

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between:
29/2010

Case No: CC

THE STATE

And

AMIER MOOSAGIE

Accused

No 1

DESIREE JENKINS

Accused

No 2

Coram:

Chetty, J

Date Heard:

**27/07/2010 – 29/07/2010; 5/08/2010; 13/06/2011 –
15/06/2011; 20/06/2011 – 22/06/2011; 19/09/2011 –
21/09/2011; 7/05/2012 – 10/05/2012; 14/05/2012;
15/05/2012**

Date Delivered:

17/05/2012

Summary:

Criminal Law – Fraud – Value Added Tax Act, No 89 of 1991 – Submission of fraudulent VAT 201 returns - Forgery - Tax invoices forged - Conducting an Enterprise through a pattern of racketeering activities – Prevention of Organised Crime Act, No 121 of 1998 – Whether established – Corruption – Prevention and Combating of Corrupt Activities Act, No 12 of 2004 – Gratification offered – Intent inferred – Money Laundering – Movement of property likely to conceal and disguise – Accused convicted as charged

JUDGMENT

Chetty, J

[1] **Value added tax (VAT)** is a tax payable on the supply of goods and services. Its legislative framework is the **Value-Added Tax Act**¹ (the Act). Section 7 of the Act, under the rubric, ***Imposition of value-added tax***, *inter alia* provides:

“7 Imposition of value-added tax

(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax-

(a) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;

(b) on the importation of any goods into the Republic by any person on or after the commencement date; and

(c) on the supply of any imported services by any person on or after the commencement date, calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be.

[Sub-s. (1) amended by s. 23 (a) of [Act 136 of 1991](#) , by GN 2695 of 8 November 1991, by [s. 14 of Act 136 of 1992](#) , by s. 23 (1)(a) of [Act 97 of 1993](#) and by [s. 33 of Act 37 of 1996](#) .]

(2) Except as otherwise provided in this Act, the tax payable in terms of paragraph (a) of subsection (1) shall be paid by the vendor referred to in that paragraph, the tax payable in terms of paragraph (b) of that subsection shall be paid by the person referred to in that paragraph and the tax payable in terms of paragraph (c) of that subsection shall be paid by the recipient of the imported services.

[2] **VAT**, as a self assessment system is predicated on honesty and integrity. It operates as follows – if your turnover is above the threshold amount, you are obliged to register for VAT and to complete either monthly, bi-monthly or six-monthly tax returns wherein your income and expenses are to be detailed on a document, the **VAT 201E**, the **VAT** return. **VAT** is either payable or refundable depending on the difference between the output tax and the input tax. If your input tax, i.e. tax charged under section 7 of the Act and payable in terms of that section by a supplier on the supply of goods or services made by that supplier to the vendor, is more than the output tax, i.e. the tax charged under section 7 (1)

1 Act No, 89 of 1991

(a) of the Act in respect of the supply of goods and services by that vendor, you will be entitled to a refund. The corollary is, if your input tax is less than your output tax, you will have to pay in an amount. This case concerns the former scenario, the principal actors, the two (2) accused and several close corporations to wit, *Dots Curtain Manufacturing CC (Dots)*, close corporation registration no, 2000/059798/23; *Tytola Trading CC (Tytola)*, Ck registration no, 2005/112822/28; *Nozomi 148 CC (Nozomi)*, Ck registration no, 2006/143959/23 and *Zenobia Trading 270 CC (Zenobia)*, Ck registration no, 2006/143976/23. In the course of this judgment I refer to these close corporations merely as **Dots**, **Tytola**, **Nozomi** and **Zenobia** respectively. It is common course that they are all registered vendors in terms of the Act.

[3] It is furthermore common cause or not in dispute that –

[a] Accused No 1 became a member of **Tytola** with effect from 14 March 2007, initially with a 50% membership interest and 100% interest from 29 February 2009. **Tytola** was a registered Vat vendor and was issued with a VAT number, 4330237308, with a commencement and liability date 4 May 2007. Accused no 1 was the representative vendor in terms of section 48 of the Act.

[b] Accused No 1 became a member of **Zenobia** with effect from 11 January 2008 by acquiring the 50% membership interest held by Accused No 2. The remaining interest continues to be held in equal shares by one *Bolekwa Lamans* and *Xoliswa Siyona*.

[c] Accused No 2 and one *Pumela Mavela (Mavela)* became members of **Nozomi** holding an equal membership interest with effect from 27 September 2006. *Mavela* resigned as a member on 17 August 2007. She was the representative vendor in terms of section 48 of the Act. Its founding statement describes its principal business as a clothing manufacturer.

[d] Accused No 2 became a member of **Zenobia** with a 50% member interest with effect from 15 September 2006. Accused No 1, as adumbrated, acquired her interest as from 11 January 2008. Accused No 2 was at all times relevant to the charges, the representative vendor in terms of section 48 of the Act. Its principal business, according to its founding statement, is the import and export of general merchandise.

[e] Accused No 2 and one *Dorothy du Plessis (du Plessis)* were the members of **Dots** with effect from 14 August 2002, each holding an equal interest. *Du Plessis* was the named representative vendor envisaged in section 48 of the Act. Its principal business was stated to be curtain and linen manufacturing including upholstery.

[4] The two (2) accused stand arraigned on forty-six (46) counts –

[4.1] **Count 1: Conducting an Enterprise through a pattern of racketeering activities.** The state alleges that the accused are guilty of a contravention of Section 2 (1) (e) read with Sections 1, 2 (2) and 3 of the **Prevention of Organised Crime Act, 121 of 1998 (POCA)**, in that during the period 2007 to 2008, and at Mthatha, and Port Elizabeth, they wrongfully and unlawfully, whilst managing or employed by or associated with the Enterprise conducted or participated in the conduct directly or indirectly of the Enterprise's affairs through a pattern of racketeering activities. The state alleges that the enterprise managed by accused no's 1 and 2 were involved in various incidents where VAT refunds were unlawfully claimed from the South African Revenue Services, SARS. The claims paid out totalled R2, 689 958.00, R842 418.00 to **Tytola** and R1 865 540.00 to **Zenobia**.

[4.2] **Counts 2 -12:** **Fraud**, in that on or about the dates referred to in column 2 of Table A and at or near the places and districts as set out in column 7 of Table A, the Accused wrongfully and unlawfully, falsely and with the intention to defraud affirmed to SARS

- that the particulars contained in the VAT returns for the VAT periods referred to in column 3 of Table A were true and correct, and/or

that the total considerations including VAT was as per column 4 and the total output tax as per column 5 of Table A and/or
that SARS was liable to refund the amounts as per column 6 of Table A

and by means of the said misrepresentation induced SARS to

- accept that the particulars in the VAT Returns were correct and true, and/or

accept that the total consideration including Vat and the total input tax were as per column 4 and 5 of Table A, and/or
accept that SARS was liable to refund them the amounts as per column 6 of Table A,

which caused a loss or potential prejudice to SARS and/or the Government of South Africa

whereas they knew

- that the particulars in the VAT 201 Returns were false,

that the total consideration including VAT and the total input tax did not amount to the figures referred to in columns 4 and 5 of Table A, and/or that they were not entitled to the refundable amounts as stated in column 6 of Table A

Table A

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5	COLUMN 6	COLUMN 7
COUNT	DATES	VAT PERIOD S	CONSIDERATI ON INCLUDING VAT	INPUT TAX	PREJUDIC E	PLACE/ DISTRIC T
Count 2	29/08/07	07/07	R40,254.00	R265,384.00	R265,384.00	MTHATHA
Count 3	28/08/07	09/07	R38,118.25	R261,228.08	R256,546.83	MTHATHA
Count 4	10/12/07	11/07	R1,377,606.00	R476,610.88	R415,365.43	MTHATHA
Count 5	25/02/08	01/08	R439,121.00	R773,964.99	R720,037.99	PORT ELIZABET H
Count 6	24/10/07	09/07	nil	R276,500.00	R276,500.00	PORT ELIZABET H
Count 7	08/12/07	11/07	nil	R283,822.00	R283,822.00	PORT ELIZABET H
Count 8	05/02/08	01/08	nil	R276,500.00	R276,500.00	PORT ELIZABET H
Count 9	24/08/07	07/07	nil	R792,000.00	R792,000.00	PORT ELIZABET H
Count 10	10/10/07	09/07	nil	R797,040.60	R797,040.60	PORT ELIZABET H
Count 11	04/12/07	11/07	nil	R276,500.00	R276,500.00	PORT ELIZABET H
Count 12	02/02/08	01/08	nil	R420,000.00	R420,000.00	PORT ELIZABET H
				Total Prejudice	R4,779,696.85	

[4.3] **Counts 13 -23: Forgery**, in that during 2007 -2008 and at Mthatha and/or Port Elizabeth, the accused wrongfully and intentionally to the prejudice or potential prejudice of the SARS and/or employees of SARS made false documents to wit tax invoices as per Table B.

Table B

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5	COLUMN 6	COLUMN 7
COUNT	INVOICE DATE / TAX DATE	INVOICE NO	DESCRIPTION OF GOODS	SUPPLIER	CLIENT	TOTAL AMOUNT INCLUDING VAT
13	07/06/22	2730	<ul style="list-style-type: none"> • Militron Break tester WECC120/2053 • Play Steering Detector 	Midnight Spark Trading 22 CC	Tytola Investments	R1,698,600.00
14	07/06/22	2749	<ul style="list-style-type: none"> • Noise Level Machine Scuff Gauge Wheel Alignment Reader WECC/31/1148 • Beam Adjuster UM9 Okia Photo Copier AGK3C6050 & 200504	Midnight Spark Trading 22 CC	Tytola Investments	R336,300.00
15	07/06/29	2775	<ul style="list-style-type: none"> • Computers incl. E-NaTIs 6313001656 & P/MJS555/BK Lexmark Lazer Printer (83BCDYN)	Midnight Spark Trading 22 CC	Tytola Investments	R126,084.00

			5pc Table & Chairs Safe Modem (AZTMEZ/E12-01913) Fax Machines (b31g605290)			
16	07/06/22	4938	<ul style="list-style-type: none"> Militron Break Tester WECC120/2053 Play Steering Detector 	Katawa Trading 160	Tytola Investments	R1,698,600.00
17	07/06/26	4947	<ul style="list-style-type: none"> Noise Level Machine Scuff Gauge Wheel Alignment Reader WECC/31/1148 Beam Adjuster UM9 Okia Photo Copier AGK3C6050 % 200504	Katawa Trading 160	Tytola Investments	R336,300.00
18	07/06/29	4958	<ul style="list-style-type: none"> Computers incl. E-NaTis 6313001656 & P/MJS555/BK Lexmark Laser Printer (83BCDYN) 5pc Table & Chairs Safe Modem (AZTMEZ/E12-01913) Fax Machines (b31g605290)	Katawa Trading 160	Tytola Investments	R126,084.00
19	07/09/30	6021	<ul style="list-style-type: none"> Excavation & Compactions Plant Hire Pneumatic Pipe Cabling Hydraulic equipment Electric Cable – 3Phase Concrete + Completion of Pit as per spec	Katawa Trading 160	Tytola Investments	R1,999,998.56
20	07/11/30	3249	<ul style="list-style-type: none"> Excavation & completion Reinforcement and Specialising Cabling Full contact as per conditions stipulated on Contract Document All work guaranteed for I year	Katawa Trading 160	Tytola Investments	R1,999,998.56
21	07/09/03	3008	<ul style="list-style-type: none"> Baths and 	Midnight	Nozomi 148	R2,251,500.00

			moulds as Per Spec 10 foot rim mould 2.10 footx12inch Star and Window Moulds 3.Tiffany Shell Assorted Heavy duty 4.Tiffany Marble Moulds Initial mould package 5. Tiffany Marble construction & remoulding	Star Trading 5 CC	CC	
22	07/11/07	4008	<ul style="list-style-type: none"> Baths and moulds as Per Spec 10 foot rim mould 2.10 footx12inch Star and Window Moulds 3.Tiffany Shell Assorted Heavy duty 4.Tiffany Marble Moulds Initial mould package 5. Tiffany Marble construction & remoulding	Midnight Star Trading 5 CC	Nozomi 148 CC	R2,251,500.00
23	07/06/14	2188	<ul style="list-style-type: none"> 3x Fenshida embroidery machines 	Midnight Star Trading 5 CC	Zenobia Trading	R6,469,665.30
24	07/10/05	5758	<ul style="list-style-type: none"> 3x Fenshida embroidery machines 	Midnight Star Trading 5 CC	Zenobia Trading 270 CC	R6,469,665.30
25	30/06/2006	002746	<ul style="list-style-type: none"> 50 Rolls grey cotton fabric, 200m per roll 10,000m at R50.00 per metre	Thiele Design	Dots Curtaining Manufacturing CC	R570,000.00
26	31/08/2006	0022788	<ul style="list-style-type: none"> 50x200mt rolls grey 100% cotton fabric 25x100mt rolls 100% cotton Bone whit 10,000mt at 50,00=500,000 25,000mt at 60,00=150,000	Thiele Design	Dots Curtaining Manufacturing CC	R741,000.00

(sic)

I shall hereinafter refer to the suppliers listed in column 5 merely as Midnight

Spark, Katawa, Midnight Star and Thiele.

[4.4] **Counts 27-29: Forgery**, in that during 2007 -2008 and at Port Elizabeth, the accused wrongfully and intentionally to the prejudice or potential prejudice of the SARS and/or the employees of SARS drafted three (3) false documents to wit two (2) acknowledgements of debt and a credit instalment agreement between Midnight Star and **Nozomi** represented by accused no 2 and *Pumela Mavela*.

[4.5] **Count 30: Fraud**, in that during June – August 2007 and at Mthatha, the Accused wrongfully, falsely and with the intention to defraud affirmed to Mr *Sydney Zilwa (Zilwa)* of Zilwa Associates CPA (SA)

- that **Tytola** traded with Midnight Spark

that Midnight Spark issued tax invoice 2730 dated 22/06/07

that Midnight Spark issued tax invoice 2749 dated 26/06/07

that Midnight Spark issued tax invoice 2775 dated 29/06/07

that **Tytola** paid the purchase price including the VAT component as per each of the invoices

and by means of the said misrepresentation induced Zilwa to

- accept that **Tytola** traded with Midnight Spark

accept that the particulars contained in the invoices were true and correct,
accept that **Tytola** paid the purchase price and the VAT component as per the invoices,

to complete the July VAT 201 return based on the information contained in the Midnight Spark invoices

which caused a loss or a potential prejudice to SARS and/or the
Government of South Africa

whereas the Accused knew

- that the tax invoices were false, and

that trade between the two (2) entities never took place as per the tax invoices

It is common cause that Zilwa and Associates were **Tytola's** auditors and that *Zilwa* was the person who dealt with accused no 1.

[4.6] **Count 31: Fraud**, in that during March 2008 – April 2008 and at Mthatha, the Accused wrongfully, falsely and with the intention to defraud affirmed to SARS

- that **Tytola** traded with Katawa Trading 160 (**Katawa**), and
- that **Katawa** issued tax invoice 4938 dated 22/06/07,

that **Katawa** issued tax invoice 4958 dated 29/06/07,
that **Katawa** issued tax invoice 4947 dated 26/06/07,
that **Katawa** issued tax invoice 6021 dated 30/09/07,
that **Tytola** paid the purchase price including the VAT component as per each of the invoices
that the name of the business **Tytola** traded with, is **Katawa**

and by means of the said misrepresentation induced SARS to

- accept that **Tytola** traded with **Katawa**,

accept that the particulars contained in the four invoices were true and correct,
accept that **Tytola** paid the purchase prices and the VAT component as per the invoices to **Katawa**,

accept that the name of the business **Tytola** traded with was **Katawa**,

which caused loss or a potential prejudice to SARS and/or the
Government of South Africa

whereas the Accused knew

- that the four (4) tax invoices and the particulars contained therein were false,

that trade between the two (2) legal entities never took place,
that a business with the name **Katawa** did not exist.

[4.7.] **Count 32: Fraud**, in that during 2007 - 2008 and at Mthatha, the
Accused wrongfully, falsely and with the intention to defraud
affirmed to SARS

- that **Tytola** traded with Midnight Star,

that Midnight Star issued tax invoice 3249 dated 30/11/07

and by means of the said misrepresentation induced SARS to

- accept that **Tytola** traded with Midnight Star,

accept that the particulars contained in the invoice was true and correct,
accept that **Tytola** paid the purchase price and the VAT component as per the
invoice to Midnight Star

which caused a loss or potential prejudice to SARS and/or the Government of
South Africa

when in fact the accused knew

- that the tax invoice and the particulars contained therein

was false,
that trade between the two (2) entities never took place

[4.8] **Count 33: Fraud**, in that during 2007 - 2008 and at Port Elizabeth,
the Accused wrongfully, falsely and with the intention to defraud
affirmed to SARS

- that **Nozomi** traded with Midnight Star,

that Midnight Star issued tax invoice 3008 dated 03/09/07,
that the aforementioned parties entered into a credit instalment agreement and
an acknowledgement of debt

and by means of the said misrepresentation induced SARS to

- accept that **Nozomi** traded with Midnight Star,

accept that the particulars contained in the invoice was true and correct,
accept that **Nozomi** paid the purchase price and the VAT component as per the
invoice to Midnight Star,
accept that they concluded a credit instalment agreement and an
acknowledgement of debt

which caused loss or a potential prejudice to SARS and/or the
Government of South Africa

whereas the Accused knew

- that the tax invoice was false and that the particulars
contained therein was false,

that trade between the two legal entities never took place as per the tax invoices,

[4.9] **Count 34: Fraud**, in that during 2007 - 2008 and at Port Elizabeth, the Accused wrongfully, falsely and with the intention to defraud affirmed to SARS

- that **Nozomi** traded with Midnight Star,

that Midnight Star issued tax invoice 4008 dated 07/11/07

and by means of the said misrepresentation induced SARS to

- accept that **Nozomi** traded with Midnight Star,

accept that the particulars contained in the invoice was true and correct, accept that **Nozomi** paid the purchase price and the VAT component as per the invoice to Midnight Star

which caused a loss or potential prejudice to SARS and/or the Government of South Africa

whereas the Accused knew

- that the tax invoice and the particulars contained therein was false,

that trade between the two (2) entities never took place.

[4.10] **Count 35: Fraud**, in that during 2007 - 2008 and at Port Elizabeth, the Accused wrongfully, falsely and with the intention to defraud affirmed to SARS and/or the employees of SARS

- that **Zenobia** traded with Midnight Star,

that Midnight Star issued tax invoice 2188 dated 14/06/07

and by means of the said misrepresentation induced SARS to

- accept that **Zenobia** traded with Midnight Star,

accept that the particulars contained in the invoice was true and correct,
accept that **Zenobia** paid the purchase price and the VAT component as per the
invoice to Midnight Star

which caused a loss or potential prejudice to SARS and/or the Government of
South Africa

whereas the Accused knew

- that the tax invoice and the particulars contained therein
was false,

that trade between the two (2) entities never took place as per the tax invoices,

[4.11] **Count 36: Fraud**, in that during 2007 - 2008 and at Port Elizabeth,
the Accused wrongfully, falsely and with the intention to defraud
affirmed to SARS

- that **Zenobia** traded with Midnight Star,

that Midnight Star C issued tax invoice 5758 dated 05/10/07

and by means of the said misrepresentation induced SARS to

- accept that **Zenobia** traded with Midnight Star,

accept that the particulars contained in the invoice was true and correct,
accept that **Zenobia** paid the purchase price and the VAT component as per the
invoice to Midnight Star

which caused a loss or potential prejudice to SARS and/or the Government of South Africa

whereas the Accused knew

- that the tax invoice and the particulars contained therein was false,

that trade between the two (2) entities never took place as per the tax invoices,

[4.12] **Count 37: Fraud**, in that during 2007 - 2008 and at Port Elizabeth, the Accused wrongfully, falsely and with the intention to defraud affirmed to SARS

- that the particulars contained in the Summary of VAT Control for **Dots**, submitted in support of the VAT refunds claimed for the VAT periods March 2006 – December 2006, and which resulted in an increase of the refunds claimed for the periods 06/06 and 08/06 were true and correct,

that the two tax invoices from Thiele, submitted in support of the increase of the refunds claimed for the VAT periods 06/06 and 08/06 were true and correct, that SARS was liable to refund it an additional amount of R23, 495.20 and R33, 754.83 for the VAT period 06/06 08/06 respectively

and by means of the said misrepresentation induced SARS to

- accept that the particulars contained in the Summary of VAT Control for **Dots** for the Vat period March 2006 – December 2006 was true and correct,
- accept that the two (2) tax invoices from Thiele, were true

and correct,

accept that SARS was liable to refund **Dots** the additional amounts

which caused a loss or potential prejudice to SARS and/or the Government of South Africa

whereas the Accused knew

- that the particulars contained in the Summary of VAT Control for **Dots** was false,
- that the two tax invoices from Thiele was false,

that **Dots** was not entitled to the additional amounts.

[4.13] **Counts 38 – 40: (Only in respect of Accused No 1) Corruption**

in contravention of section 3 (b) (i) (aa) read with sections 1, 2, 24, 25, 26 (1) (a) of the **Prevention and Combating of Corrupt Activities Act, 12 of 2004** (the Corruption Act) in that on the dates referred to in column 2 of Table C and at Mthatha, Accused No 1, directly or indirectly, unlawfully gave/agreed to give / offered to give to the person referred to in column 3 and 4 of Table C, the gratification referred to in column 5 of Table C influenced such person to act in a manner that amounts to the illegal, dishonest, unauthorised, incomplete, or biased exercise, carrying out or performance of any powers, duties, or functions arising out of a constitutional, statutory, contractual or any other legal obligation, to wit to refrain from investigating the VAT refunds claimed from SARS for the tax periods July 2007, September 2007, November 2007

and January 2008.

TABLE C

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Count	Date	Persons presented with gratification	Position at SARS	Gratification
38	20/02/08	Siphokazi Sobuwa	Auditor	Phillips Loren gold paled watch Desk ornament
39	18/03/08	Cuma Notyalwa	Investigator at the Enforcement Centre	Mount Blanc Pen Rolex Watch 2 pairs of Armani Suits
40	26/03/08	Monde James Swartbooï	Team Leader at the Enforcement Centre	R9,800.00

[4.14] **Counts 41 - 43:** A contravention of section 4 read with sections 1 and 8 of **POCA**, viz, **Money Laundering**. During his address in the discharge application, counsel for the state properly conceded that it had adduced no evidence that any money was laundered as envisaged by section 4 of the Act and that the accused were entitled to their discharge in respect of such counts. The application for their discharge of these counts was accordingly granted.

[4.15] **Counts 44 – 46:** A contravention of section 4 read with sections 1 and 8 of **POCA**, **Money Laundering** (Accused 1 and 2), in that the accused on or about the dates set out in column 2 of Table F and at

Port Elizabeth, wrongfully and unlawfully, entered into an agreement to transfer the proceeds of value added tax claims (paid by SARS as set out in column 5 and 6 in favour of **Zenobia**) in the amounts and on the dates as set out in Column 2 and 3 of Table F to the Estate Agency Trust Account of Accused 1 and/or the PE Roadworthy Centre's business account and/or **Tytola's** business account as set out in column 4 of Table F whilst they knew or ought reasonably to have known that the amounts as set out in column 3 and transferred from **Zenobia's** business account was the proceeds of unlawful activities or formed part of the proceeds of unlawful activities, and that the movement of property was or was likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of that property or the ownership thereof or any interest which anyone may have in respect thereof and/or enabling or assisting any person to remove or diminish the property, which was acquired as a result of the commission of an offence.

Table F

COLUMN N 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5	COLUMN 6
Count	Date of Transfer	Total Transferred	Beneficiary	Date VAT Claim paid to Zenobia	Total paid
44	9/10/07	R750,000.00	Estate Agency Trust Account: A Moosagie 1226286569	9/10/07	R792,000.00
45	25/10/07	R395,000.00	Estate Agency Trust	25/10/07	R797,040.00

			Account: A Moosagie 1226286569		
	27/10/07	R200,000.00	Estate Agency Trust Account: A Moosagie 1226286569		
	29/10/07	R200,000.00	Tytola Trading CC Acc no:1263110991		
	30/10/07	R5000.00	PE Roadworthy Centre Acc no: 1213045770		
	30/10/07	R5000.00	PE Roadworthy Centre Acc no: 1213045770		
	30/10/07	R5000.00	PE Roadworthy Centre Acc no: 1213045770		
	30/10/07	R5000.00	PE Roadworthy Centre Acc no: 1213045770		
	30/10/07	R5000.00	PE Roadworthy Centre Acc no: 1213045770		
	30/10/07	R5000.00	PE Roadworthy Centre Acc no: 1213045770		
	1/11/07	R5000.00	PE Roadworthy Centre Acc no: 1213045770		
	17/11/07	R5500.00	PE Roadworthy Centre Acc no: 1213045770		
	30/11/07	R15,000.00	PE Roadworthy Centre Acc no: 1213045770		
	5/12/07	R15,000.00	PE Roadworthy Centre Acc no: 1213045770		
	5/12/07	R15,000.00	PE Roadworthy Centre Acc no: 1213045770		
	7/12/07	R15,000.00	Tytola Trading CC Acc no: 1263110991		
46	7/01/08	R280,000.00	Tytola Trading CC Acc no: 1263110991	4/01/08	R276,500.00
Total		R1,925,500.00			R1,865,540.00

[5] The accused pleaded not guilty to each of the charges and written explanations were handed in as exhibits "AA" and "BB" respectively. Accused no 1, save for admitting that he was the sole member and director of **Tytola** denied

any involvement in either **Dots**, **Nozomi** and **Zenobia**. In exhibit “AA” he stated that he became a member of **Zenobia** after accused no 2 resigned as a member and after the period during which the offences were alleged to have occurred. In his subsequent amplified plea explanation, exhibit “AA1” he stated, as regards:

(i) **Dots**, he “had absolutely nothing to do with (sic) and was not involved at all with it”.

(ii) **Nozomi’s** – (he) “merely introduced their members to *Shafiek Naidu* whereupon they proceeded to do business with him. What happened in the business and how the business proceeded is foreign to me”. He furthermore decried any bookkeeping skills, and sought to distance himself from **Nozomi** by pronouncing that **Nozomi** had the same bookkeeper, to wit, one *Ismail Ahmed* and concluded by saying that **Nozomi’s** Vat refund invoices were refused and that SARS consequently suffered no prejudice.

(iii) **Zenobia**, he only became a member on 23 January 2008 and that the invoices submitted to SARS occurred prior thereto and “as such, had nothing to do with me.”

Not content with merely denying involvement in **Zenobia** however, accused no 1, in the amplified plea explanation “AA1” and in an attempt to explain certain anomalies in the evidence already tendered by several witnesses, stated as follows:-

“11.3 My only role was as an agent:

11.3.1 I introduced Shafiek Naidu to the members of
Zenobia;

11.3.2 They then did business with him, including purchasing large embroidery machinery, I believe;

11.3.3 The members of that organisation were Desiree Jenkins and two persons whom I did not know at the time.

11.4 My agreement with Shafiek Naidu and Zenobia was that

once SARS had approved the VAT repayments they (SARS)
would pay that money directly to:

11.4.1 Zenobia by EFT and thereafter

11.4.2 Zenobia would issue a cheque for the amount, made
payable to Amier Moosagie estate Agency account;
and

11.4.3 I would then withdraw that sum in cash, give the
vast majority of the money to Shafiek Naidu, minus
my commission of 10%.

The reason I did it this way was because I did not trust Shafiek
Naidu and did not believe he would pay me my commission.

11.5 The embroidery machines that Zenobia purchased in order to reclaim these VAT amounts
were installed in Zenobia's premises at the time where they remain to this day."

I shall henceforth refer to the said *Shafiek Naidu* merely as *Shafiek*. In her plea
explanation, exhibit "BB", accused no 2, quite disingenuously, sought to have
various factual averments admitted pursuant to the provisions of section 220 of
the **Criminal Procedure Act**². The authorities are however clear – only facts
alleged by the state may be admitted by an accused in terms of section 220. It is
not intended to be used by the defence as a means of getting on record
something that the state does not propose to make part of its case. As Fannin J
remarked in **S v Kuzwayo**³

² Act No, 51 of 1977

³ 1964 (3) SA 55 (N) at 57A

“It is not intended to be used by the defence as a means of getting on record something which the State does not propose to make part of its case. If the fact which the defence purports to admit in terms of the subsection is not part of the case which the State proposes to make, then there is no allegation made by the State, and no issue at that stage between it and the accused, in regard to the subject matter of the purported admission.”

[6] The introduction of exhibit “AA1” occurred in the following manner. Midway through the trial, accused no 1 dispensed with the services of his counsel and at the resumption of the hearing on 13 June 2011 Mr *Price* appeared on his behalf. Counsel informed me that he sought leave to substitute accused No 1’s plea explanation with a new one. I refused to allow a substitution but permitted him to hand up the further plea explanation as exhibit “AA1”.

[7] It will be gleaned from the foregoing that no admissions were made in respect of counts 34 – 36 in the first plea explanation, exhibit “AA”. These counts dealt with **Nozomi** and **Zenobia**. In the second plea explanation, “AA1”, and with specific reference to **Nozomi** and **Zenobia**, accused no 1, whilst denying any involvement in either enterprise, stated that he acted as an agent in various business transactions conducted by them. The name *Shafiek Naidu*, featured prominently in these proceedings and his existence is the bedrock of the accuseds’ defence. As will appear more fully in the course of this judgment, the name is a creation of the accused upon whom the fraud perpetrated on the fiscus is ascribed to in order to conceal the accuseds’ involvement therein. His role and involvement in this matter was suggested to various state witnesses but with limited success. During the defence case, certain witnesses identified him from three (3) glossy photographs with theatrical aplomb and I shall in due course evaluate that evidence.

[8] Accused no 1’s denial of any involvement in the affairs of these various entities must be viewed against the backdrop of what emerged following a search of his business premises, PE Roadworthy Centre (the PE Centre), at 36 North Road in Port Elizabeth on 4 April 2008. In his application for a search warrant, captain *Schan Bezuidenhout* (*Bezuidenhout*) of the South African police services Commercial branch deposed to an affidavit wherein he identified the investigation being conducted by him as the **“alleged fraudulent refund claims submitted by a Mr Amier Moosagie in respect of input value-added tax (hereinafter**

“VAT”) claimed from the South African Revenue Services (hereinafter SARS). He listed **Dots, Nozomi, Zenobia and Tytola** as entities under investigation and expounded upon accused no 1’s involvement and association therewith.

[9] During his testimony in chief, *Bezuidenhout* confirmed that a warrant was issued by the Port Elizabeth magistrate’s court authorising a search and seizure at accused no 1’s business and residential premises. His evidence concerning the search and seizure operation was tendered without any objection thereto by accused no 1’s then counsel. However, at the conclusion of the state case Mr *Price* submitted that the documents seized during the search and seizure operation were inadmissible in as much as the warrant themselves were fatally defective. No argument thereanent was proffered either in the address or the heads of argument during the application for discharge or in closing argument. The reason for the omission is obvious. The search was lawful, properly conducted and the warrants are not open to attack. The documents seized are clearly admissible as evidence against the accused. The affidavit deposed to by *Bezuidenhout* intelligibly and with reasonable certainty specified that the investigation related to fraudulent VAT refund claims, which, if established, would constitute offences in terms of the Act. The warrant issued clearly has reference thereto. In **Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecution and Others**⁴, the Constitutional Court, in dismissing an appeal against a judgment of the Supreme Court of Appeal upholding the validity of a search warrant stated the following –

4 2008 (2) SACR 421 (CC)

“[168] The preamble to the warrants states that the nature of the criminal investigation appears from the information placed on oath before the judge who issued the warrant. The investigation arises, the warrants state, from the reasonable belief that certain offences have been committed or that attempts have been made to commit them. The suspected offences are listed as corruption in contravention of Act 94 of 1992, fraud, money laundering in contravention of Act 121 of 1998 and tax offences in contravention of Act 58 of 1962.

[169] This broad description of the scope of the investigation was, in my judgment, sufficient to satisfy the objective test of reasonable intelligibility. It would give any reasonably well-informed person, who had knowledge of the Act and the relevant classes of offences, a fair idea of the ambit of the authorised search. A searched person confronted with a warrant would then be able to request further particulars from the investigators about the scope of their authority in terms of s 29(9)(b), and would be placed in a position to protest effectively against the search for and seizure of items clearly irrelevant to the investigation in question.”

[10] *Bezuidenhout* testified that when the terms of the warrant were explained to accused no 1, neither he nor his attorney, who had been summoned to his business premises, raised any objection to the search and seizure and fully appreciated the scope and import of the warrant. During his evidence in chief accused no 1 sought to denigrate the integrity of the search and seizure operation by stating that he was merely told that the police had a warrant to search and proceeded without any regard to his rights. He stated that he had not been informed of his right to have his attorney present nor the reason for his arrest. *Bezuidenhout's* evidence that accused no 1 was fully apprised of the reasons for the search, informed of his right to legal representation and in fact himself telephoned his attorney prior to the search being conducted, was never challenged. There was no suggestion during his cross-examination that the search was not properly conducted and the attempt to impugn the search must be evaluated and examined in conjunction with the nature and import of the documentation discovered.

[11] The documents seized were handed in as exhibits “E1” to “E12” and the inventory made at the time of the search signed by *Bezuidenhout* and accused no 1 as exhibit “E13”. The documents comprising “E1”, six (6) in number, were found in a cupboard in a lever arch file marked, “**U Roadworthy Centre ACR**”, together with various invoices, SARS documents and correspondence. These documents, save for the fifth (5th) in the batch, had reference to **Tytola**. The sixth (6th) document, invoice no 6021 from Katawa Trading 160 (**Katawa**), is an exact replica of exhibit “A3”⁵, a tax invoice submitted to SARS, Mthatha by accused no 1. The circumstances in which it came to be handed to Mr *Japi Alfred Zwane* (*Zwane*), a team leader in the VAT audit section at SARS, Mthatha is not in dispute.

[12] During December 2007, Ms *Siphokazi Sobuwa* (*Sobuwa*), an auditor at SARS, Mthatha conducted an audit of **Tytola’s** November VAT return. It is not in dispute that she telephoned accused no 1 who in turn referred her to *Zilwa*. Her attempts to speak to him failed and she reverted to accused no 1 who informed her that the refund was in respect of a vehicle testing station which he had recently opened in Mthatha. Accused no 1 undertook to fax documents in substantiation of the refund to her. It is not in issue that the documents faxed to her are those which he had furnished to *Zilwa* as listed in paragraph [18] hereinafter. Prior to her completing the audit she was absent from work for personal reasons and, on her return, discovered that the November VAT refund claim had, in the interim, been paid into **Tytola’s** Nedbank account. Notwithstanding, *Sobuwa* resumed her audit and requested additional supporting documentation from accused no 1. It is not in dispute that accused no 1 faxed a schedule of expenses to her for the period 7 November 2007 to 23 November 2007 and included therein was a reference to the VAT refund claimed in respect of the purchase from Midnight Star and that relating to the transfer of erf 25066 from Lavasco Trading 1011 (Pty) Ltd to **Tytola**.

[13] *Sobuwa* telephoned Midnight Star to confirm the **Tytola** purchase from them and supplied them with invoice number 3249. The response received was that the invoice number quoted did not tally with their invoice numbering sequence. To unravel this mystery, *Sobuwa* faxed the invoice to Midnight Star, telephoned accused no 1 and informed him that the person to whom she had spoken to at Midnight Star, one *Sheena*, denied all knowledge of the transaction reflected on the invoice. Accused no 1's response was that the person, *Sheena*, could not have any knowledge of the Port Elizabeth transactions. Accused no 1 denied the gist of the conversation but *Sobuwa's* evidence was never challenged. Shortly thereafter accused no 1 visited SARS, Mthatha and presented *Sobuwa* with a duplicate copy of invoice 3249, the only additional information contained thereon a telephone number, 031 3055104 and the name *Akbhar Khan* appeared on the bottom of the invoice. Prior to him leaving, accused no 1 presented *Sobuwa* with a wristwatch and an ornament, the relevance of which I shall in due course revert to.

[14] In response to *Sobuwa's* queries relating to the Midnight Star invoice, its director, *Mohammed Asuf Osman* (*Osman*) forwarded a fax to her in which he stated –

“DEAR MADAM

THIS LETTER SERVES TO INFORM YOU THAT OUR COMPANY: MIDNIGHT STAR TRADING 5 CC t/a ALCON, ck: 2003/090316/23, VAT REG: 4050209735, HAS NO RECORD NOR KNOWLEDGE OF RENDERING ANY SERVICES OF ANY NATURE TO THE AFOREMENTIONED COMPANY: TYTOLA TRADING, UMTATA.

FURTHERMORE, A COPY OF OUR ORIGINAL TAX INVOICE IS ATTACHED, WHICH BEARS NO SIMILARITY TO THE FAXED COPY OF FRAUDULENT INVOICE RECEIVED FROM YOU CONTAINING OUT PERSONAL COMPANY DETAILS.

THANKING YOU FOR YOUR ASSISTANCE IN THIS REGARD,
MOHAMMED ASUF OSMAN
DIRECTOR”

[15] *Osman* himself testified and confirmed that the letter was drafted on his behalf. He furthermore denied having concluded the instalment sale agreement (exhibit “B3”) or the acknowledgements of debts signed by accused no 2 and *Mavela*. It is common cause that the invoices allegedly emanating from Midnight

Star to **Nozomi** and **Zenobia** are not only forgeries but that Midnight Star's business did not encompass trade in the good specified in either invoice. I shall, in due course, when considering the charges relating to **Nozomi** and **Zenobia**, deal more fully with *Osman's* evidence relevant thereto.

[16] The common defence raised by the accused, and in particular accused no 1, in relation to **Tytola**, is that they laboured under the misapprehension that the tax invoices forwarded to SARS were valid in as much as they had in fact paid for the goods supplied per the invoice, albeit not to Midnight Star. The defence raised is contrived and accused no 1's evidence blatantly untrue. **Tytola's** banking records (exhibit "A11") reflect no cash withdrawals of the order contended for by accused no 1. As adumbrated hereinbefore, whilst *Sobuwa* was conducting an audit of the refund claimed in respect of the tax period ending November 2007, accused no 1 faxed a number of tax invoices to her to verify the tax refunds claimed by **Tytola**. Amongst them was a tax invoice from Midnight Star where the VAT claimed totalled R245, 614.03 and the description of the goods supplied, recorded as "Excavation and Completion, reinforcing and specialised cabling, full contact (*sic*) as per conditions stipulated on contract document all work guaranteed for 1 year"⁶. When *Sobuwa* contacted Midnight Star and discovered that the invoice was a fake, she contacted accused no 1 who visited SARS and presented her with an identical invoice save for the inscription of a phone number and the name *Akbhar Khan* written at the bottom of the invoice.

6 Exhibit A at page 189.

[17] The submission of the aforesaid fraudulent Midnight Star invoice to *Sobuwa* precipitated an audit by SARS, Mthatha into the tax refunds claimed for the tax periods July 2007, September 2007 and January 2008 in none of which tax invoices had been submitted. The undisputed evidence is that the July 2007 return was completed by *Zilwa* and submitted to SARS, Mthatha on 29 August 2007. A refund of R260, 440.53 was claimed. SARS paid an amount of R260, 428.17 into **Tytola's** bank account on 2 October 2007, the difference in the amounts occasioned by the deduction of a debt of R12.36 carried over from a previous VAT return. The September 2007 VAT return was forwarded to SARS, Mthatha on 25 October 2007 wherein a refund in the sum of R256, 546.83 was claimed. SARS paid the aforesaid amount into **Tytola's** banking account on 7 November 2007.

[18] It will be gleaned from the foregoing that the investigation into the tax affairs of the various entities commenced with an audit of the November 2007 VAT return. Mr *Mzwandile Raphael Hokwana (Hokwana)* is an auditor in the Enforcement Centre at SARS, Mthatha. Following the discovery of the false Midnight Star invoice, he conducted an audit into the refunds claimed by **Tytola** for the periods July 2007, September 2007, and January 2008. I interpolate to repeat that at that stage the July and September refunds, R260, 440.53 and R256, 546.83 had already been paid to **Tytola**. The July VAT return had been completed and submitted to SARS, Mthatha by *Zilwa*. He calculated the VAT refunds utilising **Tytola's** bank statements and tax invoices sent to him by accused no 1. The tax invoices (exhibits "A89", "90" and "91") emanated from an entity styled Midnight Spark Trading 22 CC, not Midnight Star and were dated 29 June 2007, invoice number 2775; 26 June 2007, invoice number 2749 and 22 June 2007, invoice number 2730 respectively. The VAT component of these invoices were R15, 484.00, R41, 300.00 and R208, 600.00, totalling some R260, 440.53.

[19] The September 2007 VAT 201 was received by *Zilwa* signed and completed. *Zilwa* testified that the calculations were not done by him and he then returned the form to accused no 1 with instructions to complete and return for submission to SARS. He received the form without any supporting documents and submitted it to SARS. As adumbrated SARS paid the refund of R256, 546.83 into **Tytola's** banking

[20] *Zilwa* completed the November 2007 VAT 201 utilising invoices presented to him by accused no 1. The *first*, an invoice from Midnight Star, invoice number 3249, dated 30 November 2007, the VAT total claimed R245, 614.03, the *second*, a statement from attorneys Pagdens Stulting dated 7 November 2007, a purchase summary from Sizwe Auctions and invoices from Blue Gill Imports and

Auction Alliance. *Zilwa* completed the VAT return and calculated the VAT refund at R307, 413.17. The VAT return was submitted on 10 December 2007.

[21] *Hokwana*, charged with conducting the tax audit, telephoned accused no 1, requested certain documents and thereafter reduced the content of his request to him in writing. A week later and in response, accused no 1 accompanied by two other persons visited *Hokwana* and produced copies of tax invoices. Dissatisfied therewith, *Hokwana* demanded the originals and a week later *Hokwana* received an envelope from *Zwane* who had received it from accused no 1 at the Mthatha Centre. The envelope contained four tax invoices emanating from “Katawa Trading 160, 302 Solace Place, 5 Nathaniel Isaacs Crescent, Durban, 4001, 031-3055104” dated 22 June 2007, 26 June 2007, 29 June 2007 and 30 September 2007 respectively. At the bottom of each invoice was appended a telephone number, 074 262 5528 and the name *Shafiek Naidu*. The tax invoices bore the invoice numbers 4938, 4047, 4958 and 6021 respectively and a VAT registration number reflected as 40402336673. The VAT refunds claimed were R208, 600.00; R41, 300.00; R15, 484.00 and R245, 613.86 respectively. The latter invoice (6021) is in substance and form similar to the Midnight Star invoice submitted to *Sobuwa* but with greater particularity concerning the description of the goods supplied. In addition to the foregoing invoices, the envelope also contained an agreement of sale between accused no 1 and *Shafiek Naidu*. The merx of the sale agreement was appended as annexure “A” under the rubric, “*List of Equipment*” comprising –

- “1). WECC BRAKE MILITRON DOUBLE BRAKE TESTER
WITH DOUBLE BOARD DISPLAY
- 2). WEIGH BRIDGE WECC MILITRON
- 3). SCUFF GUAGE MILITRON
- 4). WHELL ALIGNMENT TESTER
GROUND SUB SURFACE MODEL
- 5). PULSAR SOUND LEVEL MACHINE
- 6). PULSAR SMOKE EMITTING TESTER
- 7). PHOTO TACHOMETER
- 8). PLUMB BOB
- 9). TYRE DEPTH GUAGE CAILBERATOR
- 10). 1 X MILITRON PLAY DETECTOR FOR STEERING
- 11). 1 X PHOTO COPIER NASHUA
- 12). ALL LOOSE EUIPMENT
TYRE TOMMY BARS
HELMET, MEASURUNG TAPES
LEAD LAMPS
TROLLEY JACK
ALUMINIUM PRECISION CALIBRAT
- 13). COMPUTERS INCLUDING FULLE-NATIS
PROGRAMES
- 14). OFFICE EQUIPMENT – DESK, CHAIRS, ETC.”

and the “Installation and Outfitting” of the roadworthy centre recorded in annexure “B” to the agreement as –

- “1). INSTALLATION OF ALL EQUIPMENT ON
AGREEMENT
- 2). EXCAVATION OF 20 METER X 1.5 METER

INSPECTION PIT

- 3). INSTALLATION OF FRONT AND EXIT INDUSTRIAL ROLLER DOORS
- 4). EXCAVATION AND INSTALLATION OF ALL HYDRAULIC CABLING
- 5). INSTALLATION OF ALL 3 PHASE POWER CABLING
- 6). CONSTRUCTION OF ENTIRE OFFICE AREA AND RECEPTION AREA AS PER DECORATIVE FINISHES TO BE DETERMINED BY THE PURCHASER.”

[22] In order to fully appreciate the extent of the fraudulent character, not only of the “agreement of sale” and the VAT invoices, but moreover, accused no 1’s duplicity therein, a detailed examination of the evidence is necessary. The foundation of accused no 1’s defence is that he was duped by *Shafiek* into believing that the invoices were legitimate. Before evaluating the evidence however, it is illuminating to set out the preamble to the “agreement of sale”. It reads –

“**WHEREAS** the Purchaser is involved in “inter alia” the business of providing roadworthy services to clients;

AND WHEREAS the Seller is engaged in “inter alia” the business of providing roadworthy centre equipment and outfitting;

AND WHEREAS the Purchaser is desirous of “inter alia” purchasing from the Seller and the Seller is desirous of “inter alia” selling to the Purchaser certain roadworthy equipment subject to the conditions herein contained;”

[23] The premises in which the Mthatha Centre was housed, viz, 16 Errol Springs Road, Vulindlela Heights Mthatha, is and was owned by Mr *Ismail Osman Bijal (Bijal)*. In 2004 he leased the premises to a Mr *Haroun Bika (Bika)* who opened a vehicle testing station therein. *Bijal* effected various structural changes to the premises, in particular, the construction of an inspection pit. *Bijal*’s unchallenged evidence was that he personally, and to specifications, supplied by *Bika*, designed the inspection pit to fit the roller machine apparatus supplied by him and the scuff gauge. Cross-examination of both *Bika* and *Bijal* was rather tentatively directed at establishing that not only was the inspection pit

lengthened by accused no 1 but that the aforestated machinery was moreover replaced by him was well. Both remained resolute that the pit remained unaltered and the machinery unchanged. I shall deal more fully with their evidence later in the judgment but the foregoing synopsis merely aids the narrative.

[24] It was submitted on behalf of accused no 1 that an inference adverse to the state case is justified by reason of its failure to have called *Khan* as a witness. Suffice it to say at this stage that there is no merit in the submission. *Khan* was introduced into the audit by accused no 1. In the second plea explanation, exhibit "AA1" accused no 1 stated that he was present when SARS telephoned *Osman* and he then telephoned *Shafiek* who supplied him with the name of *Khan* and his telephone number. He stated further that *Khan* replaced the Midnight Star invoices with Katawa invoices which he then forwarded to SARS. The fact of the matter is however that when *Sobuwa* first queried the authenticity of the Midnight Star invoice which accused no 1 had supplied to her (exhibit "A97") Midnight Star disavowed all knowledge of the transaction. Accused no 1's telephonic response to her was, as previously stated, that *Sheena* would have no personal knowledge given the fact that it was a Port Elizabeth transaction. Subsequent thereto he arrived at her office and supplied her with a replica of the same invoice save for the inscription of the telephone number and name "031-305 5105 Akbar Khan" at the bottom of the page. Under cross-examination the witness was asked whether she telephoned the number and she replied in the affirmative. Whatever further response she might have had was purposefully curtailed by Mr *Price*, by saying "all I am asking you is did you have a conversation with him". Mr *Price* adopted a similar stratagem when cross-examining *Hokwana*. *Hokwana* was pertinently asked whether he had spoken to *Khan* to

which he replied in the affirmative. The follow up question, more in the form of a statement wherein counsel sought to elicit *Hokwana's* acquiescence reads as follows:-

“You then, let us not worry too much about how you got hold of him, but you got hold of a Mr Akbar Khan. --- Yes, I did.

And he appeared to confirm the correctness of the invoices in the sense that he sent invoices to Titola? Sorry M’Lord, I am interfering now, I am hearing the Xhosa, he is reverting to hearsay. I do not know if you want to hear it first (intervention)

COURT You asked him a question.

MR PRICE Yes, but I have limited him in the question M’Lord. All I asked him was the information he got from Mr Khan is that these invoices were sent by him, Mr Khan, to the accused. I have not taken it further than that. That is all I am asking. Sorry M’Lord that I interfered, but I heard the Xhosa coming. --- When I phoned Mr Khan I asked him if he did sell Titola some goods (intervention)”

[25] In his further cross-examination Mr *Price* sought to limit *Hokwana's* answer to whether or not a telephone call had been made to *Khan*. The cross-examination of both *Sobuwa* and *Hokwana* concerning the telephone call to *Khan* cannot be viewed in isolation but against the backdrop of the spurious defence to which I shall in due course advert to. One of the key components of that defence related to the failure by the police and/or SARS to have interviewed *Khan*. In the case of both *Sobuwa* and *Hokwana*, counsel for accused no 1 was at pains to preclude them from mentioning what *Khan* had said to them. The initial questions put to both witnesses were clearly not limited and *Hokwana's* evidence that the person he spoke to from Katawa 60 denied having transacted with **Tytola** was thereby rendered admissible. Although *Hokwana* admitted that he omitted to include a reference to this telephone call in his police statement, this was satisfactorily explained and I accept his evidence concerning the subject matter of the telephonic conversation between himself and *Khan*. The evidence conclusively establishes that Katawa did not conduct any business with **Tytola**. The invoices presented to SARS were clearly false.

[26] It is common cause that included in the November 2007 VAT return was a

claim for the refund of VAT paid in respect of the purchase price of an immovable property, erf 26066, Motherwell, Port Elizabeth. An invoice from attorneys Pagdens Stulting was provided to *Zilwa*, which reflected two VAT amounts payable to SARS. Ms *Eleni Antonio (Antonio)*, an attorney in the employ of Pagdens attended to the transfer of the Motherwell property from the insolvent estate Lavasco, to **Tytola**. *Antonio* testified that her firm received no payment from **Tytola** and that the property was subsequently transferred to another company. It is clear that **Tytola** was not entitled to claim the input tax relating to the Motherwell property and that in submitting the invoice to *Zilwa*, accused no 1 was aware of the fraudulent nature of the refund claim.

[27] Accused no 1's answer to the question posed by me that the envelope which should have been given to *Zwane* by *Minnie* contained the four Katawa invoices is clearly false. *Zwane*'s uncontradicted evidence was that when he met personally with accused no 1 the latter handed him an envelope which he subsequently handed to *Hokwana*. When *Minnie* handed what accused no 1 alleged was the wrong envelope to *Zwane*, *Hokwana* was already in possession of the envelope handed to him by the accused. The evidence of *Zwane*, *Hokwana* and *Minnie* conclusively establishes the falsity of accused no 1's evidence that there were two envelopes in the safe. The one marked "*Monde*" was clearly destined for *Swartbooï*.

[28] During accused no 1's examination in chief, his counsel referred him to various invoices ostensibly emanating from Midnight Star, Thiele, and Ipetombi Graphics addressed to *inter alia* Desai's Hyper Store, **Dots** and Activist Investments CC. In addition he was referred to a memorandum of agreement between *Fahiem Desai (Desai)* and *Shafiek*. This evidence was tendered not only to gainsay any suggestion that *Shafiek* was accused no 1's creation but moreover to show that in his dealings with *Desai*, *Shafiek's modus operandi* echoed that of his dealings with accused no 1. Although *Desai* vouched for the existence of *Shafiek*, I can place no reliance whatsoever on his evidence. The probabilities are overwhelming that accused no 1 drafted the agreement of sale and was in cahoots with *Desai* to defraud SARS.

[29] I have hitherto examined the evidence relating to **Tytola** by reason of the fact that the investigation into its tax affairs precipitated the investigation into

Dots, Zenobia and Nozomi where SARS uncovered a similar stratagem had been employed in claiming VAT refunds. Before considering and evaluating the evidence relating to those entities, however, it is apposite to consider the legislative framework upon which the state relies for contending that *ex facie* the *modus operandi* employed by these entities, a pattern of racketeering activities clearly emerges.

[30] The essence of the offence postulated by section 2 (1)(e) of **POCA** was succinctly stated by Cloete J.A in **S v Eyssen**⁷ viz, – “. . . the accused must conduct (or participate in the conduct) of an enterprise’s affairs. Actual participation is required (although it may be direct or indirect) . . . ss (e) covers a person who was managing, or employed by, or associated with the enterprise] . . . “Manage” is not defined and therefore bears its ordinary meaning which in this context is “(1) to be in charge of; run, (2) to supervise (staff), (3) be the manager of (a sports team or a performer).”

Extrapolated from the case law the following principles emerge - in order to found a conviction thereanent, the state is required to establish the existence of an enterprise, a pattern of racketeering activity and a link between them and the accused. It must furthermore establish that the accused participated in the enterprise’s affairs and that such participation was through a pattern of racketeering activity, which section 1 defines as – **“means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior**

7 2009 (1) SACR 406 (SCA)

offence referred to in Schedule 1;” As pointed out in *Eyssen*⁸ the participation or involvement must be ongoing, continuous, or repeated. As will appear more fully hereinafter, the existence of the enterprise has been established beyond any doubt.

[31] It is necessary, at this juncture, to dispel any notion that the reference to “two offences” in the definition of “pattern of racketeering activity” means two separate and distinct offences specified in schedule 1 to the Act. The construction contended for is self serving and nonsensical. As adumbrated in the preceding paragraph, the envisaged participation must be by way of an ongoing, continuous or repetitive participation or involvement. The enterprise relied upon is the conglomeration of **Dots**, **Tytola**, **Nozomi** and **Zenobia**. It is common cause that each was a registered vendor in terms of the Act and submitted VAT returns in which VAT refunds were solicited.

[32] The accused’s *modus operandi* to defraud SARS was initiated by **Dots**. It submitted a summary of VAT control to SARS in support of VAT refunds for March to December 2006. It is not in dispute that the submission of the summary resulted in an increased refund for June, August and December 2006. The circumstances under which the refunds were subjected to an audit and found to be fraudulent was adverted to by several witnesses. Ms *Lisa Lee (Lee)* was employed as an auditor by SARS and during January 2007 assigned the task of auditing these refunds. She addressed a letter to **Dots** in which she *inter alia*

8 Paras [8] and [9]

sought invoices to substantiate the refund. In response, accused no 2 provided Lee with an affidavit deposed to the South African Police Services during February 2007 wherein she stated that her motor vehicle had been broken into on 9 December 2006 and a briefcase containing documentation, including invoices for **Dots**, had been stolen. In due course, Lee, in a written communication to **Dots**, informed accused no 2 that her audit findings were that **Dots** turnover had been under declared and no valid tax invoices had been supplied and that adjustments would in due course be made. During her audit, Lee, in conformity with SARS' audit regime conducted a verification exercise⁹ and discovered that the supplier of the tax invoice, Thiele, had in fact been liquidated and could accordingly not have issued these tax invoices.

[33] It is not in dispute that Thiele was placed under winding-up by special resolution on 26 July 2006 and that Messrs *van den Heever* and *De Oliviera* were appointed as the joint liquidators on even date. Mr *van den Heever* testified that after his appointment he was contacted by SARS and shown the invoices submitted to SARS by accused no 2 viz, exhibits "D3.2" and "D3.3". On examination he found them to be not only completely different to the company's invoices but moreover that the goods allegedly supplied to **Dots** were not products associated with Thiele. He further testified that on comparing the serial numbers on exhibits "D3.2" and "D3.3" and invoices received from Thiele's main creditor, First National Bank, they were completely out of sequence. In addition, Thiele's accounting records indicated that no payments had been received from **Dots**.

[34] In cross-examining Mr *van den Heever*, accused no 2's attorney sought to establish that Thiele's erstwhile director, one *Andries Stricker*, had in fact surreptitiously contracted with and sent invoices to **Dots**. The evidence of *van der Heever* conclusively establishes that Thiele's business did not encompass the goods specified in exhibits "D3.2" and "D3.3". Its business was confined to manufacturing steel windows, doors and door frames. The invoices ostensibly emanating from them are forgeries and were submitted to SARS by accused no 2 to induce them to pay the amounts claimed as I shall in due course elaborate

9 In SARS (Lee's) parlance "backtracking".

upon.

[35] **Dots'** success in beguiling SARS to refund VAT to it on the strength of forged tax invoices provided the catalyst for **Zenobia, Nozomi** and **Tytola** to follow suit. One of the documents seized at the PE Centre, was listed in the inventory, exhibit "E13" as "**Absa envelope for Dots Curtain Manufacturing, P.O Box 2427, Port Elizabeth.**" The post box number is that of the PE Centre and could not have been destined for "*Ismail Ahmed*" because *Carol Redcliffe* was **Dots** bookkeeper. It is inconceivable that this envelop could have found itself into accused no 1's office fortuitously. The only reasonable inference, as subsequent events attest to, is that accused no 1 was intimately involved in its affairs. This discovery refutes any suggestion that accused no 1 had nothing to do with **Dots**. On the contrary, it directly links him to **Dots**. Accused no 1's denial of any involvement in **Dots** is, devoid of all truth. During his evidence in chief he was referred to a Thiele invoice. I interpolate to state that it was not in dispute that the said invoices were submitted to SARS to validate **Dots'** VAT return. Accused no 1 decried any involvement in **Dots** or knowing a person whom his counsel referred to as *Andries Treurnicht*. The following exchange occurred:-

"Have you ever heard of a guy called Andries Treurnicht, is, I've probably got the politician here, Andries, I think it was Treurnicht, was it Treurnicht. Have you ever heard of a name like that? --- The politician, yes.

No, no, I'm not talking, let's leave him. Have you ever heard of a guy from Thiele Design by the name of Andries Treurnicht or André Treurnicht? --- No.

Not at all? --- No.

Incidentally, Dots Curtain and Linens, did you have anything to do with that? --- Nothing at all."

[36] Counsel's exclamatory riposte to the negative reply furnished by accused no 1 has particular significance to the answers furnished by accused no 1 when cross-examined by Mr *de Jager* concerning his knowledge of *Treurnicht*. When exhibit "N" (accused no 1's statement to *Bezuidenhout* dated 9 November 2007) was put to him and wherein he mentioned *Treurnicht* he attributed his negative reply to Mr *Price* to amnesia. The truth is he lied. His efforts at distancing himself from **Dots'** affairs by contending that he merely drove accused no 2 and *du Plessis* to the police offices is shown to be demonstrably false not only by his

presence during accused no 2's and *du Plessis*' questioning but moreover by him volunteering a statement to *Bezuidenhout*. By his own admission, he made the statement of his own accord. That statement could only have been proffered to corroborate accused no 2's statement concerning *Treurnicht* to *Bezuidenhout*. Her statement handed in as part of the defence exhibit "DEF" has no evidential value whatsoever. Accused no 1's subsequent recollection of having met the said *Treurnicht* is directly contradicted by what was put to *van der Heever*. It was put to him by accused no 2's attorney that a Mr *Andries Stricker* had supplied the goods specified on Thiele's VAT invoice "D3.2" and "D3.3" and that payment had been made to him. Accused no 2's attorney at no stage made any reference to any *Treurnicht*. There is no explanation for this anomaly. The only reasonable inference is that the name *Treurnicht* was conjured up by accused no 1 and 2 and, oblivious to what had been put to *van der Heever*, persisted with by accused no 1 by reason of the reference thereto in his statement to *Bezuidenhout*.

[37] Much was made during cross-examination concerning the failure of the state to have indicted *du Plessis*. Such omission does not inure to the benefit of the accused. It is the prerogative of the prosecuting authority to indict whomsoever it chooses. Although the evidence adduced establishes that accused no 2 was the dominant figure in **Dots**, its controlling mind however, was accused no 1. The foregoing analysis of the evidence conclusively establishes that **Dots**' refund endeavour was the first act of the enterprise's pattern of racketeering activity. The concession made by Mr *de Jager* concerning accused no 1's involvement cannot, in the light of the foregoing analysis of the evidence, be sustained. The concession was not properly made but, I am in any event not bound thereby.

[38] It is common cause that over the period July 2007 to January 2008 that **Tytola** and **Zenobia** submitted four (4) VAT returns respectively whilst **Nozomi** submitted three (3) VAT returns for the period September 2007 to January 2008. Details of the claims of each entity for the tax period, the amounts of the claim, the supporting invoices furnished and the result of the claim are common cause and for ease of reference best illustrated as follows:

Tytola Trading

TAX PERIOD	CLAIM	SUPPORTIVE TAX INVOICES	RESULT OF CLAIM
07/07	R260,440.00	3X KATAWA TRADING 160 CC	PAID
09/07	R256,546.83	1X KATAWA TRADING 160 CC	PAID
11/07	R307,431.17	1X MIDNIGHT STAR TRADING 5 CC	PAID
01/08	R720,037.99	Failed to submit	REFUSED

Total paid: R824, 418.00

Total refused: R307, 431.17

Nozomi 148 CC

TAX PERIOD	CLAIM	SUPPORTIVE TAX INVOICES	RESULT OF CLAIM
09/07	R276,500.00	1X MIDNIGHT STAR TRADING 5 CC	REFUSED
11/07	R283,822.00	1X MIDNIGHT STAR TRADING 5 CC	REFUSED
01/08	R276,500.00	FAILED TO SUBIT	REFUSED

Total refused: R836, 822.00

Zenobia Trading 270 CC

TAX PERIOD	CLAIM	SUPPORTIVE TAX INVOICES	RESULT OF CLAIM
07/07	R792,000.00	1 XMIDNIGHT STAR TRADING 5 CC	PAID
09/07	R797,040.00	1 XMIDNIGHT STAR TRADING 5 CC	PAID
11/07	R276,500.00	FAILED TO SUBMIT	PAID
01/08	R420,000.00	FAILED TO SUBMIT	REFUSED

Total paid: R1, 865, 540.00

Total refused: R420, 000.00

[39] Amongst the documents seized during the search were tax invoices ostensibly emanating from Midnight Star addressed to

[34.1] **Zenobia**, invoice no's 4087 (exhibit "E3") and 5788 (exhibit "E4") respectively; and

[34.2] **Nozomi**, invoice no's 3008 (exhibit "E7"), 4008 (exhibit "E8") and 3842 (exhibit "E11").

[40] As adumbrated hereinbefore accused no 1 decried any involvement in either **Nozomi** and **Zenobia** and stated in exhibit "AA1" that his role was limited

to introducing its members to *Shafiek*. It is not in issue that **Zenobia** and **Nozomi** shared the same business address viz, 12 Charlotte Street, North End, Port Elizabeth. Coincidentally, these were the same premises which Mr *Morné Viviers* (*Viviers*), a SARS tax auditor kept under observation and visited on 13 November 2007 in the company of a colleague Mr *Rudi McLeod*. The circumstances in which the visit occurred are not in dispute. *Viviers* was conducting an audit into **Nozomi's** VAT returns for September 2007 in which a refund of R276, 500.00 was claimed. On 9 November he contacted accused no 2 to obtain documentation to verify the validity of the refund. She could provide no assistance and referred him to her accountant, "*Ismail Ahmed*", whom she, averred could be contacted at telephone no 082 786 5808. *Viviers* duly phoned the number, requested the answerer to furnish him with the requisite documentation and addressed a letter to him in confirmation of the telephone call and faxed it to the number appearing on the VAT return (exhibit "B2") viz, 041-365 0333. Despite accused no 1's denial that the cell number is his private number I am satisfied that the telephone number furnished to *Viviers* by accused no 2 is that of accused no 1. This is confirmed by exhibit "B7", a note sent to *Zilwa* by accused no 1 wherein he furnished two (2) contact cell numbers, *to wit*, 082 786 5608 and 083 243 2338. During his testimony, accused no 1 sought to refute any suggestion that the said numbers were his own and contended that these were telephone numbers of cell phones which were utilised at the PE Centre by all and sundry. That evidence is palpably false. The plethora of documentation which he furnished, not only to SARS but to various financial

institutions prove the falsity of his evidence.

[41] *Viviers* duly visited **Nozomi's** business premises on 13 November 2007. He stated that accused no 1 introduced himself as Mr *Ismail Ahmed*, showed him around the premises and pointed to products which he alleged were being manufactured. *Viviers'* clear impression was that nothing was going on because the equipment was full of dust. The banking records of both **Nozomi** and **Zenobia** confirm *Viviers'* evidence. None of them conducted any business. No documentation was however handed to *Viviers* and he then left. The next day accused no 1 visited SARS' office and handed him a letter together with the Midnight Star invoice no 3008 (exhibit "B3.2"). It is not in dispute that this invoice was a photocopy of exhibit "E8" found in accused no 1's office during the search. He furthermore handed *Viviers* a copy of an instalment sale agreement between Midnight Star and **Nozomi** (exhibits "B3.3") and two acknowledgements of debt by accused no 2 and one *Pumela Mavela* respectively in favour of Midnight Star in the sum of 2 million rand, exhibit "B3.4" and "B3.5" respectively. It is common cause that duplicates of exhibits "B3.2", "B3.4" and "B3.5" viz, "E7", and "E10" were found during the search of the PE Centre.

[42] On receipt of the documentation received from accused no 1 *Viviers* notified accused no 1 that SARS would not pay the refund. He went on leave and in his absence **Nozomi** addressed a letter to SARS vehemently objecting to SARS' refusal to pay the refund. The letter, whilst ostensibly emanating from *Ismail Ahmed*, was penned by accused no 1. On *Viviers'* return following his leave, he was notified that **Nozomi** had submitted a VAT refund claim for November 2007 in the sum of R283, 822.00. Comparing this to the September 2007 VAT return *Viviers* noted that the only difference between the two (2) returns was the addition of the sum of R7 322.00. *Viviers* addressed a further letter to "*Ismail Ahmed*" asking for additional information and when none was forthcoming telephoned him. "*Ahmed*" denied receiving the letter, undertook to provide *Viviers* with the requisite documentation and in due course forwarded a Midnight Star invoice no 4008, exhibit "B3.7" to him under cover of an undated letter. *Viviers* noted that the invoice was substantially similar to "B3.2", the notable differences, the tax date, the invoice number and the insertion of a VAT no, 4110233626, below **Nozomi's** particulars and to the extreme left of the total at the foot of the page.

[43] An analysis of these documents and comparison with exhibits "E7" and "E8" found at accused no 1's premises conclusively proves not only that accused no 1 held himself forth as *Ismail Ahmed* but that he himself generated all the invoices. The invoice furnished to *Viviers* (exhibit "B3.7") is in fact a photocopy of "E8". A comparison between "E8" and "E7" is illuminating. All the handwritten variations depicted on "E7", save for the circled numbers in the quantity column were effected and "E8" and "B3.7", the finished products.

[44] *Viviers* however remained unpersuaded and requested further information. The response received by letter dated 21 February 2008 (exhibit "B3.8") is illuminating and reads as follows:-

"Sir,

Due to huge disputes with our suppliers including invoices, we have decided to cancel all purchases and agreed in principal to return all goods purchased to suppliers.

We have also decided to move our premises from North End to a warehouse in Motherwell, as a co-op is involved we need time to Register all the co-operatives members on the cc, s data base

We hereby notify you of our withdrawal of all vat input purchases for the above business and only once our new warehouse is operative will we inform you accordingly.

Yours faithfully,

I Ahmed"

[45] In his plea explanation and in evidence before me accused no 1 denied not only presenting himself as *Ismail Ahmed* but maintained that by reason of **Nozomi's** VAT refund claims being refused SARS suffered no prejudice. As regards the latter actual prejudice is not required to found a conviction for fraud. Potential prejudice suffices. Accused no 1's denial that he masqueraded as *Ismail Ahmed* is false. I accept *Viviers'* evidence that he introduced himself as *Ismail Ahmed* and it is evident that *Ismail Ahmed* is of his alias. When *Viviers* was recalled, Mr *Price* sought to elicit the concession that he could possibly have been mistaken vis-a-vis his identification of accused no 1 as *Ahmed*. *Viviers* however remained steadfast that accused no 1 introduced himself as *Ismail Ahmed* and maintained such alias throughout.

[46] It is not in issue that **Zenobia** submitted four VAT returns to SARS. What is in dispute is the involvement of accused no 1 in **Zenobia's** affairs. As adumbrated hereinbefore and for the reasons given it is clear that accused no 1 was intimately involved in its affairs. In her plea explanation, accused no 2, whilst admitting that she submitted **Zenobia's** VAT returns to SARS held forth that she acted in good faith oblivious of the fact that the invoices submitted in support of the refunds claimed were in fact false and forged. That denial is patently untrue. The inference can properly be drawn that she knew that accused no 1 had generated these invoices in order to defraud SARS. The VAT return for the period ending July 2007 was received by SARS on 22 August 2007. No sales were declared but input tax relating to capital expenses claimed in the sum of R792, 000.00. This resulted in a VAT refund due to **Zenobia** in the sum of R792,

000.00. This amount was paid to **Zenobia** on receipt of a Midnight Star tax invoice no 2188 forwarded to SARS under cover of a letter dated 8 October 2007 addressed to SARS. Mr *Petrus Meyer (Meyer)*, a VAT refund screener, was tasked with following up VAT refunded claims which SARS' computer operating system itself identified as high risk. He testified that he then telephoned the telephone number appearing on the return and the answerer's response was to furnish him with the telephone number of the accountant. When he telephoned the number the person answering identified himself as Mr *A. Ismail*.

[47] *Meyer* testified that he was aware that three (3) further VAT refund claims were submitted by **Zenobia** but bore no personal knowledge thereanent. It is not in issue that VAT refund claims were in fact submitted for the VAT periods September 2007, November 2007 and January 2008 for R797, 040.60, R276, 500.00 and R420, 000.00 respectively. Only the latter amount was not refunded by SARS. *Leon Barend Wasserman (Wasserman)*, a tax auditor at SARS inherited **Zenobia's** tax file when *Viviers* was transferred to another section. He was tasked with auditing the tax refund for the period, January 2008. *Wasserman* attempted to make telephonic contact with a member of **Zenobia** but to no avail. A call to one (1) of numbers on his system viz, 041-457 1367 directed him to cell numbers 083 243 2338 and 082 786 5808. As adumbrated earlier these were the telephone numbers furnished by accused no 1 not only to SARS but to *Zilwa* as his contact numbers. The latter number furthermore appears on the **Tytola** letterhead (exhibit "A3.6"). *Wasserman* telephoned cell number 082 786 5808 on 10 June 2008. The call was answered by a person who identified himself as one *Ismail* who undertook to convey the message to accused no 2 that she contact *Wasserman* at SARS. Subsequent telephone calls and messages left on both numbers as well as accused no 2's cell phone number which she had provided to *Viviers* under cover of her letter dated 23 June 2008 (exhibit "C6"), elicited no response.

[48] It is common cause that the refunds claimed for July, September and November 2007 totalled R1, 865, 540.60 and were paid into **Zenobia's** banking account held at First National Bank. *Van der Vyver's* unchallenged evidence was that both the September and November 2007 VAT refund claims were paid without being audited and that the Midnight Star invoice no 5758 dated 5 October 2007 was found in **Zenobia's** VAT file which indicated that it had been attached to the September 2007 VAT return.

[49] It is furthermore not in issue that during the search of accused no 1's office two (2) invoices, no's 4089 and 5758 ostensibly emanating from Midnight Star and addressed to **Zenobia** were found in a lever arch file marked "NOZ & ZEN". This is clearly a reference to **Nozomi** and **Zenobia** respectively. These invoices were handed in as exhibits "E3" and "E4". The VAT amount claimed on "E3" totalled R276, 500.00, the exact amount paid into **Zenobia's** banking account after the November 2007 VAT refund claim. "E4" is in fact the original of the photocopied invoices "E5.1" and "E5.2". They are identical, the only difference

between them relates to the tax date and the invoice number. In addition the machinery allegedly purchased during the respective tax periods are exactly the same and, significantly, bear the same serial numbers. As adverted to earlier, accused no 1 denied all involvement in **Zenobia** in both his plea explanations. In exhibit "AA1" (the amplified plea explanation), he unambiguously stated that the machinery had in fact been purchased by **Zenobia** and installed on its premises. Interestingly, the Midnight Star invoices, exhibits "E3" and "E4" are dated 7 August 2002 and 7 October 2005 respectively which dates, according to **Zenobia's** founding statement, predate its formation.

[50] **Zenobia** was registered as a close corporation with the Registrar of Close Corporations on 22 August 2006. These undisputed facts conclusively establishes the falsity of accused no 1's evidence that the machinery was installed on **Zenobia's** premises on purchase. Accused no 1's explanation for the presence in the lever arch files of exhibits "E3" and "E4" is, in keeping with the rest of his evidence, clearly false. The explanation is nonsensical. He stated that the office staff would in the normal course of their duties have placed the invoices in the files and that they were in all probability on the premises because *Ahmed* and *Abdullah* were habitually on the premises. This tittle of evidence, in conformity with the rest of his evidence, is likewise contrived. It is abundantly clear that he manufactured these invoices with the intent of defrauding SARS. The irresistible inference is that by submitting them to SARS accused no 2 was aware of its falsity.

[51] The involvement of the two (2) accused in the submission of the fraudulent VAT returns and supporting documentation has, on the evidence adverted to hereinbefore clearly been established and the existence of the enterprise has been proven beyond a reasonable doubt. The submission of the fraudulent returns and supporting documentation moreover constitute multiple offences. The requirements of section 2(1)(e) of **POCA** have accordingly been satisfied.

[52] The gravamen of the fraud charges proffered against the two (2) accused, counts two (2) to twelve (12), tabulated diagrammatically in paragraph [4.2] hereinbefore is the submission to SARS of the VAT 201 returns which, to the knowledge of the two accused contained false information. Counts two (2) to five (5) relate to **Tytola**, counts six (6), seven (7) and eight (8) to **Nozomi** and counts nine (9), ten (10), eleven (11) and twelve (12) to **Zenobia**. In relation to these counts, the state sought a conviction for fraud in terms of the common law. I have in the course of this judgment found that the returns rendered to SARS were peppered with false particularity and presented to SARS to beguile them in paying refunds to which the various entities were not lawfully entitled to. The mere fact that the refunds claimed by

- (i) **Tytola**, for the VAT periods September, November 2007 and January 2008;

- (ii) **Nozomi** for the VAT periods September, November 2007 and January 2008 and
 (iii) **Zenobia** for the VAT period January 2008;

were not paid by SARS is entirely irrelevant. Our law punishes fraud not only for the actual harm it causes but also potential harm. The imprimatur for this statement of the law is derived from **S v Kruger and Another**¹⁰ where Wessels AJA stated:

“Indien ek die strekking van die gewysdes wat hierbo genoem is, en dié van die gewysdes wat daarin bespreek word, reg begryp, blyk dit dat die bedrieër volgens ons geldende reg veroordeel word omdat sy wederregtelike en opsetlike misleiding van so 'n aard is dat dit in die betrokke omstandighede, en volgens juridiese maatstawwe gemeet, moontlike skadelike gevolge inhou vir die persoon aan wie die wanvoorstelling gerig word en/of enige ander persoon wat binne die trefgebied van daardie wanvoorstelling is.”

[53] I have in the course of this judgment found that notwithstanding accused no 1's denial of any involvement in either **Nozomi** or **Zenobia**, he was its directing mind. His direct participation in the preparation of the fraudulent VAT returns of the various entities had been clearly established. And so too accused no 2's involvement in the submission of **Dots'** VAT summary and **Nozomi** and **Zenobia's** fraudulent VAT returns. Mr *de Jager* has conceded that there is no evidence implicating accused no 2 in the commission of the offences specified in counts two (2) to five (5). The concession is properly made.

[54] The gravamen of the fraud charges encapsulated in counts thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36) and thirty-seven (37) is the submission to SARS of fictitious and forged invoices in verification of the particulars furnished in the VAT returns.

¹⁰ 1961 (4) SA 816 (A)

Counts thirty (30), thirty-one (31) and thirty-two (32) relate to **Tytola**; thirty-three (33) and thirty-four (34) to **Nozomi**; thirty-five (35) and thirty-six (36) to **Zenobia** and thirty-seven (37) to **Dots**. The fraudulent invoices presented to SARS are listed under paragraph [4.3] hereinbefore in column 5 of Table B. The submission of these aforesaid documents constitute separate offences, notwithstanding the nexus between these counts and counts two (2) to twelve (12) – there is no splitting of charges. The concession made by Mr *de Jager* in relation to count thirty-seven (37) is against the evidence adduced. Such concession, is as adverted to earlier not binding on me.

Forgery

[55] The first grouping of the forgery counts, thirteen (13) – twenty-six (26) relate to various invoices ostensibly emanating from entities which supplied goods and material to **Tytola**, **Zenobia**, **Nozomi** and **Dots**. The second grouping, counts twenty-seven (27) – twenty-nine (29) relates to the acknowledgement of debt and the credit agreements. It is common cause that all these invoices and the documents are forged. The dispute which exists relates to whether the accused forged these documents. He of course denies having done so and maintains that he was unaware of the falsity of the invoices. It is unfortunately necessary to traverse evidence already adverted to but the repetition is unavoidable. It is not in dispute that accused no 1 handed four (4) invoices 2730, 2749, 2775 and 3249 ostensibly emanating from Midnight Star to *Sobuwa* at SARS and when SARS queried their validity, supplied *Hokwana* with copies of four (4) Katawa invoices. *Hokwana* requested the originals and accused no 1 then presented him with four (4) original invoices (exhibits “A54 – 57”) and an agreement of sale concluded between himself and *Shafiek*. The invoice presented to *Sobuwa* was in respect of the tax period November 2007. The Midnight Star invoice presented, no 3249, dated 30 November 2007 described

the services rendered as set out on the reproduced invoice hereunder: -

CHECK PDF FOR ANNEXURE

The invoice presented to *Hokwana* for the same VAT period, Katawa invoice no 6021 but dated 30 September 2007 described similar services albeit with slight variations, as appears from the reproduced invoice hereunder:-

CHECK PDF FOR ANNEXURE

[56] The business premises referred to in both invoices relate to the Mthatha Centre, 16 Errol Spring Road, Vulindlela Heights, Mthatha. Those premises were owned by *Bijal*. He testified that the premises were let to *Bika* who operated a vehicle testing station there since 2004 and eventually, after eighteen (18) months sold it as a going concern to accused no 1. It was suggested to *Bijal* that the inspection pit had been altered but he remained steadfast that it had not. A similar suggestion was made to *Bika*. It was put to him that the conversion from a B-grade testing station to an A-grade would have necessitated the lengthening of the excavation pit but *Bika* remained resolute that the business sold to accused no 1 was an A-grade station. Much was made of the fact that the deed of sale concerning the testing station was concluded between *Bika* and *Abdullah* on behalf of a company, Century Wells (Pty) Ltd. Whilst *Abdullah* signed on behalf of the purchaser *Bika*'s evidence was that during negotiations for the sale of the business accused no 1 was intimately involved and he considered that he and *Abdullah* had jointly purchased it and he left it to his partner to draw up the agreement of sale.

[57] *Bika*'s cross-examination by Mr *Price* once more introduced *Shafiek* into the fray and it was suggested to him that *Shafiek* had been to his premises. *Bika* denied ever meeting *Shafiek*. It was then put to him that Century Wells had in turn sold the business to accused no 1. What adds to the intrigue is that accused no 1's erstwhile counsel had put to *Bijal* that Century Wells had initially sold the

business to *Shafiek* who in turn sold it to accused no 1. This conflict further evidences the cunning of accused no 1 and there is no reason to doubt *Bika's* evidence that accused no 1 played the major role in the negotiations concerning the sale of the business and was the *de facto* owner of the premises. During his examination in chief accused no 1's counsel erroneously put the following proposition to him:-

“You can recall that he denied that his testing station was closed down?

--- Ja, he did say so, he said he's test station was in operation, he claimed it was an A grade test station also.

Ja and that it was operation all the time, he denied any suggestion by us that he had shut it down? --- That's correct, yes.”

The question was put to elicit the accused's response to defence exhibit “94” wherein *Bika* gave notice of his intention to deregister the Mthatha Centre. Accused no 1 readily acquiesced in the proposition that *Bika* had been untruthful. The fact of the matter is that *Bika* had readily conceded that the centre had been shut down by officialdom. Accused no 1's subsequent incantation that *Bika* had perjured himself by saying that *Shafiek* had accompanied him to the centre was purposefully designed to denigrate *Bika's* character.

[58] The reason for accused no 1 seeking to distance himself from the agreement of sale is not difficult to fathom. He was aware that no VAT was payable on the sale of the business. In order to circumvent that provision he fraudulently drafted a fictitious agreement of sale between himself and *Shafiek* which he presented to SARS as proof of having purchased the equipment in the testing station. The fact of the matter is that the equipment as reflected in annexure A to this fictitious agreement and on the Katawa invoices which he submitted to *Hokwana* already formed part of the stock which *Bika* sold to him as a going concern.

[59] Mr *Jacobus Johannes van der Nest* (*van der Nest*) owned the company Workshop Electronics, which manufactured vehicle testing station equipment, in particular brake testing apparatus. *Van der Nest* confirmed that the testing station

was A-graded and that the Millitron brake tester and scuff gauge which bore the unique serial no's WECC20/2053 and WECC31/1148 had been supplied by his company and had been installed in the testing station in Mthatha. This evidence proves the falsity of both the fictitious agreement between accused no 1 and *Shafiek* and the Katawa invoices.

[60] Accused no 1's direct involvement in the production of these fictitious and forged documentation is, as adverted to earlier conclusively established by the discovery, during the search, of exhibit "E1.12" - a number of handwritten and typed documents. It is obvious that the Katawa invoice no 6021 had its genesis in the following handwritten /partially handwritten and typed documents reproduced hereunder, a pro forma invoice "X", a handwritten invoice "Y" and a handwritten document "Z" on the reverse side of an e-natis document (page 75): -

CHECK PDF FOR ANNEXURE

The accused's convoluted explanation for the existence of the latter documents is patently false and I am satisfied that he forged the documents as alleged. What is more intriguing is that both invoices bear **Zenobia's** VAT registration no 4220233623 when in fact **Zenobia** was only registered for VAT with SARS on 1 January 2007 when its VAT number was allocated to it.

Corruption

[61] The corruption charges, counts thirty-eight (38) to forty (40) are preferred only against accused no 1. It is common cause that on 20 February 2008 the

accused presented Ms *Siphokazi Sobuwa (Sobuwa)*, an auditor employed at SARS, Mthatha with a Phillippe Loren gold plated watch and a desk ornament, (count thirty-eight (38)); that on 18 March 2008 presented Mr *Cuma Notyalwa (Notyalwa)*, an investigator at the SARS, Mthatha enforcement centre with a Mont Blanc pen, a Rolex watch and two (2) Armani suits, (count thirty-nine (39)). On count forty (40), the accused is charged with presenting *Swartbooï*, with the sum of R9, 800.00. The state alleges that in presenting the aforesaid persons with the aforementioned articles, the accused contravened section 3(b)(i)(aa) read with sections 1, 2, 24, 25 and 26(1)(a) of the **Prevention and Combating of Corruption Activities Act**¹¹. The section provides as follows:-

“3 General offence of corruption

Any person who, directly or indirectly-

- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
- (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-
 - (i) that amounts to the-
 - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
 - (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
 - (ii) that amounts to-
 - (aa) the abuse of a position of authority;
 - (bb) a breach of trust; or
 - (cc) the violation of a legal duty or a set of rules,
 - (iii) designed to achieve an unjustified result; or
 - (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

11 Act No, 12 of 2004

is guilty of the offence of corruption.”

[62] The accused’s defence is that in presenting the articles to the aforementioned persons his actions were entirely altruistic. The defence to the charges, is, in conformity with his defence on the other charges, equally contrived and palpably false. It is indeed so that neither *Sobuwa* nor *Notyalwa* testified that accused no 1 requested them to do anything, but accused no 1’s defence must be considered, not in isolation, but against the backdrop of the entire body of evidence underpinning the prosecution, and, in particular the submission to SARS, Mthatha, of forged documents in support of the VAT refund claims. I have already found that accused no 1 generated the tax invoices which he submitted both to SARS and *Zilwa* for onward transmission to SARS, Mthatha.

[63] The circumstances under which **Tytola’s** VAT refund claim for the VAT period ending November 2007 was subjected to an audit are not in dispute and, extrapolated from the evidence of *Sobuwa* may be summarised as follows. During early December 2007, she was assigned the task of auditing the November return wherein an amount of R307, 431.17 was claimed as a refund. She telephoned accused no 1 who referred her to *Zilwa* and Associates. Unable to contact them she once more contacted accused no 1 who advised her that the refund claimed was in respect of the vehicle testing station in Mthatha and he undertook to fax the relevant documentation to her. Due to the paucity of the documents faxed, *Sobuwa* requested accused no 1 to furnish her with more documentation and on 17 January 2008 he faxed a number of documents to her including one from Midnight Star, invoice no 3249 dated 30 November 2007 on which the VAT refund claimed was reflected as R245, 614.03. *Sobuwa* went on leave and when she returned noticed that the VAT refund for November had in fact been paid to **Tytola** by SARS. Nonetheless, she was directed to continue the audit and *inter alia* requested further information from accused no 1. On 18 February 2008, accused no 1 faxed further documents to her, including a schedule reflecting various entities, purchase price and VAT. Her further investigations revealed that the Midnight Star invoice was false and that the purchase price in respect of the sale of the Motherwell property had not been paid to the conveyancers, Pagdens Stulting by accused no 1.

[64] *Sobuwa* communicated her concerns to accused no 1 who responded by telling her that the person she had spoken to at Midnight Star, one *Sheena*, would not have any knowledge of the business her company conducted with **Tytola** and in due course arrived at her office and handed her a duplicate of the Midnight Star invoice (exhibit “A189”) but with the addition of the handwritten name and number “031-305 5104 Akbar Khan”. When *Sobuwa* notified accused no 1 that she intended to telephone the said *Akbar Khan*, accused no 1 handed her the Phillippe Loren wristwatch and the ornament, *Sobuwa* expressed her misgivings about accepting the gifts but notwithstanding her protestations,

accused no 1 persisted in his endeavours for her to accept same and she eventually relented, accepted them but immediately reported the matter to her superior *Swartbooi* and handed the articles to him. During cross-examination Mr *Price* sought to cajole *Sobuwa* into agreeing that accused no 1 offered her these brummagem ornaments purely in appreciation for the effort expended in her work. Although she agreed that accused no 1 thanked her she never acquiesced with the proposition put to her. All she agreed with was that accused no 1 did not ask her to do anything when he handed her the gifts, I am satisfied that his actions were not actuated by altruism. On the contrary, given his devious modus operandi, the inference is irresistible that the articles were offered to her with the intent to unlawfully influence her into ratifying the refund paid to **Tytola**.

[65] The same considerations apply in respect of the gifts offered to *Notyalwa* albeit that the overtures made by accused no 1 were not as subtle. The circumstances under which *Notyalwa* went to the Mthatha Centre are not in dispute and may be recounted as follows - *Swartbooi* instructed *Notyalwa* to repair to the Mthatha Centre and collect a parcel for him. When the latter arrived there on 18 March 2008, he met accused no 1 and during the conversation accused no 1 said that there was something he would like SARS to do for him, but without mentioning the ambit of the favour, intimated that he was desirous of meeting with him and *Swartbooi*. Without further ado accused no 1 handed him two suit bags (exhibits "A16 photos "16" and "17"), a Rolex watch and Mont Blanc pen ("A16" photo "12"). *Notyalwa* thereafter telephoned *Swartbooi*, informed him that he had received the "parcels" and returned to SARS' offices where the "parcels" were opened and the contents inspected viz, two (2) Armani suits and the watch and the pen. I interpolate to say that accused no 1's evidence that the aforementioned articles were not genuine but ersatz does not in any way diminish his culpability.

[66] About a week later, *Swartbooi* requested *Notyalwa* to accompany him to the premises and, on arrival, met with Mr *Eric Minnie (Minnie)*, an examiner at the premises who handed him an envelope with the name *Monde* inscribed thereon. The circumstances under which *Minnie* handed the envelope to *Monde* is also not in dispute save that it was put to all three (3) witnesses that the envelope had been given to the wrong "*Monde*". Accused no 1's evidence that *Minnie* gave the incorrect envelope to *Swartbooi* is clearly contrived. When he was summoned to a meeting with *Sobuwa* and *Nyqambi* he was introduced to him as their team leader. Whilst *Sobuwa* was on leave, *Swartbooi* lifted the stopper that *Sobuwa* had placed on the December 2007 VAT refund claim. It was put to *Swartbooi* that at the meeting, he complimented accused no 1 on his sartorial taste and in response, accused no 1 suggested that they form a joint venture to sell suits and that the suits given to *Notyalwa* were merely samples. *Swartbooi* denied that any such conversations took place. The further suggestion that the envelope containing the money was erroneously given to *Swartbooi* is equally contrived. I am satisfied that accused no 1 offered these gifts to *Sobuwa*, *Notyalwa* and *Swartbooi* to influence them to initially authorise payment of the

VAT refund and thereafter to desist in any further investigation into the legality of the claim. The fact that neither of them could categorically state that they considered the gifts as an inducement to act favourably in regard to accused no 1's tax affairs is irrelevant. The only reasonable inference, to the exclusion of all others is that, given his modus operandi from the outset, he intended them to act in a manner contemplated by section 3(b)(i)(aa) of the **Corruption Act**. The offence created by the sub-section is much wider than that which prevailed under the **Corruption Act 92 of 1994**. Accused no 1 knew that the recipients of the gratifications were involved in the processing of his VAT refund claim and subtly sought to influence them. By so doing he contravened the section.

Money Laundering

[67] The money laundering charges preferred against the accused are encompassed in counts forty-one (41) to forty-three (43) and forty-four (44) to forty-six (46). The former relates to the proceeds of VAT refunds paid to **Tytola** and the latter paid to **Zenobia**. During his argument at the discharge application, Mr *de Jager* fairly conceded that the evidence adduced was insufficient to found a conviction on the former counts and the accused were accordingly discharged on those counts. Section 4 of **POCA**, under the rubric "**Money Laundering**" provides as follows:-

“4 Money laundering

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect-

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence.”



[68] During his investigation *van der Vyver* examined the flow of money between **Tytola**, **Zenobia** and other entities controlled by accused no 1. His evidence hereanent was unchallenged and amounts to the following. **Zenobia** received a VAT refund of R792, 000.00 on 9 October and a further refund of R797 040.60 on 25 October 2007. On the same day of the first mentioned payment a cash cheque in the sum of R750, 000.00 was issued by accused no 2 and deposited by accused no 1 into a Nedbank current account in the name of A. Moosagie Estate Agency trust account. The deposit slip (exhibit "E5") was one (1) of the documents discovered during the search of the PE Centre.

[69] After payment of the R797, 040.60 on 25 October 2007 and on the same day, accused no 2 issued a cheque in the sum of R395, 000.00 payable to Midnight Star and followed this by issuing two (2) further cheques, on 27 and 29 October 2007 respectively, likewise to Midnight Star in the amounts of R200, 000.00 each. Each of the aforesaid cheques was endorsed - "embroidery plant payment". It is not in dispute that none of these cheques were either received or banked into Midnight Star's banking account. *Osman's*, the owner of Midnight Star, evidence hereanent was not disputed.

[70] On 29 October 2007 the **Zenobia** cheque dated 27 October 2007 was paid into **Tytola's** banking account by one *Humza* viz, accused no 1. On the same day, he issued a **Tytola** cheque in the sum of R100, 000.00 payable to **Zenobia** and **Zenobia's** banking account was duly credited with the aforesaid amount. On 31 October 2007 **Tytola** issued a further cheque payable to accused no 2 in the sum of R100, 000.00. **Zenobia** utilised the funds deposited to its credit in the following manner. It issued seven (7) cheques in favour of Bid Africa for R5 000.00 each; a further cheque to Signcom for R5, 500.00; a cheque to Midnight Star for R15 000.00; a cheque to Discount Distributors for R15 000.00 and two cheques of R15 000.00 each to **Tytola**. Each of these cheques, save for the last cheque dated 6 December 2007 which was paid into **Tytola's** account was deposited into PE Centre's banking account.

[71] The onward movement of the R100, 000.00 paid by **Tytola** to accused 2 on 31 October 2007 is likewise not in dispute. On the same day, i.e. 31 October 2007, she opened a Nedbank Money -24 Investment account. The account accumulated interest of R4, 790.85 until 27 May 2008 when R94, 000.00 was transferred into a Peoples Card account, no. 223199901 which accused no 2 held with Peoples Bank. The same day R94, 000.00 was teller transferred to High Point Trading 682 CC's banking account, the signatory on the account, the son of accused no 1. Prior to this electronic transfer the account had a credit balance of R671, 64. Interestingly, High Point issued a cheque to the value of R93, 500.00 payable to "Red Star" on 6 May 2007, one day prior to the electronic transfer to it of the R94, 000.00.

[72] There can be no question that the movement of the funds via the aforementioned disparate banking accounts constitutes money laundering as envisaged by section 4 of the Act. As adumbrated hereinbefore the accused fraudulently engineered the electronic transfer of funds from SARS to **Zenobia**.

[73] Accused no 1 called a number of witnesses in support of the defence raised by him. Mr *Monde Ndlanini (Ndlanini)* was called to corroborate accused no 1's evidence that the envelope containing the money was in fact destined for him and had erroneously been handed to *Swartbooi*. His evidence must be evaluated and considered in conjunction with accused no 1's evidence. As adumbrated hereinbefore his evidence concerning the envelope containing the Katawa invoices is clearly false. These invoices had, by his own admission, personally been handed to *Zwane* at the Mthatha Centre. His own evidence thus disproves the presence of another envelope in the safe. The instruction to *Minnie* to hand the envelope to a *Monde* could therefore only have been a reference to *Swartbooi*. *Ndlanini's* collusion with accused no 1 in attempting to suggest that the envelope was destined for himself is self evident. By his own admission he had communicated to accused no 1 that the negotiations with Sadtu had stalemated and the loan was no longer required. There was accordingly no need for accused no 1 to have told *Minnie* to hand the envelope to *Ndlanini*. The witness could not even remember the year in which the discussion took place and I have no hesitation in rejecting his evidence as false.

[74] *Rafiq Moosagie* was called to lend credence to the accused's version that the Mthatha Centre was not A-graded but in fact a B-grade station. Somewhat disingenuously the foundation for his testimony was predicated by the handing in of a file "Def exhibit" and in particular a document styled "South African National Standard, Evaluation of Vehicle test Stations". This document was utilised by accused no 1 and his son to gainsay the evidence of *Bika* and *van der Nest* that the Mthatha Centre was A-graded. The document upon which reliance was placed is entirely irrelevant in determining whether the centre was A or B graded. I have hereinbefore stated the reasons for rejecting accused no 1's evidence that the centre was not A-graded. *Rafiq Moosagie's* evidence that the inspection pit had been lengthened is, in the light of other credible evidence, clearly false. On his own evidence he went to the centre "late in 2007". By then the station had been operational for several months. *Rafiq Moosagie's* perjured evidence can only be ascribed to a filial duty towards accused no 1.

[75] Reverend *Xolisi Maxwell Tengo's (Tengo)* evidence is equally contrived. Masquerading as a private eye to resolve a problem which *Fahiem Desai* had encountered with SARS, he embarked upon a mission to locate the ubiquitous *Shafiek*. The primary purpose in calling him was to corroborate accused no 1's evidence not only that *Shafiek* in fact exists but that he is readily available. I can attach no credence to *Tengo's* evidence. It is obvious from his demeanour and general unease, notwithstanding his portliness, that his evidence is contrived.

[76] *Amelia Farmer (Farmer)* was similarly called to attest to the existence of *Shafiek*. Her evidence was adduced to establish *Shafiek's* fraudulent propensities and the similarity of his *modus operandi vis-a-vis Fahiem Desai's* business and that of the accused. Her evidence is equally contrived.

[77] To corroborate his defence that he had been duped by *Shafiek*. Accused no 1 called one *Fahiem Desai (Desai)*. Prior to him being called I was informed that *Desai* wished to have his attorney present when he testified. The matter stood adjourned till the next day and on resumption, Mr *Griebenow* advised me that he represented *Desai*. As a precursor to his examination in chief, Mr *Price* informed me that he been instructed by his attorney not to direct any questions to the witness concerning any tax invoices. Such self imposed limitation on his examination in chief does of course not inhibit the cross-examiner's field of cross-examination. This stratagem was no doubt adopted to prevent counsel for the state to cross-examine him on tax invoices. Although *Desai* admitted having forwarded a tax invoice to SARS which prompted an investigation, he declined to answer any further questions, relying on the advice given that he could refuse to answer questions which might incriminate him. During his examination in chief, accused no 1 was referred to a number of tax invoices, of relevance a tax invoice from Ipetombi Graphics CC to *Desai's* Hyperstore CC and a Midnight Star Trading 5 CC tax invoice to the same entity dated 4 August 2008 and 7 December 2008 respectively. The witness was asked to compare the similarity of the VAT amount claimed to which the witness replied in the affirmative.

[78] It is common cause *ex facie* an indictment handed in as part of the accuseds' "Defence bundle" that accused no 1 and *Desai* stand arraigned for trial in the Specialised Commercial Crimes Court, on one (1) count of fraud and multiple counts of forgery relating to the submission to SARS of a VAT refund claim of R1 042, 913.32 on 26 February 2008. The forgery counts relate to three (3) Midnight Star invoices and one (1) from Ipetombi. It is not in dispute that those charges remain pending against accused no 1 and *Desai*. During his examination in chief accused no 1 was referred to a number of agreements of sale and in response to a leading question testified that he concluded an agreement of sale with *Abdullah* for the sale of the Motherwell property. The named purchaser is reflected on "DEF81" as "Sonjal Investments – REP –

AHMED, MOOSA & MOHAMMED EBRAHIM". The agreement was signed by the purchasers on 26 March 2008. Two signatures are appended under the words "name of purchaser". The document itself refutes accused no 1's evidence that he sold the property to *Abdullah* and the suggestion that the named purchaser is yet another alias of *Abdullah* quite disingenuous.

[79] The falsity of this testimony is confirmed by a lease agreement dated 1 February 2008 concluded between himself representing **Tytola** and one *Mohammed Unus Dawood Desai* representing Desai's Hyperstore. The term of the agreement was for a fixed term with an option to renew. In terms of a further sale agreement concluded between *Desai* and *Shafiek* the former sold the equipment to *the latter* for R5 million. In terms of a further "Draft Agreement" dated 3 November 2010 *Ahmed Jalalpur*, a.k.a *Abdullah* sold the "equipment in supermarket" to *Fahiem Desai* for R800, 000.00. The foregoing analysis of the various documents to which accused no 1 was referred to apropos the evidence of both him and *Desai* conclusively establishes the falsity not only of their evidence but also the various agreements. The only inference is that these documents, in conformity with the other entities which I have found accused no 1 to be directly involved in, were prepared to convey that not he, i.e. accused no 1 but *Abdullah* and "*Shafiek*" were the villains. The R5 million consideration in the "agreement" concluded between "*Shafiek* and *Fahiem Desai*" was intended, as in the case of the agreement between Century Wells and "*Shafiek*" to constitute the input tax justifying the VAT refund claimed. *Desai's* untruthfulness is further

evidenced by the scurrilous accusations levelled against *van der Vyver* and *Heunis*. None of these allegations were put to either of them when they initially testified. *Desai's* evidence furthermore cannot be viewed in isolation but against the backdrop of his defence in the pending criminal prosecution against him and accused no 1. It is apparent from his testimony that central to his defence is the ubiquitous *Shafiek*. Viewed against the totality of the evidence, his testimony is contrived and the product of collusion between him and accused no 1. On an appraisal of the evidence I am satisfied that accused no 1 suborned all his witnesses to perjure themselves and I reject their evidence as false.

[80] Accused no 1's evidence that the documents seized during the search were generated by either *Abdullah* or *Ismail Ahmed* is nonsensical. The latter is, as adumbrated, his alias. *Abdullah* had nothing to gain from generating tax invoices to benefit **Nozomi**. Nor, for that matter could he stand to gain anything by generating the Midnight Star tax invoice no 6021 for the September VAT return. Accused no 1's evidence that the script on the handwritten document marked "Y" (page 72) was that of *Abdullah* is palpably false. It is patently clear that it was the source document for the preparation of the Midnight Star tax invoice which was submitted to SARS to validate the September VAT return. By then *Abdullah* had resigned as a member of **Tytola**. The CK2 documents, handed in pursuant to the provisions of section 234 of the Act show that he resigned as a member during August 2007. The only real beneficiary was accused no 1. The other members, listed on the CK2 documents, viz, *Bradley Jaylarnie* and *Phumelela Mavela* were, upon a holistic appraisal of the evidence, members in name only. Accused no 1 could furthermore proffer no satisfactory explanation for the fact that the amount claimed as a VAT refund for January 2008 viz, R720, 037.99, was the exact figure in the bracketed portion of, "Z" on page 74 of this judgment.

[81] At the inception of the arguments presented on behalf of the accused I was informed that two (2) documents marked "AM1" and "AM2", heads of argument prepared by *Beyleveld* S.C (*Beyleveld*) and a memorandum by advocate *J.M Barnard* (*Barnard*) were appended to the heads of argument

presented on behalf of the accused and were being presented in amplification of the submissions advanced on behalf of the accused. *Barnard's* opinions, encapsulated in the memorandum, are entirely irrelevant in determining whether the state has discharged the onus and the attempt to introduce it as evidence is to be deprecated. The cornerstone of the argument advanced by *Beylveid* and adopted by both Mr *Price* and Mr *Ahmed* is the contention that SARS not only usurped the functions of the South African Police Services by themselves investigating the matter but that moreover “the biased investigation by the complainant and the failure to adequately bring exculpatory evidence to Court, vitiated the entire proceedings and resulted in the accused having been subjected to an unfair trial”. The heads of argument contain a plethora of authorities and case law dealing with the concept of a fair trial, a right constitutionally entrenched in our jurisprudence.

[82] Finding succour in certain dicta by Myburgh J, in ***S v Botha en Andere***¹² to the effect that the right to fair trial could be said to be breached where private bodies and not the police conduct the investigations the point is sought to be made that by itself conducting virtually the entire investigation against the accused their right to a fair trial had been vitiated to such an extent that they were entitled, on that ground alone, to an acquittal. Reliance on ***Botha*** in support of the submissions advanced on behalf of the accused is entirely misplaced. The judgment must be read and understood in context. The learned judge prefaced his judgment by saying “Tensy spesifiek daartoe gemagtig . . .” (unless specially authorised). This qualification appears to have been largely

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ignored in developing the argument. Unlike the situation which prevailed in **Botha**, the VAT Act itself authorises SARS to conduct investigations to *inter alia* determine whether an offence in terms of the Act has been committed. Part I of the Act, the administration provisions, charges the commissioner or any officer with the duty and obligation of carrying out the provisions of the Act.

[83] To ensure compliance with the provisions of the Act, the commissioner is granted extensive powers. Thus, section 57A authorises the commissioner or any officer “in relation to any vendor (to) require such vendor or any other person to furnish such information (whether orally or in writing), documents or things as the commissioner or such officer may require”. The administration of the Act is defined as:-

“**administration of this Act**’ means the-

- (a) obtaining of full information in relation to the-
 - (i) supply by any vendor of goods and services supplied by him in the course or furtherance of any enterprise carried on by him;
 - (ii) importation of any goods into the Republic by any person; and
 - (iii) supply of any imported services by any person;
- (b) ascertaining of the correctness of any return, financial statement, document, declaration of facts or valuation;
- (c) determination of the liability of any person for any tax and any interest or penalty in relation thereto leviable under this Act;
- (d) collecting of any such liability;
- (e) ascertaining whether an offence in terms of this Act has been committed;
- (f) ascertaining whether a person has, other than in relation to a matter contemplated in paragraphs (a), (b), (c), (d) and (e) of this definition, complied with the provisions of this Act;
- (g) enforcement of any of the Commissioner's remedies

under this Act to ensure that any obligation imposed upon any person by or under this Act, is complied with; and

(h) performance of any other administrative function which is necessary for the carrying out of the provisions of this Act;”

[84] Whilst this judgment was under preparation, additional heads were filed to meet the argument raised by Mr *de Jager* in reply that the VAT Act itself vested SARS with the obligations and indeed the duty to act as they did. The argument advanced in the additional heads indicates that the import of the compliance provisions of the Act is not properly understood. The foregoing analysis of the legislative provisions establishes the fallacy of the submissions advanced on behalf of the accused that their right to a fair trial was denied them.

[85] Allied to the foregoing complainant is the further contention that the failure by SARS and the South African Police Services to have interviewed *Shafiek, Abdullah, Ismail Ahmed and Akbar Khan per se* negated the accuseds’ right to a fair trial. Shorn of excess verbiage, the submission amounts to the following – where an accused volunteers information which not only exonerates him/her in the commission of the offence charged but moreover implicates other named persons therewith, the failure by the state to interview and obtain statements from such individuals deleteriously impacts upon an accused’s right to a fair trial in the sense that “vital evidence” is thereby excluded. The cases cited in support of this startling proposition are entirely distinguishable. In **S v**

Mvelasi¹³, the Full Court correctly found that in a given case the state's failure to produce real evidence should be deprecated. There is no suggestion that any real evidence which would have inured to the benefit of the accused was withheld. As adumbrated hereinbefore, the state is under no obligation to present evidence which an accused contends proves his innocence.

[86] The fact of the matter however is that the police interviewed and took statements from both *Abdullah* and *Akbar Khan*, statements handed in during the defence case. *Bezuidenhout* interviewed *Abdullah* in Pretoria on 24 March 2011. In his evidence in chief accused no 1, save for admitting certain of the factual averments made by *Abdullah*, refuted the remainder of his narrative and in fact labelled him a liar. *Akbar Khan* was likewise questioned by the South African Police Services in Durban on 10 November 2009. Having been appraised of his constitutional rights, he declined to make any statement. The accuseds' complaint apropos *Abdullah* and *Khan* is entirely fatuous.

[87] Equally so, *Shafiek* and *Ismail Ahmed*. I have in the course of this judgment found that the names were his creations and alias. Suffice it at this juncture to state that the submission made by Mr *Price* and adopted with alacrity by Mr *Ahmed* that *Bezuidenhout* attested to *Shafiek's* existence is devoid of all merit. I was referred to various passages in the transcript in support of the submission advanced. *Bezuidenhout* at no stage made any concession that he met *Shafiek*. During her cross-examination of *Bezuidenhout* accused no 1's then counsel sought to establish that *Abdullah* and *Shafiek* were one and the same person. The question posed was -

“Did you meet with *Shafiek*, with this person, whether he is Mr
Essak Abdulla or *Shafiek Naidoo*, whatever his name is, did you

get to meet him and interview him? --- I did interview him in my office M'Lord and I took an affidavit down from him. That affidavit I do not think it forms part of our case in these courts because that was related to another matter”

In similar vein, accused no 2's attorney sought to elicit the same concession from *Bezuidenhout* by putting the proposition –

“That's what Mr, and I will put these questions to Mr van der Vyver. But you will confirm that Essack Abdullah was at that stage regarded as Shafiek Naidoo, by everybody that dealt with it?”

Bezuidenhout's consistent answer was that his investigations uncovered no such person. In response to a question by Mr *Ahmed* –

“As far as the investigation is concerned, the name has cropped up with regards to this matter also. Have you forwarded any information to SARS the complainant, that there is a possibility and a probability that Shafiek Naidoo exists? ---That he exists?

Yes? --- Under the name Shafiek Naidoo, no.”

The reason for *Bezuidenhout* making no headway in locating *Shafiek* is not difficult to fathom. The name is, as adumbrated hereinbefore, a creation by accused no 1 in order to avoid the consequences of his criminal conduct.

[88] In summary, I am satisfied that the state has discharged the onus resting upon it of proving beyond any reasonable doubt that the two accused are guilty of the offences as set out hereunder:

Accused no 1:

1. Count 1: Conducting an enterprise through a pattern of
racketeering activities in contravention
section 2(1)(e) read with sections 1, 2(2)
and 3 of Act 121 of 1998

Counts 2 -12: Fraud
Counts 13 – 29: Forgery
Counts 30 – 37: Fraud
Counts 38 – 40: Corruption, in contravention of section
3(b)(i)(aa) read with sections 1, 2, 24, 25 and
26(1)(a) of the Prevention and Combating of
Corruption Activities Act, 12 of 2004
Counts 44 – 46: Money Laundering, in contravention of section
4 read with sections 1 and 8 of Act 121 of 1998

Accused no 2:

1. Count 1: Conducting an enterprise through a pattern of
racketeering activities in contravention
section 2(1)(e) read with sections 1, 2(2)
and 3 of Act 121 of 1998

Counts 6 – 12: Fraud
Counts 21 – 29: Forgery
Counts 33 – 37: Fraud
Counts 44 – 46: Money Laundering, in contravention of section
4 read with sections 1 and 8 of Act 121 of 1998

D. CHETTY
JUDGE OF THE HIGH COURT

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On behalf of Accused No 1: Adv Price instructed by S. Ahmed Attorneys
On behalf of Accused No 2: Mr S Ahmed