IN THE TAX COURT
HELD AT JOHANNESBURG

CASE NO 11038/2006

In the application of:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant (Respondent in the tax appeal)
and	
Mr. N	First Respondent
ABC Ltd	Second Respondent (Appellant in the tax appeal)

In re the tax appeal of:

ABC Ltd	*Appellant*
and	
THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	*Respondent*

JUDGMENT

(Judgment delivered on: 1 October 2009)

GILDENHUYS J:

[1] This is an application for the separation and prior adjudication of a question of law in a tax appeal. The appellant in the tax appeal is ABC Ltd. I shall refer to it as "ABC Ltd".

The respondent in the tax appeal is the Commissioner for the South African Revenue Service. I shall refer to him as “SARS”. At the time of the transactions relevant to the tax appeal, one Mr N was the “controlling mind” of ABC Ltd. I shall refer to him as “Mr N”.

[2] On 15 February 2002, SARS issued tax assessments against ABC Ltd for the 1998 to 2000 tax years. The assessment relates to profits made by ABC Ltd from the sale of shares which it held in a number of companies listed on the Johannesburg Stock Exchange. ABC Ltd appealed against the assessments. The appeal is presently pending in the Tax Court.

[3] On 13 June 2002 Mr. N was arrested. He faces charges of fraud, tax evasion, exchange control contravensions, perjury, money laundering and racketeering. The issues relating to some of these charges could overlap issues which will arise in the tax appeal. The criminal trial has not yet commenced, and is not expected to commence within the near future.

[4] On 14 October 2005 SARS delivered a notice of set-down for the hearing of the tax appeal. ABC Ltd found itself unable to proceed with the hearing because Mr. N, a crucial witness, refuses to consult with ABC Ltd’s legal team. He made it known that he will decline to give evidence in the tax appeal, even if subpoenaed to do so, because it will intrude upon his constitutional right to remain silent, and also because he might incriminate himself if he testifies.

[5] On 9 December 2005 ABC Ltd lodged an application for a postponement of the hearing of the tax appeal. The application was argued before Boruchowitz J. The learned Judge found that it would not be possible to compel Mr N to give evidence in the tax appeal before the criminal trial has been disposed of. He ordered that the tax appeal be postponed *sine die* and that it may not be set down or reinstated without leave of the Court.

[6] On 25 April 2008 the following direct use immunity was issued to Mr N by the National Prosecuting Authority:

"**UNDERTAKING WITH REGARD TO EVIDENCE GIVEN BY MR N ("MR N") IN THE PROCEEDINGS BEFORE THE TAX COURT**

The National Prosecuting Authority hereby undertakes that no evidence regarding questions put to, and answers given by, Mr N:

- before the Tax Court proceedings, held at Johannesburg, between ABC Ltd (Appellant) and The Commissioner for the South African Revenue Service (Respondent) under Case No 11038/2006; or

- in consultations with ABC Ltd and/or its legal representatives for the purpose of and in advance of the testimony of Mr N in the above proceedings;

will be used in evidence in the prosecution of an offence alleged to have been committed by Mr N: provided that this undertaking Mr N will not have the effect of preventing the use of such evidence in any trial in which Mr N is charged with perjury in respect of the evidence given before the Tax Court."

[7] By notice of motion dated 10 November 2008, SARS applied for leave to re-enroll the tax appeal on the basis that there has been a material change in the relevant circumstances brought about by the issue of the direct use immunity to Mr N. Mr. N opposed the application for leave to re-enroll, *inter alia* on the basis that -

- the immunity is impermissible new matter;
- the immunity was unlawfully issued;
- the immunity cannot affect Mr N's rights because its issue is not permitted by a law of general application; and
- there is no need for ABC Ltd or Mr N to apply to Court for an order to set the immunity aside.

[8] The re-enrolment application came before me. I found that the issue of the immunity constituted a circumstance which would, in the absence of any other constraint, justify leave to SARS to re-enroll the tax appeal as envisaged under the Order by Boruchowitz J on 8 March 2006. ABC Ltd argued that there are also other constraints preventing the re-enrolment. I considered them, but was not convinced that they can stand in the way of

the re-enrolment. I accordingly granted leave on 2 November 2009 for SARS to enroll the tax appeal.

[9] In consequence of my Order of 2 November 2009, the tax appeal was set down for hearing on 15 to 26 March 2010. The legal representatives of ABC Ltd, however, intimated to SARS that they would not be ready to proceed with the appeal on those dates.

[10] The legal teams of SARS and ABC Ltd then met and subsequently discussed the matter with the Judge President. It was agreed that the March 2010 dates would be utilized for an interlocutory application to be brought by SARS relating to the direct use immunity, and that the tax appeal itself would be heard during June 2010.

[11] By notice of motion dated 14 December 2009, SARS brought the envisaged interlocutory application for an order against Mr. N and ABC Ltd, as follows:

> "That it be declared that the first respondent [Mr N] would not be entitled to refuse to give evidence on behalf of the second respondent [ABC Ltd], appellant in the tax appeal, at the hearing of the tax appeal, merely because the answers may tend to incriminate him."

Mr. N opposes the application. ABC Ltd abides the decision of the Court.

[12] The SARS application came before me on 15 March 2010. I put to counsel that it may be necessary for SARS to bring a separation application and to obtain a separation order as envisaged in Rule 33(4) of the Uniform Rules of the High Court before I can adjudicate on the relief sought. The parties are *ad idem* that Rule 33(4) can be utilized for that purpose in proceedings before this Court.

[13] Following upon my remarks, SARS applied the next day for an order as follows:

> "1. Directing in accordance with the provisions of Rule 33(4) of the Uniform Rules of the High Court, that the following question of law be decided

before any evidence is led and separately from any other question in the Tax Appeal:

"Whether the first respondent would be entitled to refuse to give evidence on behalf of the second respondent (appellant in the Tax Appeal) at the hearing of the Tax Appeal, merely because the answers may tend to incriminate him."

2. Directing that the proceedings in respect of all remaining questions in the Tax Appeal be postponed to 7 June 2010, which date has been arranged for the hearing of the Tax Appeal.

3. Declaring that the first respondent would not be entitled to refuse to give evidence on behalf of the second respondent (applicant in the Tax Appeal) at the hearing of the Tax Appeal, merely because the answers may tend to incriminate him."

[14] Some debate followed. On the following day SARS came up with yet another (substitute) application, this time for an order:

"1. Directing in accordance with the provisions of Rule 33(4) of the Uniform Rules of the High Court, that the following question of law be decided before any evidence is led and separately from any other question in the Tax Appeal:

"Whether, while the undertaking Mr. N annexure **"SARS14"** to the application is in existence, the first respondent's reliance on a right not to be compelled to give self-incriminating evidence, or on a right to remain silent, would not constitute "reasonable cause" as contemplated in section 84(2) of the Income Tax Act, Act 58 of 1962, to fail or refuse to give evidence at the hearing of the Tax Appeal."

2. Directing that the proceedings in respect of all remaining questions in the Tax Appeal be postponed to 7 June 2010, which date has been arranged for the Tax Appeal.

3. An order that while the undertaking Mr. N annexure **"SARS14"** to the application is in existence, the first respondent's reliance on a right not

> to be compelled to give self-discriminating evidence, or on a right to remain silent, would not constitute "reasonable cause" as contemplated in section 84(2) of the Income Tax Act, Act 58 of 1962, to fail or refuse to give evidence at the hearing of the Tax Appeal."
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> 4. That no order for costs will be applied for."

[15] The relief claimed by SARS is twofold. Firstly, an order separating the issues pertaining to the immunity, and secondly a decision on those issues. The two cannot be telescoped into a single process.[5] Now before me is the application for a separation order. If I grant the order, the question of law would have to be decided in a separate hearing prior to the adjudication of the tax appeal itself.

[16] I proceed to enquire under what circumstances a Court will grant a separation order. In this regard, Moosa AJ held as follows in *African Bank v Soodhoo*[6]:

> "The general principle in law would appear to be that notwithstanding the wide powers conferred on a court under rule 33(4) of the Uniform Rules of Court it is ordinarily desirable, in the interests of expedition and finality of litigation, to have one hearing only at which all issues are canvassed so that the court, at the conclusion of the case, may dispose of the entire matter. *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 D at 362G-H, and *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) ((2004) 25 ILJ *659)* at 485B-C have reference. In some instances, however, the interests of the parties and the ends of justice are better served by disposing of a particular issue or issues before considering other issues which, depending on the result of the issue singled out, may fall away. *(Minister of Agriculture* (supra) at 362H.)"[7]

[17]The compellability of Mr. N as a witness underlies the issue which I have been asked to separate. That in turn is dependant on the validity or enforceability of the direct use immunity given to Mr. N. If the issue is not separated, it is bound to come to the fore when Mr. N is called to the witness stand during the hearing of the appeal. He will

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[5] See *Marsay v Dilley,* 1992(3) SA 962 (A) at 962H-963C.
[6] 2008 (6) SA 46 (D&CLD) at 51B-E.
[7] See also *Braaf v Fedgen Insurance* 1995 (3) SA 938 (C) at 941D, *Sharp v Victoria West Municipality* 1979 (3) SA 510 (N) at 512B, *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D&CLD) at 362G-H and 363A-G and *King v King* 1971 (2) SA 630 (O) at 633A-C.

probably refuse to testify. That would entail, so Mr XP (on behalf of SARS) contended in his founding affidavit to this application,[8] that valuable court time will be taken up to place all the relevant facts, allegations and contentions, and the answers thereto, before the Court. The result might well be that there will be insufficient time left for the hearing of the tax appeal to be completed within the allocated time. If that comes to pass, much of the time and effort spent on the preparation of the tax appeal may be wasted.

[18] If the issues which SARS seeks to separate have to be adjudicated at the hearing during June 2010, the court might find it inconvenient to rule on them forthwith. In such an event, the matter may have to stand down. Should the Court at the hearing rule that Mr. N has no “reasonable cause” not to testify, Mr N might well lodge an appeal. The converse could apply if the ruling is in favour of Mr. N. Furthermore, if Mr. N is held to be a compellable witness, he might change his mind and be willing to consult with ABC Ltd’s legal team. Such consultations will take up time, and can be expected to necessitate a postponement of the hearing of the appeal.

[19] It is most likely that should the issue of Mr. N’s compellability as a witness have to be adjudicated at the commencement of or during the course of hearing of the tax appeal, the hearing itself will thereafter have to be postponed. Viewed from that angle only it could be convenient to dispose of the compellability issue before the main hearing of the appeal. There may however be other factors which make this impossible or undesirable. Mr Chaskalson, who appeared on behalf of Mr. N, contended that such factors do exist. I proceed to consider them.

[20] Firstly, it is submitted that Mr. N is not a party to the principal action (the tax appeal) and the issue to be separated is not an issue in the principal action. Mr Chaskalson relied on a *dictum* in the case of *Transvaal Canoe Union v Bugereit and Another*[9] to the effect that rule 33(4) of the Uniform Rules only applies to issues in a “pending action” between the parties thereto, Mr. N is not a party in the proceedings between SARS and ABC Ltd. The facts in the *Transvaal Canoe Union* case, however are different from the facts in the

[8] Par 15 of the founding affidavit dated 12 December 2009.
[9] 1990(3) SA 398 (T) at 410 J

case before me. The *Transvaal Canoe Union* case, in my view, does not lay down any principle in a matter such as the present.

[21] Rule 33(4) of the Uniform Rules reads as follows:

> "If it appears to the Court *mero motu* or on the application of any party that there is, in any pending action, a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the Court may make an order directing the disposal of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of…"

The compellability of a witness in a pending action could, in my view, be a question of law or fact in that action. The circumstance of the witness concerned having an interest in the question does not change that. It may, however, be problematic in the present case to decide the question of Mr. N's compellability as a witness separately, as I shall indicate hereunder.

[22] Secondly, Mr Chaskalson submitted that the issue of whether Mr. N can be compelled to give evidence in the tax appeal is not an issue in the tax appeal itself, but rather an issue in an enquiry which the Court has conduct under sec 82(2) of the Income Tax Act,[10] should Mr. N refuse to testify. Section 84(2) states:

> "(2) If any person who has been duly sub-poenaed to give evidence at the hearing of an appeal… fails without reasonable cause to attend or to give evidence… the President of the Court may, upon being satisfied upon oath or by the return of the person by whom the sub-poenaed was served, that such person has been duly sub-poenaed and that his reasonable expenses have been paid or offered to him; impose upon the said person a fine or in default of payment imprisonment for a period nor exceeding three months."

(my underlining)

[10] Act No 58 of 1962.

[23] The issues in the sec 84(2) inquiry, so Mr Chaskalson argued, are issues between the objecting witness and the presiding judge. They should not be decided in advance by a different judge. I am not convinced that an enquiry about whether a witness has "reasonable cause" not to give evidence does not involve the parties to the proceedings, especially in cases where the alleged "reasonable cause" involve discrete issues of law or fact.

[24] An enquiry into the existence or absence of "reasonable cause" under sec 84(2) may not be the only route along which the compellability question can be decided. The issue of Mr. N's fundamental right to silence and his right not to be compelled to give self-incriminating evidence will inevitably arise if he is called to give evidence in the appeal hearing.[11] Determining that issue in advance of the main hearing might well be convenient. It is, however, not trite that it is an issue capable of separation under rule 33(4).

[25] Thirdly, Mr Chaskalson submitted that this Court has no jurisdiction to dispose of the separated issues because whatever order the Court might make will be a declaratory order and the Tax Court, being a creature of statute, has no jurisdiction to grant a declaratory order.[12] It is possible for the High Court to issue a declaratory order which is not subject to variation or amendment, *ie* a final order.[13] *Non constat* that the Tax Court has the power to make such a declaratory order, or that a declaratory order on the compellability of a witness is a final order.

[26] Lastly, Mr Chaskalson submitted that the proposed separation will not offer any advantages of convenience because it will remain open for Mr. N in any sec 84(2) enquiry to re-litigate the issue of whether he can be compelled to testify in the tax appeal in advance of his criminal trial. Whether Mr. N can re-litigate the issue of his compellability as a witness depends on the nature of the order made pursuant to the separated hearing.

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[11] See par [19] of judgment by Boruchowitz J delivered on 27 February 2006.

[12] At common law no Court has any power to grant a declaratory order without consequential relief. The High Courts, however, have been given such power by Parliament in terms of sec 19(1)(a)(ii) of the Supreme Court Act No 59 of 1959. The Tax Court is not a High Court. See also *Softec Mattress (Pty) Ltd v Transvaal Mattress and Furnishing Co Ltd,* 1979 (1) SA 755 (D) at 757D-E.

[13] See also *SA Eagle Versekeringsmaatskappy Bpk v Harford,* 1992 (2) SA 786 (A) at 792D-G.

The order is an interlocutory order which, so SARS contends, has final effect and will be binding on the judge who hears the tax appeal.

[27] The Roman Dutch authorities recognized that some interlocutory orders have little or no bearing upon the merits of an action, whilst others might have a direct effect on the final issue.[14] They divided decisions of this kind into *interlocutory orders* proper and *interlocutory orders* which have final effect. The distinction was considered by Innes CJ in *Bell v Bell.*[15] He concluded:

> "……it will convenient in future… to hold that the *interlocutory orders* of our rules correspond with the simple *interlocutory orders* of the books; while what the Dutch lawyers would have styled *interlocutory orders* having the force of definite decisions as final judgments."

[28] In a later decision Holmes J (as he then was) distinguished in *Bashford v Bashford*[16] between what he called two kinds of interlocutory orders. He said:

> "Some have the effect of a final and definitive sentence, others do not. ……The test for distinguishing between the two is whether the order is such as to 'dispose of any issue or any portion of the issue in the main action or suit.[17]

[29] It is open to doubt whether a finding by a judge in a separated hearing that Mr. N is a compellable witness would be final and definitive, and therefore binding on the judge hearing the main tax appeal. In a recent unreported judgment in the case of *The State v Selebi,*[18] Joffe J ruled on the compellability of a prospective witness to give evidence. The witness objected to testifying on the basis that his evidence will endanger state security. The objection was raised during the trial at a time when the witness was already in the witness box[19] although not yet sworn in. The judgment in which Joffe J conveyed

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[14] See Claassen, *Dictionary of Legal Words and Phrases, 5V* "Interlocutory Order".
[15] 1908 TS 890.
[16] 1957(1) SA 21 (N) at 24A-B.
[17] *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd,* 1948 (1) SA 839 (A) at 870.
[18] Judgment dated 24 November in Case no SS25/09.
[19] This is evident from the transcript of the proceedings, p 1734 line 17.

his decision that the witness must testify is headed "Ruling". The heading indicates that the learned judge did not consider his decision to be final end definitive.

[30] In *Rhodesian Timbers Ltd v Rosenbach*[20] Caney J considered an application that an issue relating to the admission of evidence tendered in respect of the interpretation of a certain document be separated for prior adjudication. The learned judge said in the course of his judgment:[21]

> "In relation to this it appears to me that the Rule should be employed in relation only to those questions of law decisions upon which are not interlocutory in the sense of *Bell v Bell, supra.* This is so whether the Judge to determine the question is the trial Judge, in advance of hearing evidence, or some other Judge, for, as that case decided, in either instance such an interlocutory order may be varied or set aside by the Judge who made it or by any other Judge sitting in the same Court and exercising the same jurisdiction.
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> If, as I consider is the case, such decisions, by their very nature, would be purely interlocutory, the advance determination of them would be a futility, for they would not bind the trial Judge who, with the general evidence of the case before him, might consider a contrary ruling on the admissibility or otherwise of evidence to be proper. If, on the other hand, any such decision in advance would be binding on the trial Judge, I consider it undesirable that he should be so bound, since he, with the general evidence of the trial before him, will be in the best position to decide whether evidence should or should not be admitted in aid of interpretation."

Since a finding on the compellability issue in this case could well be interlocutory in the sense of *Bell v Bell*[22]*,* a separation thereof might not be appropriate.

[31] Separation of the compellability issue cannot have the effect that any of the other issues in the tax appeal might fall away. Although prior adjudication of the compellability issue might prevent a postponement of the main hearing, it will not shorten the main hearing.

[20] 1962 (1) SA 112 (DeCLD)
[21] At p 114B-F.
[22] 1908 TS 890.

[32] A separation order will furthermore introduce new questions for decision, which could take up time and increase the costs. Such new issues include the following:

- the question whether a prior decision on the separated issue is final and binding, or whether the issue can be reconsidered at the main hearing;
- the question whether a prior decision on the separated issue would be a declaratory order, and if so, whether the Court has the power to make such an order; and
- the question whether the Court can forestall an enquiry under section 82(2) of the Income Tax Act by a prior decision on the very issues which will come up at such an enquiry.

[33] If I order that the compellability issue be adjudicated prior to the other issues in the tax appeal, the adjudication will be before a different judge. That judge might be of the view that he has no power to give a prior decision on the compellability issue, or that it would be inadvisable for him to do so. In such event the prior hearing would have been a waste of time and money. It must be remembered that Mr. N opposes the separation application, and will in all likelihood endeavor to persuade the judge hearing the separation application that he has no power to decide the separated issue, or that it would be inadvisable for him to do so.

[34] Mr Chaskalson stated that the issues surrounding Mr. N's refusal to testify have not been properly canvassed. That may be so. It will be remembered that SARS presented the formulation of the issue it now asks to be separated only at the commencement of the third day of the hearing before me. Mr N is entitled to an opportunity to respond thereto, so that the facts and the law relating to the issues will be properly canvassed before the issues are decided. All of this will take up time and cause further delays.

[35] I find that the advantages to be gained by separating the compellability issue are outweighed by the disadvantages. The issue is in my view not suitable for prior adjudication. An order separating it might very well, in the words of Caney J in the

Rhodesian Timbers matter (*supra*), "create a confused situation and involve the parties in greater expense."[23]

[36] I come to the issue of costs. In my view, and on the information before me, SARS did not act unreasonably in bringing the separation application. The Court hearing the tax appeal will, however, be in a better position than I am now to decide the issue of costs. I will therefore reserve costs.

[37] Because of the pending trial date in June 2010, I was requested to decide this separation application as soon as possible. My judgment was prepared in some haste, and is not as comprehensive as I would have liked it to be.

[38] For the reasons set forth above, I make the following order:

(a) The application that the question of law set forth hereunder be decided separately from and in advance of any other issue in the tax appeal is hereby dismissed:

> "Whether, while the undertaking Mr. N annexure **"SARS14"** to the application is in existence, the first respondent's reliance on a right not to be compelled to give self-incriminating evidence, or on a right to remain silent, would constitute "reasonable cause" as contemplated in section 84(2) of the Income Tax Act, Act 58 of 1962, to fail or refuse to give evidence at the hearing of the Tax Appeal."

(b) The costs of the separation application are reserved

[23] 1962 (1) SA 112 at p 115.

A GILDENHUYS

PRESIDENT