**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**WESTERN CAPE DIVISION, CAPE TOWN**

**Case no. A88/2023**

Before: The Hon. Mr Justice Binns-Ward
The Hon. Mr Justice Nuku
The Hon. Ms Justice Slingers

Hearing: 22 January 2024
Judgment: 2 April 2024

In the matter between:

**CANDICE-JEAN POULTER** Appellant

and

**THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** Respondent

**JUDGMENT**
**Delivered by email and listing on SAFLII**

**BINNS-WARD J (NUKU and SLINGERS JJ concurring):**

**Introduction**

[1] The appellant has come on appeal to this Court from a decision of a tax court confirming the 'original assessment' of her taxable income for 2018 and ordering her to pay the Commissioner's costs on the scale as between attorney and client, including the fees of two counsel. The tax court's orders were made without hearing the taxpayer (who did not attend the proceedings in that court) or her father, Mr Gary van der Merwe, who sought audience there as the taxpayer's authorised representative.

[2] Relying on the judgments of the Supreme Court of Appeal (SCA) in *Commissioner for the South African Revenue Service v Candice-Jean van der Merwe* and a full court in this Division in *Commissioner for the South African Revenue Service v Poulter In re: Poulter v Commissioner for the South African Revenue Service*, the tax court held that Mr van der Merwe, who is not a legal

practitioner, was not entitled to appear in the Tax Court.

[3] It bears mention that at an interlocutory stage of the proceedings in the tax court another judge, who was then presiding in the matter, had made a ruling that provided, insofar as currently relevant:

'2. The appellant is to appear on her own behalf or to be represented by an entitled representative who has a right of appearance in the High Court as an attorney or an advocate;

3. Mr Gary van der Merwe is not entitled to appear on behalf of the appellant in that s 125(2) of the Tax Administration Act 28 of 2011 has been repealed.'

An appeal was noted against paragraphs 2 and 3 of the order but it became waylaid by further interlocutory challenges by the Commissioner and – assuming that it was appealable, as to which I have my doubts – was ultimately not prosecuted to a hearing on its merits.

[4] The tax court indicated that, in making the orders that are the subject of the current appeal, it was proceeding, at the request of the Commissioner, in terms of rule 44(7) of the then applicable rules of the Tax Court. Rule 44(7) provided:

'If a party *or a person authorised to appear on the party's behalf* fails to appear before the tax court at the time and place appointed for the hearing of the appeal, the tax court may decide the appeal under section 129(2) upon-

*(a)* the request of the party that does appear; and

*(b)* proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party *or absent party's representative*,

unless a question of law arises, in which case the tax court may call upon the party that does appear for argument.'

(Emphasis supplied.)

Section 129(2) mentioned in the subrule is the provision in the Tax Administration Act 28 of 2011 (TAA) that provides:

'In the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in section 117(3), the tax court may-

*(a)* confirm the assessment or "decision";

*(b)* order the assessment or "decision" to be altered;

*(c)* refer the assessment back to SARS for further examination and assessment; or

*(d)* make an appropriate order in a procedural matter.'

The word 'decision' used in s 129(2) is defined to mean 'a decision referred to in section 104(2)', viz. *(a)* a decision under subsection 104(4) not to extend the period for lodging an objection; *(b)* a decision under section 107(2) not to extend the period for lodging an appeal; and *(c)* any other decision that may be objected to or appealed against under a tax Act.

[5] The appeal from the Tax Court to this Court is brought in terms of s 133 of the TAA.

[6] The principal points argued by the appellant's counsel were that the tax court had been misdirected in holding that Mr van der Merwe, whose authority to do so was vouched by a power of attorney given by the taxpayer, was not entitled to appear on her behalf in that forum, and that the court in any event had erred in granting what he termed 'default judgment' without considering 'the evidence' that was before the court. By 'the evidence' counsel appears to have meant the content of the dossier provided for in rule 40 of the Tax Court rules.

[7] It was initially common ground before us that if the first mentioned point advanced on behalf of the appellant were good, the consequence would be that the proceedings in the tax court were vitiated on account of its failure to hear the appellant's authorised representative, and that accordingly the appropriate order for us to make would be to remit the tax appeal to the Tax Court for hearing *de novo*. The Commissioner's counsel, however, subsequently withdrew from that position and argued, in a context to be discussed presently, that the point was one that the appellant had been obliged to pursue in judicial review proceedings impugning the order described in paragraph 3 above, not an appeal in terms of s 133 of the TAA.

***The principles governing right of appearance in the Tax Court?***

[8] In *CSARS v Van der Merwe* supra, a matter in which Mr van der Merwe had

applied to appear on his daughter's behalf in the SCA in an appeal from the High Court in another of her tax disputes with the Commissioner, the appeal court held that he did not have the right to appear on her behalf in 'a court of law'. The finding was expressed as follows in paragraphs 45-46 of the judgment:

'[45] In terms of the common law, it is not permissible for a lay person to represent a natural person in a court of law. This common-law position now finds support in s 25 of the Legal Practice Act 28 of 2014, which provides in relevant part that:

"(1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising.

(2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law.'[]

[46] It follows that there is no discretion to allow a lay person to represent a natural person in a court of law. In *Shapiro & De Meyer Inc v Schellauf* [[2001] ZASCA 131 (27 November 2001) para 10] this Court accordingly held that the respondent's wife was not entitled to appear and argue the appeal on behalf of the respondent. There is no justification for this Court to depart from its established practice, which is in accordance with the common law. The pitfalls of a natural person being represented by a person who is not a legal practitioner are obvious. The clearest example that comes to mind is that the rules of this Court would not oblige such a lay representative to file a power of attorney. This could cause a party to subsequently deny the authority of the representative, to the detriment of the administration of justice. These are the reasons why this Court refused to grant Mr van der Merwe leave to represent the taxpayer.'

Mr van der Merwe had represented his daughter in that matter when it came before the tax court and in the appeal from that court to a full court in the High Court. The SCA did not pronounce on whether a layperson can represent a taxpayer in

proceedings in a tax court.

[9] The judgment in *CSARS v Van der Merwe* did not identify where in our common law it sourced the rule against permitting lay representation in courts of law. In *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* and *Lees Import and Export (Pvt) Ltd v Zimbabwe Broadcasting Corporation Ltd*, the SCA and the Supreme Court of Zimbabwe, respectively, traced the rule rather to a practice established in the English courts in the 18th century. As pointed out in both those judgments, the practice of limiting representative audience before courts of law to admitted legal practitioners manifests in many other jurisdictions throughout the world, such as England, Scotland, Ireland, Australia, New Zealand, Canada and Zimbabwe. The judgment in *Manong* identified the principled basis for the widespread practice of excluding lay representation in the superior courts as lying in the public interest that cases in those courts be presented by 'persons who observe the rules of their profession, are subject to a disciplinary code and are familiar with the methods and scope of advocacy to be employed in presenting argument'.

[10] In addition to section 25 of the Legal Practice Act mentioned in *CSARS v Van der Merwe*, counsel on both sides in the current matter made reference to s 33 of the Act, which provides as follows in relevant part:

'**Authority to render legal services**

(1) Subject to any other law, no person other than a practising legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward-

*(a)* appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or

*(b)* draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.

(2) …

(3) No person may, in expectation of any fee, commission, gain or reward, directly or

indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is a practising advocate, attorney, conveyancer or notary, as the case may be.'

We understood the appellant's counsel to argue that the provision supported Mr van der Merwe's right to appear on behalf of the taxpayer provided he did so without expectation of being compensated for doing so; whereas the Commissioner's counsel argued that it underscored the correctness of her contention that he was not on any account entitled to appear in the Tax Court, which she submitted was a 'court of law'.

[11] Section 33 is not a model of statutory draftmanship. It prohibits anyone who is not a legal practitioner from appearing for or acting for another or drafting documents for use by another in legal proceedings for reward or in expectation of reward, which might on the face of it be understood to allow a right of appearance by non-practitioners provided they exercise it free of charge. It is clear enough, however, on a contextual consideration, that the provision is indeed a generally prohibitory one, as contended by the Commissioner's counsel. It does not, by prohibiting appearances by laypersons *for reward*, afford them a general warrant to appear in any forum provided they do not do so for reward. Thus, s 33 does not afford a layperson a right to represent a company in a court of law that he otherwise did not possess merely because he acts without reward or the expectation of reward. It does not in any way derogate from or amend the law as pronounced in *Manong*. Section 33 is concerned with prohibiting persons who are not legal practitioners from acting as if they were legal practitioners. It is not directed at giving laypersons rights of appearance that they did not already enjoy; cf *Lees Import and Export* (supra, at 1123C-I) concerning the effect of the proviso to 9(2) of the Legal Practitioners Act (Z), which is analogous in my view. Section 33 is of interest, however, because of its employment, in subsection (1), of the term 'court of law', a concept that will be considered later in this judgment. Section 33 is of application to Mr van der Merwe's right of appearance in the Tax Court only if that court is a 'court of law' or if there is a statutory provision limiting the right of representative appearance in the Tax Court to

legal practitioners.

[12] The relevant part of *Shapiro*'s case cited in *CSARS v Van der Merwe* was an application by the respondent's wife to be joined as the second respondent in the appeal in that matter. The SCA described the application as 'an obvious ploy' to enable her to represent her husband at the hearing of the appeal. The court's observation in *Shapiro* that a natural person litigant could not be represented in court proceedings by his wife was supported with reference to *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956(1) SA 364 (A) at 365C and *Volkskas Motor Bank Ltd v Leo Mining Raise Bone CC* 1992(2) SA 50 (W).

[13] The decision in *Volkskas Motor Bank* concerned the irregularity of a notice of intention to defend an action signed by a natural person on behalf of the defendant who was also a natural person. The question turned on the effect of Uniform Rule 19, which required, in terms, that the notice be signed by the defendant or an attorney on its behalf. The judgment is accordingly not in point in the current matter.

[14] The question in *Yates* (which coincidentally also concerned an appeal to the Appellate Division in a tax dispute) was whether a litigant that was not a natural person (a registered company) could be represented in a superior court by a natural person who did not have right of appearance as an advocate. The Appellate Division answered it as follows:

'Mr. Prior and the appellant [the company] are different *personae*. A litigant is entitled to appear in person in any Division of the Supreme Court. The appellant, being an artificial person, cannot appear in person and must be represented by a duly admitted advocate: apart from certain statutory provisions which allow attorneys in very exceptional circumstances to appear in a Superior Court on behalf of a litigant only a duly admitted advocate can represent a litigant in a Superior Court. As far as the Appellate Division is concerned there are no statutory provisions which allow anybody who is not a duly admitted advocate to appear on behalf of a litigant.'

[15] In the case before us the principle stated in *Yates* begs the question whether the Tax Court is a superior court or a 'court of law' within the meaning of that term used in *CSARS v Van der Merwe* and the Legal Practice Act. If it is, the judgment in

the latter case would weigh heavily against the first of the appellant's counsel's forementioned main contentions. It would, however, not necessarily be dispositive of his argument because, as I shall explain, the view expressed in *CSARS v Van der Merwe* that even a superior court has no discretion in the matter is impossible to reconcile with the law as expressed the SCA's earlier judgment in *Manong* supra, to which the attention of the judges in *CSARS v Van der Merwe* does not appear to have been directed.

[16] In *Manong*, some half a century after the decision in *Yates*, in the post-Constitutional era, the SCA qualified the apparently absolute import of the judgment in *Yates*, holding that it was within the inherent powers of the superior courts to permit a layperson to represent a corporate litigant before them. Ponnan JA, writing for a unanimous court, relied in support of that conclusion both on the superior courts' common law inherent jurisdiction to regulate their own procedures in the interests of the proper administration of justice and the entrenchment of that power in s 173 of the Constitution.

[17] It is difficult to conceive why the discretionary power identified by the SCA in *Manong* in respect of permitting a layperson to appear on behalf of a juristic person should not also extend to allowing a layperson to represent another natural person. Whether the discretion would be more readily exercised in the first situation than the second is an entirely discrete consideration from the existence of the discretion. The judgment in *Manong* did hold, however, that cases in which some relaxation of the general rule against litigants being represented by laypersons might be considered were 'likely to be rare and their circumstances exceptional or at least unusual'.

[18] Whether the Tax Court possesses the discretionary power to permit lay representation in the course of regulating its own procedures depends on whether it is a superior court within the common law's understanding of the concept, i.e. a court with inherent jurisdiction to regulate its process and procedure and develop the common law. Such courts are undoubtedly 'courts of law'. The Tax Court is certainly not one of the courts to which s 173 of the Constitution applies.

[19] We were referred to a judgment of Southwood J in the Tax Court in *A (Pty)*

*Ltd and another v CSARS*, in which, in determining whether it was within the jurisdictional competence of a tax court to rule on the constitutional compatibility of a statutory provision, the learned judge held that the Tax Court was not 'a court of similar status' to the High Court within the meaning of s 166(e) or s 172(2)(a) of the Constitution. We respectfully agree with that conclusion and with the reasons given in the judgment for arriving at it. In our view, the learned judge's conclusion necessarily also implies that the Tax Court is not a superior court in the relevant sense. That narrows the enquiry in the current matter to whether a tax court is nevertheless a court of law. The tax court in *A (Pty) Ltd* was not concerned with that question. The fact that it is evident that the quite different question before the tax court in *A (Pty) Ltd* was decided on the common assumption by Southwood J and the parties to the case that the Tax Court was a court of law is consequently by the bye.

**What makes a court a 'court of law'? : The pertinent jurisprudence**

[20] Turning then to the question whether the Tax Court is 'a court of law' within the meaning of that term used in *CSARS v Van der Merwe* or s 33 of the Legal Practice Act. No authority was cited by either side that is directly in point on the question.

[21] It was acknowledged in the majority judgment of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* that '[i]n form, characteristics and functions, administrative tribunals straddle a wide spectrum. At one end they implement or give effect to policy or to legislation. At the other, some tribunals resemble courts of law'. Navsa AJ illustrated the proposition with reference to the late Appellate Division's judgment in *South African Technical Officials' Association v President of the Industrial Court and Others* (*SATOA*), in which '[t]he old Industrial Court established in terms of the Labour Relations Act 28 of 1956, although performing functions similar to that of a court of law, was regarded as administrative in nature'. The late Appellate Division's judgments in *SATOA* (concerning the industrial court) and *Commissioner for Inland Revenue v City Deep Ltd* (concerning the special court established under the then applicable Income Tax

Act 41 of 1917) illustrate, consistently with the foreign jurisprudence considered later in this judgment, that the mere fact that the Tax Court is called a court by name does not, by itself, justify its characterisation as a court of law. In *Minister of the Interior and Another v Harris and Others*, Schreiner JA observed that '[i]t is not easy to draw a clear line of demarcation between tribunals which are and those which are not Courts of Law'. As I shall seek to demonstrate, the relevant South African jurisprudence, consistently with the English and Commonwealth cases, seems to suggest that the basis for demarcation is the predominant character of the institution's functions.

[22] The manner in which the question was approached in a not dissimilar context by the Australian Courts and, on appeal from them, by the Privy Council, was to ask whether the Board of Review established to review assessments by the Commissioner under the Income Tax Assessment Act, 1922 (Cth) and a 1925 amending statute was an institution 'exercising the judicial power of the Commonwealth' or 'merely a tribunal engaged in the administration of the statutes';

see *Shell Company of Australia Ltd v Federal Commissioner of Taxation*. The question arose because if the Board was a court, properly so called, its establishment would have been incompatible with the provisions of the Constitution of the Commonwealth of Australia concerning the judiciary.

[23] In *Shell v Federal Commissioner*, the Privy Council (per Lord Sankey LC) observed:

'The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power. It is conceded in the present case that the Commissioner himself exercised no judicial power. The exercise of such power in connection with the assessment commenced, it was said, with the Board of Review, which was in truth a Court.

In that connection it may be useful to enumerate some negative propositions on this subject:

1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision.

2. Nor because it hears witnesses on oath.

3. Nor because two or more contending parties appear before it between whom it has to decide.

4. Nor because it gives decisions which affect the rights of subjects.

5. Nor because there is an appeal to a Court.

6. Nor because it is a body to which a matter is referred by another body.

(See *Rex v Electricity Commissioners* [1924], 1 K.B. 171).'

[24] The aforementioned 'negative propositions'– I would prefer to label them 'inconclusive features'– all but the last of which might apply to the Tax Court, were referred to by the Appellate Division with apparent approbation in *SATOA* supra. In a more recent case, Lord Edmund-Davies ventured the following additions to Lord Sankey's list as features that, in themselves, were inconclusive for the proper characterisation of a particular tribunal as a 'court of justice': '(1) The fact that the tribunal is called a "court," as in the case of the local valuation court. (2) The necessity of sitting in public. (3) The fact that the tribunal has power to administer oaths and hear evidence on oath.[] (4) The fact that prerogative writs may issue in relation to the tribunal's proceedings. (5) The fact that absolute privilege against an action for defamation protects those participating in its proceedings'. But, as Lord Diplock noted in *Ranaweera v Ramachandran*, Lord Sankey's list '… throws little light upon what characteristics *are* conclusive either of [a tribunal] exercising judicial functions or of its exercising executive or administrative functions'. The same might be said, with respect, of Lord Edmund-Davies additions to it.

[25] In *Attorney-General v BBC*, Lord Edmund-Davies was also not persuaded that a local valuation court established in terms of the English General Rate Act, 1967 and its statutory predecessor, the Local Government Act, 1948, was a court because it had to 'discharge its duties in a "judicial" manner' and because '… its decisions … amount to a declaration which is binding on those concerned'. The learned Law Lord considered those features also characteristic of the decisions of any number of

institutions that carried out administrative functions. Having touched upon a wide range of *indicia*, including virtually all of those advanced by the Commissioner's counsel in support of their contention in the current case that a tax court is a court of law, Lord Edmund-Davies concluded, somewhat unhelpfully for our purposes: 'At the end of the day it has unfortunately to be said that there emerges no sure guide, no unmistakeable hallmark by which a "court" or "inferior court" may unerringly be identified'. What is evident from the cases, however, is that determining whether an adjudicative body is a court of law or not has historically been assessed with reference to a number of criteria such as the nature of its composition, the security of tenure and independence of the adjudicators or presiding officers, and, most importantly, it would seem, the essential character of its functions, for example whether those are predominantly judicial or administrative in character.

[26] In the same case, Lord Scarman favoured the view that 'the existence of a judicial function did not necessarily make the body to which it was entrusted "a court in law"'. Referring approvingly to the judgments of the Court of Appeal in *Reg. v Assessments Committee of St Mary Abotts, Kensington* [1891] 1 QB 378 and *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, he pointed out that in both those cases 'the judges stressed the importance of *the purpose* which the judicial function was intended to serve. If it be administrative, the body would not be a court in law'.

[27] That approach seems consistent with that of the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, where, in a discussion about the means of determining whether particular governmental action constituted 'administrative action', it was held that the focus should be not on the character of the position of the functionary who carried out the function but on the nature of the power that the relevant actor exercised. Accordingly, if the function of the Tax Court is entirely or predominantly administrative, that would militate strongly against its characterisation as a court of law notwithstanding that it is presided over by a member of the judiciary and its proceedings are conducted in a judicial manner.

[28] Lord Scarman also considered it to be significant for arriving at his conclusion that a local court of valuation was not a court of law that a decision of the court did not create an estoppel *per rem judicatam*. The same position applies in respect of the decisions of the Tax Court. On substantive matters, they determine a taxpayer's tax liability in the given case but they do not create binding precedent for any other assessment by the Commissioner on identical facts nor (whilst they are often persuasive) for the determination of the same question by any other tax court or board in a subsequent case. That cannot be a conclusive consideration, however, for the same applies in respect of the judgments of the magistrates courts, which are indisputably courts of law. It is significant, however, to consider why the judgments of the Tax Court are effective only in respect of the individual cases in which they are given, and not generally. The answer is, I think, provided in the reasoning of the House of Lords in *Society of Medical Officers of Health v Hope (Valuation Officer)* [1960] AC 551 (HL).

[29] In *Hope*'s case, the House of Lords held that decisions by the valuations court on appeal from rating determinations by the valuation officer did not create an estoppel *per rem judicatam* in respect of any subsequent rating determination by the officer on the same facts. Observing that the position of the valuation court under the applicable rating legislation was closely analogous with the system of annual personal taxation, Lord Radcliffe addressed the issue as follows:

'One consideration is that the jurisdiction of the tribunal to which the decision belongs by the administrative scheme [in this case, the Tax Court] is a limited one. It is limited in the sense that its function begins and ends with that of deciding what is to be the assessment of a person for a defined and terminable period. "The assessment seems inherently to be of a passing nature." For the purpose of arriving at its decision, the tribunal may well have to take account of, and form its own opinion, on questions of general law; it may even have necessarily to consider one or more of such questions: but in either case the view adopted with regard to them is incidental to its only direct function, that of fixing the assessment. For that limited

purpose it is a court with a jurisdiction competent to produce a final decision between the parties before it: but it is not a court of competent jurisdiction to decide general questions of law with that finality which is needed to set up the estoppel per rem judicatam that arises in certain contexts from legal judgments.'

As will be apparent from what is said elsewhere in this judgment concerning the narrowly defined jurisdiction of the Tax Court, which, on substantive matters, is to ultimately determine a taxpayer's liability for assessed taxes, Lord Radcliffe's observations seem to me to be in point. They serve to demonstrate why, as discussed later in this judgment, our jurisprudence classified the Tax Court's statutory predecessor, the special tax court, as 'a court of revision', not 'a court of law'.

[30] Lord Scarman remarked in *Attorney-General v BBC* that '[i]t ill behoves a judge to say that what Parliament says is a court is not a court'. He immediately qualified that statement, however, by proceeding, 'But, in my judgment not every court is a court of judicature, i.e. a court in law. Nor am I prepared to assume that Parliament intends to establish a court as part of the country's judicial system whenever it constitutes a court. The word "court" does in modern English usage, emphasise that the body so described has judicial functions to exercise; but it is frequently used to describe bodies which, though they exercise judicial functions, are not part of the judicial system of the Kingdom. … When, therefore, Parliament entrusts a body with a judicial function, it is necessary to examine the legislation to discover its purpose. The mere application of the "court" label does not determine the question; nor, I would add, does the absence of the label conclude the question the other way'.

**The South African judicial system**

[31] Section 166 of the Constitution identifies the courts of law in our judicial system. The Tax Court is plainly not a court referred to in s 166(a) to (d) of the provision. In order to be characterised as a court of law, the Tax Court would therefore need to qualify as an institution within the ambit of s 166(e), namely 'any

other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts'.

[32] Being mindful of the reasoning in the cases reviewed in the preceding section of this judgment, assists, I think, in the proper construction of s 166(e) of the Constitution. It supports the conclusion that the provision's words 'any other court established or recognised in terms of an Act of Parliament' denote any other court intended by Parliament to be part of the country's 'judicial system'. They do not pertain to a tribunal intended to serve an administrative purpose, even if it is labelled as a 'court' by the legislation in terms of which it is established, and even if, in fulfilling its administrative role, it is required to act judicially.

[33] Such an interpretation is compatible with the separation of powers between the legislative, executive and judicial branches of government that is reflected in the constitutional framework. It is also supported by the section's subheading, 'Judicial system' and its setting in Chapter 8 of the Constitution, which is concerned with 'Courts and Administration of Justice'. Chapter 8 is quite discrete in its subject matter from the chapters concerned with the establishment and functioning of the legislative and executive branches of government. As its title predicts, it is devoted solely to the establishment and workings of the judicial arm of government and the administration of justice.

[34] The proposition that the Tax Court would need to be part of the constitutionally created 'judicial system' to be properly characterised as a court of law also finds support in the reasoning of the Constitutional Court in *Sidumo* supra, of its conclusion that the CCMA is not a court of law. See, in particular, Navsa AJ's endorsement of Currie and De Waal's statement that 'The CCMA is not a branch of the judiciary and does not exercise judicial power. Rather, the exercise of the compulsory arbitration power is an exercise of public power of an administrative ("governmental") nature. The arbitration power is designed to fulfil the primary goal of the Act which is to promote labour peace by the effective settlement of disputes. It does so with an element of compulsion, corresponding to the traditional government/

governed relationship'. As I shall demonstrate, when I come, presently, to review its statutory context, the Tax Court functions as a body of ultimate assessment in terms of the TAA. Stepping into the shoes of the Commissioner for that purpose, it fulfils an administrative function directed at achieving one of the important goals of the Act, namely the correct assessment and recovery of taxes.

[35] The Tax Court is a creature of statute. Provision for its establishment is made in terms of s 116 of the TAA, which provides:

'**Establishment of tax court**

(1) The President of the Republic may by proclamation in the *Gazette* establish a tax court or additional tax courts for areas that the President thinks fit and may abolish an existing tax court as circumstances may require.

(2) The tax court is a court of record.'

[36] A tax court is accordingly established by the President, not directly by the TAA. It is, however, arguable on a purely textual predicate that it is a court 'recognised in terms of an Act of Parliament' within the meaning of s 166(e) of the Constitution. A tax court has jurisdiction to decide appeals in terms of s 107 of the TAA and may determine any procedural questions arising in respect of such appeals. Those characteristics on the face of it, and in isolation, satisfy the qualifying criteria in s 166(e) of the Constitution, but they are insufficient by themselves to answer the question whether what has been established by the Act of Parliament in question is indeed a court within the state's judicial system, i.e. a 'court of law'.

[37] A tax court is ordinarily composed of three members, the president of the court and an accountant member and a commercial member. The president of the court is nominated by the judge president of the division of the High Court at the place in which the tax court will sit. The president so nominated must be a judge or acting judge of the division concerned, who is seconded to the tax court either to preside in a particular appeal or for a period of time, as determined by the relevant judge president. Three judges may be appointed if the amount in dispute exceeds R50 million or SARS and the appellant jointly apply for the court to be so constituted.

[38] The accountant member and commercial member are selected from a panel of suitably qualified persons appointed by the President of the Republic in terms of s 120 of the TAA. The Act does not specify how the non-judicial members of a tax court are to be selected. Each of us, having previously been seconded to preside in a tax court from time to time, is able to say from experience that the accounting and commercial members are chosen by the nominated president of the court from a list of three panel members in each category submitted to the president by the registrar of the Tax Court. We assume, but do not know for certain, that the list submitted to the president is compiled by the registrar on a rotational basis.

[39] The TAA provides that when an appeal involves a complex matter that requires specific expertise and the president of the tax court so directs, after considering any representations by a senior SARS official or the appellant, the commercial member may be a person with the necessary experience in that field of expertise. It also provides that when an appeal involves the valuation of assets, and the president of the tax court, a senior SARS official or the appellant so requests, the commercial member must be a sworn appraiser. It is not clear, however, whether the specially qualified members contemplated for such matters are to be selected from the panellists appointed in terms of s 120 of the TAA or on an ad hoc basis. One can understand that the President of the Republic might be expected to be mindful of the possible need for sworn appraisers to be appointed to the panel, but it is difficult to conceive how the President might be expected to anticipate and cater for all the areas of special expertise that might be germane to the decision of an infinite variety of different types of 'complex matters' that could present for determination. The latter consideration suggests that ad hoc appointments are contemplated.

[40] The panellists appointed in terms of s 120 of the TAA must be persons of good standing and 'appropriate experience'. They hold office for a term of five years, which is renewable in the discretion of the President. They can also be called upon to serve on the Tax Board, constituted in terms of s 108 of the TAA. The Tax Board is chaired by a legal practitioner appointed by the Minister of Finance, in consultation

with the relevant judge president. He or she is selected from a panel of suitably qualified legal practitioners.

[41] Subsection 120(6) of the TAA provides that 'A member of the tax court must perform the member's functions independently, impartially and without fear, favour or prejudice'. It is evident from the context that the subsection pertains only to the non-judicial members of a tax court. The president of the court is bound to act independently and impartially by virtue of the oath of office that all judicial officers must take in terms of s 174(8) read with Item 6 of Schedule 2 of the Constitution. There is no provision that the non-judicial members of a tax court must take an oath of office.

[42] The Tax Board fulfils exactly the same dispute resolution functions as a tax court. The differences between the two are that the Tax Board's jurisdiction is restricted to matters in which the tax in dispute in issue concerns a lesser amount, and proceedings before the Board are less formal and not a matter of record. Any party dissatisfied with the outcome of proceedings before the Tax Board can require the dispute to be adjudicated afresh before a tax court. Compatibly with the less formal character of proceedings before the Tax Board, a taxpayer is ordinarily required to appear in person (i.e. unrepresented) in that forum, save where the tax return involved was prepared by 'a third party', in which event that 'third party' may appear on the taxpayer's behalf. Clearly the 'third party' concerned is not required to be a legal practitioner, nor, indeed, to hold any professional qualification.

[43] Section 125(1) of the TAA provides that a 'senior SARS official referred to in section 12 may appear at the hearing of an appeal in support of the assessment or 'decision'. Section 12 qualifies the effect of s 125(1) by providing that only a senior SARS official who has been admitted as a legal practitioner may appear in a tax court or in the High Court. Any senior SARS official may, however, appear ex parte before a judge in chambers in a tax court or in the High Court. The qualification that senior officials appearing in a tax court must be admitted legal practitioners was introduced by virtue of an amendment to s 12 introduced with effect from 15 January 2020. The explanatory memorandum to the bill that introduced the amendment

stated that the amendment was proposed 'consequential to the coming into effect [on 1 November 2018] of the Legal Practice Act, 2014'. Accordingly, it would appear that the statutory draftsperson had s 33 of the Legal Practice Act in mind, and considered the tax court to be a 'court of law' as referred to in that provision. The draftsperson's conception is, of course, not determinant of the characterisation. Whether it was well-founded or not is a question of law, and for a court to decide if the question arises for determination.

[44] The registrar of the Tax Court is an employee of the South African Revenue Service, who is appointed to the office by the Commissioner, as are the other persons working in the registrar's office. They are enjoined by s 121(3) of the TAA to 'perform their functions under this Act and the "rules" independently, impartially and without fear, favour or prejudice'.

[45] The sittings of a tax court are not open to the public. The president of the tax court may in exceptional circumstances, on request of any person, allow that person or any other person to attend the sitting but may do so only after taking into account any representations that the appellant and a senior SARS official appearing in support of the assessment or decision, wishes to make on the request. In contrast, the general rule, subject to exception in special cases or where expressly otherwise provided by statute, is that courts of law sit and determine cases in public. The practice gives effect to s 34 of the Constitution. It is underwritten, for example, in s 32 of the Superior Courts Act 10 of 2013, s 5 of the Magistrates' Court Act 32 of 1944 and s 160 of the Labour Relations Act 66 of 1995 in respect of the Labour Court (which is expressly characterised as a 'court of law'). The provision concerning the exclusion of the public from the sittings of the tax court appears to be an extended manifestation of the administrative duty of confidentiality imposed on the Commissioner and the employees of SARS in terms of Chapter 6 of the TAA. Equivalent constraints against publicity do not apply should the dispute proceed on appeal from the Tax Court to either the High Court or the SCA, where the litigation becomes subject to the same degree of public scrutiny that ordinarily attends proceedings in courts of law. The TAA does, however, provide that the judgments of

the Tax Court must be published in a form that precludes identification of the appellant.

[46] Section 105 of the TAA limits a taxpayer's right to dispute an assessment or 'decision' as referred to in s 104, outside the fora domestically provided under the Act, save with leave granted by the High Court. The limitation is closely comparable in effect to that provided in terms of s 7(1)(c) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which requires persons aggrieved by allegedly unlawful administrative action to exhaust their internal remedies before approaching a court of law for judicial review and consequential relief. The jurisprudence shows that, as in the case of s 7(1)(c) of PAJA, leave in terms of s 105 of the TAA will be granted by the High Court only in exceptional circumstances. A dispute exclusively involving a question of law –something very unusual in the context of tax disputes – and accordingly, by its very nature, pre-eminently suitable for determination by a court of law rather than an administrative tribunal, will generally be accepted as deserving of leave in terms of s 105 of the TAA.

[47] The provisions of the TAA concerning the establishment and composition of the Tax Court and the Board and the nature of their functions appear to me to be in all material respects a reiteration of those that formerly applied in respect of the tax courts (colloquially called the 'Special Income Tax Court') and the tax board established in terms of Part III of Chapter 3 of the Income Tax Act 58 of 1962 prior to the repeal of that Part by the TAA.

[48] In *CIR v City Deep Ltd* supra, the Appellate Division stated that the special income tax court established under the 1917 Income Tax Act 'though a competent court to decide the issues between the parties, is not a court of law'. The judgment unfortunately does not contain an explicit explanation for that conclusion. The characterisation does, however, appear to have been accepted in subsequent cases. So, in *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue*, Centlivres CJ, with reference to the earlier judgment of the Appellate Division in *Bailey v Commissioner for Inland Revenue* and that of the Transvaal Provincial Division in *Benoni Board of*

*Executors v Commissioner for Inland Revenue* , explained that the special income tax court was a 'court of revision', rather than an ordinary court of appeal. It is apparent that by that the learned chief justice meant that, in deciding the relevant statutory appeals of which it became seized, the special court revisited the Commissioner's decision on its merits and could step into the latter's shoes to correct it: the special court 'could substitute its own decision for that of the Commissioner'. A court of law, by contrast, will, save in exceptional circumstances, be astute to avoid substituting an administrative authority's decision with that of its own. The constitutionally ordained separation of powers is fundamental to this manifestation of judicial deference to administrative decision-making; see e.g. *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*. It seems to me that the Appellate Division's approach in distinguishing the special tax court from courts of law in *CIR v City Deep Ltd* and the following cases was essentially the same as that reflected in the subsequent exposition in *Society of Medical Officers of Health v Hope* discussed earlier in this judgment.

[49] The Constitutional Court's treatment of the roll of the special income tax court in terms of the closely comparable provisions of the Value-Added Tax Act 89 of1991 in *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* is especially instructive for the purpose of the characterisation exercise that we are called upon to undertake. Kriegler J, writing for the Court, stated:

'Sections 33, 33A and 34 of the Act [subsequently repealed in terms of the TAA] deal with the statutory right afforded aggrieved vendors to challenge the rejection by the Commissioner of objections to assessments and associated decisions. Sections 33 and 33A provide that vendors may bring such challenges in either the Special Court or before a board; and s 34 allows a further resort to an ordinary court of law against decisions of the Special Court. The Act calls the proceedings before the Special Court/board (as well as the subsequent resort to a court of law) an 'appeal'. The Commissioner is not a judicial officer and assessments and concomitant decisions by the Commissioner are administrative, not judicial, actions; from which it follows

that challenges to such actions before the Special Court or board are not appeals in the forensic sense of the word. They are proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions - and appropriate corrective action - by a specialist tribunal'.

[50] Later in the same judgment, Kriegler J described proceedings in the special court as the first level of adjudication of tax disputes and, referring to the availability of appeals from that court to either the High Court or the SCA, remarked that proceedings in the Tax Court were the only level of adjudication that took place 'outside the normal forensic hierarchy'.

[51] The Value-Added Tax Act, in s 36(1), expressly distinguished between an appeal, in terms of the Act, to the Board or the Special Court and an appeal to 'a court of law'. Section 36 provided:

'Unless the Commissioner otherwise directs in terms of subsection (4)-

*(a)* the obligation to pay; and

*(b)* the right to receive and recover,

any tax, additional tax, penalty or interest chargeable under this Act shall not be suspended by any objection or appeal or pending the decision of a court of law.'

The 'appeal' referred to in s 36(1) was to the tax board or the special tax court and the pending 'decision of a court of law' was the decision of any court to which a decision of the tax court might be taken on further appeal, i.e. the High Court or the SCA.

[52] All of the aforementioned characteristics of the Tax Court, assessed in the light of the jurisprudence reviewed earlier, impel the conclusion that its function is essentially that of an administrative tribunal. The fact that it has been established as a 'court' and that it is called upon to discharge its functions in a judicial manner and appropriately constituted to be able to do so do not negate its role essentially as an administrative-decision maker. That role positions the Tax Court outside the judicial system provided in s 166 of the Constitution and confirms that tax courts are not courts of law.

[53] There is no basis to distinguish the characterisation of the tax courts in this

regard from the characterisation of their statutory predecessors by the Appellate Division and the Constitutional Court. As evident from the discussion earlier in this judgment, that jurisprudence is to the effect that the Tax Court is a 'court of revision', not a 'court of law'. This means that the judgments in cases like *Yates*, *Manong* and *CSARS v Van der Merwe* concerning representation by duly authorised laypersons have no application to appearances by such persons in the Tax Court. It also means that the provisions of the Legal Practice Act discussed earlier also do not apply, save to the extent that the legislation regulating the Tax Court might make them applicable.

**Are laypersons prohibited from representing taxpayers in the Tax Court?**

[54] It is necessary therefore to consider whether the legislation regulating the establishment and operation of the Tax Court makes any provision excluding the ability of a taxpayer to be represented there by a person who is not a legal practitioner with right of appearance in the courts of law.

[55] Prior to its deletion, with effect from 18 December 2017, s 125(2) of the TAA provided '"The appellant" or the appellant's representative may appear at the hearing of an appeal in support of the appeal'. There was no limitation on whom the appellant might appoint as 'representative'.

[56] It seems to me that the deletion of the provision did not make any practical difference to the position that obtained prior to its deletion. The deletion of the provision obviously cannot be understood to imply that the appellant was no longer entitled to appear at the hearing, for such an interpretation would bring about a situation that would offend against everyone's right to fair, just and reasonable administrative action. And the 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 s 125(2) as having such an effect.

[57] It is of no surprise therefore to read in the explanatory memorandum concerning the amendment that the deletion was regarded as '… a technical

correction. The right of the appellant or his or her representative to appear at the hearing before the tax board is implicit.' Whether an appellant is, or, before the deletion of s 125(2) of the TAA, was, entitled to representation by a person not enrolled as a legal practitioner was never affected by s 125(2). To the extent that paragraph 3 of the interlocutory order made in the tax court described in paragraph 3 above, implied otherwise, it was, with respect, clearly wrong.

[58] Apart from in the now deleted s 125(2), the TAA contains three other references to a taxpayer's 'authorised representative': in terms of s 25(2) a taxpayer's return under a tax act may be signed by a taxpayer's authorised representative in lieu of signature by the taxpayer; in terms of s 67(5), the Commissioner may, in order to protect the reputation and integrity of SARS, publish taxpayer information to rebut false allegations made in the public media by a taxpayer or its authorised representative; and in terms of s 73, a taxpayer's authorised representative is permitted to obtain the taxpayer's confidential information from the Commissioner by way of application in terms of the Promotion of Access to Information Act.

[59] In terms of the regulations governing objections and appeals made by the Minister of Finance in terms of s 103 of the TAA (i.e. the Tax Court Rules), an authorised representative may act on a taxpayer's behalf in submitting an objection, sign a notice of appeal on a taxpayer's behalf, sign a 'pleading' on the taxpayer's behalf, and may (with SARS's agreement or leave of the facilitator) represent a taxpayer before a facilitator in alternative dispute proceedings. A taxpayer's representative may also sign a notice of motion in a tax court or in a matter before the Tax Board in an application for judgment by default. These are all of the sort of actions that can only be done by a legal practitioner on behalf of a natural person litigant in a court of law. There is, however, no requirement in the regulations that the taxpayer's authorised representative must be an admitted legal practitioner.

[60] One would ordinarily expect that a representative with authority to initiate and plead an appeal on a person's behalf and apply for judgment in its favour would also be entitled to appear at the hearing on their principal's behalf. The regulations are

consistent with an understanding that proceedings in a tax court are not treated or regarded as proceedings before a court of law, for if they were one would expect to find reference to a taxpayer's 'legal representative' rather than to its 'authorised representative', 'representative' or 'representative of the appellant's choice'. The current iteration of the regulations was made some five years after the deletion of s 125(2) of the TAA.

[61] Rule 44(7), being the very provision in the regulations that the tax court purported to invoke in deciding the appeal to it in the current matter, s.v. 'Procedures in tax court', allows for the appearance at an appeal of a party 'or a person authorised to appear on the party's behalf… before the tax court at the time and place appointed for the hearing of the appeal'. Rule 44(7) has to be read subject to ss 12 and 125(1) of the TAA in respect of appearances on behalf of the Commissioner, but there are no such constraints on its application, according to its tenor, in respect of appearances on behalf of a taxpayer.

[62] As mentioned, there is nothing in the regulations to suggest that the references in them to a taxpayer's representative must be interpreted as being limited to a person admitted as a legal practitioner. Experience tells that in the past taxpayers have often been represented in proceedings before a tax court by an accountant or similarly qualified tax practitioner rather than a legal practitioner. As discussed above, the deletion of s 125(2) of the TAA did not alter the thitherto obtaining position, and evidently was not intended to.

[63] It is evident therefore that the tax court was misdirected in refusing to entertain Mr van der Merwe's appearance as the taxpayer's representative at the hearing of the appeal.

**Did the ruling made earlier described in paragraph 3 above nevertheless preclude Mr van der Merwe from being permitted to represent the taxpayer?**

[64] Counsel for the Commissioner contended, however, that Mr van der Merwe was precluded from appearing by virtue of the order made earlier in the proceedings described in paragraph 3 above. Ms *Southwood* SC submitted that if, as we have found, the Tax Court's functions are administrative in character because it is a court

of revision and not a court of law, the court's decisions stand until and unless set aside on judicial review; cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004). She argued that the tax court was bound by the procedural order it had made earlier in the appeal proceedings as the taxpayer had failed to have it reviewed and set aside.

[65] I have considerable doubt whether the ruling made at a previous stage of the proceedings had a final effect. Notwithstanding that the order in which the ruling was pronounced was formulated in generally declaratory terms, the judge who made it is most unlikely to have intended it to have that effect, for that would have been outside his jurisdiction. It is trite that tax courts do not give judgments *in rem*. It is evident, therefore, that the order was of a procedural nature. I consider that the tax court was accordingly entitled to recall it at any stage before it decided the appellant's tax appeal.

[66] But even if my view that the ruling was susceptible to recall, and should have been recalled, were unfounded, I consider that the ambit of the current appeal makes the tax court's failure to hear Mr van der Merwe a justiciable question before this Court. The appellant's complaint is that the tax court erred in making an order in terms of rule 44(7) of the Tax Court rules. As explained earlier in this judgment, the tax court was empowered to make such an order only '[i]f a party or a person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the appeal'. The ruling made earlier by another judge in the tax court at an earlier stage of the proceedings could not grant the court a warrant to make an order in terms of rule 44(7) when a person authorised to appear on the taxpayer's behalf appeared before it. The order that the tax court purported to grant in terms of rule 44(7) notwithstanding Mr van der Merwe's appearance as the appellant's representative at the hearing of the appeal was plainly outside its powers in terms of the subrule, and, consequently, susceptible to correction on appeal to this Court.

[67] A finding by this Court in the course of its *ratio decidendi* that a taxpayer is

entitled to be represented in proceedings before the Tax Court by a lay representative is a judgment *in rem* and consequently binding not only on the parties to the current proceedings but on all parties to appeals in the Tax Court. It is declaratory of the law. Accordingly, it overrides the effect of the ruling wrongly made at an earlier stage of her appeal in that Court that purported to preclude Mr van der Merwe from representing her.

[68] For all of the aforegoing reasons, the appeal must succeed and the order of the tax court granting judgment against the taxpayer must be set aside. It is not necessary in the circumstances for us to determine whether it was necessary for the tax court to engage with the content of the dossier before it granted judgment in terms of rule 44(7).

[69] An order will issue in the following terms:

1. The appeal is upheld with costs.

2. The order made by the tax court in terms of rule 44(7) of the rules made in terms of s 103 of the Tax Administration Act 28 of 2011 is set aside.

3. The appellant's appeal to the Tax Court in terms of s 107 of the Tax Administration Act is remitted to that Court for hearing *de novo* on a date to be determined by the registrar of the Tax Court.

**A.G. BINNS-WARD**
**Judge of the High Court**

**L. NUKU**
**Judge of the High Court**

**H. SLINGERS**
**Judge of the High Court**

**Appearances:**

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| | C.A.A. Louw |
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