SHOULD THE MINISTER OF FINANCE BE JOINED IN PROCEEDINGS BEFORE THE TAX COURT CONCERNING THE CONSTITUTIONALITY AND VALIDITY OF TAX LEGISLATION?

1 Introduction

This note deals with the question whether the Minister of Finance should be joined in proceedings before the Tax Court concerning the constitutionality and validity of certain sections of tax legislation.

2 The leading of evidence pertaining to the constitutional issue in the Tax Court

The Tax Court does not have jurisdiction to make an order concerning the constitutional validity of an Act of Parliament. Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, a High Court or a Court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

Section 166 of the Constitution establishes the judicial system. The courts are:

(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

(c) the High Court, including any High Court of Appeal that may be established by an Act of Parliament to hear appeals from high courts;

(d) the Magistrate's Court; and

(e) any court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the high courts or the magistrates' courts.

In *ITC 1806* 68 SATC 117 139G–H the Court dealt with the question whether the Tax Court is a "High Court" or "court of similar status to the High Court" for purposes of section 166 of the Constitution. Southwood J stated the following in this regard:

> "It is therefore found that there is not a sufficient resemblance or likeness between the tax court and the High Court for the tax court to be a court of similar status to the High Court. The tax court therefore does not have jurisdiction to decide on the constitutionality of an Act of Parliament."

It is suggested that even though the Tax Court does not have the jurisdiction to decide on the constitutionality of an Act of Parliament, the evidence pertaining to the constitutional issue must be led before the Tax Court as the court of first instance. In *Walker v Stadsraad van Pretoria* 1997 4 SA 189 T at 203E–I Van Dijkhorst J stated:

> "Die blote feit dat die verweerder 'n verweer van grondwetlike aard opper ontneem die landdros nie van sy jurisdiksie om die eis te bereg nie. Hy kan bloot nie die verweer beoordeel nie. Indien die konstitusionele verweer een van meerdere verwere is moet hy die ander bereg en die konstitusionele verweer tersyde laat. Indien die grondwetlike verweer die enigste verweer is, is daar geen deur hom beregbare verweer voor hom nie en moet hy as die eis andersins bewys is vonnis gee . . . Die benadering lei nie tot onreg teenoor 'n verweerder wat deur 'n eiser gedwing word om te litigeer in 'n hof waar sy verweer nie beregbaar is nie. Die antwoord is eenvoudig. Hy pleit sy verweer. Beide partye lei hul getuienis op die verweer. (Die getuienis is toelaatbaar omdat dit relevant is tot die pleit.) Die landdros maak sy geloofwaardigheidsbevindings ten aansien van die getuies. Nadat vonnis gegee is ten gunste van die eiser (by verstek aan 'n beregbare verweer) word die saak op appèl beslis op al die geskilpunte, insluitend die konstitusionele geskilpunt waaroor die landdros hom nie uitgelaat het nie. Die vraag op appèl is immers of die vonnis van die landdroshof in die lig van alle verwere in die Hof van appèl beregbaar, staande kan bly. Hierdie Hof het wel jurisdiksie om grondwetlike vrae van hierdie aard te bereg . . . Hierdie benadering ten aansien van die afneem van getuienis deur die laerhof strook met die gees van die Grondwet. Kyk art 102(1) en (3)."

This decision was confirmed by the Constitutional Court in *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC) 1188F–1189D where the court stated:

> "The submission that the appellants could not have placed the relevant evidence on record before noting their appeals under Rule 21 is not correct. There were at least two opportunities prior to the appeal to this Court when the evidence could have been placed on record. First, the appellants could have called the witnesses on whom they rely to give evidence at their trials, indicating that the evidence was relevant to the determination of the constitutional issues that they wished to raise as a defence to the charges against them. If this had been refused the issue could have been raised as a ground of appeal. The appellants could also have tendered the evidence on which they now rely at the time of their appeals to the Cape of Good Hope Provincial Division. The constitutional issues were the only defences that the appellants had to the convictions and sentences imposed by the magistrates and were decisive for the appeals. The matters accordingly fell within the terms of s 102(1) of the interim Constitution. The appellants should have acted in terms of that section and asked for the matters to be referred to this Court for its decision, indicating that evidence was necessary for the purposes of resolving the constitutional issues. If the Cape Provincial Division considered the referral to be in the interests of justice, as it presumably would have done, it would have been obliged to

> refer the matters. It would also have been obliged to consider the implications of the appellants' failure to place the necessary evidence on record at the time of their trials. If it took the view that evidence was admissible on appeal, it would have been obliged to receive the evidence and make findings thereon before referring the matter. If it took the view that evidence was not admissible on appeal, it would have referred the issues without receiving the evidence . . . The appellants did not avail themselves of either of these opportunities. The first time that they evinced any intention of adducing evidence on the constitutional issues was after an appeal in terms of Rule 21 had been noted to this Court."

From the above it is clear that even though the Tax Court may not make an order concerning the constitutional validity of an Act of Parliament, the evidence pertaining to this issue must be placed on record before the Tax Court. If it is not placed on record, the court of appeal, for instance the High Court or the Supreme Court of Appeal, who has the jurisdiction to make an order concerning the constitutional validity of an Act of Parliament, will be unable to do so if no evidence pertaining to that point is contained in the record before it.

3 When should a party be joined

3 1 Common-law principles

In general any person who has a direct and substantial interest in an order that the court might make, or who is bound to be affected prejudicially by the putting into effect of a court order, is a necessary party and should be joined. (See Erasmus and Van Loggerenberg *The civil procedure of the magistrates' courts in South Africa* Vol 1 (2002) 175.)

It is clear from the case law that the court will refrain from dealing with issues in which a third party "has a direct and substantial interest" if that party has not been joined in the suit. In *Amalgamated Engineering Union v Minister of Labour* 1949 3 SA 637 (A) 659 the Court stated the following:

> "[In the decided cases] when once the Court realised that a third party might be affected, it set aside the lower Court's order and referred the case back to *that* Court to be dealt with afresh after the third party had been joined, and it ordered the *plaintiff* to join him . . . Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a *direct and substantial interest* without either having that party joined in the suit or, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interest" (emphasis added).

The aforementioned test has on numerous occasions been affirmed and applied – see eg *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 4 SA 212 (SCA) 226F–G.

Once it has been established that a third party has a direct and substantial interest in the matter, he is regarded as a "necessary party" to the proceedings. In such a case he has to be joined. It would seem that the court has no discretion in this regard. In *Khumalo v Wilkens and Another* 1972 4 SA 470 (N) 475A the court stated:

> "I am, with the greatest respect, constrained to differ from the view of WESSELS J, which was set out above [in *Marais and Another v Pongola Sugar Milling Co Ltd and Others* 1961 2 SA 698 (N) 702]. In my view, once it is shown that a party 'is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the Court and that his right may be affected by the judgment of the Court' the Court will not deal with those issues

> without such a joinder being effected, and no question of discretion nor of convenience arises."

If the constitutionality and validity of an Act is attacked by a party, the minister responsible for the administration of that Act has a direct and substantial interest in the matter and should be joined. This appears from the following authorities:

In *Parbhoo v Getz NO* 1997 4 SA 1095 (CC) 1100–1101 para 5 the court held:

> "Despite the fact that an order of constitutional invalidity has no force unless it is confirmed by this Court, it appears undesirable for any court to make an order under s 172(2)(a) concerning the invalidity of an Act of Parliament or a provincial Act, where the relevant organ of State is not a party to the proceedings, unless that organ has had an opportunity to intervene in such proceedings."

In *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 2 SA 1 (CC) 8 the court stated:

> "It is undesirable for a Court to make an order of constitutional invalidity in relation to an Act of Parliament or provincial Act unless the relevant organ of State which is not a party to the proceedings has had an opportunity to intervene in those proceedings."

And:

> "Section 35(1) is an element of [the relevant] legislation and the Minister, as the representative of the State responsible for the administration of this legislation, clearly has a direct, abiding and crucial interest in the outcome of the litigation. This Court may well have declined to confirm the order [of the High Court] solely on the ground that notice of the proceedings in the High Court was not given to the Minister" (para 9).

In *Beinash v Ernest & Young* 1999 2 SA 116 (CC) 127C–D the following was stated:

> "The Minister of Justice, who is responsible for this legislation, has a direct interest in whether or not this legislation is found to be constitutional. He should be given an opportunity to defend the legislation should he wish to do so. Often the relevant organ of State is best positioned to provide the necessary arguments of justification should the issue of the provisions of constitutionality come down to the question of the right's limitation. It is often the only party that can provide this Court with the evidence it will need to enable it to tailor its order in terms of the options available under section 172(1)(b) of the Constitution."

3 2 Rules of court

Rule 10A of the Rules of the Supreme Court – Provincial Divisions provides:

> "If in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the validity of the law *shall* join the provincial or national executive authorities responsible for the administration of the law in the proceedings" (emphasis added).

Rule 20(1) of the Tax Court Rules states the following:

> "Save as is otherwise provided in these rules, the rules issued in terms of section 43 of the Supreme Court Act . . . shall apply in respect of the general practice and procedure of the Court insofar as such rules are applicable."

Therefore, apart from the fact that the Minister has a substantial interest in such a matter and should therefore be joined in terms of the common-law principles of joinder, Rule 10A of the Supreme Court Rules read with Rule 20 of the Tax Court Rules also prescribes this.

4 Competence of Tax Court to order joinder of the Minister of Finance

4 1 Common law

The question arises, however, whether the provisions of the Income Tax Act 58 of 1962 ("the Act") allow anyone other than the South African Revenue Service ("SARS") and the taxpayer concerned to be parties before that court – this question is dealt with below.

The Tax Court is a creature of statute which is governed by the provisions of section 83 of the Act read with the rules promulgated under section 107A of the Act ("Tax Court Rules").

In *ITC 1687* 62 SATC 474 477B the Court stated:

> "It is trite that this court [Tax Court] is a 'creature of statute' – *Commissioner for Inland Revenue v GT Taylor* 1934 AD 387 at 390. It is not a court of appeal in the ordinary sense, but a court of revision with powers to investigate the matter before it and to hear evidence thereon – see *Bailley v Commissioner for Inland Revenue* 1933 AD 204 at 220, *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142 at 150 and *ITC 743* 18 SATC 94. Notwithstanding the Special Court consisting of a judge of the High Court, an accountant and a representative of the commercial community, it has no inherent jurisdiction such as is possessed by the High Court and can claim no authority which is not laid down in the Income Tax Act under which it is constituted. It is what may be referred to as 'an inferior or lower' court."

The Tax Court therefore has a status similar to that of a magistrate's court – both are lower courts and creatures of statute.

In *Rex v Boon* 1913 TPD 12 14 the following was stated in regard to the powers of magistrates:

> "The decision in *Connolly v Ferguson* [1909 TS 198] has never been questioned in this Court, and there is no doubt that the jurisdiction and powers of magistrates have to be deduced from the four corners of the statute creating the magistrates' courts. But I have never understood that it has been held that the Court must give those powers such a restrictive interpretation as to practically, in many cases, lead to a miscarriage of justice."

De Villiers JP stated (15):

> "On the contrary, everything that is necessary and incidental to enable a magistrate to perform his function to its final conclusion must be read into the rule."

In *Van der Merwe v De Villiers* 1953 4 SA 670 (T) 673A–C it was stated:

> "In Chapter VI dealing with civil jurisdiction there are quoted in *Buckle & Jones* . . . a number of instances where it has been held that a magistrate has an inferential jurisdiction, in the interest of a just hearing and a proper enquiry, to order certain matters to be done. In the case of *Ruiters v. Clarke*, 1922 E.D.L. 303 at p. 305, the Court specifically approved of the *dictum* to the effect that when the Magistrates' Courts Act gives jurisdiction to the court on the main subject under dispute its purpose is not to be defeated because the ancillary powers necessary to enforce that jurisdiction have not been specifically mentioned."

Erasmus and Van Loggerenberg 170 state:

> "The procedure provided in s 42 [which provides that certain parties may be joined in particular cases] was first introduced into magistrates' court practice by Act 32 of 1944 . . . This section is clearly not intended to restrict the common-law joinder of defendants. *The common law of joinder has always applied in the inferior courts*, and all that this section [42] does is to give a plaintiff a procedural advantage which he did not have before [emphasis added] . . . As far as concerns the superior courts (whose practice in this matter must serve as a guide for the

> magistrates' courts), they have always had a common–law jurisdiction to join defendants at any stage of the proceedings, either on the application of a party or *mero motu*, and this jurisdiction is not derived from any rule of court."

Theron "Joinder of parties in the magistrate's court" 1991 *Die Landdros/The Magistrate* 43 states the following regarding the joinder of parties in the magistrate's court:

> "That a joinder of parties in a magistrate's court action can occur by virtue of common law is clear from the provisions of ss 41 and 42 of the Magistrate's Court Act 32 of 1944 and r 28. Nowhere in the Act or the rules, however, is any explicit reference to joinder by virtue of the common law. As already indicated, the magistrate's court has, contrary to the supreme court, no common law powers. It is evident that both ss 41 and 42, as well as r 28, do not restrict but rather extend the common law. Rule 28 is so wide that it also includes joinder by virtue of the common law. The common law entails stricter requirements for joinder than ss 41, 42 and r 28. It is therefore clear that the intention of the legislature was to impose jurisdiction on the magistrate's court for joinder by virtue of the common law. The common law serves as a starting point for joinder in the magistrate's court when considering the extension thereof created by ss 41, 42 and r 28. The common law primarily requires that a person *must*, as a rule, be joined when he is an essential party to the proceedings and, furthermore, if the party to be joined has a direct and substantial interest in the dispute before the court; and his rights might be affected by a judgment which the court might give on the issues. In such an instance the court has no discretion to refuse an application for joinder. Secondly, the common law confers a discretion upon the court to join parties where considerations of convenience so require. Such a discretion should be exercised judicially."

In *Moleko v Minister of Plural Relations and Development* 1979 1 SA 125 (T) 230 it was stated that if a party has a direct and substantial interest in the dispute before the court, and his rights may be affected by a judgment that the court might give on the issues, he must be joined and the court has no discretion to refuse an application for joinder.

See also *Khumalo v Wilkins* 1972 4 SA 470 (N) 475A–B where it was held that the court should not proceed to deal with the questions in issue without first having joined the defendants who have a direct and substantial interest in the disputes before the court and whose rights may be affected by the decision of the court.

It is submitted that the Tax Court is similar to a magistrate's court, namely that, if a party has to be joined in terms of the requirements of the common law on the basis that he has a direct and substantial interest in the matter before the court, the court has no discretion and must join the party. It is implied that the court also has the competence to join such a party.

4 2 Rules of court

A further reason why it is submitted that the Tax Court has the competence to join the Minister is that this is provided for in Rule 20 of the Tax Court Rules, read with Rule 10A of the Rules of the Supreme Court.

As was indicated above, Rule 10A states that if a party challenges the constitutional validity of the law, he *shall* join the national authority responsible for the administration of the law, which validity is challenged.

Rule 20 of the Tax Court Rules, as indicated above, states that "the rules issued in terms of s 43 of the Supreme Court Act . . . shall apply in respect of the general practice and procedure of the court in so far as such rules are applicable".

In *ITC 1806* 68 SATC 117 133E–F the court indicated that Rule 33(4) of the Uniform Rules applies in the Tax Court. It is submitted that Rule 10A of the Rules of the Supreme Court also applies in the Tax Court. The Minister must therefore be joined.

5 Conclusion

If the Tax Court will be the first court seized of a matter where the constitutionality and validity of a section of tax legislation is raised, the evidence pertaining thereto must be led in that court even though the Tax Court may not make an order concerning the constitutional validity of an Act of Parliament. I am therefore of the view that the Minister, in these circumstances, must be joined as a party in the Tax Court and that the Tax Court is competent to make such an order.

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