IN THE TAX COURT, HELD AT JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA) CASE NO 11038/2006

Before:

The Honorable Judge A Gildenhuys	President
Dr H A Coetzee	Accountant Member
Mr S Lumka	Commercial Member

Heard on: 14 & 15 May 2009 and 19 & 20 August 2009

Judgment Delivered: …….. October 2009

In the matter between**:**

THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**APPLICANT (RESPONDENT IN THE TAX APPEAL)**
And	
ABC HOLDINGS LIMITED	**Respondent (Appellant in the tax appeal)**

In re the tax appeal of:

ABC HOLDINGS LIMITED	**Respondent (Appellant in the tax appeal)**

And

THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Applicant (Respondent in the tax appeal)**

JUDGEMENT

GILDENHUYS J.:

[1] This is an application for the re-enrolment of a tax appeal. The appellant in the tax appeal is ABC Holdings Limited. I shall refer to it as "ABC". The respondent in the tax appeal is the Commissioner for the South African Revenue Service. I shall refer to it as "SARS". At the time of the transactions relevant to the tax appeal, one D C K was the "controlling mind" of ABC. I shall refer to him as "K".

[2] During March 2000 SARS began an enquiry into the tax affairs of K. This led to a formal enquiry under section 74C of the Income Tax Act No 58 of 1962. K gave evidence at the enquiry. It is common cause between SARS and ABC that in his testimony, K dishonestly sought to put distance between himself on the one hand and ABC on the other.

[3] On 15 February 2002, SARS issued tax assessments against ABC for the 1998 to 2000 tax years. The amount which ABC was required to pay in respect of income tax, additional tax and interest amounted to R1.467-billion. The assessment relate to profit generated from the sale by ABC of shares which it owned in a company named XYZ (XYZ), a company listed on the Johannesburg Stock Exchange, as well

as the sale of other listed shares. ABC appealed against the assessments. The appeal is pending in the tax court.

[4] The tax appeal turns on whether or not the profits made by ABC on the sale of the XYZ and other shares are taxable income. In its decisions to acquire or to dispose of the shares, ABC acted on the wishes of K. It follows that the determination of whether the shares were bought and sold with a capital or revenue intent, turns on K's state of mind. He is therefore a crucial witness in the tax appeal.

[5] On 13 June 2002 K was arrested. He currently faces some 322 criminal charges of fraud, tax evasion, exchange control evasion, perjury, money laundering and racketeering. These charges could overlap some of the issues which will arise in the tax appeal. The criminal trail has not yet commenced. Indications are that it will not commence within the near future, and that it will take a long time to conclude. The docket comes to some 147000 pages. The indictment runs into nearly 1000 pages. There are more than one hundred potential state witnesses.

[6] According to ABC, K refused and still refuses to give it any assistance in prosecuting the tax appeal. Specifically, he refuses to consult with ABC' legal advisers. He made known that he will decline to give evidence in the appeal, even if subpoenaed to do so, on the basis that by testifying he might incriminate himself. K's stance, so ABC say, precludes it from prosecuting the tax appeal.

[7] On 14 October 2005 SARS delivered a notice of set down for the hearing of the tax appeal. K indicated that he will invoke his constitutionally protected right to remain silent as well as his privilege against self-incrimination until his criminal trail has been finalized. ABC contends that it cannot proceed with the tax appeal without the evidence of K. It also alleges that an agreement had been concluded between the respective senior counsel representing ABC and SARS to the effect that the tax

appeal would not be enrolled until the criminal proceedings instituted against K had been finalized.

[8] On 9 December 2005 ABC' erstwhile attorneys, Messrs. Moss Cohen (who were at the time also K's attorneys), launched an application for the postponement of the tax appeal. I shall refer to it as the "postponement application". The application was opposed by SARS. The matter was argued before Boruchowitz J, who delivered judgment on 8 March 2006. The learned Judge found that it would not be possible to compel K to give evidence in the tax appeal before the criminal trail had been disposed of. He made no finding on the alleged agreement between counsel. He ordered that the tax appeal be postponed *sine die* and that it may not be set down or reinstated for further hearing without leave of the Court. Boruchowitz J said in his judgment that:

> "The commissioner in my view should be afforded the right, in the event of a **material change in the relevant circumstances,** to set down or reinstate the tax appeal for hearing prior to the finalization of the criminal trail. Such further enrolment should take place under the supervision of and with leave of the Court". (Emphasis added).

[9] By a notice of motion dated 10 November 2006, SARS launched the present application for leave to re-enroll the tax appeal. It alleges that there has been a material change in the relevant circumstances. ABC denies any such change. Furthermore, ABC says that the tax appeal cannot be re-enrolled because of the agreement between counsel that it would not be enrolled before the criminal

proceedings against K have been disposed of. The issues before me are therefore the following:

- Has there been a material change in the relevant circumstances which, as required by the order of Boruchowitz J, would permit SARS to re-enroll the tax appeal; and

Is the re-enrollment precluded by an agreement between counsel that the tax appeal would not be proceeded with until the criminal proceedings against K have been finalized?
I proceed to consider with the first of these two issues.

[10] As I have said, the only real dispute presently before the tax court is the nature of the profits realized by ABC through the sale of the XYZ and other shares. SARS contends that the profits are revenue and therefore taxable. ABC, on the other hand, contends that the profits are non- taxable, being of a capital nature. Crucial to this issue is the intention with which the shares were bought and XYZ. It was contended by ABC at the time of its argument before Boruchowitz J that the relevant intention was the intention of a team of professional advisers located in Guernsey. It has subsequently been established that this is not so. It is now common cause between SARS and ABC that the intent with regard to the capital or revenue purpose for which the XYZ and other shares were acquired and disposed of, is the intent of K. This, so SARS contends, is a changed circumstance which entitles it to an order permitting the re-enrollment the tax appeal.

[11] Boruchowitz J pointed out in his judgement that ABC cannot compel K to give evidence where his fundamental right to silence may be infringed. It has the right to subpoena him, but it cannot compel him to testify. Some of the criminal charges against K relate to perjury, allegedly committed at the section 74C enquiry. Any evidence which he might give about his intention in causing ABC to acquire and sell

the XYZ and other shares, could well incriminate him, at least in respect of some of the perjury charges. In my view, none of the above constitutes a sufficiently changed circumstance under which this court can allow SARS to re-enroll the tax appeal. The potential for prejudice still exists. It was held by Navsa J (as he then was) in *Seapoint Computer Bureau v McLoughlin and de Wet NNO*, 1997 (2) SA 636 (W) at 648 E-F that:

> Once potential for prejudice is established, the Court will stay proceedings or find a formula for preventing prejudice, such as, in appropriate cases, ruling that information obtained should not be subsequently disclosed, or barring the use of compelling or coercive measures.

[12] In a recent move, SARS sought to establish a "formula" for preventing prejudice by persuading the prosecuting authorities to give K a use indemnity. On 25 April 2008 the following immunity ("the immunity") was issued to him:

> "UNDERTAKING WITH REGARD TO EVIDENCE GIVEN BY MR D C K ("MR K") IN THE PROCEEDINGS BEFORE THE TAX COURT
>
> The National Prosecuting Authority hereby undertakinges that no evidence regarding questions put to, and answers given by, Mr K:
>
> - before the Tax Court proceedings, held at Johannesburg, between ABC Holdings Ltd (Appellant) and The Commissioner for the South African Revenue Service (Respondent) under Case No 11038/2006; or
>
> in consultations with ABC and/or its legal representatives for the purpose of and in advance of the testimony of Mr K in the above proceedings;
>
> will be used in evidence in the prosecution of an offence alleged to have been committed by Mr K: provided that this undertaking will not have the effect of preventing

the use of such evidence in any trial in which Mr K is charged with perjury in respect of the evidence given before the Tax Court."

The immunity is a revised immunity, issued in response to concerns raised by K and/or ABC in respect of two earlier versions of the same immunity.

[13] ABC makes four main points in respect of the immunity

- The immunity is impermissible new matter;

The immunity was unlawfully issued;
The immunity cannot affect K's rights because its issue is not permitted by a law of general application; and
There is no need for ABC or K to set the immunity aside.

[14] The immunity was placed before this Court by Mr Leontsinis, the attorney for ABC. This was done ten months ago, in December 2008, well after the launching of these proceedings. In placing the immunity before the Court, Mr Leontsinis did not suggest that it is new matter and was therefore irrelevant to the proceedings. Instead, he stated:

"It will be argued at the hearing of this application that K is indeed correct in contending that the grant of the immunity is *ultra vires* the powers of the NPA.

It will thus be argued at the hearing of the re-enrolment application that the immunity that the NPA has purported to grant K has no foundation in law and is *ultra vires* the powers of the NPA. In these circumstances the purported immunity does not assist SARS at all.

On this basis, and since ABC has been unable to point to any prejudice it has suffered as a result of the third immunity being introduced, the Court should in my view give it full consideration.

[15] Furthermore, the judgement of Boruchowitz J makes clear that he envisaged the possibility of new circumstances arising. The issuing of the immunity is in my view such a new circumstance. Should the Court decline to consider the immunity at this stage on the ground that it is new matter, SARS could simply file a new application in which it would raise the immunity. That would be a waste of time and money.

[16] Our courts have, albeit in a different context, made it clear that persons who have the benefit of valid and enforceable direct use immunities cannot claim that being compelled to testify would violate their constitutional rights. The question was addressed by the Constitutional Court in the case of *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC). The issue before the court was the validity of section 417 (2) (b) of the Companies Act No 61 of 1973 under the transitional Constitution (Act 200 of 1993). The sub-section provides that any person summoned to testify at an enquiry under section 417 into the affairs of a company in the course of winding-up:

> "may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to such question may thereafter be used in evidence against him".

All but one member of the Court held that section 417 (2) (b) of the Act was constitutionally invalid, in that it compelled persons to provide self-incriminating

evidence. The Court made it clear, however, that there is nothing unconstitutional about compelling persons to give self-incriminating evidence where that evidence cannot be used against them in subsequent criminal proceedings; in other words, where they have the benefit of a direct use of immunity.

[17] Ackermann J explained the position as follows at par [153] of the judgment:

> " A compulsion to give self-incriminating evidence, coupled with only a direct use immunity along the lines indicated above, and subject to a judicial discretion to exclude derivative evidence at the criminal trial, would not negate the essential content of the s 11 (1) right to freedom or the s 25 (3) right to a fair trial. Only a discrete and narrowly defined part of the broad right to freedom is involved which could not conceivably be described as a "negation" of its essential content. As far as s 25(3) is concerned, the trial Judge is obliged to ensure a 'fair trial', if necessary by his or her discretion to exclude, in the appropriate case, derivative evidence. Ultimately this is a question of fairness to the accused and is an issue which has to be decided on the facts of each case. The trial Judge is the person best placed to take that decision. The development of the law of evidence in this regard is a matter for the Supreme Court. The essential content of the right is therefore not even touched" .

The same approach was followed in the subsequent cases of *Equisec (Pty) Ltd v Rodriques and Another*, 1999 (3) SA 113 (W) and *Mitchell and Another v Hodes and Others* NNO, 2003 (3) SA 176 (C).

[18] The issue was again considered by the Constitutional Court in the case of *Shaik*

v Minister of Justice and Constitutional Development and Others 2004 (3) SA 599 (CC) The Court referred to the judgment in *Ferreira v Levin (supra)* and said, at 613 I – 614 C of the judgement:

> "It came to the conclusion that in the South African context, mere direct use immunity was sufficient, bearing in mind that the trail Judge had a discretion – in appropriate cases – to exclude derivative evidence if that were necessary to ensure a fair trial.

In coming to this conclusion, the Court paid close attention to comparable decisions in other jurisdictions, and in particular to the very Canadian authorities relied upon in this Court on the applicant's behalf. The conclusion reached *in Ferreira v Levin* on the use of derivative evidence, summarized above, was a broad and general one, and not confined to the statutory provision in question. Although attempts were made by the applicant in this Court to distinguish *Ferreira v Levin*, these were not convincing**.** If the applicant's contention was that the case had been wrongly decided, argument should have been addressed to convince this Court that it has the power to overrule itself and that it ought to do so. This was not done"

[19] I turn to the validity of the immunity. SARS relies primarily on section 179 (2) of the Constitution (Act 108 of 1996) and section 20 (1) (b) of the National Prosecuting Authority Act (No 32 of 1998). Section 179(2) of the Constitution provides as follows:

> "The Prosecuting Authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings".

Section 20(1) of the National Prosecuting Authority Act is to the following effect:

> "The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to -

(a) institute and conduct criminal proceedings on behalf of the State;

b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

discontinue criminal proceedings,

vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

[20] ABC contends that the National Prosecuting Authority ("NPA") does not have the authority to issue the indemnity. Mr Maritz, who appeared with Mr Snyman and Mr Budlender for SARS, submitted that issuing the indemnity falls within the "necessary functions incidental to instituting and conducting" criminal proceedings, as is permitted by section 179 (2) of the Constitution and by section 20(1) (b) of the National Prosecuting Authority Act. The NPA's functions include deciding whether to prosecute or not to prosecute, and determining what evidence to present in a prosecution. In this case, so Mr Maritz contended, that is all the NPA has done. It has chosen that in prosecuting K in the pending criminal case, it will not rely on his evidence before the Tax Court. Nor will it institute further prosecutions (save for perjury etc). That, according to Mr Maritz, is patently part of its functions.

[21] It remains to examine whether the NPA's decision not to use evidence submitted to the Tax Court in its prosecution of K constitutes the exercise of a "necessary" function. Mr Maritz submitted that it is "necessary" because it allows SARS to proceed with enrolling the tax appeal, thereby commencing its collection of

money owing to the *fiscus*. Given the importance of tax collection and SARS's statutory duties in this regard, Mr Maritz contended that it is indeed necessary and appropriate for the NPA to assist in this regard.

[22] It is not uncommon for the NPA to give undertakings in respect of a criminal trial. Our Courts have in the past kept the NPA to such undertakings. In the case of *National Director of Public Prosecutions v Zuma,* 2009 (2) SA 277 (SCA), Harms JA referred to *North Western Dense Concrete CC and Another v Director of Public Prosecutions, Western Cape*, 2000 (2) SA 78(C); *R v Croydon Justices, ex parte Dean,* [1993] QB 769, [1993] 3 AVER (129), and then said:

> "Courts have also interfered with decisions to prosecute in circumstances where the prosecuting authorities had given an undertaking not to prosecute or had made a representation to that effect in exchange for a plea or for co-operation. The prosecuting authority has been kept to its bargain"

[23] Lastly, Mr Maritz suggested that, even if the immunity is legally invalid, no Court will permit evidence given by K in the tax appeal to be used against him in a criminal prosecution, because justice dictates that it should be excluded. Because K had received immunity before giving self-incriminating evidence in the tax appeal, he might well have the requisite constitutional and contractual right to hold the prosecuting authority to the terms of that immunity. See the judgement of Uijs J in *North Western Dense Concrete CC v Director of Public Prosecution, Western Cape* (supra) at 91B and 93C.

[24] The proceedings before me are interlocutory proceedings. K is not a party to the proceedings. Although any findings which I might make in respect of the validity or enforceability of the immunity in these proceedings might not be legally binding on K, it is nevertheless undesirable that I make any such findings. It might prejudice K in subsequent proceedings. What we can and should decide, however, is whether there is sufficient force in the submissions made by Mr Maritz on the effect of the immunity to enable me to hold that the immunity constitutes "a material change in the relevant circumstances", as envisaged in the judgment of Boruchowitz J.

[25] If we permit the tax appeal to be re-enrolled, ABC will in all likelihood subpoena K to testify at the hearing thereof. K cannot lawfully ignore the subpoena and refuse to attend court or enter the witness stand. He may, however, object to questions if the answers could intrude upon his right to remain silent or his right not to incriminate himself. The immunity might override any such objection, compelling him to answer the questions. That is for the Court hearing the tax appeal to decide. In my view, there is a distinct possibility that that the Court will, on the strength of the immunity, compel K to testify, even if his testimony might incriminate him.

[26] I conclude that the issue of the use immunity constitutes a circumstance which would, in the absence of any other constraint, warrant leave to be given to SARS to re-enroll the tax appeal, as required under the order given by Boruchowitz J on 8 March 2006.

[27] ABC says that there is another constraint against re-enrollment, v*iz* the alleged agreement between counsel that the tax appeal will not be enrolled until the criminal proceedings against K have been concluded. Boruchowitz J did not decide this issue because it was not necessary for him to do so. I will now proceed to consider it.

[28] In brief, the facts relating to the conclusion of the alleged agreement are as set forth hereunder. Shortly after ABC noted its tax appeal, Mr van der Merwe, counsel then acting for SARS contacted Mr Levin, counsel then acting for ABC, in order to arrange dates for its hearing. Exactly what was agreed between the two counsel is in dispute. Neither counsel deposed to affidavits on the issue. The Court therefore has to rely on hearsay statements made by others.

[29] Mr Cohen, ABC' attorney, described the conclusion of the alleged agreement as follows in the postponement application (paginated record, pp 23-26).

> 10.1 I am advised by senior counsel representing Mr K and ABC, Advocate R D Levin SC that:
>
> 10.1.1 shortly after the panel rulings referred to above he was contacted by Advocate van der Merwe SC on a number of occasions, seekinh to arrange dates for the hearing of the tax appeals of his clients. This occurred on a number of occasions towards the end of 2002 and the beginning of 2003;
>
> 10.1.3 On each occasion, Advocate Levin explained the following to Advocate van der Merwe:
>
> (1) Mr K could not be, and had been advised that he should not and could not be compelled to give evidence and be subjected to cross-examination in his tax appeal, or the ABC tax appeal, particularly in the light of the reverse onus provisions of the Income Tax Act, prior to the disposal of the criminal case against him;

(2) there had been a delay in the finalisation of the criminal indictment against Mr K and even certain preliminary criminal trail dates for 2003 might not be met. Everything was dependant on the charges being finalised, trial dates being agreed and the criminal matter being disposed of.

[30] Mr Engelbrecht, a legal manager in the employ of SARS, deposed to an answering affidavit in the postponement application, stating the following:

"40.1 I deny that an agreement was concluded between counsel to the effect that the ABC tax appeal will not be enrolled prior to the criminal proceedings against K having been finalised.

_ _ _ _ _ _

40.6 Mr van der Merwe made it clear to the legal teams of K and ABC, in my presence, on several occasions, that he cannot bind SARS. SARS, after due consideration, makes its own decisions. Furthermore, SARS officials are bound to act in terms of the Acts administered by the Commisioner and no concessions or agreements can be reached without the appropriate authority within SARS, and then only if this is in the public interest to do so.

40.7 Mr van der Merwe advises me, and I verily believe, that he and Mr Levin often had different perceptions of certain events in the course of the extended litigation, particularly between January 2002 and September 2002.

40.8 I state that Mr van der Merwe was never authorized by SARS to enter into an agreement with ABC or K to the effect that the court's jurisdiction to decide whether the tax

appeals can be heard before the criminal matter or not, be ousted, or to waive any rights which SARS might have in this regard. Mr Levin and Cohen must have known at all times that SARS wanted the tax appeals to be heard as soon as possible.

_ _ _ _ _

40.11 According to Mr van der Merwe, all discussions between him and Mr Levin took place on the basis that Mr Levin was, in broad terms, correct in respect of the legal position as advanced by him to Mr van der Merwe.

_ _ _ _ _

40.13 The perception in respect of the duration of the criminal trial has, in time, changed dramatically. I understand that the criminal trial may well last for much more than a year, that there are more than 100 potential state witnesses and that the dossier consists of approximately 147,000 pages. K has, moreover, indicated that numerous points will be raised *in initio*.

40.14 SARS, when it turned out that the criminal trial may not be heard soon, _ _ _ _ _ _ caused the legal position to be reconsidered, and concluded that the original perception of the legal position as referred to above was incorrect."

[31] Mr Maritz submitted that ABC is seekinh to elevate an informal acceptance as between colleagues of a legal proposition (which, according to Mr Maritz, turned out to be incorrect) into a binding contract. He pointed out that at no time did ABC' attorneys seek to confirm the agreement in contemporaneous correspondence, as attorneys are wont to do.

[32] It is correct, as Mr Cohen pointed out, that Mr van der Merwe at some point in time expressed the view that it would be inadvisable for the tax appeal to proceed before the criminal prosecution has been finalised. This opinion, so Mr Maritz argued, was based on a misapprehension regarding the correct legal position. He submitted that the Commissioner cannot be bound by an incorrect statement uttered on a point of law. An advocate is not responsible for such an error See van Dijkhorst, "Legal Practitioners*"* vol 14, 2nd ed*, The Law of South Africa, p 152 par [144]*. It must follow that the client will also not be bound by the erroneous statement.

[33] The crucial question, in my opinion, is whether the two counsel acted *animo contrahendi* when they concurred that the tax appeal should not be enrolled for hearing at the time. Not every meeting of minds culminates into a contract. *Grotius, Inleydinge tot de Hollandtsche Regts-geleertheyt* (3.1.12 and 13) explains the position as follows:

> "Toesegging noemen wy een willige daedt eens mensches, waer door hy aen een ander yet belooft, met meeninghe dat den ander het selve aennemen ende daer door op den belover eenigh reght sal mogen verkrygen.
>
> Toesegginghe is yet meer dan belofte : Want belofte maeckt wel dat her onbehoorlijk is fulx te laten als belooft is, maer geeft een ander geen regt om fulx te mogen aennemen.*"*

[34] Pothier (Obligations*, par 3)* distinguishes promises which lead to contracts from

promises which do not, as follows:

> There are…promises made with fairness and a real design of accomplishing them, but without any intention of giving the person to whom they are made a right of demanding their performances. This is the case where a person makes a promise, intimating at the same time that he does not mean to engage himself; or when such a reservation can be implied from the circumstances of the case or the relative characters of the person making the promise, and the person to whom it is made. As if a father promises his son at college, that if he is attentive to his stufies there, he will give home money for a journey of pleasure in the vacation; it is evident that, in making this promise, the father does not mean to contract what can properly be called an engagement. [Footnotes omitted]

The quotation appears and was discussed in Kerr, *The Principles of the Law of Contract,* 6th ed at p 41-42. Christie, *The Law of Contract in South Africa,* 5th ed p 30 n 43 correctly pointed out that –

> The example must not be misunderstood. There is no reason why a binding contract should not be entered into between father and son or between any other close relatives, but the relationship between the parties is one of the relevant circumstances surrounding the offer, and it is a matter of common experience that many offers concerning domestic matters are made within a family without *animus contrahendi.*

[35] A recent example of a commitment not given *animo contrahendi* is to be found in the case of *du Toit v Minister of Safety and Security and Another,* 2009 (1) SA 176 (SCA). In that case the appellant was deemed to have been discharged from the police service on account of a prison sentence on four counts of murder. He applied for amnesty for the murders under national reconciliation legislation. In response to

an inquiry whether he will be reinstated in his post if his amnesty application succeeds, the National Commissioner of Police replied:

> "Die Regsafdeling van die Suid-Afrikaanse Polisiediens is ook van mening dat indien u suksesvol met u hersieningsaansoek is, u geag sal word nooit skuldig bevind te gewees het nie, en u gevolglik nie ontslaan kon gewees het uit die SAPD nie, en u posisie sal terugwerkend herstel word.
>
> In so 'n geval sal u uiteraard in u vorige pos, of 'n soortgelyke pos waarmee u akkoord gaan, in die SAPD geakkommodeer word."

He was subsequently granted amnesty. The Chief of Staff, however, refused to reappoint hom. The appellant thereupon applied to the Transvaal Provincial Division for an order declaring that he is entitled to be reinstated in his employment. He lost in the Provincial Division and went on appeal to the Supreme Court of Appeal.

[36] Streicher JA, who delivered the judgment in the appeal, concluded that the declaration by the National Commissioner was not made *amino contrahendi,* and that –

> " _ _ _ _ _ _ the National Commissioner was simply stating what he understood the legal position to be. He was not asked to bind himself contractually and the letter does not evince an intention to do so."

[37] I revert to the case before me. I have no reason not to accept Mr Engelbrecht's statement that Mr van der Merwe had not authority to commit SARS contractually not to enroll the tax appeal before the criminal proceedings have been finalised. Nor do I think that he attempted to do so. If there was such a contract between ABC and SARS, I would have expected it to have been concluded through the attorneys, or at least confirmed by the attorneys in writing. I would also not have expected that Mr Levin to would contact Mr van der Merwe "on a number of occasions seeking to arrange dates for the hearing of the tax appeals", as Mr Cohen said he did in par 10.1.1 of the founding affidavit in the postponement application. If there was an agreement that the tax appeal will not be heard before the criminal case has been finalised, why would Mr van der Merwe, on Mr Cohen's version, keep on contacting Mr Fine to agree on hearing dates? I agree with the submission by Mr Maritz that it would have been absurd to do so.

[38] I do not believe that Mr van der Merwe, in his discussions with Mr Levin, went beyond expressing his views on the law. He had no *animus contrahendi.* He must have realised that he had no authority to bind his client contractually, and it is unlikely that he would have set out to do so.

[39] Even if Mr van der Merwe did intend to restrain SARS contractually from enrolling the tax appeal before the criminal proceedings have been finalised (which

intention in my view he did not have), SARS would not be bound by such restraint, because Mr van der Merwe had no authority to agree to it. The full bench of the Cape Provincial Division held as follows in *Ras v Liquor Licensing Board, Area No 11, Kimberley,* 1992 (2) SA 323 (c) at 237 E:

> " From the authorities cited to the Court it is clear that a client is not bound by the actions of his legal representative - attorney or counsel - where such representative has exceeded the mandate given him and he has achieved an object that had not been intended by his principal."

See also *Transvaal Canoe Union v Butgereist and Another,* 1990 (3) SA 398 (T) and the authorities cited on pages 409-410.

[40] I conclude, therefore, that ABC did not establish the existence of a legally enforceable contract which preludes SARS from re-enrolling the tax appeal.

[41] For the reasons set forth above we make the following order:

a) leave is granted to SARS to enrol the tax appeal for adjudication there of

a date must be set for the hearing of the tax appeal
ABC must pay the costs of the application
A GILDENHUYS

JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant (SARS)

Mr NGD Maritz SC

with him

Mr HGA Snyman, and

Mr S Budlender
instructed by
Mahlangu Incorporated

For the respondent (ABC)

Mr H Z Slomowitz SC

with him

Mr R Hutton SC