



THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: SS15/2010

In the matter between:

THE STATE

And

JOHANNES ERASMUS VAN STADEN & 5 OTHERS

JUDGMENT: 27 JUNE 2016

VELDHUIZEN J et Assessors:

[1] Accused 1, 2, 3 and 5 are indicted before us on various counts under the Prevention of Organized Crime Act 121 of 1998 ('POCA') as well as under the common law.

[2] The state has conceded that forgery charges in counts 63 to 167 amount to a splitting or duplication and that a conviction is,

therefore, not sought on these charges. In our view these concessions were correctly made.

[3] In count 1 it is alleged that accused 1 and 2 had contravened s2(1)(f) of POCA in that they had managed the operation or activities of an enterprise whilst they knew or ought reasonably to have known that such enterprise's affairs was conducted through a pattern of racketeering activity.

[4] Count 2 charges all four the accused with a contravention of s 2(1)(e) of POCA in that they had, whilst managing or employed by or associated with an enterprise, had conducted or participated directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity. In the alternative to count 2 it is alleged that they had contravened s2(1)(d) of POCA in that they had acquired or maintained, directly or indirectly an interest in or control of an enterprise through a pattern of racketeering activity.

[5] Count 3 alleges a contravention by accused 1, 2, 3 and 5 of section 4 of POCA. In the alternative they are charged firstly with a contravention of s5 of POCA, secondly with a contravention of s6 of POCA, thirdly with a contravention of s2(1)(a) of POCA, fourthly with a contravention of s2(1)(b) of POCA and fifthly a contravention of s2(1)(c) of POCA

[6] In count 4 it is alleged that accused 1 committed the crime of fraud in that he had wrongfully and with intent to defraud made certain representations to one Mattheus Adriaan Johan Annandale and/or Mercedes-Benz Commercial Vehicles which caused them to suffer prejudice whilst he knew that one or more of the representations were false. In the alternative it is alleged that he had contravened s 18(2)(a) of Act 17 of 1956 in that he had conspired to commit the fraud alleged in the main count.

[7] Counts 5 and 6 also charge accused 1 with the crime of fraud in that he had wrongfully and with intent to defraud made certain representations to one Martin Horn and/or Processing Solutions Industry CC that Indo Atlantic Seafoods (Pty) Limited amongst others intended installing a plant for the processing of fish whilst he knew that one or more of the representations were false thereby causing them prejudice. Alternatively to these two counts the accused is charged with a contravention of s 18(2)(a) of Act 17 of 1956 in that he had conspired to commit the fraud alleged in the main counts.

[8] Count 7 is also a charge of fraud. It is alleged that accused 1 had defrauded Helga Pheiffer and/or Andrew Blaine and/or V&A Waterfront Properties (Pty) Ltd in that he had fraudulently represented that Indo-Atlantic Seafoods (Pty) Limited would rent certain premises whilst he knew that the last mentioned company would not honour its agreement with V&A

Waterfront Properties (Pty) Ltd. He is again charged in the alternative with the commission of a contravention of s 18(2)(a) of Act 17 of 1956.

[9] Counts 8 and 9 charges accused 1 with fraud. It is alleged that he had made certain fraudulent misrepresentations to PAM Refrigeration Marine & Industrial (Pty) Limited to its prejudice.

[10] Count 10 also alleges that accused 1 defrauded Martin Horn and/or Processing Solutions Industry CC

[11] Counts 11 to 15 also charges accused 1 with fraud in that he had during 2005 made certain fraudulent misrepresentations to Diane Rall and/or Johan Bierman and/or Dekko Coatings (Pty) Limited and caused them to act to their prejudice. Here too contraventions of s 18(2)(a) of Act 17 of 1956 are alleged in the alternative.

[12] In counts 16 to 50 it is alleged that accused 1, 2, 3 and 5 had defrauded the South African Revenue Services (SARS) regarding claims for the repayment of input Value Added Tax. In the first alternative it is alleged that the accused had firstly committed theft or secondly a contravention of s 59(1)(a) of the Value Added Tax Act 89 of 1991 (VAT Act) or thirdly a contravention of s59(1)(d) of the VAT Act or fourthly s 18(2)(a) of Act 17 of 1956.

[13] Count 51 alleges that accused 1, 2 and 3 committed fraud against the SARS and alternatively that they had contravened s 18(2)(a) of Act 17 of 1956.

[14] In count 52 it is alleged that accused 1, 2 and 3 had defrauded the SARS. This count contains three alternative charges under the VAT Act and lastly an alternative under s 18(2)(a) of Act 17 of 1956.

[15] Counts 53 to 60 are also fraud charges which are brought against accused 1, 2, 3 and 5. These too involve claims that were made with regard to VAT claims. Here too there are alternative charges under the VAT Act and lastly under s 18(2)(a) of Act 17 of 1956.

[16] Also count 61 alleges fraud was committed by accused 1, 2, 3 and 5 with regard to claims for the repayment of input VAT. This count contains a first alternative count of theft two alternative counts under the VAT Act and lastly an alternative count under s 18(2)(a) of Act 17 of 1956.

[17] In count 62 it is alleged that fraud was committed by accused 1, 2 and 3 with regard to the VAT return for the period 08/06 dated 18 October 2006.

Here too there are four alternative charges under the VAT Act and a fifth under s 18(2)(a) of Act 17 of 1956.

[17] In counts 63 to 73 accused 1, 2, 3, and 5 are charged with forgery with regard to documents that were seized from Vogue House on 27 November 2008.

The alternative charge is under s 18(2)(a) of Act 17 1956.

[18] Counts 74 to 111 are forgery charges which are brought against accused 1, 2, 3, and 5.

This relates to documents that were seized from the premises at 18 Fraser Street Somerset-West on 27 November 2008.

The alternative charge in under s 18(2)(a) of Act 17 of 1956.

[19] Counts 112 to 167 are also forgery charges which are brought against accused 1, 2, 3, and 5.

This relates to documents that were stored on the server at Vogue House.

The alternative charge is again under s 18(2)(a) of Act 17 of 1956.

[20] In counts 168 to 171 accused 1 and 5 are charged with a contravention of section 58(d) of the Value Added Tax Act, 89 of 1991 in that they failed to pay over VAT.

The alternative charge is under s 18(2)(a) of Act 17 of 1956.

[21] In counts 172 to 178 accused 1 and 5 are charged with a contravention of paragraph 30(1)(i) of the Fourth Schedule to the

Income Tax Act, 58 of 1962 in that they failed to submit EMP 201 returns.

In the first alternative the charge is a contravention of section 75(1)(a) of the Fourth Schedule to the Income Tax Act, 58 of 1962.

The second alternative is a contravention of s 18(2)(a) of Act 17 of 1956.

[22] In counts 179 to 181 accused 1 and 5 are charged with a contravention of paragraph 30(1)(b) of the Fourth Schedule to the Income Tax Act in that they failed to pay over employee's tax.

The first alternative is under the Income Tax Act and the second under s 18(2)(a) of Act 17 of 1956.

[23] In counts 182 to 184 all the accused are charged with the reckless conduct of business of Indo-Atlantic Seafoods, Indo-Atlantic Shipping and Indo-Atlantic Group Holdings in contravention of s 424(3) of the Companies Act, 61 of 1973.

[24] It is common cause that during the period from 2005 to 2008 in all 35 claims for the repayment of input-VAT were presented to SARS by Indo Atlantic Seafoods (Pty) Limited. It is also common cause that these claims were largely false and accuse 1 conceded that all the claims in respect of Isotherm were false. Of these claims only the last three were not paid. Also of

interest is the fact that the zero rated VAT for export sales of fish gradually grew. This was of course necessary because there had to be an explanation of what happened to the fish that was purchased and for which input VAT was claimed. It is necessary to refer to each of these claims separately.

Claims

[25] On 5 July 2005 a VAT return was submitted by Indo Atlantic Seafoods for the period February 2005. The total input amount claimed and paid was R814 679.17. This included input tax claims in respect of:

- (a) the V & A Waterfront for R672 000, R19 147.27, R31 770.30, R2 094.46; and
- (b) a claim of R82 486.04 in respect of PSI Engineering.

[26] Also on 5 July 2005 a VAT return was submitted for the period April 2005. An amount of R111 010.77 was claimed for input VAT. This included rental, amounting to R95 310.91, in respect of the V & A Waterfront. The sum of R111 010.77 was paid.

[27] On 17 August 2005 a claim was submitted for the period June 2005. The input tax claimed and paid was R33 358.32. This included an amount of R31 770.30 for rental in respect of the V & A Waterfront.

[28] On 29 September 2005 a return for the period August 2005 was submitted. The input tax claimed and paid was R3 384 877.00 which included an amount of:

- (a) R2 520 000.00 in respect of Pam Refrigeration; and
- (b) R59 721.42 rental paid to the V & A Waterfront.

[29] For the period October 2005 an amount of R4 320.25 was claimed for business expenses. This was accepted by SARS.

[30] The next claim was for the period December 2005. Total input tax of R836, 884.35 was claimed and paid. This included a claim of R826 747.60 in respect of seven Mercedes Benz trucks.

[31] On 27 March 2006 a claim for the period February 2006 was submitted. It was for R2 122, 829.05. Included in this claim was:

- (a) an amount of R1 008 000 for the purchase of a fishing vessel, the Capensis;
- (b) R350 000 for the purchase of the vessel Cecil G. White from Sea Point Fishing; and
- (c) Four claims for inspection and consultation fees paid to Southern Ocean Marine Corporation. This amounted to R317 163.00.

Exports to the tune of R2 812 500.00 is reflected

[32] On 7 June 2006 input tax of R2 016 116.06 was claimed and paid for the period April 2006. This included:

(a) three false Southern Ocean Marine Corporation invoices amounting to R617 014.30; and

(b) three invoices from Isotherm amounting to R1 339 275.62.

false exports of R28 102 085 were declared.

[33] For the period June 2006 input tax of R653, 364.46 was claimed on 7 July 2007. This included:

(a) an input from Isotherm for R503 862.24; and

(b) one from Southern Ocean Marine Corporation amounting to R43 855.00.

All these claims were paid.

Exports were indicated as R8 959 244.00 which was false.

[34] On 31 August 2006 a return was submitted for the period August 2006 claiming input tax of R5 451 511.30. Included in this claim was:

(a) Three input VAT claims in respect of Southern Ocean Marine Corporation amounting to R1 594.208.00; and

(b) Four input VAT claims in respect of Isotherm amounting to R3 450 758.56.

The claims were paid.

The return also indicated zero rated outputs of R51 633 659.00.

[35] For the period October 2006 input tax of R10 476 739.77 was claimed on 21 November 2006. These included:

- (a) a claim of R8 189 415.63 in respect of Isotherm; and
- (b) R2 125 917.38 in respect of Southern Ocean Marine Corporation.

The claim was paid.

The export sales are indicated as R118 922 199.00.

[36] On 22 December 2006 a return was submitted for the period November 2006. Input tax of R5 568 564.92 was claimed and paid.

- (a) R4 067 187.14 was claimed in respect of three Isotherm invoices; and
- (b) R1 326 074.44 for one Southern Ocean Marine Corporation invoice.

Exports are reflected as R42 405 959.00.

[37] For the period December 2006 input tax of R11 158 896.53 was claimed and paid. This claim consisted of:

- (a) a claim of R9 618 154.98 in respect of five Isotherm invoices; and
- (b) R1 425 551.48 for one Southern Ocean Marine Corporation invoice.

Exports are reflected as being R88 748 334.00.

[38] For the period January 2007 input tax of R7 980 227.69 was claimed on 23 February 2007. The claim was paid.

- (a) Payment of R7 204 127.49 was claimed in respect of four Isotherm invoices; and
- (b) R701 890.00 in respect of one Southern Ocean Marine Corporation invoice.

Exports were reflected as being R56 640 675.00.

[39] On 20 March 2007 input tax of R12 430 958.76 was claimed for period February 2007. R12 359 293.09 was claimed in respect of five Isotherm invoices. The claim was accepted.

Exports were declared as being R145 605 663.00.

[40] On 19 April 2007 a return was presented for the period March 2007 claiming input tax of R9 212 863.92 of which R8 953 979.73 was in respect of four Isotherm invoices. The claim was accepted and paid by SARS.

Exports declared were R124 618 557.00.

[41] For the period April 2007 input tax of R9 771 503.02 was claimed on 25 May 2007 and paid. R9 485 233.65 were in respect of four Isotherm invoices.

Exports declared R104 640 803.00.

[42] On 25 June 2007 input tax of R12 486 966.53 was claimed for the month of May 2007. This included R12 430 156.19 in respect of false Isotherm invoices.

The return reflected exports to the tune of R127 479 406.00.

[43] For June 2007 input tax of R10 583 835.90 was claimed on 26 July 2007. Of this amount R10 569 176.41 was claimed and paid out in respect of four Isotherm invoices.

The exports are reflected as R109 542 622.00.

[44] For July 2007 input tax of R10 851 938.67 was claimed on 24 August 2007. It included R10 778 577.69 for four Isotherm invoices.

Exports of R92 869 891.00 were declared.

[45] For August 2007 input tax of R10 982 702.78 was claimed on 25 September 2007. Included was a claim of R10 969 197.51 for four Isotherm invoices.

Export sales declared amounted to R115 868 870.00.

[46] Input tax of R12 929 059.65 was claimed on 25 October 2007 for the month of September 2007. It was accepted and R12 839 761.02 was in respect of four Isotherm invoices.

Exports declared amounted to R118 655 390.00.

[47] On 23 November 2007 a return for October 2007 was presented. Therein input tax of R10 517 309.18 was claimed of which R10 335 628.97 consisted of four Isotherm invoices.

It reflected exports as R105 594 381.00.

[48] For November 2007 input tax of R10 205 450.58 was claimed on 21 December 2007. Part of the claim was for three Isotherm invoices amounting to R9 910 078.56.

Exports indicated as R100 449 417.00.

[49] On 25 January 2008 input tax of R12 375 341.73 was claimed for December 2007. It was paid. Of this R12 269 992.74 was claimed for four Isotherm invoices.

Exports were indicated as R125 546 940.00

[50] Input tax of R10 484 845.95 was claimed on 25 February 2008 for January 2008. R10 434 388.58 was for three Isotherm invoices.

The return reflects exports as R101 695 676.00.

[51] For the month of February 2008 input tax of R9 533 920.07 was claimed on 25 March 2008 and R9 433 113.92 was in respect of four Isotherm invoices.

The figure for exports are indicated as R114 754 604.00

[52] For the period March 2008 input tax of R11 016 334.36 was claimed on 25 April 2008. R10 986 306.62 was claimed for four Isotherm invoices.

Again exports are indicated as R133 384 386.00

[53] On 23 May 2008 input tax for the period April 2008 in the sum of R11 061 995.35 was claimed. R10 802 347.29 was represented as being in respect of four Isotherm invoices.

The exports are indicated as R150 431 105.

[54] For the period May 2008 Input tax of R12 157 303.88 was claimed.

This included an amount of R12 026 212.22 that was claimed for five Isotherm invoices whilst exports are reflected as having been R152 712 813.

[55] For June 2008 input tax of R10 990,305.97 was claimed on 25 July 2008. This included an amount of R10 792 335.83 that was claimed for five Isotherm invoices.

Exports are stated to have been R143 611 747

[56] For July 2008 input tax of R12 807 930.35 was claimed on 25 August 2008 this included an amount of R12 758 695.88 that was claimed and paid in respect of Isotherm invoices.

The exports are stated to be R162 245 544.

[57] For August 2008 input tax of R10 956 902.46 was claimed on 25 September 2008. The return stated that five Isotherm invoices accounted for R10 898 027.37 of the claim.

Exports are reflected as R139 628 887.

This claim and those that followed were not paid because the returns were queried and under investigation.

[58] On 24 October 2008 input tax of R9 707 699.01 was claimed for September 2008. This included an amount of R9 632 584.79 that was claimed in respect of Isotherm invoices.

The exports were stated as R165 941 451.

[59] Lastly a return for the period October 2008 was lodged and input tax of R10 086 727.42 was claimed. This included an amount of R10 024 148.26 for Isotherm invoices..

Exports again were stated to have been R89 786 401.

[60] Thus all the claims save those for August, September and October were paid by SARS.

[61] The total amount for the false Isotherm invoices came to R263 062 017.97 (i.e. 93% of the false claims). The actual amount paid out by SARS was R250 362 792.03. The zero rated exports were also hugely inflated and accused 1 conceded that the figure is closer to R98m as Mr. Scholtz had testified.

ACCUSED 1

[62] In evaluating the evidence of accused 1 we keep in mind that he was required to testify about matters that had occurred many years ago and that one cannot expect that he would have perfect or even good recall of the detail of his actions over this period. Having said this, I must immediately say that we are of the opinion that accused 1 was a very bad witness. He was evasive and relied on his memory failing him when it suited him. He not only gave contradictory evidence but, at times, lied.

[63] It is common cause that accused 1 was the registered representative vendor with SARS of Indo Atlantic Seafoods (Pty) Limited, Indo Atlantic Shipping Limited and Southern Ocean Marine Corporation (Pty) Limited and therefore legally responsible for their VAT returns. The question we have to answer is this: was he also responsible for the false claims which were presented in these returns? To answer this question it is helpful to look at some of the transactions that underlie the VAT returns. At the end of the day we, of course, have to view the evidence as a whole and not in watertight compartments.

[64] It was put in cross-examination of the handwriting expert, Capt. Olsen, that accused 1 may have signed one or two of the VAT returns and later that he would deny having signed any of the returns forming the basis of the charges against him. The accused, during his bail application, had admitted to signing fifteen returns. In this court he admitted that he had signed the majority of VAT returns.

[65] With regard to counts 5, 6 and 10 the state called Mr. Marin Horn who was the managing director of Processing Solutions Industry CC. They distributed food processing equipment mainly to the fishing industry. He testified that accused 1 contacted him in early 2005 and asked him to supply custom made equipment. He met accused 1 and the erstwhile accused 4 at the Waterfront. The request was that they manufacture and install a fish processing line on the vacant floor of a building in the Waterfront. His quote was accepted by accused 1 and he submitted an invoice. Later accused 1

informed him that they also required a second faster line. He again submitted a quotation which was accepted by accused 1. He again submitted an invoice at the request of accused 1. He was told that the invoice was required for financing purposes. He was later again contacted and asked to supply Indo Atlantic Seafoods with refrigerated containers. His quotation was also accepted and he issued a pro forma invoice. As the deposits were not paid the work was never done.

[66] Accused 1 admitted that the company did not have the funds to pay for the installation and work and also did not expect that funds would be forthcoming in the near future. The state submitted that accused 1 was guilty of the fraud alleged counts 5 and 6 in that his conduct caused PSI, at least potential prejudice. With regard to count 10 Horn was asked to value certain equipment on premises in Hout Bay. To this end he engaged the services of a civil engineer and paid for it. The state submits that this constituted fraud and that actual prejudice was caused because PSI was never reimbursed.

[67] Horn testified that he would never have issued the invoices if he knew that they would form the basis of a claim for input VAT.

[68] The VAT return presented on July 2005 included a claim of R82 486.04 in respect of PSI Engineering.

[69] Mr. Evert Potgieter, the Managing director of the company Pam Marine and Industrial Refridgeration, testified that he was contacted by accused 1. He

was asked to inspect premises at East Pier in the Waterfront where accused 1 wanted to install a chill room. After the company had issued the first invoice accused 1 promised that payment would be effected within a week. Over a period of time negotiations took place because accused 1 wanted to upgrade the facility. Further quotations were given and eventually accused 1 accepted the third one. During September 2005 and at accused 1's request a pro forma invoice in the sum of R20 520 000 was submitted for financing purposes. He testified that he would not have issued an invoice if he knew it would be used to claim a VAT refund. It is quite clear that the Indo Atlantic group could not pay for any of this work. It is also important here to note that the Indo Atlantic group of companies had been evicted from the premises in July 2005. There was, therefore, no possibility of any work being done at the premises.

[70] Two companies, Aluship and Surmon Fishing rented premises in the Waterfront at the East Pier. After the 2 concerns fell in arrears with their rent accused 1 negotiated with Ms. Helga Pfeiffer to take over their lease for the remaining period. In the agreement he also undertook to pay their arrear rental which amounted to R4.8m. The arrear rental was never paid and only two payments in the sums of R50 000 and R12 000 were made. The Indo Atlantic group was evicted during June or July 2005 and the premises were cleared out. Ms. Pfeiffer identified 10 invoices which had been issued and testified that these would not have been issued if they knew that payment would not be forthcoming.

[71] During 2005 Mattheus Annandale was contacted by the erstwhile accused 4. After negotiations, 7 trucks were ordered. He was asked to supply invoices so that financing could be arranged. In January 2006 the vehicles were ready for delivery but in March or April it became clear that the Indo Atlantic group would not honour its obligations and the vehicles were sent back to the factory. Mercedes Benz Commercial Vehicles suffered a substantial loss.

[72] During 2005 and 2006 Mr. Francis Pretorius was a shareholder of Dolphin Whisper Trading (Pty) Limited which operated a fishing vessel Capensis. ABSA Bank financed the purchase of the vessel and it was the owner. During 2005 the bank had the vessel arrested. After its arrest, Pretorius had a meeting with accused 1 and 4 with the view that it would be arranged for the taking over of the company as well as the financing of the Capensis. Nothing came of the negotiations and the vessel was, eventually sold as scrap. Pretorius testified that he had no knowledge of the invoice for the purchase of this vessel and that he could in any event not have sold the vessel as the bank was the owner thereof and it was under arrest. This invoice was clearly false. According to him the price was over inflated because it could not have been worth more than R1.6 million.

[73] Mr. Leroy Julius, a member and director of Sea Point Fishing CC testified that the company in 2003 bought a vessel named Cecil G. White for R2.12m. It was an old vessel and had some damage. In 2004 the vessel was declared to be unseaworthy and in 2008 it was sold as scrap for R60 000. He

had no knowledge of Indo Atlantic and denied that Sea Point Fishing had issued the invoice exhibit 'SS'. This invoice was also clearly false.

[74] Accused 1 professed that he knew very little of the financial side of the companies. This is not true. He was well aware of every payment the company received from SARS. Simple arithmetic shows that if the Seafoods claims were correct it must have, over the period covered by the claims, bought fish to the value of R1.78 billion. The accused conceded the impossibility that such huge purchases could have been made.

[75] In all these transactions the hand of accused 1 is evident. The part he plays runs like a golden thread through all of them. This finding is also supported by the evidence of accused 3 that once he had received the spreadsheets from Ms Claudia Mannel, accused 1 supplied the false information which appeared at the end of the VAT control account.

[76] Then we have the emails which accused 1 sent to accused 3 during the period 14 to 17 November 2008 when the VAT claims were under investigation by SARS. These emails unequivocally show that accused 1 knew that there were no supporting invoices for claims in respect of Isotherm and that he then attempted to enlist the aid of accused 3 to create false invoices to support the claims.

[77] What happened to the money that SARS had paid? We know that 90% of the payments flowed to the Indo Atlantic companies. Accused 1 bought a

game farm and game in the name of the Swordfish Trust, a family trust of the accused. It was paid for by the Indo Atlantic group. An aeroplane was also bought in the name of the trust and all the motor vehicles were registered in the name of the trust. A flat was bought for his daughter. The accused could not explain how the companies, being separate legal persona, could legally transfer the money for these transactions. Then he and his family travelled to Mauritius in a chartered jet. The cost of all of this came to about R500 000. We simply do not believe the accused when he says that it was a business trip. It is clear to us that the accused lived in luxury on the money that SARS claims provided.

[78] All these facts and circumstances lead us inexorably to the conclusion that accused 1 had put in place and implemented the scheme whereby SARS was defrauded.

[79] This brings us to the individual counts. The state asks that accused 1 be convicted on counts 1, 3, 4 to 15, 16 to 19, 21 to 50, 61 and 62 and lastly on counts 182 to 184.

[80] It was conceded that accused 1 cannot be convicted on counts 2, 20, 51 and 52, 53 to 60, 63 to 167 and 168 to 181. This concession is, in our opinion, a sensible one and correct.

[81] Count 1 alleges a contravention of s 2(1)(f) of POCA, in that the accused did at least from 2005 until 2008 wrongfully and unlawfully manage

the operation or activities of an enterprise whilst knowing or ought reasonably to have known that any person, whilst employed by that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity.

[82] Each one of the Indo Atlantic group of companies, as well as accused 1, fall clearly within the definition of "enterprise" in s 1 of POCA. The fraud committed on SARS also falls squarely within the definition of "pattern of racketeering activity". POCA does not define what is meant by "managed", but it is clear that accused 1 managed the operation or activities of the Indo Atlantic group of companies whilst he was the direct cause or at the very least participated in the frauds on SARS that were committed over this period and therefore not only participated but in fact managed the pattern of racketeering activity.

[83] We are satisfied that the state has proved the guilt of accused 1 on this count beyond a reasonable doubt.

[84] Count 3 alleges a contravention of s 4 of POCA. It is clear that accused 1 knew that the money that SARS paid into the account of S&D Consulting was the proceeds of unlawful activities. We are not satisfied that the agreement which accused 1 and 2 entered into was done with the purpose of concealing or disguising the nature or source of the money that was paid by SARS. Accused 1 ought, however, to have known that the agreement had or was likely to have the effect of concealing or disguising the

nature or source of the funds. He is, therefore, found guilty on count 3 of a contravention of s 4 of POCA.

[85] Count 4 to 15 refer to various agreements which accused 1 entered into or negotiations which he had with the complainants.

[86] Count 4 relates to the agreement which was entered into with Mr. Annandale of Mercedes Benz. At this stage, that is November 2005, it was clear that the Indo Atlantic group was in no position to pay for the vehicles it ordered and would not be in the position to pay for them in the foreseeable future. It is our conclusion that this transaction was part and parcel of accused 1's scheme to obtain invoices so that he could present them to SARS and that he never had any intention of honouring the purchase agreements. He is, therefore, found guilty on count 4.

[87] The initial instructions to Mr. Martin Horn of Processing Solutions Industry CC for the installation of a fish processing plant form the basis of counts 5 and 6. The instructions were given in February 2005. It is significant that the invoices issued by him were only utilised in July 2005 to claim input VAT. The instruction for the valuation of the plant in Hout Bay, forming the basis of count 10, followed much later. Although the conduct of accused 1 is highly suspicious, it cannot in our view be found beyond reasonable doubt that accused 1, when issuing the initial instructions and when asking for the valuation, had the intention to defraud. In the result he is found not guilty on counts 5, 6 and 10.

[88] Count 7 involves the lease agreement which was entered into with V&A Waterfront Properties (Pty) Limited in respect of the property at East Pier Road, Quay No 7, V&A Waterfront. Before we can convict the accused on this count we have to be satisfied that, when entering into the agreement, he had no intention of paying the agreed rent. It is clear that the Indo Atlantic Group of companies was in dire financial straits at that time. We can, however, not find that accused 1, from inception, had no intention of paying the rent. The fact that the company defaulted, cannot be used ex post facto to supplement this shortcoming. In the result, he is found not guilty on count 7.

[89] Counts 8 and 9 are, however, different. Negotiations and the acceptance of the quotes from PAM Refrigeration Marine & Industrial (Pty) Limited for the installation of a refrigeration plant in part took place when the Indo Atlantic Group had already been evicted from the premises. We have come to the conclusion that accused 1 had no intention of paying for this work. The fact that the complainant did not install or purchase the equipment does not mean that no prejudice was suffered. Quite a bit of work was done inspecting and calculating the cost of the work and this is sufficient to satisfy the prejudice requirement to constitute fraud. We are satisfied that accused 1 committed fraud and he is convicted on counts 8 and 9.

[90] The agreements entered into with Dekko Coatings for renovations to the premises occupied by the Indo Atlantic Group forms the basis of counts 11 to 15. The agreements for the renovations were entered into early in 2005.

It is clear that extensive work, for which it was never paid, had been done by the complainant. We are not satisfied that it can be found that accused 1 never intended to pay for the work at the time when the agreements were entered into and he is, therefore, found not guilty on counts 11 to 15.

[91] Counts 16 to 19 and 21 to 50 relate to the fraud perpetrated on SARS. As stated above it is common cause that the VAT returns referred to in these charges were all false and were presented as a result of a scheme which accused 1 had put in place and employed to defraud SARS. There can, in our view, be no doubt as to his guilt and he is convicted on counts 16 to 19 and 21 to 50.

[92] Next are counts 61 and 62. During October 2006 a VAT return was submitted by Indo Atlantic Shipping for the period August 2006. Included in the return was a claim for input VAT in respect of Isotherm and Dekko Coatings. This conduct forms the basis of count 61. The claim was selected for screening by Mr. Malcolm Wrench and on 24 October 2006 the documents to substantiate the claims were faxed to him. This conduct forms the basis of count 62. The claim in the sum of R1 104 778 was paid. It is common cause that the Isotherm invoices were false. The invoices for Dekko Coating were more than a year old and accused 1 was well aware that they had not been paid. We are satisfied that accused 1 was instrumental in submitting this claim and that he is guilty of fraud as alleged in count 61. The facts relied on in count 62 is merely a continuance of the fraud already committed and in our view merely an extension thereof. Accused 1 is found not guilty on count 62.

[93] Lastly, there are counts 182 to 184. It is alleged that the accused is guilty of reckless trading in contravention of s 424(3) read with s 424(1) of Act 61 of 1973. That accused 1 managed and controlled all three companies i.e. Indo Atlantic Seafoods (Pty) Limited, Indo Atlantic Shipping Limited and Indo Atlantic Group Holdings (Pty) Limited cannot be doubted. He kept a tight reign on all the finances and major creditors were not paid unless he approved. During 2008 and 2009 the three companies were liquidated. The companies were only kept alive with the 'VAT refunds' that were paid by SARS. Major creditors were not paid. Rental payments to V&A Waterfront Properties were not paid and so to Dekko Coatings and the companies that were responsible for the exports to mention but a few. It is clear that the companies not only experienced cash flow problems but were in fact trading in insolvent circumstances. Despite this fact, accused 1 syphoned off funds for his family trust and to fund his lavish lifestyle. It is clear that accused 1 used company funds as if it belonged to him personally, Large amounts were credited to his loan account. There can be little doubt that when he appropriated the money he knew that the companies were financially in dire straights. This conduct in our view constitutes reckless trading within the meaning of the section of the Act. He is accordingly, convicted on counts 182 to 184.

ACCUSED 2

[94] Early in 2005 accused 2 was approached by accused 1 to render bookkeeping and accounting services through his firm S&D Consulting for the Indo Atlantic group. Accused 1 accepted the offer and proceeded to render the services. His fees were, however, not paid and it was then that accused 1 made the offer that accused 2 be paid 10% of all VAT refunds plus his fees for work done. This offer was accepted by accused 2. It is important to note that the 10% offer did not originate from accused 2. It also cannot be overlooked that initially accused 2 's 10% share of the refunds did not amount to much it only escalated later when the VAT refunds increased substantially. It was accused 1's suggestion that they enter into the agreement. At best for the state the acceptance of the offer by accused 2 could be described as opportunistic. The agreement itself was, however, not illegal.

[95] In August 2005 the First National Bank closed the account of Indo Atlantic Seafoods (Pty) Limited. It was then agreed with accused 2 that the refunds would be received into the bank account of S&D Consulting. Accused 2 would then deduct the 10% as well as the fees earned and pay over the balance as directed. In August 2005 the prescribed forms VAT119i and VAT 126 were lodged with SARS. On 29 August 2005 the first refund from SARS was paid into S&D's account. This agreement resulted in accused 2 receiving approximately R37m over and above the fees earned over a period of about three years. Again this was not an illegal arrangement. The procedures of SARS in fact allow for such an arrangement. It was the fact

that the 10% agreement resulted in payments amounting to R37 over the period of about 3 years which attracted the attention of the investigators. As stated it is our view that it can at best be described as opportunistic and even greedy.

[96] The evidence of accused 2 regarding the agreement and later arrangement that the refunds be paid into the S&D account cannot be rejected and certainly cannot be said to be false beyond reasonable doubt.

[97] We are of the view that accused 2 was a good witness. The state submitted that accused 2 was an evasive witness and that he also failed to answer direct questions. That is not our impression. Making due allowance for the long lapse of time since these events occurred we find that accused 2 acquitted himself well in the witness box. There was nothing untoward in his demeanour which may have alerted us to the fact that he was not being truthful. He answered all questions to the best of his ability and where clarification of the question was needed he asked for it and answered it.

[98] Other than the arrangement referred to above accused 2 had no part in the management or the day to day business or operations of the Indo Atlantic group. He relied solely on the information and documentation supplied to him by the companies' employees. He never got to the point where he could do a full and complete audit of the accounts of the Indo Atlantic group.

[99] That he was not actively engaged in the business of the Indo Atlantic group is also borne out by the fact that over the whole period he only received about 20 emails regarding the companies and only actively participated in 6 of

them. The state relied heavily of the emails of 1 to 8 July 2008 and 14 to 17 November 2008. The first batch of invoices relate to turnover invoices and accused 2's advice in that regard. If the emails are read in context then and in our view the accused was simply giving sound advice to his client regarding zero rated invoices and in the later email requested the Isotherm purchase invoices because these are the invoices which the SARS inquiry related to.

[100] As far as the second string of invoices is concerned the evidence shows that, although accused 2 is indicated as a recipient, he never responded to any of them. On 12 November 2008 he advised his client of SARS's requirements. He thereafter went overseas and was away during the period that the emails were sent.

[101] In asking for a conviction on s 2(1)(f) of POCA it was submitted that accused 2 should at least have reasonably concluded that SARS was being defrauded. It is true that R37m over the period of three years is indeed a very large sum of money to receive for the simple act of the use of one's banking account. It must, however, be kept in mind that the initial payments were not large. It was only later that the refunds grew and concomitantly accused 2's share thereof. He seldom visited the offices of his client but on the occasions that he did he saw, what was by all appearances, a healthy and wealthy company. It occupied luxury offices with a large number of employees. He came to know that the company had purchased a game farm, and an aeroplane. By all appearances, the Indo Atlantic group of companies was a successful group making huge profits. He no doubt would also have been aware of the zero rated exports, which were reflected on the VAT returns.

This certainly painted a glowing picture of a company that was financially strong with a huge market share.

[102] It also is not unreasonable for someone in accused 2's position to accept that SARS had done a proper evaluation of the VAT claims otherwise they would not have paid the refunds.

[103] It is a very important fact that accused 2 only came into the picture after the fraud on SARS had been on-going for some time. It is true that one can certainly join in an existing scheme of criminal activity but in this case it is unlikely that that is what happened here. There are invoices which could not possibly have been created on the advice of accused 2. If he had been involved, these invoices would not have contained the mistakes which they reflect. Except for two emails which accused 2 sent to SARS in 2008 and his visit to them on 6 November 2008 there is no evidence that he had any further contact with SARS. This flies in the face of the state's stance that he was narrowly involved in persuading SARS to pay the refunds.

[104] In our view there were no facts or circumstances on which he should have concluded that the refunds were tainted or out of the ordinary. He is accordingly, found not guilty of all charges.

ACCUSED 3

[105] This brings me to accused 3. The question we have to answer is: was accused 3 a party to the presentation of the false claims or did he have

knowledge of their falsity and despite his knowledge nevertheless went ahead and presented the VAT returns to SARS?

[106] Accused 3 was initially, during June 2005, employed by the accounting firm of accused 2 in Somerset West. He commenced working for the Indo Atlantic group of companies towards the end of 2006 and the beginning of 2007. On 1 March 2007 Ms. Claudia Mannel was employed by the Indo Atlantic group and her duty was mainly to prepare the VAT control account. It is, however, significant that this account goes back to 2005; a period well before Mannel or accused 3 was employed by Indo Atlantic. It is also clear that accused 3 stood under the instructions of accused 1.

[107] In approaching his evidence we have to keep in mind that accused 3 was required to recall matters that stretched over more or less three years and go as far back as 2005. It would be remarkable if his evidence were without blemishes. He was not an impressive witness during his evidence in chief. His evidence given under cross examination stands in contrast to his evidence in chief. He was initially nervous and he did not always answer the questions satisfactorily. Under cross examination he improved markedly and turned out to be a good witness. The reason for his nervousness is probably to be found in the fact that he knew he had admittedly failed to pay tax on the bonuses he had received and he also knew that he had completed the VAT returns which, as it turned out, contained false information. With the exception of a few matters we are satisfied that his evidence can be accepted.

[108] The procedure that was followed for the completion of the VAT returns was that accused 3 was presented with a spread sheet of all invoices that qualified for claiming input VAT. Once he had received these accused 1 would then give him the figures constituting the further claims. These figures constituted the false input VAT claims. Accused 3 denied that he was aware of the falsity of this part of the claim and he simply accepted accused 1's figures. It is common cause that towards the end i.e. from about July 2008 accused 3 became very uncomfortable with the claims. When he voiced his concerns with accused 1 and also the erstwhile accused 6 he was assured that it was in order and accused 6 assured him that it was not his responsibility. Eventually he sought to distance himself from these claims by firstly threatening to resign and eventually resigning from the Indo Atlantic group of companies on 30 October 2008. No doubt the situation with regard to irate unpaid creditors who continuously complained to him also contributed to his unhappiness.

[109] We have to keep in mind that the completion of the VAT returns was only a small part of the tasks that accused 3 was required to perform. There can be little doubt that his attention was for the most part occupied with the other daily financial matters of the group and towards the end dealing with the complaints of unpaid creditors. Eventually he, like the erstwhile accused 6, became uncomfortable with the large refunds that were received from SARS.

[110] It is important to note that accused 3 was not intricately involved in the day to day running of the companies. He was, after being released by S&D Consulting, employed by Indo Atlantic Group Holdings and not Indo Atlantic

Seafoods or Indo Atlantic Shipping. Although he completed the VAT returns he did not, save for the February 2005, April 2005, June 2005, 6 June 2006, August 2006 and November 2006 returns, sign any of them. These six returns were signed by him whilst still in the employ of S&D Consulting. The vast majority were signed by accused 1. No false invoices were found on accused 3's computer. The false invoices that were found at Vogue House were on the server under the folder 'My Documents' which contained a sub-folder 'Johan'.

[111] Save for the bonuses which were paid to accused 3, which were clearly not insignificant amounts, he received very little benefit from the refunds paid by SARS.

[112] In the result we are not satisfied that the state has proved its case against accused 3 and he is acquitted on all charges.

ACCUSED 5

[113] We do not think it necessary to spend much time analysing the evidence regarding accused 5. He was an excellent witness and there is simply no evidence implicating him in any of the crimes he is charged with. He is accordingly, found not guilty on all charges.

SUMMARY

[114] In summary:

- (a) Accused 1 is convicted on counts 1, 3, 4, 8, 9, 16 to 19, 21 to 50, 61 and 182 to 184. He is acquitted on all other charges; and
- (b) The other accused are found not guilty on all charges.