tax debts of Gold Kid Trading (Pty) Ltd (Gold Kid). This was on the basis of section 180 of the TAA and the applicant's control and/or regular involvement in the management of the overall financial affairs of Gold Kid.

In February 2023, SARS obtained an order against the applicant and Gold Kid for the preservation and repatriation of their assets in terms of sections 163 and 186 of the TAA (the order). The order also required the applicant to surrender his passport to the curator bonis appointed to preserve the assets.

Although the applicant disputed SARS' claims against him, his application in this case pertained not to the dispute but to the constitutionality of sections 180, 184(2) and 186(3) of the TAA.

Constitutionality of SARS' powers to determine a third party's liability

The applicant contended that section 180, read with section 184(2) of the TAA, allows SARS to resort to self-help, as SARS is tasked both with investigating and making a finding on whether a third party is personally liable for a taxpayer's tax debts. This, according to the applicant, undermines the right to access court, as the jurisdiction of the Tax Court (see our previous alert of 20 April 2023 [here](#)) is excluded, since liability under section 180 does not arise from an assessment, and SARS' finding can only be reviewed and not appealed.

The court rejected the applicant's argument and emphasised that SARS' decisions under sections 180 and 184(2) of the TAA amounted to administrative action for purposes of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Not only must SARS provide a third party with an opportunity to make representations prior to making a decision (protecting the third party's audi alteram partem right), but the decision itself is subject to judicial review of both its process and substance, and potentially also to appeal. (See our previous alert of 14 July 2022 [here](#) for more on the interplay between the TAA and PAJA.)

Accordingly, the court found that section 180 read with section 184(2) of the TAA does not oust the jurisdiction of a court and does not infringe on section 34 of the Constitution.

**TAX & EXCHANGE CONTROL
ALERT**

Bringing (and keeping) home the bacon: SARS' repatriation and collection powers affirmed

CONTINUED



Constitutionality of the repatriation and travel restriction provisions

Regarding the challenge to section 186(3) of the TAA, the court noted that the effect of the order was to limit the applicant's ability to travel outside South Africa, and to prevent him from dealing with his assets. This limited the applicant's rights in sections 21 and 22 of the Constitution.

While recognising that the rights to freedom of movement and freedom of trade hold an important place in our constitutional order, the court emphasised that the effective and efficient recovery of taxes (by restricting persons from dealing with assets and leaving South Africa to escape tax liabilities) is vital to maintain the fiscus in South Africa and ultimately to serve the public interest.

Having regard to the safeguards accompanying the order, such as the appointment of a curator bonis, and the fact that less restrictive means were not likely to have been effective in this case, the court found that the limitation of sections 21 and 22 of the Constitution by section 186(3) of the TAA was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and therefore passed the test in section 36(1) of the Constitution.

Conclusion

This judgment confirms that while SARS' powers and duties of recovery of taxes are not absolute, the third-party liability and repatriation provisions of sections 180, 184(2) and 186(3) of the TAA are lawful and constitutional. SARS will be happy to be able to bring home (and keep home) the bacon.

Heinrich Louw and Theodore Pauw



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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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