

# THE LEGAL STATUS OF TAX TREATIES IN SOUTH AFRICA

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MARCH 2017

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## **ACKNOWLEDGEMENTS AND DEDICATION**

First and foremost I would like to thank the almighty God for giving me the ability to finalise this dissertation. Thank you to my family for allowing me the time to further my studies. Mrs Carika Fritz from the Department of Mercantile Law at the University of Pretoria, your guidance throughout this dissertation is truly appreciated. I dedicate this dissertation to my wife Sharilee, my daughter Shani and my son Erwee. You are my rock and my wings.

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# 1. CHAPTER 1: INTRODUCTION

## 1. BACKGROUND

Never underestimate a simple question. The value of this statement becomes clear when one is faced with the question - what is the legal status of a tax treaty in South Africa? One will quickly find yourself using words like, “but”, “if”, and “maybe”. A moment’s reflection will make you realise - You underestimated a seemingly simple but very important question.

The underestimation becomes more apparent when one starts considering other related questions that comes to mind that one have not considered before or have simply taken for granted. Some of those questions are: What is a tax treaty? Why is it important to determine the legal status of a tax treaty? Are there legal provisions about the status of a tax treaty? Is a tax treaty binding law? If a tax treaty is law, what is the position if the provisions of a tax treaty are in conflict with the law? These are important aspects when considering the legal status of a tax treaty and aspects that local and foreign tax advisers are confronted with when advising taxpayers on cross-border trade.

There are divergent views as to the status of a tax treaty. De Koker rightly states that while some are of the view that a tax treaty is nothing but a treaty that addresses tax issues with no special kind of status, others are of the view that a tax treaty is not a mere treaty but also constitutes domestic law that stands supreme at domestic level which has an effect on the rights and obligations of taxpayers.<sup>1</sup>

If one for a moment accepts that a tax treaty constitutes domestic law in the South African context, the logical next step will be to analyse the South African legal framework to be able to answers the other related questions. The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”) contains provisions, in section 231, dealing with international agreements. The Income Tax Act<sup>2</sup> (hereinafter referred to as “the

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<sup>1</sup> De Koker AP “Introduction” in De Koker AP and Brincker E (Eds) *Silke on International Tax* (2010) par 1.3. De Koker states that the first view is held by Lenz (1960) *The interpretation of double taxation conventions International Fiscal Association Congress* (footnote 7). De Koker further states that the latter view is the view of Professor Michael Edwardes-Ker *Tax Treaty Interpretation* (footnote 8).

<sup>2</sup> Act 58 of 1962.

Act”) also contains provisions, in section 108, dealing with international agreements. However, the legislation does not provide guidance in respect of a conflict between the Act and a treaty.<sup>3</sup> If one then turns to case law for guidance it seems that there are at least three different views.<sup>4</sup>

In the matter of *AM Moolla Group Ltd v Commissioner for the South African Revenue Service*<sup>5</sup> (hereinafter referred to as “the *Moolla* matter”) the court held that in the case of a conflict between an Act and a treaty, the Act must prevail.<sup>6</sup> In the matter of *Commissioner for the South African Revenue Service v Tradehold Ltd*<sup>7</sup> (hereinafter referred to as “the *Tradehold* matter”) the court had the view that that a treaty modifies the domestic law and must prevail over domestic law.<sup>8</sup> In the matter of *Glenister v President of the Republic of South Africa*<sup>9</sup> (hereinafter referred to as “the *Glenister* matter”) the minority expressed the view that in the case of conflict between a treaty and domestic law “the conflict must be resolved by the application of the principles of statutory interpretation and superseding of legislation”.<sup>10</sup>

These nuances form the background of this study.

## 2. RATIONALE FOR THE STUDY

To determine the tax liability of any person the first port of call is the Act and more specifically the definition of “gross income” as contained in section 1(1) of the Act.<sup>11</sup> “Gross income” is defined to mean:

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<sup>3</sup> Benhardt LJ (2013) *The interpretation of South African double taxation agreements under international law*, LLM dissertation, University of Pretoria 84.

<sup>4</sup> Du Plessis I (2014) *A South African perspective on some critical issues regarding the OECD model tax convention on income and on capital, with special emphasis on its application to trusts*, Phd thesis, University of Stellenbosch 118.

<sup>5</sup> 2003 65 SATC 414.

<sup>6</sup> *AM Moolla Group Ltd v Commissioner for the South African Revenue Service* 2003 65 SATC 414 par 15.  
<sup>7</sup> 2012 3 All SA 15 (SCA).

<sup>8</sup> *Commissioner for the South African Revenue Service v Tradehold Ltd* 2012 3 All SA 15 (SCA) par 17.

<sup>9</sup> 2011 3 SA 347 (CC).

<sup>10</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 101.

<sup>11</sup> Costa D and Stack L “The relationship between double taxation agreements and the provisions of the South African Income Tax Act” (2014) *JEFS* 271.

- (i) “in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
- (ii) in the case of any other person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic”.

Accordingly, a resident of South Africa may be taxed on all income received by or accrued to such resident from sources from all over the world. As it is possible that an amount is received by or accrued to a South African resident from another country (source) outside of South Africa such amount may then be taxed in that country because of the legislative prescripts of that country. Because of the definition as mentioned above, and since the taxpayer is a South African resident, the same amount may be taxed in South Africa. A similar situation can arise with regards to a non-resident. An amount received by or accrued to a non-resident from a South African source may be taxable in South Africa, while also taxable in the country where the taxpayer is a resident.

The circumstances referred to above is generally referred to as double taxation. One of the key purposes of a tax treaty between two countries is to provide relief from a situation where double taxation occurs. Arnold opines that “the most important operational objective of bilateral tax treaties is the elimination of double taxation. Most of the substantive provisions of the typical bilateral tax treaty are directed at the achievement of this goal”.<sup>12</sup> Therefore, a tax treaty, by its very nature, does not impose taxes, but rather provides relief from double taxation by assigning a taxing right to a specific country. It is only the Act that can impose income tax.<sup>13</sup> From the aforesaid it becomes apparent that a tax treaty can limit South Africa’s right to tax both residents and non-residents. This is done when a treaty assigns a taxing right to another country.

Trade between South African residents and non-residents increased over the past years.<sup>14</sup> Further, in 2001 there were approximately 1000 treaties in force worldwide.<sup>15</sup> The growth of tax treaties over the past decade was exponential, and by 2017 there are more than 2000

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<sup>12</sup> Arnold BJ and McIntyre JM *International Tax Primer* (2002) 105.

<sup>13</sup> Costa D and Stack L (2014) *JEFS* 272.

<sup>14</sup> Mosupa F “An introduction to double taxation agreements” (2003) *JELJ* 140.

<sup>15</sup> Olsen K *Characterisation and Taxation of Cross-Border Pipelines* International Bureau of Fiscal Documentation (2012) 3.3.1.4.



tax treaties in existence and several treaties are being concluded weekly.<sup>16</sup> South Africa is currently party to 93 treaties for the avoidance of double taxation. This excludes the 21 treaties that are in the process of negotiation or finalised but not yet signed.<sup>17</sup> Therefore, although the topic of the mini-dissertation is a long standing issue, the sheer number of treaties that were concluded between South Africa and other countries over the last decade, and those that are in the process of being negotiated, makes the subject current and it became indispensable to understand the legal implications of a tax treaty in the South African context.

### 3. RESEARCH PROBLEM STATEMENT

De Koker opines that some academics are of the view that a tax treaty is nothing but a treaty that addresses tax issues.<sup>18</sup> Therefore, the nature of a treaty is not really important and that a tax treaty does not have any special status. It follows that the general principles that govern public international law should apply to a tax treaty. Yet, others are of the view that although a tax treaty is governed by public international law, a tax treaty is not a mere treaty but also constitutes domestic law “that stands supreme at domestic level” which has an effect on the rights and obligations of taxpayers.<sup>19</sup> Arnold rightly states that “the relationship between tax treaties and domestic legislation is a complex one in many countries”.<sup>20</sup> These different approaches pose the question: what is the position in South Africa? This research will attempt to clarify the question.

### 4. RESEARCH QUESTION

The primary research question that this research seeks to answer is - what is the legal status of tax treaties in South Africa? In other words, does a tax treaty have the same legal status as legislation? The secondary research question is - What is the position in South Africa if

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<sup>16</sup> Arnold BJ (2002) 3; Olsen K (2012) 3.3.1.4.

<sup>17</sup> Summary of Treaties for the Avoidance of Double Taxation.

<sup>18</sup> De Koker A (2010) par 1.3.

<sup>19</sup> De Koker A (2010) par 1.3. De Koker states that the first view is held by Lenz (1960) *The interpretation of double taxation conventions International Fiscal Association Congress* (footnote 7). De Koker states that the latter view is the view of Professor Michael Edwardes-Ker *Tax Treaty Interpretation* (footnote 8).

<sup>20</sup> Arnold BJ (2002) 104.

the provisions of a tax treaty are in conflict with the provisions of the Act? In other words, do the provisions of a treaty trump the provisions of the Act or do the provisions of the Act trump the provisions of a treaty?

## **5. KEY WORDS**

Treaty, Constitution, Income Tax Act, South Africa, Status, Interaction, Vienna Convention, Double taxation, Taxation, Model Tax Convention.

## **6. RESEARCH DESIGN AND METHODOLOGY**

The research methodology of this mini-dissertation will follow an analytical approach. Secondary data such as the South African legislative framework and the commentary thereon, court decisions, textbooks and opinions in articles will be analysed to determine the legal status of tax treaties in South Africa. As the aim of the research will be to determine the current status of tax treaties in South Africa, the time horizon will be cross sectional. An applied method will be used to address the specified issues.

## **7. STRUCTURE OF THE MINI-DISSERTATION**

### **7.1 Chapter 1: Introduction**

Chapter 1 provides an introduction and background to the present research and also sets out the rationale for the study, the research problem and the research question. The research design and methodology are briefly summarised and the chapter finally provide an overview of the chapter structure of the mini-dissertation.

### **7.2 Chapter 2: Double taxation agreements: An overview**

Chapter 2 provides an overview of the basic principles of tax treaties and international tax. This includes a discussion of the term “international law”, the nature and objective of tax treaties, model tax treaties, the concept of source and residence as well as double taxation

and the elimination thereof. The purpose of this chapter is to provide a background for the further chapters in which the legal status of tax treaties in the South African context are analysed. Without this essential background some concepts that will be discussed will not be fully appreciated.

### **7.3 Chapter 3: Double taxation agreements: The South African legislative framework**

Chapter 3 provides an overview of the legal framework with regards to double taxation agreements in the South African context with specific reference of the process whereby double taxation agreements are incorporated and regulated in the South African legal framework. This includes a discussion of the relevant legislative provisions, the enactment of a treaty into South African domestic law by legislation, the self-executing provisions of a treaty as well as the interpretation of the legislative provisions with reference to case law.

### **7.4 Chapter 4: Interplay between South African domestic law and a treaty**

Chapter 4 discuss the relationship between the provisions of a treaty and that of the Act. From the previous chapter it can be concluded that, once domesticated into the South African domestic law, a treaty has the same status as South African domestic legislation. This would imply that that the provisions of a treaty and the provision of the Act have the same status and that one does not rank higher than the other. The question however is – what is the position in the case of conflict between the provision of a treaty and that of the Act? The Act itself does not provide assistance in the case of such conflict. This chapter will articulate on the relationship between the provision of a treaty and that of the Act in an attempt to address this issue with reference to case law and other academic contributions.

### **7.5 Chapter 5: Conclusion**

Chapter 5 brings the study to its conclusion. The chapter summarises the findings and conclusions from the other chapters based on the research questions and objectives.

## 2. CHAPTER 2: DOUBLE TAXATION AGREEMENTS: AN OVERVIEW

### 1. INTRODUCTION

This chapter provides an overview of the basic principles of tax treaties and international tax. This includes a discussion of the term “international law”, the nature and objective of tax treaties, model tax treaties, the concept of source and residence as well as double taxation and the elimination thereof.

The purpose of this chapter is to provide a background for the further chapters in which the legal status of tax treaties in the South African context will be analysed as well as the interaction between the South African domestic law and the provisions of a treaty. Without this essential background some concepts that will be discussed would not be fully appreciated.

### 2. INTERNATIONAL TAX LAW

The term “international tax” is often misinterpreted. Arnold correctly states that the term “international tax” is in fact a misnomer.<sup>21</sup> What is conveniently referred to as “international tax” generally relates to the international aspects of the domestic tax laws of a country. Such domestic tax laws are not “international” by nature but are the creations of a sovereign state.<sup>22</sup>

The treaties of a country are conceivably the most apparent international aspect of a country’s domestic tax system.<sup>23</sup> Most countries around the world have an extensive treaty network with their trading partners and the growth of tax treaties over the past decade was exponential.<sup>24</sup> In 2001 there were approximately 1000 treaties in force worldwide.<sup>25</sup> In 2017

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<sup>21</sup> Arnold BJ (2002) 2.

<sup>22</sup> Croome B (Ed) *Tax Law: An Introduction* (2013) 512.

<sup>23</sup> Croome B (2013) 513.

<sup>24</sup> Arnold BJ (2002) 3.

<sup>25</sup> Olsen K (2012) 3.3.1.4.

there are more than 2000 tax treaties in existence and several treaties are being concluded weekly.<sup>26</sup>

### 3. NATURE AND OBJECTIVE OF TAX TREATIES

De Koker is of the view that tax treaties are agreements between sovereign nations.<sup>27</sup> Article 2(1)(a) of the Vienna Convention on the Law of Treaties<sup>28</sup> (hereinafter referred to as “the VCLT”) provides:

“Treaty” means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments or whether its particular designation”.

Brincker opines that a treaty is an agreement, convention or arrangement between states relating to the way in which they treat the variances between the domestic tax laws of the contracting states.<sup>29</sup> In most countries a treaty does not confer rights or impose obligations on the tax residents of a contracting state, unless the treaty is enacted into the domestic law of that country.<sup>30</sup>

The broad objective of tax treaties is to facilitate cross-border trade by eliminating tax impediments.<sup>31</sup> As mentioned in Chapter 1<sup>32</sup> “the most important operational objective of bilateral tax treaties is the elimination of double taxation. Most of the substantive provisions of the typical bilateral tax treaty are directed at the achievement of this goal”.<sup>33</sup> From the

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<sup>26</sup> Arnold BJ (2002) 3; Olsen K (2012) 3.3.1.4.

<sup>27</sup> De Koker A (2010) par 1.3. This is also the view held by Arnold, see Arnold BJ (2002) 105.

<sup>28</sup> Vienna Convention of the Law of Treaties (1969).

<sup>29</sup> Brincker E “The Conclusion and Force of Double Taxation Agreements” in De Koker AP and Brincker E (Eds) *Silke on International Tax* (2010) par 12.1.

<sup>30</sup> Arnold BJ (2002) 104.

<sup>31</sup> Arnold BJ (2002) 105.

<sup>32</sup> Chapter 1, paragraph 2.

<sup>33</sup> Arnold BJ (2002) 105.

preamble of a typical tax treaty concluded by South Africa<sup>34</sup> it is clear that a tax treaty is aimed at relieving double taxation.<sup>35</sup>

Olivier and Honiball rightly states that a treaty is the result of “the zero-sum game: one country’s gain in revenue is another’s loss”.<sup>36</sup> A treaty therefore essentially allocates taxing rights between the contracting states and is ultimately “an independent voice to avoid double taxation”.<sup>37</sup> This is achieved by one state agreeing to levy a limited tax, or not to levy any tax at all, thereby enabling the other state to levy a tax without a taxpayers being taxed twice. Therefore, the lack of such agreement between countries would have the effect that two countries can both levy the maximum allowable tax, disregarding the overall tax payable by a taxpayer.<sup>38</sup> Such situation would ultimately hamper (instead of facilitating) cross border trade.

Further, section 108(1) of the Act provides:

“The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country”.

From the above it can be concluded that, in the South African context, the objective of a tax treaty is the relief from double taxation, but it may also be wider. Generally other objectives of a tax treaty include:<sup>39</sup>

- provide certainty to the taxpayers of the contracting states;

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<sup>34</sup> See for example the treaty between South Africa and Malaysia published in the Government Gazette 29021 Notice 68 (13 July 2006). The preamble to the treaty provides as follows: “Agreement between the government of the Republic of South Africa and the government of Malaysia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income”.

<sup>35</sup> Olivier L and Honiball M *International Tax: A South African Perspective* (2011) 276.

<sup>36</sup> Olivier L and Honiball M (2011) 268.

<sup>37</sup> Olivier L and Honiball M (2011) 269.

<sup>38</sup> Olivier L and Honiball M (2011) 269.

<sup>39</sup> Brincker E in De Koker A (2010) par 12.3.

- the division of tax revenues between the contracting states;
- mutual assistance in the collection of taxes and the exchange of information; between the contracting states;
- the creation of dispute resolution procedure;
- the facilitation of international trade.

#### 4. MODEL TAX TREATIES

In an attempt to create standardisation with regards to the contents of treaties worldwide, international organisations published model tax conventions to be used for that purpose.<sup>40</sup> Model tax conventions are also sometimes referred to as “conventions”, “treaties”, “double tax agreements” or “tax treaties”. In this dissertation the word “tax treaty” and “treaty” are used interchangeably.

Model tax treaties are also used by countries as a foundation or yardstick when they negotiate tax treaties.<sup>41</sup> The two most commonly known model tax treaties are the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital (hereinafter referred to as “the OECD MTC”) and the United Nations Model Double Taxation Convention between Developed and Developing Countries (hereinafter referred to as “the UN MTC”).<sup>42</sup>

The key difference between the OECD MTC and the UN MTC is that the OECD MTC favours developed (and generally capital exporting) countries over developing (and generally capital importing) countries.<sup>43</sup> Du Plessis<sup>44</sup> and Arnold<sup>45</sup> agree that the OECD MTC is the most prominent model as the majority of countries (not only OECD member countries but also non-OECD member countries) use it as basis when negotiating and drafting treaties. Most

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<sup>40</sup> Olivier L and Honiball M (2011) 268.

<sup>41</sup> Du Plessis I “Some Thoughts on the Interpretation of Tax Treaties in South Africa” (2012) *SA Merc LJ* 31.

<sup>42</sup> Arnold BJ (2002) 106. There are also a number of other model tax treaties that are used around the world. The United States of America formulated its own model tax treaty. Members of the Andean Group also formulated a model. Some Asian countries use the Intra-ASEAN model. For further reading on the different models and its variances see Brincker E in De Koker A (2010) par 12.11.

<sup>43</sup> Arnold BJ (2002) 108.

<sup>44</sup> Du Plessis (2012) *SA Merc LJ* 31.

<sup>45</sup> Arnold BJ (2002) 107.

of the treaties concluded by South Africa, who is not a member of the OECD,<sup>46</sup> are based on the OECD MTC.<sup>47</sup> This means that although the actual treaty does not follow the exact wording of the OECD MTC, the format, arrangement of sections and many of the terms of the OECD MTC are used in the treaty between the contracting countries.

## 5. THE CONCEPT OF SOURCE AND RESIDENCE

The jurisdiction of a state to levy tax is based either on the relationship between the income and the country levying the tax or the relationship between the taxpayer and the taxing country based on the residence of the taxpayer.<sup>48</sup>

### 5.1 The concept of source

Under this concept income may be taxable under the domestic tax laws of a country if there is a causal link between that country and the generated income. A country's tax claim based on such a link is referred to as "source jurisdiction".<sup>49</sup> For example, a country would tax income derived from the extraction of minerals within that country's geographical borders or from rental income earned on a property located in that country. Thus, a country that levies a tax on this basis would have the power to tax income if the assets or activities that generate the income are located within that country's borders.

### 5.2 The concept of residence

Under this concept income may be taxable under the domestic laws of a country if there is a causal link between the income and the person earning the income. A country's tax claim based on such a link is referred to as "residence jurisdiction". Taxpayers that are subject to residence jurisdiction are generally taxable on their worldwide income.<sup>50</sup> For example, a

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<sup>46</sup> Du Plessis (2012) *SA Merc LJ* 31.

<sup>47</sup> Du Plessis (2012) *SA Merc LJ* 31.

<sup>48</sup> Committee of Experts on International Cooperation in Tax Matters: *Revision of the Manual for the Negotiation of Bilateral Tax Treaties* Report (10 October 2011) 11.

<sup>49</sup> Arnold BJ (2002) 15.

<sup>50</sup> Arnold BJ (2002) 15.



country would tax salary income earned in another country if that person is a resident of such country. The place where the salary is earned is in this case irrelevant.<sup>51</sup>

## 6. INTERNATIONAL DOUBLE TAXATION AND THE ELIMINATION THEREOF

### 6.1 International double taxation

Most countries around the world levy tax based on the residence of the taxpayer as well as on the source of the income derived. This is referred to a dualistic approach since a country levies tax on the worldwide income of residents as well as the domestic income of non-residents.<sup>52</sup>

Based on the definition of “gross income” as defined in section 1(1) of the Act,<sup>53</sup> South Africa also follow a dualistic approach since taxes are levied based on both the residence of the taxpayer as well as the source of the income. Accordingly, a South African resident may be taxed on all income received by or accrued to such resident from all sources from all over the world. It is however possible that an amount is received by or accrued to a South African resident from another country (source) outside of South Africa. It may very well be that such amount is then taxed in that country because of the legislative prescripts of that country. Because of the definition as mentioned above, and since the taxpayer is a South African resident, the same amount may be taxed in South Africa. A similar situation can arise with regards to a non-resident. An amount received by or accrued to a non-resident from a South African source may be taxable in South Africa, while also taxable in the country where the taxpayer is a resident. These circumstances are commonly referred to as international double taxation. It is clear from the above that cross-border trade has an inherent potential of double taxation.<sup>54</sup>

Double taxation can manifest in either a juridical or in an economical context. In a juridical context double taxation generally means that the same income is taxed twice in the hands of the same taxpayer. In an economical context double taxation generally means the same

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<sup>51</sup> Committee of Experts on International Cooperation in Tax Matters (2011) 11.

<sup>52</sup> Mosupa F (2003) *JELJ* 178.

<sup>53</sup> See definition of “Gross income” as quoted in Chapter 1, par 2.

<sup>54</sup> Olivier L and Honiball M (2011) 6.

income is taxed in the hands of two different taxpayers.<sup>55</sup> Further, double taxation can arise because of various causes. Usually double taxation arises because of a conflict over tax jurisdiction. The following are the causes of such conflict:<sup>56</sup>

- *Source-source conflicts*: This occurs when two countries claim that the income is sourced from both countries and therefore taxable in both countries;
- *Residence-residence conflicts*: This occurs when two countries claim that the taxpayer is a resident of both countries and therefore taxable in both countries;
- *Residence-source conflict*: This occurs when one country claim a taxing rights since that country allege that the taxpayer is a resident of that country while the other country claim taxing rights since that country allege that the income was sourced in that country.

## 6.2 Elimination of international double taxation

International double taxation can be eliminated in various ways. The two overarching methods of elimination of double taxation are achieved either unilaterally or bilaterally.<sup>57</sup>

Concession of taxation by one country is referred to as unilateral relief. This is based on the relief provided in the domestic tax laws of that country. Relief is provided for in three main relief methods, being the exemption method, the credit method and the deduction method.<sup>58</sup> Briefly, under the exemption method a country exempts certain income derived by its residents in another state from taxation.<sup>59</sup> Under the credit method a country allows a taxpayer a credit for taxes paid to another country against the otherwise payable taxes.<sup>60</sup> Under the deduction method a country allows a taxpayer to claim a deduction for taxes paid to another country.<sup>61</sup>

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<sup>55</sup> Olivier L and Honiball M (2011) 6.

<sup>56</sup> Arnold BJ (2002) 27.

<sup>57</sup> Committee of Experts on International Cooperation in Tax Matters (2011) 16; Arnold BJ (2002) 30.

<sup>58</sup> Olivier L and Honiball M (2011) 443.

<sup>59</sup> Committee of Experts on International Cooperation in Tax Matters (2011) 16; Arnold BJ (2002) 30.

<sup>60</sup> Arnold BJ (2002) 30.

<sup>61</sup> Arnold BJ (2002) 30.

Concession of taxation on the basis of the agreed treaty between two countries is referred to as bilateral relief. The tax treaty will for instance allocate exclusive taxing rights to one country for the particular income of the taxpayer and only one country will thus tax the specific income. Each treaty deals with this aspect in its unique (and agreed) way. Apart from exclusively allocated taxing rights of certain income, treaties generally contain various other mechanisms to relief double taxation. Tie-breaker rules<sup>62</sup> are one such mechanism. Tie-breaker rules in its simplest conception are a series of questions. The outcome of the questions will determine where a taxpayer is “resident” for taxation purposes in the event that two countries treat the same person as a resident in that state.<sup>63</sup>

## 7. CONCLUDING REMARKS

It can be concluded that there is some degree of interaction between the domestic laws of a country and a treaty – since they both have the same objective which is the elimination double taxation. Since the contents of a treaty might not be same as the domestic law provisions, the interaction might cause inconsistencies in application. This poses the question, what is the legal status of a tax treaty, and more specifically, the legal status in South Africa? Further, what is the position when there is conflict between the provision of the South African domestic law and the provisions of a treaty? This will be investigated and discussed in the following chapters.

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<sup>62</sup> Article 4(2) of the OECD MTC contains the tie-breaker rules.

<sup>63</sup> Croome B (2013) 564.

### 3. CHAPTER 3: DOUBLE TAXATION AGREEMENTS: THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK

#### 1. INTRODUCTION

There are different procedures around the world that are followed whereby double taxation agreements form part of the domestic laws of a country. In some countries the treaty becomes part of the domestic law of the country once the treaty takes effect. In other countries the treaty becomes part of the domestic law of the country once the treaty is approved by the parliament of that country, while in other countries legislation is needed for the treaty to become part of the domestic laws of the country.<sup>64</sup>

This chapter provides an overview of the legal framework with regards to double taxation agreements in the South African context with specific reference of the process whereby double taxation agreements are incorporated and regulated in the South African legal framework. This includes a discussion of the relevant legislative provisions, the enactment of a treaty into South African domestic law by legislation, the self-executing provisions of a treaty as well as the interpretation of the legislative provisions with reference to case law. The determination and articulation of the legal framework, as is done in this chapter, is an important building block to determine the legal status of a treaty in South Africa.

#### 2. RELEVANT LEGISLATIVE PROVISIONS

The foundation of the legislative framework in South Africa is found in two provisions, namely section 231 of the Constitution and section 108 of the Act.<sup>65</sup> Section 231 of the Constitution provides as follows:

- (1) “The negotiating and signing of all international agreements is the responsibility of the national executive.

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<sup>64</sup> Du Plessis I (2014) Phd thesis, University of Stellenbosch 111.

<sup>65</sup> Du Plessis I “The Incorporation of Double Taxation Agreements into South African Domestic Law” (2015) 18(4) *PELJ* 1187.

- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect”.

Most authors agree that sections 231(2) of the Constitution effectively means that once an international agreement, such as a double tax agreement, has been approved by the National Assembly and the National Council of Provinces, South Africa is bound, at least on international level (as a result of the agreement that binds the two contracting countries), by such agreement.<sup>66</sup> However, this does not mean that, at that stage, the treaty has automatically or routinely become part of the South African domestic law.<sup>67</sup>

Section 108 of the Act provides as follows:

- (1) “The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made

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<sup>66</sup> Du Plessis I (2012) *SA Merc LJ* 111; Olivier L and Honiball M (2011) 294; Hatting J “Elimination and Avoidance of International Double Taxation” in De Koker AP and Brincker E (Eds) *Silke on International Tax* (2010) par 36.14.

<sup>67</sup> Benhardt LJ (2013) LLM dissertation, University of Pretoria 76.

with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.

- (2) As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in this Act”.

From the wording of section 108(2) it can be said that section 108(2), which refers to section 231 of the Constitution, is the national legislation referred to in section 231 of the Constitution that dictates the procedure for a treaty to become part of the domestic law in South Africa.<sup>68</sup>

Section 231(4) of the Constitution provides that an international agreement becomes law in the Republic when it is enacted into law by national legislation. The same section further provides that a self-executing provision of an agreement that has been approved by Parliament is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament.

From the above two essential aspects are clear. The one is that an international agreement (such as a treaty) becomes law in South Africa when it is enacted into law by national legislation, the other being that a self-executing provision of an agreement that has been approved by Parliament is law in South Africa. These two aspects will be considered separately below.

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<sup>68</sup> Olivier L and Honiball M (2011) 303; Du Plessis (2012) *SA Merc LJ* 33; Du Plessis I (2014) Phd thesis, University of Stellenbosch 119; Benhardt LJ (2013) LLM dissertation, University of Pretoria 77.

### 3. THE ENACTMENT OF TREATY INTO SOUTH AFRICAN DOMESTIC LAW BY LEGISLATION

There are different views as to whether a further step (other than the step to enter into the treaty as provided for in section 231(1) of the Constitution) is required for a treaty to become part of the domestic law of South Africa. Du Plessis states that “the real debate centres on the question of whether a further step is required”.<sup>69</sup>

Olivier and Honiball are of the view that, once a treaty is published in the Government Gazette, the provisions of the treaty have the same force as domestic law in South Africa.<sup>70</sup> This view is based on the following: as a treaty is an international agreement it has to be complied with in the context of section 231 of the Constitution. Section 231(4) envisage that the relevant domestic legislation, which is section 108 of the Act, for incorporation into domestic law have to be complied with. Section 108(2) of the Act provides the relevant domestic legislation for incorporation of a treaty as section 108(2) provides that once Parliament approved a treaty<sup>71</sup> “the arrangements thereby made shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in the Act”. Once published in the Government Gazette the treaty has the same legal status as any other provision contained in the Act.<sup>72</sup>

Du Plessis agrees with this view and opines that after parliamentary approval, and in order for a treaty to form part of South African domestic law, enactment by national legislation is required.<sup>73</sup> Du Plessis argues that there are various methods by which a treaty can be incorporated into domestic law one of which is by way of enabling legislation that provides for the domestication of a treaty by publishing the treaty in the Government Gazette. Section 108(2) of the Act is the enabling national legislation provided for in the Constitution by which the treaty becomes part of the domestic legislation. Once a treaty becomes part of the domestic law of South Africa statutory obligations are created.<sup>74</sup>

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<sup>69</sup> Du Plessis I (2015) *PELJ* 1189.

<sup>70</sup> Olivier L and Honiball M (2011) 303.

<sup>71</sup> As contemplated in section 231(2) of the Constitution

<sup>72</sup> Section 108(2) of the Act; Olivier L and Honiball M (2011) 303.

<sup>73</sup> Du Plessis (2012) *SA Merc LJ* 33; Du Plessis I (2014) Phd thesis, University of Stellenbosch 119.

<sup>74</sup> Du Plessis (2012) *SA Merc LJ* 33; Du Plessis I (2014) Phd thesis, University of Stellenbosch 119.

Benhardt agrees with the views of Olivier and Honiball and Du Plessis articulated above and states that “Section 108(2) of the Income Tax Act is the enabling provisions that provides that DTAs are deemed to be part of the Income Tax Act once it have been approved by both houses of Parliament as required in section 231(4) of the Constitution of the Republic of South Africa and published in the Government Gazette”.<sup>75</sup>

Hatting however holds a different view and opines that enactment of a treaty by national legislation is not required.<sup>76</sup> Hatting argues that South African treaties are self-executing, as envisaged in section 231(4), and therefore does not have to be enacted by national legislation to form part of South African domestic law. With regards to section 108 of the Act he states that section 108 of the Act is of administrative nature aimed to empower the tax administration to carry out treaty obligations in the context of the powers granted under the Act and that section 108 does not serve as “proper enacting legislation in the sense that one, for instance, finds in the United Kingdom where a separate standalone statute of Parliament is passed which contains the text of a particular double tax convention”.<sup>77</sup>

Gutuza differs from Hatting and is of the view that once a treaty is signed and ratified by the executive the treaty is only binding on international level and does not form part of the domestic law until the treaty has been incorporated into domestic law by legislation. Gutuza argues that countries like America use a monist approach, meaning that a further act, like enactment via legislation is not needed before the treaty forms part of the domestic law. Gutuza states that, in the South African context the Constitution, in section 231, follows a qualified dualist or hybrid dualist-monist approach and states that it can be assumed that a treaty only becomes part of the domestic law when it is enacted by national legislation.<sup>78</sup>

The view preferred in this dissertation is that in order for a treaty to form part of South African domestic law enactment by national legislation is required. Section 108(2) of the Act provides that “after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by

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<sup>75</sup> Benhardt LJ (2013) LLM dissertation, University of Pretoria 77.

<sup>76</sup> Hatting J in De Koker A (2010) par 36.14.

<sup>77</sup> Hatting J in De Koker A (2010) par 36.14.

<sup>78</sup> Gutuza T “Tax treaties, the Income Tax Act and the constitution- trump or reconcile?” (2016) *SA Merc LJ* 485.



publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in this Act". This provision in the Act is unambiguous and serves as the enabling legislation provided for in section 231 in the Constitution. This view is supported by the fact that one cannot ignore the wording of section 108 as if it does not exist. Further, if it was the intention of the legislature that section 108 of the Act is of administrative nature aimed to empower the tax administration (as argued by Hatting) the legislature would have expressly provided as such.

Further, support for this view is found in the *Glenister* matter where Ngcobo CJ observed as follows:

"An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory states. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations".<sup>79</sup> (emphasis added)

#### 4. THE ISSUE OF SELF-EXECUTION

Section 231(4) of the Constitution provides that an international agreement becomes law in the Republic when it is enacted into law by national legislation. Apart from the aforesaid, the same section also provides that a self-executing provision of an agreement that has been approved by Parliament is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament.

The question is whether a treaty is self-executing or not? In the event that a treaty is self-executing it would mean that a treaty would become part of the South African domestic law without the need of enactment by national legislation.<sup>80</sup> This might sound very simplistic.

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<sup>79</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 92.

<sup>80</sup> Section 231 of the Constitution.

However, as with the issue of whether enactment of a treaty by national legislation is required or not, the issue whether a treaty is self-executing or not is also contentious. In the words of Ferreira and Scholtz “section 231 has been the focal point of lively discourse and discontent amongst legal scholars”,<sup>81</sup> or as Dugard puts it “the proviso to section 231(4) is bound to create problems as it introduces the concept of self-executing of treaties into South African law”.<sup>82</sup>

Brincker is of the view that a treaty is not self-executing.<sup>83</sup> He states that section 231(4) of the Constitution clearly makes a distinction between an international agreement and the self-executing provisions of an agreement that has been approved by Parliament and poses the question whether a treaty would fall within the first part (an international agreement) or the second part (self-executing provisions of an agreement) of section 231(4) of the Constitution. Brincker concludes that “the better interpretation is” that a treaty falls within the first part as a treaty is enacted into South African domestic law in terms of the provisions of section 108(2) of the Act.<sup>84</sup>

Dugard is of the view that a treaty will only be self-executing if the treaty specifically provides as such and if no existing domestic law “place any obstacle in the way of treaty application”.<sup>85</sup> Ferreira and Scholtz state that the concept of self-execution is an American law concept whereby a treaty automatically forms part of the domestic law without any formal incorporation into the domestic law and therefore enforceable by courts.<sup>86</sup> They prefer the approach by Dugard<sup>87</sup> and add that the starting point should be the domestic law of a country and not the treaty itself (as per the American law definition). They submit that, when a court needs to decide whether a treaty is self-executing in terms of section 231(4) of the Constitution, the point of departure should be to determine to what extent does the domestic law allow for the application of the provisions of the treaty and only then make a

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<sup>81</sup> Ferreira G and Scholtz W “The interpretation of section 231 of the South African Constitution: A lost ball in the high weeds” (2009) *Competition and International LJSA* 338.

<sup>82</sup> Dugard J “International Law and the South African Constitution” (1997) *European Journal of International Law* 83.

<sup>83</sup> Brincker E in De Koker A (2010) par 12.7.1.

<sup>84</sup> Brincker E in De Koker A (2010) par 12.7.1.

<sup>85</sup> Dugard J *International Law: A South African Perspective* (2011) 57.

<sup>86</sup> Ferreira and Scholtz (2009) *Competition and International LJSA* 332.

<sup>87</sup> Ferreira and Scholtz specifically refer to Dugard’s view. See Ferreira and Scholtz (2009) *Competition and International LJSA* 332.

determination whether the treaty is self-executing or not.<sup>88</sup> They conclude that any treaty is possibly self-executing but when a court needs to determine this, the domestic law need to be taken cognisance of.<sup>89</sup>

Olivier and Honiball are of the view that a treaty is not self-executing as the Constitution, in section 231(4), sets out a procedure of specific adoption of a treaty into the domestic law.<sup>90</sup> Scholtz's view is that it is unfortunate that such a vague and difficult concept such as self-execution is included in the Constitution. He argues that there are no self-executing provisions in a treaty and therefore states that the reference in the Constitution to self-execution should be ignored.<sup>91</sup>

As mentioned above,<sup>92</sup> Hatting, on the other hand, is of the view that South African treaties are self-executing and therefore does not have to be enacted by national legislation to form part of South African domestic law. Hatting notes that the concept of self-executing has been adopted from the United States of America. He adds that on perusal of some American cases<sup>93</sup> it was demonstrated that the test in the United States of America for a self-executing treaty is as follows: "In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts".<sup>94</sup>

This dissertation favours the view that a treaty is not self-executing by nature as the view is that the domestic law needs to be considered first before the provisions of the treaty can be considered. In other words, does the domestic law allow for the applications of the provisions of the treaty in the domestic law?<sup>95</sup> Having regard to the wording of section 108 of the Act it can be concluded that the Act does not automatically or routinely allow a treaty to form part

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<sup>88</sup> Ferreira and Scholtz (2009) *Competition and International LJSA* 332.

<sup>89</sup> Ferreira and Scholtz (2009) *Competition and International LJSA* 332.

<sup>90</sup> Olivier L and Honiball M (2011) 304.

<sup>91</sup> Scholtz W "A Few Thoughts on Section 231 of the South African Constitution, Act 108 of 1996" (2004) *South African Yearbook in International Law* 202 p 216.

<sup>92</sup> Chapter 3, paragraph 3.

<sup>93</sup> Hatting refers to the following American cases in footnote 59 of Hatting J in De Koker A (2010) par 36.14: *Foster v Neilson* 27 US (2 Pet.) 253 (1929) and *Sei Fujii v California* 242 P 2d 617 (1952).

<sup>94</sup> Hatting J in De Koker A (2010) par 36.14.

<sup>95</sup> Du Plessis I (2015) *PELJ* 1191.

of the domestic law as section 108 of the Act provides for publication in the Government Gazette. In other words, a further step is required.

Moreover, the issue self-execution has been judicially considered.<sup>96</sup> In the matter of *Goodwin v The Director-General, Department of Justice and Constitutional Development*<sup>97</sup> (hereinafter referred to as “the *Goodwin* matter”) the court, although *obiter*, quoted with approval from a textbook,<sup>98</sup> as follows:

“A treaty can be described as self-executing if its provisions are automatically, without any formal or specific act of incorporation by state authorities, part of the law of the land and enforceable by municipal courts”.<sup>99</sup>

However, can one simply ignore the words of section 231(4) that states “but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament” as if it do not exist? As this aspect is not the focus of this dissertation the issue will not be articulated any further. This could possibly be investigated in a further study.

## 5. ENACTMENT OF TREATIES INTO DOMESTIC LAW AND CASE LAW

As was argued above, this dissertation favours the view that treaty is not self-executing and can therefore only become part of the domestic law of South African once enacted into law by national legislation as provided for in section 231(4) of the Constitution. Dugard states that, in the South African context, a treaty becomes part of the domestic law through an enabling Act of Parliament, being section 108(2) of the Act which provides that the arrangements thereby made shall be notified by publication in the Gazette and the

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<sup>96</sup> Du Plessis I (2015) *PELJ* 1190.

<sup>97</sup> Unreported case number 21142/08 of 23 June 2008 (T).

<sup>98</sup> In the judgment the court did not provide the full reference of the textbook but referred to the book as follows: “Parry and Grant in their *Encyclopaedic Dictionary of International Law*”. The full reference is Grant J and Barker J *Parry and Grant Encyclopaedic Dictionary of International Law* (3<sup>rd</sup> edition) Oxford; Du Plessis I (2015) *PELJ* 1190.

<sup>99</sup> *Goodwin v The Director-General, Department of Justice and Constitutional Development* unreported case number 21142/08 of 23 June 2008 (T) par 30.

arrangements so notified shall thereupon have effect as if enacted in the Act.<sup>100</sup> Dugard's argument is supported by court decisions that, to a certain degree, dealt with this issue.<sup>101</sup>

In the matter of *Commissioner for the South African Revenue Service v van Kets*<sup>102</sup> (hereinafter referred to as "the *van Kets* matter") the Western Cape High Court considered the treaty between South African and Australia as well as the protocol that later amended the treaty. Davis J stated that:

"The effect of s 108 is thus to ensure that domestic statutory obligations are created."<sup>103</sup>

Further, Davis J held that:

"On the basis of the provisions of s 231 and, as is apparent from the analysis provided by the Constitutional Court in *Glenister*, supra, the Act has chosen one of the three principal methods to transform treaties into municipal law; in this case an enabling Act of Parliament which gives the executive the power to bring a treaty into effect in municipal law by means of a proclamation or notice in the Government Gazette".<sup>104</sup> (emphasis added)

The same year, in the *Tradehold* matter the Supreme Court Appeal considered the treaty between South Africa and Luxembourg. Although the issue for determination was whether the term "alienation" in the treaty includes within its ambit deemed disposals of assets, Boruchowitz AJA, with reference to section 108 of the Act, referred to the said provision as "enabling legislation" and stated as follows:

"The DTA is one of many double tax agreements entered into between South Africa and other countries. Its principal objectives are the avoidance of double

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<sup>100</sup> Dugard J (2011) 55; Du Plessis I (2015) *PELJ* 1192.

<sup>101</sup> Du Plessis I (2015) *PELJ* 1193.

<sup>102</sup> 2012 3 SA 399 (WCC).

<sup>103</sup> *Commissioner for the South African Revenue Service v van Kets* 2012 3 SA 399 (WCC) par 16.

<sup>104</sup> *Commissioner for the South African Revenue Service v van Kets* 2012 3 SA 399 (WCC) par 18.

taxation and the prevention of fiscal evasion. The enabling legislation is section 108(1) of the Act.<sup>105</sup> (emphasis added)

Three years later, in the matter of *Krok v The Commissioner for the South African Revenue Service*,<sup>106</sup> (hereinafter referred to as “the *Krok* matter”) the treaty between South African and Australia (as well as the subsequent protocol) was again at issue in the Supreme Court of Appeal. The appeal concerned the correctness of the confirmation of a preservation order granted against Mr Krok by the Gauteng Division of the High Court, Pretoria, for taxes allegedly due by Mr Krok to the Commissioner of Taxation of the Commonwealth of Australia.<sup>107</sup> With reference to the treaty Maya JA stated:

“The DTA and the Protocol, which came into effect on 12 November 2008, were concluded in terms of s 108(2) of the Income Tax Act 58 of 1962 read with s 231(4) of the Constitution of the Republic of South Africa, 1996 (the Constitution). Thus, they became part of South African law as they were approved by the legislature under these provisions and duly gazetted”.<sup>108</sup>

Based on the above, Du Plessis remarks that the court in the *Krok* matter viewed publication in the Government Gazette as a requirement for the treaty to become part of the domestic law of South Africa and adds that if the agreement was self-executing publication in the Government Gazette would not have been necessary. Therefore, the only way that a treaty can become part of the domestic legislation of South Africa is by enactment via national legislation, being section 108 of the Act.<sup>109</sup>

More recently,<sup>110</sup> in the matter of *The Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre*<sup>111</sup> (hereinafter referred to as “the *Al Bashir* matter”) the Supreme Court of Appeal decided on a matter concerning the arrest of the President of Sudan, Omar Hassan Ahmad Al Bashir (hereinafter referred to as “Al Bashir”).

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<sup>105</sup> *Commissioner for the South African Revenue Service v Tradehold Ltd* 2012 3 All SA 15 (SCA) par 15.

<sup>106</sup> 2015 (SCA) 107.

<sup>107</sup> *Krok v The Commissioner for the South African Revenue Service* 2015 (SCA) 107 par 2.

<sup>108</sup> *Krok v The Commissioner for the South African Revenue Service* 2015 (SCA) 107 par 24.

<sup>109</sup> Du Plessis I (2015) *PELJ* 1194.

<sup>110</sup> March 2016.

<sup>111</sup> 2016 2 All SA 365 (SCA).

The majority judgment concluded that the failure by the South African government to take steps to arrest and detain, for surrender to the International Criminal Court, Al Bashir during his visit to South Africa in June 2015 was unlawful. The court referred to the Rome Statute of the International Criminal Court,<sup>112</sup> to which South Africa is a signatory, and stated as follows:

“It incorporated it into the domestic law of South Africa in terms of s 231(4) of the Constitution by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act)”.<sup>113</sup>

In the *Al Bashir* matter the issue was not about a tax treaty but about an international agreement.<sup>114</sup> The court nevertheless made it clear that the only way that an international agreement can become part of the domestic legislation of South Africa is by enactment via national legislation.<sup>115</sup>

## 6. CONCLUDING REMARKS

From the discussion in this chapter it is clear that there are divergent views as to whether a further step (other than the step to enter into the treaty), such as enactment into law by national legislation,<sup>116</sup> is required for a treaty to become part of the domestic law of South Africa. There are also divergent views as to whether a treaty is self-executing or not.

As mentioned, the view preferred in this dissertation is that in order for a treaty to form part of South African domestic law enactment by national legislation is required as section 108(2) of the Constitution is unambiguous and serves as the enabling provided for in section 231 in the Constitution. The view is that one cannot ignore the wording of section 108 as if it does not exist. This dissertation also favours the view that a treaty is not self-executing by nature as

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<sup>112</sup> The Rome Statute established the International Criminal Court. *The Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre* 2016 2 All SA 365 (SCA) par 1.

<sup>113</sup> *The Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre* 2016 2 All SA 365 (SCA) par 1.

<sup>114</sup> Rome Statute of the International Criminal Court.

<sup>115</sup> In the case of the Rome Statute of the International Criminal Court the enabling national legislation is the Rome Statute of the International Criminal Court Act 27 of 2002.

<sup>116</sup> As set out in section 231(4) of the Constitution.

the view is that the domestic law needs to be considered first before the provisions of the treaty can be considered.

Based on recent judgments discussed in this chapter it seems that the position currently in South Africa supports the view that publication in the Government Gazette is a requirement for a treaty to become part of the domestic law of South Africa and that a treaty is not self-executing. Therefore, the only way that a treaty can become part of the domestic legislation of South Africa is by enactment via national legislation, being section 108 of the Act.



## 4. CHAPTER 4: INTERPLAY BETWEEN SOUTH AFRICAN DOMESTIC LAW AND A TREATY

### 1. INTRODUCTION

As discussed in Chapter 3, this dissertation favours the view that a treaty is not self-executing and that section 108(2) of the Act is the enabling national legislation provided for in the Constitution by which the treaty becomes part of the domestic legislation. However, whether a treaty is self-executing or not, the status of treaty, in relation to the Act still, needs to be determined. Arnold rightly states that “the relationship between tax treaties and domestic legislation is a complex one in many countries”.<sup>117</sup>

Therefore, for purposes of this chapter, the question is – what is the position in South Africa in the case of conflict between the provision of a treaty and that of an Act? In other words, in the case of conflict, does the provisions of an Act trump the provision of a treaty or does the provisions of the treaty trump the provision of an Act, or is there a possible middle way. The Act itself does not provide assistance in the case of such conflict.<sup>118</sup> Du Plessis observes that, if one resort to case law for guidance, it seems that there are divergent views.<sup>119</sup> This chapter investigates the relationship between the provision of a treaty and that of an Act in an attempt to address this question.

### 2. RELATIONSHIP BETWEEN THE ACT AND A TREATY WITH REFERENCE TO CASE LAW

There are different views regarding the status of a treaty in relation to the Act. This is the cause of discourse amongst academic writers. Further, the courts have not been consistent in their treatment of the issue by handing down contradictory decisions.<sup>120</sup> These court decisions will be discussed below where after a discussion of the case law, with reference to the different views follows. Finally, the view preferred by this dissertation will be discussed.

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<sup>117</sup> Arnold BJ (2002) 104.

<sup>118</sup> Benhardt LJ (2013) LLM dissertation, University of Pretoria 84; Olivier L and Honiball M (2011) 303.

<sup>119</sup> Du Plessis I (2014) Phd thesis, University of Stellenbosch 118.

<sup>120</sup> Du Plessis I (2015) *PELJ* 1200.

## 2.1 The *Moolla* matter

At issue in this appeal was the interpretation to be placed on an article<sup>121</sup> in the trade agreement between South Africa and Malawi.<sup>122</sup> It should be noted that the *Moolla* matter was not about the interaction between the Act and the treaty but about the interaction between the Customs and Excise Act<sup>123</sup> (hereinafter referred to as “the Customs Act”) and the treaty. However the Customs Act contains similar provisions in section 49(1)(a) than those contained in section 108(2) of the Act that allows for the enactment of a treaty as part of the Customs Act.<sup>124</sup>

The court referred to the legislative framework and specifically section 49(1)(a) of the Customs Act that deals with the status and requirements for enforceability of trade agreements. The relevant part of section 49(1)(a) of the Customs Act provides that:

“such agreement or any protocol or other part or provision thereof is enacted into law as part of this Act when published by notice in the Gazette....”.

The court had to interpret the article in the treaty and consequently had to consider the interplay between the Customs Act and the treaty. The dispute centred around the words “production cost” and whether the said words should be interpreted with reference to the provisions of the treaty or with reference to the relevant rules promulgated under the Customs Act.<sup>125</sup> The court found that there is no conflict between the Customs Act and the treaty.<sup>126</sup> However, Lewis JA stated that:

“If there were to be an apparent conflict between general provisions of the statute and particular provisions of an agreement, difficulties of interpretation might indeed arise. The Act must, of course, prevail in such a case: the agreement once promulgated is by definition part of the Act. It must follow that

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<sup>121</sup> Article 6(ii) of the Trade Agreement between South Africa and Malawi. Article 6(ii) determines the minimum percentage of production cost of goods.

<sup>122</sup> The treaty between South Africa and Malawi was entered into on 19 June 1990.

<sup>123</sup> Act 91 of 1964.

<sup>124</sup> Gutuza T (2016) *SA Merc LJ* 488.

<sup>125</sup> Rule 46 is the relevant rule. Rule 46 was issued in terms of section 46(2) of the Customs Act.

<sup>126</sup> *AM Moolla Group Ltd v Commissioner for the South African Revenue Service* 2003 65 SATC 414 par 16.

where words which are defined in the Act occur in the agreement, they must be given the meaning assigned to them by the Act unless the context indicates the contrary”.<sup>127</sup> (emphasis added)

Lewis JA went further and stated that:

“The structure of the Act and the incorporation of the agreement as a part of it lead to the inevitable conclusion that the agreement must be construed in such a way as to avoid any conflict between the Act itself, and the rules promulgated under it, on the one hand, and the terms of the agreement on the other”.<sup>128</sup>

Therefore, in essence the court found that, in the event of conflict (although the court found that there was no conflict) between the Customs Act and the treaty, the Customs Act must prevail.

## 2.2 The *Glenister* matter

In the *Glenister* matter the Constitutional Court, in delivering the majority judgment,<sup>129</sup> stated, with reference to the status of international agreements, as follows:

“It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations”.<sup>130</sup>

The minority judgment<sup>131</sup> dealt with the issue of conflict between an Act and a treaty in a more definite manner<sup>132</sup> and stated as follows:

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<sup>127</sup> *AM Moolla Group Ltd v Commissioner for the South African Revenue Service* 2003 65 SATC 414 par 15.

<sup>128</sup> *AM Moolla Group Ltd v Commissioner for the South African Revenue Service* 2003 65 SATC 414 par 29.

<sup>129</sup> Per Moseneke DCJ and Cameron J in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

<sup>130</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 181.

<sup>131</sup> Per Ngcobo CJ in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

<sup>132</sup> Du Plessis (2012) *SA Merc LJ* 33; Du Plessis I (2014) Phd thesis, University of Stellenbosch 112.

“In addition, the amicus also accepted, quite properly, that if there is a conflict between an international agreement that has been incorporated into our law and another piece of legislation, that conflict must be resolved by the application of the principles relating to statutory interpretation and superseding of legislation”.<sup>133</sup> (emphasis added)

In a footnote the minority stated that it is arguable that if Parliament passes legislation later in time that conflicts with the provisions of the legislation that incorporates the international agreement, such legislation would supersede the legislation that incorporates the international agreement. However, the court stated that since the issue is not before court it is not necessary to express a definite view on that.<sup>134</sup>

Drawn from both the minority and the majority judgments in the *Glenister* matter, it can be concluded that, once a treaty is incorporated into domestic law it has the same status as domestic legislation. In the domain of a tax treaty it would imply that, once incorporated via section 108(2) of the Act, the treaty would have the same status as any other provision in the Act.<sup>135</sup>

## 2.3 The *van Kets* matter

In the *van Kets* matter the Western Cape High Court had to decide on the status of a tax treaty in relation to the Act. For purposes of this dissertation it is important to provide a brief background of the matter in order to fully appreciate the court’s finding. The South African Revenue Service (hereinafter referred to as “SARS”) received a request from the Australian Tax Office (hereinafter referred to as “ATO”) for information in terms of a treaty entered into between South Africa and Australia.<sup>136</sup> The request by the ATO was made pursuant to article

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<sup>133</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 100-101.

<sup>134</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) footnote 88; Du Plessis (2012) SA Merc LJ 33; Du Plessis I (2014) Phd thesis, University of Stellenbosch 113.

<sup>135</sup> Du Plessis (2012) SA Merc LJ 34; Du Plessis I (2014) Phd thesis, University of Stellenbosch 113.

<sup>136</sup> The agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income between South Africa and Australia was signed on 1 July 1999 and came into force on 21 December 1999. See Government Notice 1538 published in Government Gazette 20761 of 24 December 1999. A protocol amending the treaty was entered into on 12 November 2008. See Government Notice 1368 published in Government Gazette 13721 of 23 December 2008.

25 of the relevant treaty<sup>137</sup> and related to an investigation of the income tax affairs of an Australian resident, one Saville, and his relationship with an off shore company, Republic Life Common Fund (hereinafter referred to as “RLCF”). The information was to be obtained from another director of RLCF, a South African resident, being van Kets.

Based on the request from the ATO, SARS attempted to obtain the information regarding Saville and RLCF, from van Kets, in terms of section 74A and 74B of the Act. It was not in dispute that the requested information was held by van Kets. However, van Kets refused to provide the information on the basis that the information was confidential as well as that he was not authorised, nor had he permission to disclose the requested information.

The relevant part of section 74A and 74B enabled SARS to, “for the purposes of the administration of this Act, in relation to any taxpayer, require such taxpayer or any other person to furnish such information, documents or things as the Commissioner or such officer may require” (emphasis added).

Van Kets advanced the argument that neither Saville nor RLCF were “taxpayers” as defined in the Act and that SARS could not rely on section 74A and 74B to obtain the requested information. Van Kets argued that the term “taxpayer” is defined in the Act as, amongst other, “any person chargeable with tax under the Act”<sup>138</sup> and that van Kets was not chargeable with tax, but merely held information.<sup>139</sup>

SARS advanced the argument that section 74A and 74B are (at the time the matter was argued) the means by which SARS invokes the power to obtain information requested for foreign tax authorities pursuant to agreements concluded by South Africa in terms of which it is obliged to provide information. SARS further argued that, on the approach of van Kets, it would have no legislative mechanisms to obtain the information within its own jurisdiction to meet the requests from foreign authorities.<sup>140</sup>

The issue that the court had to decide on was whether article 25 of the treaty, that deals with the exchange of information, could be enforced in terms of the South African domestic law

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<sup>137</sup> Article 25 of the treaty (after amendment by the subsequent Protocol) relates to the exchange of information between South Africa and Australia.

<sup>138</sup> Section 1 of the Act.

<sup>139</sup> *Commissioner for the South African Revenue Service v van Kets* 2012 3 SA 399 (WCC) par 8; Du Plessis (2012) SA Merc LJ 35.

<sup>140</sup> *Commissioner for the South African Revenue Service v van Kets* 2012 3 SA 399 (WCC) par 9.

(section 74A and 74B of the Act) to obtain the requested information from van Kets.<sup>141</sup> Further, if article 25 could not be enforced in terms of the section 74A and 74B, how would South Africa be able to meet its treaty obligations as contained in article 25?<sup>142</sup>

Davis J referred to section 108 of the Act, section 231 of the Constitution as well as the majority judgment in the *Glenister* matter<sup>143</sup> and stated that the effect of section 108 of the Act is that statutory obligations are created and that those statutory obligations are contained in article 25 of the treaty.<sup>144</sup> With regards to the status of a treaty in relation to the Act, in the event of conflict, Davis J stated as follows:

“It would thus appear as if the DTA provisions become part of domestic income tax laws. Given the manner in which the DTA stands to be in terms of section 231 of the Constitution, its provisions must rank at least, equally with domestic law, including the Act. For this reason, the provisions of the DTA and the Act, should, if at all possible, be reconciled and read as one coherent whole”.<sup>145</sup>  
(emphasis added)

The court proceeded to find that SARS was entitled to require van Kets to furnish the requested information and therefore that article 25 of the treaty could be enforced in terms of the South African domestic laws to obtain the information.

## 2.4 The *Tradehold* matter

In the *Tradehold* matter the Supreme Court Appeal considered the treaty between South Africa and Luxembourg.<sup>146</sup> The issue for determination was whether the term "alienation" in

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<sup>141</sup> *Commissioner for the South African Revenue Service v van Kets* 2012 3 SA 399 (WCC) par 19.

<sup>142</sup> *Commissioner for the South African Revenue Service v van Kets* 2012 3 SA 399 (WCC) par 19; Gutuza T (2016) SA Merc LJ 503.

<sup>143</sup> The court quoted from paragraph 181 of the *Glenister* matter.

<sup>144</sup> *Commissioner for the South African Revenue Service v van Kets* 2012 3 SA 399 (WCC) par 16.

<sup>145</sup> *Commissioner for the South African Revenue Service v van Kets* 2012 3 SA 399 (WCC) par 25.

<sup>146</sup> Double Tax Agreement entered into between South Africa and the Government of the Grand Duchy of Luxembourg on 6 December 2000.

the treaty includes within its ambit deemed disposals of assets. Boruchowitz AJA, with reference to the treaty, stated as follows:

“Double tax agreements effectively allocate taxing rights between the contracting states where broadly similar taxes are involved in both countries. They achieve the objective of section 108, generally, by stating in which contracting state taxes of a particular kind may be levied or that such taxes shall be taxable only in a particular contracting state or, in some cases, by stating that a particular contracting state may not impose the tax in specified circumstances. A double tax agreement thus modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict”.<sup>147</sup> (emphasis added)

Based on the above it is clear that the court found that a treaty will outrank the domestic law in the case of a conflict. It should be noted that the court, when making this finding, did not refer to the *Glenister* matter.<sup>148</sup> It is argued later in this dissertation that the court should have had regard to the *Glenister* matter. It is also argued that if the court had regard to the *Glenister* matter, the court in the *Tradehold* matter might have come to a different conclusion.

### **3. ANALYSIS OF CASE LAW WITH REFERENCE TO DIFFERENT VIEWS ON THE STATUS OF TREATIES IN RELATION TO AN ACT**

#### **3.1 Summary of views in case law**

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<sup>147</sup> *Commissioner for the South African Revenue Service v Tradehold Ltd* 2012 3 All SA 15 (SCA) par 17.

<sup>148</sup> Du Plessis (2012) *SA Merc LJ* 39.

Having regard to the case law discussed it is submitted that there are three views that may be distinguished with regards to a conflict between an Act and a treaty.<sup>149</sup>

- The view of the Supreme Court of Appeal in *Moolla* that holds that if there were to be an apparent conflict between an Act and the provisions of a treaty, the Act must prevail.
- The view of the minority judgment in the Constitutional Court in *Glenister*. Both the majority and the minority judgment expressed the view that the incorporation of a treaty creates ordinary domestic statutory obligations. The minority expressed the view that if there is a conflict between a treaty that has been incorporated into law and another piece of legislation, the conflict must be resolved by the application of the principles relating to statutory interpretation and superseding legislation. The view held by the court in *van Kets* is primarily the same as the minority's view in *Glenister* in that the court found that the provisions of a treaty and the Act, should, if at all possible, be reconciled and read as one coherent whole.<sup>150</sup>
- The view of the Supreme Court of Appeal in *Tradehold* that a treaty modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict.

### 3.2 Analysis of case law

Brincker states that the procedure envisaged in the Constitution for incorporation of a treaty into domestic law is not by means of specific adoption and, on that basis, states that it may very well be possible for a treaty to override the domestic law, except in a situation where the domestic legislation specifically provide for the contrary. Thus, where the domestic legislation specifically provides that it will override the treaty, the domestic law will take precedence over the treaty.<sup>151</sup>

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<sup>149</sup> Du Plessis (2012) *SA Merc LJ* 39; Du Plessis I (2014) Phd thesis, University of Stellenbosch 118.

<sup>150</sup> Du Plessis (2012) *SA Merc LJ* 40.

<sup>151</sup> Brincker E in De Koker A (2010) par 12.7.1.



Regarding the *Moola* matter, Brincker's view is that it appears as if the matter was decided on the common law rule that a treaty does not have a higher status than the domestic law and adds that the *Moola* matter will have far-reaching implications as far as the interpretation of treaties is concerned.<sup>152</sup> This view is based in the fact that the court's approach in the *Moola* matter is inconsistent with the international interpretation of treaties. Brincker states that the treaty and the domestic law should be interpreted, as far as possible, that they are not in conflict with each other. However, in the case of conflict, Brincker states that "effect should be given to the international interpretation of words, rather than one based on domestic legislation".<sup>153</sup>

It is therefore clear that, Brincker holds a different view than that of the court in the *Moola* matter as he essentially holds the view that the provisions of a treaty should trump the provisions of the domestic law in the case of conflict (except where the domestic law specifically provide for the contrary). Although the *Tradehold* matter was not yet decided at the time Brincker expressed his view, his view is in line with the court's view in the *Tradehold* matter.

In short, Hatting is of the view that

"the Constitution places South Africa's commitments under international tax treaties, once approved by Parliament, at a level superior to ordinary Parliamentary legislation (such as the Income Tax Act). Any derogation or an attempt to undermine an obligation arising for the South African state under an operative double tax convention that has received the approval of Parliament would, in this scheme of things, be tantamount to unconstitutional behaviour".<sup>154</sup>

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<sup>152</sup> Brincker E in De Koker A (2010) par 12.7.6.

<sup>153</sup> Brincker E in De Koker A (2010) par 12.7.7.

<sup>154</sup> Hatting J in De Koker A (2010) par 36.14.

Therefore, Hatting, like Brincker, also favours the view of the court in the *Tradehold* matter and consequently that the provisions of a treaty should trump the provisions of the domestic law in the case of conflict.<sup>155</sup>

Olivier and Honiball opines that the *Moolla* matter may be criticised on the basis that the court did not take cognisance of section 233 of the Constitution in that it is not in conformity with the international law.<sup>156</sup> Olivier and Honiball contends that the problem with domestic law overriding a treaty is that a treaty represents a binding contract between the two contracting states, and on that basis the domestic law cannot be used to alter or override the provisions of the treaty as such override will result in a contracting state not honouring the treaty.<sup>157</sup> It is clear that that Olivier and Honiball, like Brincker and Hatting, holds a different view than the view of the court in the *Moolla* matter, therefore also favouring the view of the court in the *Tradehold* matter.<sup>158</sup>

Costa and Stack argues that interpreting the domestic law as overriding a treaty would be in conflict of with the Constitution.<sup>159</sup> According to their view section 108 of the Act provides for the conclusion of a treaty to prevent the same income being taxed twice in both contracting states. They add that it would be illogical to interpret section 108 of the Act as meaning that it would not apply when the provisions of the Act are in conflict with the provisions of a treaty and impose a liability for tax as such interpretation would have the effect that section 108 would be meaningless and serve no purpose.<sup>160</sup> They argue that, in the event of a conflict between the Act and a treaty, which results in an ambiguity, the interpretation must be guided by the *contra fiscum* rule, meaning that the ambiguity should be resolved in a manner that favours the taxpayer.<sup>161</sup>

Regarding the *Moolla* matter, Costa and Stack opines that the *Moolla* matter related to trade agreements and not to tax treaties as such and argues that the *ratio decidendi* would not be

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<sup>155</sup> Although Hatting does not refer to the *Moolla* matter (which was decided at the time Hatting expressed his view) the *Tradehold* matter was not yet decided at the time Hatting expressed his view.

<sup>156</sup> Olivier L and Honiball M (2011) 317. Section 233 of the Constitution provides that “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

<sup>157</sup> Olivier L and Honiball M (2011) 317.

<sup>158</sup> At the time that Olivier and Honiball expressed their view the *Tradehold* matter was not yet decided.

<sup>159</sup> Costa D and Stack L (2014) *JEFS* 274; Du Plessis I (2015) *PELJ* 1197.

<sup>160</sup> Costa D and Stack L (2014) *JEFS* 275; Du Plessis I (2015) *PELJ* 1198.

<sup>161</sup> Costa D and Stack L (2014) *JEFS* 276; Du Plessis I (2015) *PELJ* 1198.

binding upon the court when called upon, in future, to interpret the provisions of a treaty in the context of the provisions of the Act. Like Olivier and Honiball, they argue that the court in the *Moolla* matter did not take cognisance of section 233 of the Constitution.<sup>162</sup> With reference to the *Tradehold* matter, they submit that the legal principles set out in the *Tradehold* matter is correct and therefore ultimately support the argument that the provisions of a treaty should trump the provisions of the domestic law in the case of conflict.<sup>163</sup>

Du Plessis prefers the view of the minority judgment in the *Glenister* matter<sup>164</sup> and therefore suggests that a treaty and the Act (that domesticates the treaty) ranks equally and that, in the case of conflict between the provisions of the Act and the provisions of the treaty, the normal principles of statutory interpretation should apply to resolve the conflict.<sup>165</sup> Du Plessis adds that those principles would include:<sup>166</sup>

- A reference to section 233 of the Constitution which provides that a court should prefer any reasonable interpretation of the Act that is consistent with international law over any other interpretation that is inconsistent with international law.
- The maxim of *lex posterior priori derogat*. This rule has been referred to in the *Glenister* matter<sup>167</sup> and in essence means that a statutory provision that is inconsistent with its preceding counterparts revokes such provision to the extent of such inconsistency.
- The presumption that legislation does not violate international law.

With reference to Hatting's contribution that the Constitution places South Africa's commitments under a treaty at a level superior to ordinary Parliamentary legislation, Du Plessis correctly states that Hatting's view cannot be supported as the Constitutional Court in the *Glenister* matter specifically stated that:

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<sup>162</sup> Costa D and Stack L (2014) *JEFS* 277.

<sup>163</sup> Costa D and Stack L (2014) *JEFS* 280.

<sup>164</sup> Du Plessis (2012) *SA Merc LJ* 40. Du Plessis referred to the *Moolla*, *Glenister*, *Tradehold* and *van Kets* matters.

<sup>165</sup> Du Plessis (2012) *SA Merc LJ* 40.

<sup>166</sup> Du Plessis (2012) *SA Merc LJ* 40.

<sup>167</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) footnote 88.

“It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations”.<sup>168</sup>

With reference to Costa and Stack’s contribution that interpreting the Act as overriding a treaty would be unconstitutional, Du Plessis states that Costa and Stack do not provide any reason for this view.<sup>169</sup> With regards to Costa and Stack’s interpretation of section 108, Du Plessis rightly states that it is not the interpretation of section 108 that is relevant, but rather the interpretation of the relevant section of the Act that imposes the tax and the provisions of the treaty.<sup>170</sup> Insofar as Costa and Stack’s argument, that interpretation should be guided by the *contra fiscum* rule, Du Plessis states that this rule is not applicable as the Act only imposes tax once and explains that the cause of double taxation is the result of tax imposed by another state on the same income that the Act applies to.<sup>171</sup>

Du Plessis therefore ultimately states that the status of a treaty is determined by the Constitution. With regards to a conflict between the Act and a treaty, the principles of statutory interpretation should apply. Du Plessis’s views find support in the *Glenister* matter.<sup>172</sup> Du Plessis acknowledge that, although her preferred view is the view of the minority in the *Glenister* matter, the courts will probably follow the view of the court in the *Tradehold* matter as it was a unanimous decision of the Supreme Court of Appeal.<sup>173</sup>

Gutuza states that the South African approach to conflicting provisions is to consider the context and the purpose of the two inconsistent provisions and then attempt to reconcile the provisions. She states that, with reference to the *Tradehold* and *van Kets* matter, the purpose of the Act and the purpose of treaty in these two matters differs from each other.<sup>174</sup> She further states that in the *Tradehold* matter the purpose of the anti-avoidance provisions in the Act must be considered against the purpose of the treaty to allocate taxing rights. In the *van Kets* matter the right of SARS to obtain information, on request of the ATO, from a

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<sup>168</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 181. Du Plessis I (2015) *PELJ* 1194.

<sup>169</sup> Du Plessis I (2015) *PELJ* 1198.

<sup>170</sup> Du Plessis I (2015) *PELJ* 1198.

<sup>171</sup> Du Plessis I (2015) *PELJ* 1198.

<sup>172</sup> Du Plessis I (2015) *PELJ* 1199.

<sup>173</sup> Du Plessis (2012) *SA Merc LJ* 41.

<sup>174</sup> Gutuza T (2016) *SA Merc LJ* 481.

person who is not a taxpayer, must be considered against the right of the ATO to obtain information from a person who is not a taxpayer in the jurisdiction of the treaty partner.

Gutuza proceed to argue that if one applies the principles relating to the interpretation of legislation, then in both the *Tradehold* and the *van Kets* matter, the court attempted to reconcile the contradictory provisions.<sup>175</sup> Gutuza explains this by stating that although the court in the *Tradehold* matter held the view that a treaty modifies the domestic law and will apply in preference to the domestic law (the “trump” view), it can be said that the court did so in terms of the purpose of the provisions of the treaty and reached its decision by reconciling the provisions. Regarding the *van Kets* matter she states that the reconciliation approach was clearly applied where the court stated that the treaty and the domestic law should be reconciled and read as one coherent whole.<sup>176</sup>

The sum of Gutuza’s argument is that, instead of using terminology such as “trump”, which creates the impression that, in the case of conflict, the Act or the treaty should take precedence over the other, and which creates a “winner takes it all” approach, it is more appropriate to use the reconciliation approach.<sup>177</sup>

### 3.3 The view favoured in this dissertation

Based on the academic contributions discussed above it seems that the majority (Brincker, Hatting, Olivier and Honiball and Costa and Stack) prefers the view that a treaty will override the domestic law in the case of conflict (the view of the court in the *Tradehold* matter). The minority (Du Plessis and Gutuza) prefers the view that, in the case of conflict between the provisions of the Act and the provisions of a treaty, the conflict should be resolved by reconciling the conflicting provisions and applying the ordinary principles of statutory interpretation (the view of the minority in the *Glenister* matter and the view of the court in the *van Kets* matter).

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<sup>175</sup> Gutuza T (2016) *SA Merc LJ* 481, 507.

<sup>176</sup> Gutuza T (2016) *SA Merc LJ* 481, 507; *Commissioner for the South African Revenue Service v van Kets* 2012 3 SA 399 (WCC) par 25.

<sup>177</sup> Gutuza T (2016) *SA Merc LJ* 481; Gutuza T (2016) *SA Merc LJ* 507.

This dissertation favours the view of the minority of the academic contributions (and therefore the view of the minority in the *Glenister* matter). Consequently, in the case of conflict between the provisions of the Act and the provisions of a treaty, this dissertation favours the view that the conflict should be resolved by reconciling the conflicting provisions and applying the ordinary principles of statutory interpretation. The reasons for this view are expounded on below.

- Brincker's view that the procedure envisaged in the Constitution for incorporation of a treaty into domestic law is not by means of specific adoption cannot be supported. Section 231(4) of the Constitution provides that a treaty becomes law in the Republic when it is enacted into law by national legislation. Further, section 108(2) of the Act provides that a treaty shall then have effect as if enacted in the Act. This procedure, outlined in section 231(4) of the Constitution and section 108(2) of the Act, envisages a procedure of specific adoption of a treaty into the Act. Further, Brincker's view that a treaty will override domestic law except in a situation where the domestic law specifically provides for the contrary cannot be supported. Brincker based his argument on the fact that the domestic law should specifically provide for a situation where the intention is to override the treaty. Brincker does not explain why only the domestic law should provide for a situation where the intention is to override the treaty. The counter argument could be that the domestic law should override a treaty unless the treaty contains specific provisions to the contrary.
- Hatting's view that the Constitution places South Africa's commitments under international tax treaties at a level superior to ordinary legislation and that any derogation or an attempt to undermine an obligation arising under the treaty would be tantamount to unconstitutional behaviour, cannot be supported based on two grounds. Firstly, the Constitutional Court in the *Glenister* matter specifically stated that the incorporation of an international agreement creates ordinary domestic statutory obligations and added that incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.<sup>178</sup> This was also Du Plessis's critique on Hatting's contribution.<sup>179</sup> Further, in the *van Kets* matter Davis

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<sup>178</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 181. Du Plessis I (2015) *PELJ* 1194.

<sup>179</sup> Du Plessis I (2015) *PELJ* 1194.

J stated that “The effect of s 108 is thus to ensure that domestic statutory obligations are created”.<sup>180</sup> Secondly, derogation or an attempt to undermine an obligation under a treaty cannot be viewed as unconstitutional if the Constitution itself dictates in section 231(4) that a treaty becomes law in the Republic when it is enacted into law by national legislation therefore creating ordinary statutory obligations.

- Olivier and Honiball’s view that the problem with domestic law overriding a treaty is that a treaty represents a binding contract between the two contracting states and an override by domestic law will result in a contracting state not honouring the treaty, cannot be supported. If a treaty partner interprets a treaty in such a way that it needs to be reconciled with the domestic law, the relationship (dispute) at that stage is between the contracting state and a taxpayer and not between the contracting states that are disputing the interpretation of the treaty. It can therefore not be said that one contracting party is not honouring the treaty.
- With regards to Costa and Stack’s interpretation of section 108, this dissertation agrees with Du Plessis’s critique<sup>181</sup> that it is not the interpretation of section 108 that is relevant, but rather the interpretation of the relevant section of the Act that imposes the tax and the provisions of the treaty.
- The court, when deciding on the *Tradehold* matter, did not have regard to the view of the Constitutional Court in the *Glenister* matter. The fact that the court in the *Tradehold* matter did not have regard to the view of the Constitutional Court in the *Glenister* matter is a departure from the *stare decisis* principle<sup>182</sup> that provides that courts should abide by or adhere to principles established by decisions in earlier cases. If the court did have regard to the Constitutional Court’s view the outcome might have been different.
- Although the court in the *Moola* matter stated that the Act must prevail in the case of conflict, it is important to note that the court also stated that in that specific matter there was no apparent conflict.<sup>183</sup> It may well be that if there was indeed conflict between the provisions of the treaty and the provisions of the Customs Act, the court

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<sup>180</sup> Commissioner for the South African Revenue Service v van Kets 2012 3 SA 399 (WCC) par 16.

<sup>181</sup> Du Plessis I (2015) *PELJ* 1198.

<sup>182</sup> Authority for this principle is found in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 4 SA 613 (CC) par 57 where Kriegler J, with reference to the *stare decisis* principle, stated “The words are an abbreviation of a Latin maxim, *stare decisis et non quieta movere*, which means that one stands by decisions and does not disturb settled points. It is widely recognized in developed legal systems”.

<sup>183</sup> *AM Moola Group Ltd v Commissioner for the South African Revenue Service* 2003 65 SATC 414 par 15.



might have been inclined to follow a different view. This view is supported by the fact that Lewis JA in the *Moolla* matter stated that “[t]he structure of the Act and the incorporation of the agreement as a part of it lead to the inevitable conclusion that the agreement must be construed in such a way as to avoid any conflict between the Act itself”.<sup>184</sup> Therefore the court essentially stated that the Customs Act and the treaty must be reconciled so as to avoid any conflict.

- Based on section 231(4) of the Constitution read with section 108(2) of the Act it is clear that the provisions of a treaty shall have the effect as if enacted into the Act. This means that the provisions of the treaty and the provisions of the Act stands equal and that one cannot be regarded as superior to the other.<sup>185</sup> Support for this view is found in the *Glenister* matter.<sup>186</sup> In the event that those provisions are then inconsistent with each other there should be no difference in interpretation than when two provisions of the same act are in conflict with each other.

It follows that this dissertation agrees with Du Plessis that the conflict should be resolved by applying the ordinary principles of statutory interpretation.<sup>187</sup> It also follows that this dissertation agrees with Gutuza where she argues that instead of using terminology such as “trump”, which creates the impression that, in the case of conflict, the Act or the treaty should take precedence over the other, and which creates a “winner takes it all” approach, it is more appropriate to use the reconciliation approach.<sup>188</sup>

#### 4. CONCLUDING REMARKS

With regards to the interplay between a treaty and the domestic law, in the case of conflict, there are divergent views as to whether a treaty should outrank the provisions of the domestic law. The courts have also been inconsistent in their approach.<sup>189</sup> Although this dissertation favours the approach of the minority in the *Glenister* matter, the court in the

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<sup>184</sup> *AM Moolla Group Ltd v Commissioner for the South African Revenue Service* 2003 65 SATC 414 par 29.

<sup>185</sup> Du Plessis (2012) *SA Merc LJ* 34.

<sup>186</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 100-101.

<sup>187</sup> Du Plessis I (2015) *PELJ* 1195.

<sup>188</sup> Gutuza T (2016) *SA Merc LJ* 507.

<sup>189</sup> Du Plessis I (2015) *PELJ* 1200.



*Moola* and the *Tradehold* matters expressed a different view. It is hoped that the court will provide clear and definite guidance on this issue in future judgments.

## **5. CHAPTER 5: CONCLUSION**

The primary research question posed by this dissertation is - what is the legal status of tax treaties in South Africa? The secondary research question is - what is the position in South Africa if the provisions of a tax treaty are in conflict with the provisions of the Act? In other words, do the provisions of a treaty trump the provisions of the Act or do the provisions of the Act trump the provisions of a treaty? Therefore, the primary aim of the research was to determine the legal status of tax treaties in South Africa and thereafter determine the position

in the case where the provisions of a tax treaty and the provisions of the domestic law are in conflict with each other.

Chapter 2 provided an overview of the basic principles of tax treaties and international tax and concluded that there is some degree of interaction between the domestic laws of a country and a treaty since they both have the same objective.

Chapter 3 dealt with the primary research question and demonstrated that there are divergent views as to whether a further step, such as enactment into law by national legislation, is required for a treaty to become part of the domestic law of South Africa. Based on the arguments advanced in Chapter 3, the view preferred in this dissertation is that in order for a treaty to become part of South African domestic law, enactment by national legislation is required. Further, based on the case law discussed in Chapter 3 the view is that publication in the Government Gazette is a further requirement for a treaty to become part of the domestic law of South Africa. Therefore, as far as the primary research question is concerned, the view advanced in this dissertation is that a treaty becomes law in South Africa, once published in the Government Gazette, and has the same status as domestic law.

Chapter 4 dealt with the secondary research question and demonstrated that, as with the primary research question, that there are divergent views regarding the status of a treaty in relation to the Act. Further, the courts have not been consistent in their treatment of the issue by handing down contradictory decisions. This dissertation does not support the view that the provisions of a treaty trumps the provisions of the Act or that the provisions of the Act trumps the provisions of a treaty. The arguments advanced in this dissertation supports the view that conflict between the provision of an Act and the treaty should be resolved by applying the ordinary principles of statutory interpretation. Further, this dissertation supports the view that instead of using terminology such as “trump”, which creates the impression that, in the case of conflict, the Act or the treaty should take precedence over the other, and which creates a “winner takes it all” approach, it is more appropriate to us the reconciliation approach. Support for the view favoured by this dissertation is found in the minority judgement in the *Glennister* matter as well as the *van Kets* matter). However, the court in the *Moolla* and the *Tradehold* matters expressed a different view. Chapter 4 concluded by

stating that it is hoped that the court will provide clear and definite guidance on this issue in future judgments.

When one is faced with the question regarding the legal status of a treaty in South Africa – for the moment, it seems appropriate to use words such as “if”, “but” and “maybe”.

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