REPORTABLE

IN THE HIGH COURT OF NAMIBIA CASE NO: A 417/09

In the matter between:

MERLUS SEAFOOD PROCESSORS (PTY) LTD APPLICANT

and

THE MINISTER OF FINANCE RESPONDENT

CORAM: GEIER, AJ

Heard: 29 March 2011
Delivered: 11 November 2011

JUDGMENT:

GEIER, AJ.: [1] The Applicant is in the business of processing raw Hake, Kingklip, Blue Shark and Monkfish. Its operations, relevant for purposes of this

case, entail the purchasing, cleaning, skinning and cutting of the raw fish into various prime cuts, which are thereafter treated by way of glazing to enhance its shelf- life. This glazing is apparently effected by a chemical process. The final product is then packaged in accordance with the regulatory requirements set by the market in the European Union, were it is sold.

[2] The applicable provisions of the Namibian Income Tax Act, Act 24 of 1981, as amended, provide for the registration of manufacturing companies, as registered manufacturers, pursuant to which such registered manufacturers become entitled to claim certain consequent tax relief.

[3] During July 2004, and for purposes of attaining such registration, the Applicant caused a first enquiry in this regard to be made with the Directorate of Inland Revenue.

[4] The Directorate thereafter inspected the Applicant's factory. This was done on 2 August 2004.

[5] A formal application for registration in terms of Section 5 A of the Income Tax Act was launched on behalf of the Applicant during April 2005, which application was for the first time refused during August 2005.

[6] The application was reconsidered and again refused during September 2005.

[7] The application was thereafter renewed and finally refused on 25 September 2006.

[8] On 13 December 2007 an application to review this decision was made to the Special Court for the hearing of Income Tax appeals. This was some 15 months later.

[9] Various steps were taken during the period December 2007 to September 2009 to procure the hearing of the Applicant's case as lodged before the Special Court.

[10] From the correspondence exchanged during this period it becomes clear that the parties were not agreed 'whether or not this would be a matter for the Special Court' and whether or not the Special Court would be empowered to consider and grant review relief.[1]

[11] Eventually and on 3 December 2009 the Applicant turned to the High Court[2] and brought an application for an order:

> *"1. Reviewing and correcting or setting aside the decision of the Respondent not to register the applicant as a manufacturer in terms of s 5A of the Income Tax Act, 24 of 1981 reiterated on 25 September 2006.*
>
> *2. Declaring the aforesaid decision unconstitutional and/or null and void.*
>
> *3. Declaring that the applicant is entitled to be registered as a manufacturer pursuant to s 5A aforesaid.*
>
> *4. Directing the respondent to register the applicant as such.*
>
> *5. Directing that the respondent pay the costs of this application.*
>
> *6. Granting the applicant such further and/or alternative relief as this*

[1] This issue was never finally resolved between the parties

[2] No issue was subsequently made of the High Court's jurisdiction – and accordingly - and without deciding the issue - I assume that this court has jurisdiction to hear and decide this matter.

Honourable Court deems fit."

[12] This application was opposed and not surprisingly, and given the history of this matter, the Respondent, *inter alia,* raised the points of undue delay and prescription.

[13] In the Heads of Argument, filed on behalf of Applicant on 2 March 2011, the Applicant, now, for the first time, indicated that the review application would not be persisted with.

[14] However, and as the Applicant - in tandem with the review - had also sought declaratory relief, such declaratory relief was persisted with and accordingly an order was now sought to the effect that the Applicant should be recognised and registered as a manufacturer as contemplated by Section 5A of the Income Tax Act, alternatively that Applicant would be entitled to a declarator that its operations constitute a 'manufacturing activity' as defined in the Act.

THE ENTITLEMENT TO A DECLARATOR

[15] Before dealing with the other objections and the merits of this application it became apposite to determine whether or not the Applicant would, in circumstances, where it had elected not to persist with the review relief, be nevertheless, entitled to declaratory relief.

[16] In this regard it was contended by Mr. Barnard, who appeared on behalf of the Respondent, that the Court should not come to the assistance of the Applicant who, had utilised the review procedure as a guise to obtain declaratory relief. He submitted that such utilisation of the review procedure in the circumstances of the unreasonable delay constituted an abuse of the process of Court and that the Court should not come to the assistance of such a party. Mr. Barnard further alluded to the principle that - in review proceedings -

and where the setting aside of administrative decisions was sought - as a general principle - the Courts would normally refer such decisions back to the administrative body for reconsideration unless there would be special circumstances not to do so. He submitted that Applicant cannot ask the Court to make a declaration that will have the effect of the Court deciding an issue which was actually reserved for the executive, without the decision of the executive first having been set aside. It was further submitted that a Court should not substitute its decision with that of the executive unless there are special circumstances giving reason for the Court to do so.

[17] Mr. Frank SC, who appeared on behalf of the Applicant, pointed out that - coupled with the review relief - now abandoned - the Applicant had always also sought a declaratory order declaring it to be entitled to be registered as a manufacturer pursuant to Section 5 A of the Income Tax Act. He pointed out that such declarator would not have any retrospective effect as it would operate *ex nunc*. This would be so, so the argument ran, because a declarator could only be sought in respect of any “existing, future or contingent right or obligation”.[3]

[18] He elaborated:

> *“ … the relief for review and a declarator will operate on different time scales, namely the review ex tunc and the declarator ex nunc. With the review relief applicant will be entitled to claim the tax benefits attaching to the status of manufacturer from 2006, whereas if only the declaratory relief is obtained the tax benefits will only be claimable from the date the declarator is made.*
>
> *As far as the declarator is concerned it is submitted that applicant is entitled to the declarator sought, i.e. to be recognised as a manufacturer pursuant to sec. 5A of the Act by respondent,*

[3] Section 16 of the High Court Act

alternatively that it be declared that the applicant conducts a manufacturing activity as defined for the purposes of sec. 5A.

It is clear that applicant has sought to be regarded as a manufacturer as from 2004 and a dispute has arisen and is currently still in place with the respondent as to whether the applicant is entitled to so be recognised. It is also submitted that, given the wording of sec. 5A of the Act applicant would be entitled to apply for such recognition at any time provided it avers it conducts a manufacturing activity.

The dispute between the parties is not merely of academic or abstract interest nor is it a hypothetical one, but has a direct impact on applicant who cannot claim certain tax deductions because it is not recognised as a manufacturer.

Furthermore, the facts are not in dispute and it is an essentially legal question. What needs to be determined is whether the admitted activities of the applicant amount to the conducting of a "manufacturing activity" as manufacturer. "

[19] The Court's approach to the question of a declarator was recently considered by this Court in the unreported case of *Protasius Daniel and Willem Peter v the Attorney General and Others*[4], where the Court held :

"[17] The Court approaches the question of a declarator in two stages. ... First, is the applicant a person 'interested' in any 'existing, future or contingent right or obligation'. Secondly, and only if satisfied at the first stage, the Court decides whether the case is a proper one in

[4] Unreported Judgment in High Court Cases A 238/2009 and A 430/2009 delivered on 10 March 2011

which to exercise its discretion.

[18] It was decided in Ex parte Nell 1963 (1) SA 754 (A) that an existing dispute is not a prerequisite for jurisdiction under section 19(1)(a)(iii). There must, however, be interested parties on whom the declaratory order will be binding. The absence of an existing dispute may, or course, incline the Court, in the exercise of its discretion, not to grant a declarator."

[20] It was at no stage contended on behalf of the Respondent that there was no existing dispute between the parties or that the Applicant would not be an interested party who could be said to not have any existing, future or contingent right to the determination of the legal question in issue and whether or not its activities would constitute *'manufacturing activities'* as defined in the Income Tax Act.

[21] It appears immediately that the Applicant does indeed satisfy the first leg of the requirements for a declaratory order as set by the applicable case law and section 16 of the High Court Act. This aspect was virtually common cause.[5]

[22] In deciding whether the case is a proper one in which to exercise the court's discretion it is firstly of relevance that all the arguments mustered on behalf of the Respondent against the consideration of the declaratory order sought essentially related to reviews and review relief, which are no longer of application, save for the question of costs, given the abandonment of such relief and accordingly they do not materially impact on the determination of whether or not the Applicant would, per se, be entitled to the declarator sought.

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[5]See also : *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at [17] were it was said *' .. .It seems to me that once the applicant has satisfied the Court that he/she is interested in an 'existing, future or contingent right or obligation', the Court is obliged by the subsection to exercise its discretion. This does not, however, mean that the Court is bound to grant a declarator, but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors… '.*

[23] What is of further relevance in this regard is that the declaratory relief was sought from the outset. This appears already from the Notice of Motion filed of record herein. The continued determination of declaratory relief would therefore never have prejudiced the Respondent, as all issues relevant thereto, were fully ventilated, and canvassed in the papers filed of record, the relevant Heads of Argument and during the hearing of oral argument.

[24] It is also clear that any declaratory order granted by the Court herein will be binding on parties hereto.

[25] It is further clear that some tangible and justifiable advantage in relation to the Applicant's tax position with reference to its existing and/or future tax obligation would flow from the grant of the declaratory sought herein.

[26] By that same token the Respondent would obtain the tangible advantage of being assisted in its assessment of the Applicant's future tax liability and possibly that of other taxpayers through the determination of the declaratory relief sought.

[27] It thus also emerges that, despite the discontinuation of the review relief, the continued dispute between the parties would not merely be of academic or abstract interest or would only be a hypothetical one.

[28] All these factors, save for the aspect of the delay, cumulatively indicate that this would be an appropriate instance to entertain the remnants of the review application through the consideration of the declaratory relief sought.

[29] On the other hand it cannot be argued away that the factor of undue delay in reviews would have been a factor, which might have adversely

influenced a review court in the exercise of its discretion.[6] This factor does however not immediately seem directly relevant to declarators. Nevertheless - and even if relevant – the impact of this factor would to a great extent however have been ameliorated by the fact that the Applicant had initially lodged its review with the Special Court, which was not convened for a number of years by the authorities – surely a factor beyond the Applicant's control.

[30] It must also be taken into account further that the Respondent's decisions regarding the Applicant's tax liability for 2006 now continue to stand. In that regard the Respondent is essentially in the same position as any other successful party in litigation. This outcome can be recognised - and any prejudice for that matter - occasioned to the Respondent - through the abandonment of the review relief – surely - can be cured by an appropriate order for costs.

[31] Given the fact however that the Applicant has satisfied the legal requirements for declaratory relief and as tangible and practical advantages can be achieved through the making of the declaratory orders sought it seems justified that I nevertheless exercise my discretion in favour of the Applicant.

[32] Before, however, the merits of the claimed declaratory relief can be considered, it becomes necessary to determine the issue of prescription.

HAS THE APPLICANT'S CLAIM FOR A DECLARATOR PRESCRIBED

[33] The issue of prescription was raised crisply in the answering affidavit as

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[6]See for instance : *Purity Manganese Pty Ltd v Minister of Mines & Energy & Others* 2009 (1) NR 277 (HC); *Disposable Medical Products Pty Ltd v Tender Board of Namibia* 1997 NR 129 (HC), *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 798G -799E, see also : *Wolgroeiers Afslaers (Edms) Bpk v Municipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 42A; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A) at 86B-D

follows:

> *" I am advised and submit to the honourable court that any right or claim which the applicant has to the relief sought in the notice of motion has become prescribed by virtue of the provisions of the Prescription Act 68 of 1969. The decision which is complained about was taken on 25 September 2006. The application for review was served on 3 December 2009 only, more than three years later. Legal argument will be addressed to the honourable court at the hearing of this matter"*

[34] Mr. Barnard formulated this argument as follows:

> *" … In its heads the applicant confirms that the declarator is sought to enable it to claim tax deductions, (par. 20).*
>
> *Section 10 of the Prescription Act 68 of 1969 provides that a debt prescribes, in the absence of any specific provision, after the lapse of a period of three years. The term "debt" is not defined in the Act. The South African courts have endeavoured to do so.*
>
> *In the context of section 10(1) of the Income Tax Act the term "debt" has a wide and general meaning, and includes an obligation to do something and to refrain from doing something.*[7]
>
> *The South African courts have found that the provisions of section 10(1) of the Prescription Act apply in the following situations:*
>
> > *a) A claim that a property developer complies with conditions imposed by the City Council upon approval of the development was found to have prescribed three years after the property*

[7] *Desai N.O. v Desai and Others See: Desai N.O. v Desai and Others* 1996 (1) SA 141 (AD) at p 146 I-J *Burley Appliances Limited v Grobbelaar N.O. and Others* 2004 (1) SA 602 (CPD) at p. 613 B

developer indicated its refusal to comply. [8]

b) A claim that ownership of immovable property be transferred.[9]

c) In the Burley Appliances matter the issue was whether a right to apply to court for a declarator that a person should be held liable for the debts of a corporation In terms of the provisions of section 64 and 65 of the Close Corporations Act could prescribe in terms of the provisions of section 10(1) of the Prescription Act. The court found that It did.[10]

In South Africa there were two divergent lines of authority, one as stated in the Burley Appliances matter and the other line, that such relief was not subject to prescription. In the matter Barnard and Lynn NNO v Schoeman and Another 2000 (3) SA 168 (N), the South African Supreme Court of Appeal approved and followed the line of authority as set out in the Burley Appliances matter. See: Duet and Magnum Financial Services v Koster 2010 (4) SA 499 (SCA)

In the Duet and Magnum matter the applicant (the liquidator) claimed that an impeachable transaction be set aside in terms of the provisions of section 32 of the Insolvency Act 24 of 1936, and an order declaring that the respondent be liable to pay a certain amount of money to the liquidator. The respondent filed a plea of prescription. In issue was whether the claims by the appellant constituted a "debt" as contemplated in sections 10, 11 and 12 of the Prescription Act.[11]

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[8] *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (AA) at p. 355 E – H
[9] Desai at p. 146 G 147 B.
[10] *Burley Appliances at p. 603 G and p. 614 B ~ G*
[11] *Duet and Magnum at p. 501 [3] and [6]*

The court followed the Burley Appliances decision. The court stated that the contrary argument in the Barnard and Lynn matter was the only decision to that effect and was inconsistent with a considerable body of authority and inconsistent with the principles underlying every decision of the South African Supreme Court of appeal on prescription.[12]

The court formulated its conclusion as follows:

> *" I agree with the conclusions of Nel J in Burley, and with his reasons for that conclusion, and in my view they apply as much in this case. I think it is clear that the sections of the Insolvency Act with which we are concerned give a right to a liquidator, in prescribed circumstances, to have a person declared to be a debtor of the estate, and its compliment is a "debt" for purposes of prescription, in that the person concerned is liable to have such a declaration made."*[13]

In the Burley Appliances matter the court found that what prescribed was the right that:

> *"... a creditor can enforce the remedy created by section 64. The remedy is the right to apply to court for a declaration that a particular person or particular persons should be held personally liable for all or any of the debts or liabilities as the court may direct, (p. 614C)*

Regarding the concepts "debt", right, cause of action and obligations. The South African Supreme Court of Appeal found as follows:

> *"[23] Indeed, it is not unusual when dealing with prescription for*

[12] *Duet and Magnum at p. 507 at D and F*

[13] *Duet and Magnum at p. 507 [27]*

courts to ask only when the 'right of action' arose, leaving it to implication that its complement is a 'debt'. Thus in Mazibuko v Singer, which has often been cited in this court, Colman J referred to the 'right of action' prescribing, implying that its complement was a 'debt'. Trollip JA said that expressly in Evins v Shield Insurance Co Ltd, when he said:

> *"Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the defendant's "debt", the word used in the prescription Act.'*

[24] A 'debt' for purposes of the Act is sometimes described as entailing a right on one side and a corresponding 'obligation' on the other But if 'obligation' is taken to mean that a 'debt' exists only when the 'debtor' is required to do something, then I think the word is too limiting. At times the exercise of a right calls for no action on the part of the 'debtor', but only for the 'debtor' to submit himself or herself to the exercise of the right. And if a 'debt' is merely the complement of a 'right', and if all 'rights' are susceptible to prescription, then it seems to me that the converse of a 'right' is better described as a 'liability', which admits of both an active and a passive meaning."[14]

It is submitted that there is no difference between situations on the one hand as in the Duet and Magnum matter, namely the right of a liquidator to have a person declared to be a debtor of an estate in terms of the provision of the Insolvency Act; and the situation in the Burley Appliances matter, the right to apply to court for a declaration that a particular person

[14] *Duet and Magnum at p. 506 [23] + [24]*

should be held personally liable for the debts of a corporation, and on the other hand in the present matter the right to apply to court for an order that the applicant is entitled to be registered as a manufacturer in terms of the provisions of section 5A of the Income Tax Act. The reasoning and findings in the two South African judgments are equally applicable in the present case.

The only purpose why the applicant wants to be registered is to be able to claim tax benefits from the respondent. The right of the applicant to apply and obtain the order has as a logical consequence the corresponding obligation on the respondent to register the applicant. This constitutes a debt for purposes of section 10 of the prescription act.

If the right of the applicant to apply for an order declaring that it is entitled to be registered as a manufacturer does not have the concomitant obligation upon the respondent to act accordingly, the order sought is of academic value only.

The South African Supreme Court of Appeal followed the same reasoning in finding that a claim for rectification cannot prescribe.

"A debt" is not defined in the Prescription Act. Dealing with the meaning of the Afrikaans "n skuld' van Heerden AJA said in Oertel en Andere v Direkteur van Plaaslike Bestuur en Ander 1983(1) SA 354 (A) at 370 B:

> *'Volgens die aanvaarde betekenis van die begrip slaan "n skuld' op 'n verpligting om lets te doen (hetsy bewyse van betaling of lowering van 'n saak of dienste), of nie te doen nie. Dit is die een pool van 'n verbintenis wat in die reel 'n vermoeens bestandeel en – verpligting omvat ...'*
>
> *(According to the accepted meaning of the word "a debt" indicates*

> *a duty to do something (whether by way of payment or of delivery of property or rendering of services), or not to do something. This is the one side of an obligation which in the rule contains a patrimonial element and obligation... (counsel's translation)*

> *A claim for rectification does not have as a correlative a debt within the ordinary meaning of the word. Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified, the rights and obligations are no different after rectification. Rectification does not create a new contract, it merely serves to correct the written memorial of the agreement."*[15]

> *The cause of action of the applicant, the application declaring that the applicant is entitled to be registered as a manufacturer pursuant to the provisions of section 5A, was first available to the applicant in August 2005, and most definitely at the latest by 27 September 2006. The whole cause of action arose then. The application was served on 3 December 2009, after expiry of a three- year period from the date upon which the cause of action arose.*

> *It is submitted that the claim by the applicant for a declarator has become prescribed."*

[35] Mr. Frank countered these arguments and submitted that no case for prescription has been made out and that only once assessed, a debt, in terms of the Income Tax Act, could arise. The Applicant had simply applied for the recognition of its manufacturing processes as a *'manufacturing activity'* within the meaning and ambit of the Income Tax Act, in terms of which it was seeking

[15] *See: Boundary Financing Limited v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA) at p. 452 [13]

the recognition and the achieving of the status of a 'manufacturer' in terms of Section 5A. It was thus a question of law, which required the determination by the Court and a debt could therefore only arise once the Directorate of Inland Revenue had made a decision in regard to the tax liability of the Applicant as a tax payer, based on the declarator.

[36] He submitted therefore that the *(court's)* duty to make such decision, in accordance with the interpretation of the Income Tax Act, pursuant to a declarator does not constitute a debt within the meaning of the Prescription Act 1969, that in any event, a declarator does not have, as its correlative, necessarily a debt within the ordinary meaning of the word and that the Respondent's claim for a special plea of prescription should not be upheld therefore.

[37] It appears from the abovementioned authorities that they all follow upon the judicial forensic analysis of the relief sought in each particular instance. The first factor of significance relevant to the determination of the present issue between the parties must therefore be the consideration of the nature of declaratory relief. A declarator is surely also and necessarily a remedy antecedent[16] to the enforcement of a party's right, here a statutory right to claim tax relief in accordance of the provisions of the Income Tax Act, (on the interpretation of which the parties do not agree), pursuant to the declarator.[17]

[38] It is also clear that the declaratory relief sought is not in itself a claim for the enforcement of tax relief with an inherent corresponding duty on the Directorate to recognise the ultimate claimable tax deduction. Only once declaratory order would have been issued would such declarator clarify how any rights and the corresponding obligations flowing therefrom could be enforced. In that sense Mr Frank is correct when he submits that a debt can in terms of the

[16]This is also apparent form the empowerment to grant a declaratory order even in advance of the date on which a cause of action is anticipated to arise. See for instance *Lawson & Kirk Pty Ltd v Phil Morkel Ltd* 1953 (3) SA 324 (A) – this is also borne out by the use of the words 'future' and *'contingent'* in section 16(d) of the High Court Act 1990

[17]In this regard a declaratory is similar in nature to a contractual claim for rectification

Income Tax Act only arise thereafter and only once the Directorate of Inland Revenue has made a decision in regard to the tax liability[18] of the Applicant as a tax payer, based on the declaratory order.

[39] On proper analysis the declarator sought would in this instance on its own merely result in an accurate interpretation of the statute. In this sense the declaratory relief sought is akin to a procedural device resorted to before being able to enforce a right on the basis of it and thus also any correlative obligation of such right. Most importantly a claim for a declarator does not alter the rights and obligations of the parties in terms of the particular statute - to be interpreted - such rights and obligations - created in terms of such statute – remain the same and are no different before or after the declarator. The only aspect that might change is the manner in which the statute – which continues to remain unchanged throughout - was interpreted by a party before the judicial pronouncement by way of declaratory order and which then might have to change in compliance with such order. That however is 'neither here nor there'. The particular statutory provision will merely - from then on - be interpreted in accordance with the declaratory order granted. The declaratory order does simply not create a new statute, it merely serves to declare what the correct interpretation of the statutory provision in question is. A claim for a declaratory order therefore cannot have, as a correlative, a 'debt' within the ordinary meaning of the word.

[40] I cannot agree with Mr Barnard that 'the right to apply to court for a declaration that a particular person, in prescribed circumstances, should be held personally liable for the debts of a corporation – and were the court actually found that what had prescribed - was the right of a creditor to enforce the remedy created by section 64[19] - is similar to the present matter' - were the parties differ on the interpretation to be accorded to a particular statutory provision - such declarator being merely being antecedent to any right of the

[18] Section 67(2) of Act 24 of 1981
[19] *Burley Appliances Limited v Grobbelaar N.O. and Others at 614C*

Applicant to claim consequent tax relief - *ex nunc* - or for any antecedent right of the Respondent to afford, or not to afford such tax relief consequent to such declarator - *ex nunc – and* pursuant to the further provisions of the Income Tax Act, as opposed to - and were conceivably - both the Applicant's right to enforce tax relief – *ex tunc* – as well as the Respondent's corresponding rights – *ex tunc* – could, in principle, become liable to prescription.

[41] If the Respondent's argument were to be accepted that a claim for a declarator would constitute a separate and self- standing debt for purposes of the running of prescription, the uncertain and anomalous situation would arise that a claim for future performance under a statute could be defeated on the basis that a claim for a declaratory order has prescribed.

[42] In conjunction with this it must also be of relevance that the High Court Act expressly provides[20] for the disrectionary power of the court to inquire into and determine existing, future or contingent rights or obligations only and not retrospective rights and that a declaratory order therefore essentially operates *ex nunc* as submitted by Mr Frank.

[43] The Applicant's tax rights and obligations are surely existing and probably future and contingent. Also the Respondent's rights and obligations in terms of the Act are definitely existing and ongoing. To hold that the Applicant's claim to a declarator in regard thereto would have prescribed would simply be absurd.

[44] The special plea of prescription is therefore dismissed.

THE APPLICABLE STATUTORY PROVISIONS

[45] The Applicant wishes to be recognised as a manufacturer by the

[20] Section 16(d) of Act 16 of 1990

Respondent pursuant to the provisions of Section 5 A of the Income Tax Act[21], the relevant portion whereof reads as follows:

> *"(1) A company which conducts or intends to conduct a manufacturing activity and which requires to be recognized as a registered manufacturer in respect of that manufacturing activity for the purposes of this Act, may apply for registration to the Minister.*
>
> *(2) ....*
>
> *(3) Upon receipt of an application in term of subsection (1), the Minister may register a company in respect of the manufacturing activity applied for if the Minister, acting with the concurrence of the Minister of Trade and Industry, is satisfied that the manufacturing activity concerned –*

(a) *Is or will be beneficial to the Namibian economy by way of net employment creation, net value addition, replacement of imports or an increase in net exports; and*

(b) *Represents or will represent an investment in a new manufacturing activity or a substantial expansion of an existing manufacturing activity…*

[46] In in support of the Applicant's quest it was thus submitted by Mr Frank that it is clear from the wording of section 5A that an application for recognition as a manufacturer can be made at any stage from prior to the commencement of the activities to any time subsequent when such activities are concluded. The section expressly states this:

> *"A company which conducts or intends to conduct a manufacturing activity...".*

[21] See Act 24 of 1981 as amended

Applicant maintains that it conducts a manufacturing activity.

A "manufacturing activity" is defined in the Act as:

"(a) the <u>physical or chemical transformation of materials or components into new products</u> –

(i) *whether manually or by mechanical or other process;*

(ii) *whether in a factory; at a private dwelling or any other place; or*

(iii) *whether for the purposes of sale in the wholesale or retail trade; or*

(b) *the assembly of the component parts of manufactured products...".*

The dispute between the parties centres around requirement (a) of the definition, respondent maintaining that :

"<u>there is no physical transformation at all.</u> The raw fish with which the process is started remains exactly the same. The end product is still raw fish."

[47] The Applicant's further submissions in this regard read as follows:

"*In summary, the applicant purchases raw fish and processes it in such a way as to clean, skin and to cut such fish into various prime cuts and thereafter treating such fish for an enhanced shelf life. The fish is then frozen and packaged for the retail market.*

A more detailed breakdown of the process, which is also not in dispute, is set out by applicant in the original attempt to deal with

the matter in the Special Income Tax Appeals Court, eg. Hake fillets, hake steaks in skinless form as well as the glazing of the products.

Whereas the courts have not had the opportunity to apply the definition of "manufacturing activity", the courts In South Africa have dealt with the concept of "process of manufacture" and in this regard have required a transformation.

"The word 'process' can cover an unlimited multiplicity of types of operations; 'manufacture', in its widest sense, can be said to mean the making of any sort of article by physical labour or mechanical power. DARLING, J., in McNicol v Finch, (1906) 2 K.B. 352 at p. 361, stated that

> *'the essence of making or manufacturing is that what is made shall be a different thing from that out of which it is made'.*

Some judicial dicta seem to emphasise 'a change of the character of the raw materials' out of which something is made. Others again state that the 'difference' must be 'substantial' or 'essential'.

In Income Tax Case 1052, 26 S.A.T.C. 253 at p. 255, VAN WINSEN, J., refers to some of these dicta and he concludes that

> *'the article claimed to have resulted from a process of manufacture must be essentially different from the article as it existed before it had undergone such process'.*
>
> *With this statement I do not disagree. But it must be*

> *recognised that the term 'essentially' obviously imports an element of degree into the determination of the sufficiency of the change that must be effected for a process to be one of 'manufacture'. As a result of being processed, a change may take place in regard to the nature or form or shape or utility, etc., of the previous article or material or substance. There can be no fixed criteria as to when any such change can be said to have effected an essential difference. It is a matter to be decided on the particular facts of the case under consideration. The most exhaustive examination of imaginary examples of change really does not carry the matter further."* [22]

[48] Mr Frank submitted that guidance can be taken from the above approach in that the definition of "manufacturing activity" also refers to the "physical transformation ... into new products" and that the following statement appearing in the *Hersamar* case was thus applicable in the current context, namely that the transformation must be "in regard to the nature or form or shape or utility, etc., of the previous article".

> *"In the Hersamar case the activities of a metal merchant who purchased scrap metal and compressed it into "briquettes" and "blocks" for supply to foundries for smelting did constitute a manufacturing process. The reasoning of the Court was as follows:*
>
> > *"Turning to the present case, it is quite clear, on the facts found and submitted as part of the stated case, that, 'unprocessed' scrap metal in which the respondent traded was not a commodity which it could sell to the main purchasers of such scrap – the steel manufacturers. In this uncompacted and shapeless form in which*

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[22] *Secretary for Inland Revenue v Hersamar (Pty) Ltd* at 187 A-E

it originally exists, such scrap cannot, and apparently will not, be used in the foundries. The evidence shows that 'steel scrap' of the very light category and of the light category is only usable economically in the furnace employed for the manufacture of steel if it Is compacted to specified densities and sizes and shapes. The accepted manner of obtaining these requirements is by making very light steel scrap into the briquettes and light steel scrap into the blocks referred to above. The blocks and briquettes are articles specifically made by expensive machines exercising very great pressure - articles which can be and are dealt in the trade between steel manufacturers and metal merchants.

Although a briquette (or a block of light steel scrap) is physically the same material, unaltered metallurgically, as the steel scrap of which it is made, it has become essentially something different. It is now, not a shapeless quantity of loose steel scrap, but a definite article, formed to certain desired specifications and compressed to great density, which has thereby acquired a utility and a commercial purpose which it did not previously possess. This article has been brought into existence by processing loose scrap steel with a machine for the purpose of the respondent's trade, as a metal merchant. The process involving the use of the machines was in the circumstances, in my view, a process whereby this specific type of article was manufactured;"[23]

"In the Safranmark[24] *case the South African Appellant Division reaffirmed the approach taken in the Hersamar case and held that the changes effected to pieces of chicken by Kentucky Fried Chicken were sufficient to constitute a "process of manufacture" despite the fact that, obviously, in general terms the process started with chicken and ended with*

[23] *Secretary for Inland Revenue v Hersamar (Pty) Ltd* at p 187H - 188C
[24] *Secretary for Inland Revenue v Safranmark Pty Ltd* 1982 (1) SA 113 (A)

chicken. Part of the reasoning was that "inedible raw chicken had become an edible product" and the Court quoted with approval the judgment of the Special court part of which read as follows:

> *"In the present case it seems relevant to me that a standardised product is produced on a large scale by a continuous process utilising human effort and specialised equipment in an organised manner. When to that is added the factor that the end product is, in terms of its nature, utility and value, essentially different from its main component, the process must, it seems to me, be described as one of manufacture."*[25]

"In the Ovation Recording Studios[26] *case the South African Appellate Division held that the process used in a recording studio to produce a master tape from a blank recording tape was a "process of manufacture" even though such tape could be wiped clean after recording and did not differ visibly from the tapes from which it was created. This was so because the nature and utility of the master tape produced the required change.*

> *"From a purely physical point of view, the change is minute and the difference not even discernible to the naked eye. In many cases the physical characteristics and dimensions of the difference between the original article and the finished product may be important and even decisive, but that is not invariably the position. There are other factors to be taken into account (see the remarks of Grosskopf J, made in the Court a quo in the Safranmark case supra and cited with approval by Galgut AJA in this Court at 124E – H). In the extract quoted above from Hersamar's case, viz 'change.., in regard to the nature or form or*

[25] *Secretary for Inland Revenue v Safranmark (Ptv)* at 124H

[26] *Ovation Recording Studios v Commissioner of Inland Revenue* 1990 (3) SA 682 (A)

shape or utility, etc, of the previous article...', the words 'form' and 'shape' refer to physical attributes, but neither the word 'nature' nor the word 'utility' is so limited, and under the umbrella of 'etc' must certainly be included, I consider, the factor of 'value'. As a matter of principle I can see no reason for generally according more weight to features of 'form' and 'shape' than to the attributes of 'nature' (in a non-physical sense), 'utility' and 'value'. <u>The relative weight to be given to the various features of change must depend on the particular facts of each case.</u> In the circumstances of the present case it would be wholly unrealistic and artificial. In my opinion, to focus attention on the insignificant degree of physical difference between the blank master tape and the finished master tape. Instead, <u>it is both appropriate and necessary, in my view, to concentrate on the degree of difference in relation to nature (in a general sense), utility and value."</u>[27]

[49] Mr Frank therefore concluded by submitting that *"as far as applicant is concerned the physical transformation into new products is also effected as :*

a) *there is a transformation in relation to the "nature (in a general sense), utility and value;*

b) *there is a change in nature from raw unprocessed and unclean inedible fish to specially cut ready for consumption fish - from something which cannot be sold to the end-consumer to something which can;*

c) *here is a change in utility in that the fish changed from something that only a processing plant or fishmonger would be interested in to a product ready made and packaged for sale by retailers to the ultimate consumer. Thus the end product*

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[27] *Ovation Recording Studios v Commissioner for Inland Revenue* at 689 F-J

has a commercial purpose, which the initial product did not have;

d) *there is a change in value in that the process cuts, cleans and generally prepares the fish to be in such portions and visual state to present value to the ultimate consumer;*

e) *the process physically transforms the original state of the raw fish so as to shape it into pieces with a different functionality and purpose. It is ready made for the retail market with an enhanced shelf life. From something that could not be sold in the retail space it had changed to something that can.Whereas the product remains fish in general sense of the word it is physically transformed through the process to change it from something that the consumer would not purchase and/or value less to a product that is desirable in terms of its nature, utility and value.*

It is respectfully submitted that applicant thus conducts a 'manufacturing activity' as defined."

[50] The Respondent's submissions on the other hand ran as follows:

"The applicant maintains that its processing of raw fish constitutes a manufacturing activity. The respondent found that the processing of raw fish as done by the applicant does not constitute a manufacturing activity.

In the papers filed on behalf of the applicant there are numerous explanations of the manufacturing process and even diagrams and photos. If all these descriptions are evaluated and all

components of the process as explained are put together, the processing of raw fish by the applicant constitutes the following:

a) *The purchase of raw fish;*
b) *The cleaning and skinning of the raw fish;*
c) *The cutting of the raw fish into shapes or prime cuts of the raw fish;*
d) *The treatment of the raw fish for enhancing the shelf life (or glazing);*
e) *The freezing and packaging of the raw fish.*

It is alleged that the glazing process constitutes a chemical transformation of the raw fish. This was specifically denied by the respondent in the answering affidavit. The deponent on behalf of the respondent specifically states that no facts are given by the applicant on how the glazing can possibly effect the physical or chemical transformation of the raw fish. In the reply the applicant did not give any further facts or an explanation. The officials of the respondent, before the decision, had visited the premises of the applicant on invitation and were demonstrated the process. After the inspection it was concluded from the facts that the glazing is not a separate chemical process but amounts to freezing the fish.

It is submitted that the processing of raw fish by the applicant does not constitute a manufacturing activity, which results in the physical or chemical transformation of materials or components into new products. The raw fish remains raw fish. The end product is still raw fish. It is only prepared for marketing. It is not physically or chemically transformed.

If the contention by the applicant is correct, such an interpretation

of "manufacturing activity" would lead thereto that every butcher would be a manufacturer for purposes of this act. It is totally conceivably that on such an interpretation the marinated meat cutlets in vacuum packed bags, the biltong and the boerewors would then be physically or chemically transformed meat, new products. Similarly, conceivably a producer of vegetables who grows the raw vegetables and then picks the vegetables, washes it, dresses it and packages it attractively and freezes it for enhanced shelf life could also be a manufacturer. It is submitted that this could lead to absurdities.

In South African Tax legislation, section 12(2)(d) of the Income Tax Act 58 of 1962 the phrase "process of manufacture" is used. This phrase is not defined in the South African Income Tax Act. The South African courts have declined to define the phrase. It was held that there must be a substantial or essential change in the material before it would constitute a process of manufacture. In this regard the following was said:

> *"There can be no fixed criteria as to when any such change can be said to have effected an essential difference. It is a matter to be decided on the particular facts of the case under consideration. The most exhaustive examination of imaginary examples of change really does not carry the matter further"*[28]

In the Namibian Income Tax Act the phrase "manufacturing activity" is defined. The South African authorities are thus of no

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[28] *Secretary for Inland Revenue v Hersamer (Pty) Ltd* at p. 187 D – E; *D & H Piping Systems (Pty) Ltd v Trans Hex Group Limited* 2006 (3) SA 593 (SCA) at p. 607 B

> *assistance. The definition in our Act must be applied to each situation.*
>
> *It is submitted that the processing of raw fish by the applicant does not constitute the physical or chemical transformation of the raw fish into new products. It remains raw fish, simply prepared for sale."*

[51] It appears that I have quoted extensively from both counsels heads of argument - which were thoroughly prepared - and which proved extremely helpful, despite the seeming differences between the South African and Namibian underlying statutory provisions.

[52] If one then has closer regard to the statutory definitions contained in both the South African and Namibian legislation it appears immediately that the differences between them are not as material as would appear at first glance.

[53] The word *'activity'* is used in the Namibian definition as opposed to the word *'process'*, as utilised in the definition contained in the South African legislation.[29]

[54] The word *'activity'* is defined in both the *Chambers*[30] and *Collins*[31] English Dictionaries as "*the state or quality of being active*". The *Chambers Dictionary* adds that it can also mean: '*doings*', whereas the *Collins English Dictionary* adds that the word can also mean '*any specific deed, action, pursuit*'.

[55] The word *'activity'* therefore has a very wide and general meaning.

[56] The word *'process'* was held to *'cover an unlimited multiplicity of types of*

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[29] *"manufacturing activity"* as opposed to *"process of manufacture" – (my underlining)*
[30] *Chambers English Dictionary* 7th Ed at p 13
[31] *Collins English Dictionary – Complete and Unabridged* - 6th Ed at p 17

operations'.[32] This is similarly very wide and general.

[57] The word *'process'* and its meaning covering an *'unlimited multiplicity of types of operations'* obviously also includes '*doings*' and "*the state or quality of being active*" Nothing significant thus turns on this difference.

[58] The common denominator between the two statutory definitions, is the word '*manufacture*'.[33]

[59] The Namibian definition is given its specific connotation by the defined attributes listed in sub-sections (a) (i), (ii) and (iii) of the definition of '*manufacturing activity*' as contained in Section 1 of Act 24 of 1981.

[60] These specific connotations are expressly listed to be 'the physical' or 'chemical transformation of materials or components into new products' – whether 'manually' or by 'mechanical' or 'other process'; whether in a 'factory'; at a 'private dwelling' or any 'other place'; or whether for the purposes of sale in the wholesale or retail trade; etc

[61] The South African definition is given its specific connotations by the attributes assigned to it by judicial interpretation were it has for instance been held that *'what is required is a transformation of the product'.*[34] Mr Frank has further correctly pointed out that the Namibian definition of "manufacturing activity" also refers to the *"physical transformation ... into new products"*. There are thus identical/ overlapping/ characteristics/ requirements contained in both definitions.

[62] Due to the virtually identical language employed in both statutory definitions and due to the close overlapping of some of the express attributes,

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[32]*Secretary for Inland Revenue v Hersamar (Pty) Ltd* at 187 A-E
[33]*"manufacturing activity"* as opposed to *"process of manufacture" (my underlining)*
[34] See for instance : *Secretary for Inland Revenue v Hersamer (Pty) Ltd* at p. 187A-E

contained in the Namibian definition with the elements extracted through the process of judicial interpretation of the South African definition I find myself in disagreement with the submission made on behalf of the Respondent that *'the* South African authorities are of no assistance'. I find that the judicial interpretations accorded to the South African statutory definition are, on the contrary, of high relevance, and thus of guidance in the determination of the dispute between the parties herein.

[63] When one turns to these authorities in order to determine whether or not the Applicant does indeed conduct a *'manufacturing' activity'* it must again be noted that the word *'manufacture', in its widest sense, can be said to mean the making of any sort of article by physical labour or mechanical power'*[35]*.* This very wide and all-encompassing meaning - the general nature of which is underscored even more by the word *'activity'* - immediately shows that almost all activities, through which any sort of article is made by way of physical or mechanical process –ie by way of an *'unlimited multiplicity of types of operations'*[36] - fall within the ambit of the meaning of these words.

[64] The South African courts have further held that *'the article claimed to have resulted from a process of manufacture must essentially be different from the article as it existed before it had undergone such process'*[37] and in England Darling J said that *'The essence of making or manufacturing is that what is made shall be a different thing from that out of which it is made'*[38]*.* This is the element of 'transformation', which was expressly written into the Namibian statute by way of definition. This is therefore then also the first express qualification of the abovementioned 'all-encompassing general meaning' of the concept *'manufacturing activity'* from which it now also appears that a different thing is to be the end-result of the *'manufacturing activity'*, whether by way of

[35] *Secretary for Inland Revenue v Hersamer (Pty) Ltd* at p. 187A-E
[36] *Secretary for Inland Revenue v Hersamer (Pty) Ltd* at p. 187A-E
[37] *Income Tax Case 1052, 26 S.A.T.C* 253 at p255 per Van Winsen J
[38] *Mc Nichol v Finch* (1906) KB 352 at 361

‘physical; or ‘chemical process’.

[65] Some South African judicial dicta seem to emphasise ‘a change of the character of the raw materials’ out of which something is made[39]. Others again state that the ‘difference’ must be ‘substantial’ or ‘essential’.[40] Whether or not ‘a change of the character’ of raw materials has been achieved or not, and whether or any such change is ‘substantial’ or ‘essential’, would obviously be a question of degree.

[66] Also this factor has been assimilated into the Namibian statute. It lays down that the degree of ‘transformation’ required is - that at the end – of the ‘physical’ or chemical ‘transformation’, - of materials – by way of either a ‘manual’ or ‘mechanical process’ – the process should result in a *‘new product’* or ‘products’.

[67] If one then considers the facts of this case it appears that the Applicant maintains that its establishment of a factory, in Namibia, is unique *(and different)*, as traditionally fish, currently caught by *(other)* Namibian companies, is usually exported to other countries, where it is processed to meet the requirements of the final customer. The Applicant on the other hand employs ‘raw materials’ such as Hake, Kingklip, Blue Shark and Monkfish. These raw materials are processed here in Namibia by the various production lines set up in Applicant’s factory in order to produce the final product that is then packed and priced for the consumer market.

[68] It does not take much to conclude, given the wide import of the language employed by the legislature here that the Applicant conducts a ‘*manufacturing activity*’ in that it makes its final product either manually and/or mechanically or by way of other process. It is also clear that some physical transformation of the raw material takes place, at least in the various ways set out above.

[39] *Secretary for Inland Revenue v Hersamer (Pty) Ltd* at p. 187A-E
[40] *Income Tax Case 1052, 26 S.A.T.C* 253 at p255 per Van Winsen J

[69] In so far as the Respondent has disputed that a chemical transformation occurs – as a result of the glazing process – as maintained by Applicant – I do not take this aspect into account for purposes of deciding this matter on the application of the governing approach to disputed facts in motion proceedings.[41]

[70] It appears further that also the additional factors/requirements - listed in sub-sections (ii) and (iii)[42] of the definition - are met.

[71] The only aspect which ultimately therefore requires determination for purposes of deciding this case is whether or not the said aforesaid transformation results in a *'new product'* or products?

[72] The Respondent has maintained that *'the processing of raw fish by the applicant does not constitute the physical or chemical transformation of the raw fish into new products. It remains raw fish, simply prepared for sale'*.

[73] At first glance this contention has substance, particularly if one takes into account the meaning of the word *'new'*, which for instance is described in the *Concise Oxford Dictionary of Current English* to mean :

> *" … not existing before, now first made, brought into existence, invented, introduced … or discovered … ".*[43]

[74] At a second glance the word can however also mean :

> " *… renewed, fresh, further, additional, different, changed … "*[44]

[41] See for instance : *Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 A at 634E and 655 A –

[42] The *'manufacturing activity'* must also result in a transformation of materials into new products whether conducted in a factory; at a private dwelling or any other place; or whether for the purposes of sale in the wholesale or retail trade; or … etc

[43] *'The Concise Oxford Dictionary of Current English* – 6th Ed - at p 734 at 1

[44] *The Concise Oxford Dictionary of Current English* – 6th Ed - at p 734 at 2

[75] If one then considers that the raw fish - in unprocessed form - not marketable in that form in the target European Union market – is processed by the Applicant's workforce in an organized manner – by utilizing specialized equipment – by physically transforming the raw fish –into portions – which have been cleaned, trimmed and neatly packed - in a form suitable for sale – then treated for an enhanced shelf-life – and delivered to the retailers and end-customers - it appears that a *'new'* product is created - in the wide and further sense of the word - in that the end- result has *'changed'* and is *'different'* to the raw material with which it commenced.

[76] Mr Frank's analysis, of the various other ways, in which such change manifests itself, fortifies this conclusion.[45]

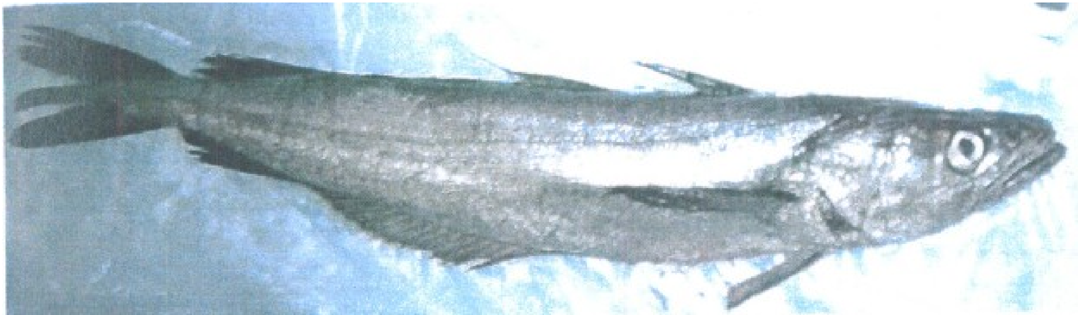
[77] Finally this transformation is also depicted by the 'Product Examples' annexed to the founding papers filed of record and by way of which, for instance, the transformation, of the raw hake into the final product, was

[45]In this regard it will have been noted from the argument quoted above that counsel listed such changes as being *'a change in nature from raw unprocessed and unclean inedible fish to specially cut ready for consumption fish - from something which cannot be sold to the end-consumer to something which can; -that there is a change in utility in that the fish changes from something that only a processing plant or fishmonger would be interested in to a product ready-made and packaged for sale by retailers to the ultimate consumer - were the end product thus has a commercial purpose, which the initial product did not have; - that there is a change in value in that the process cuts, cleans and generally prepares the fish to be in such portions and visual state to present value to the ultimate consumer; - that the process physically transforms the original state of the raw fish so as to shape it into pieces with a different functionality and purpose in that it is ready made for the retail market with an enhanced shelf life - from something that could not be sold in the retail space it is changed to something that can - whereas the product remains fish in general sense of the word it is physically transformed through the process to change it from something that the consumer would not purchase and/or value less to a product that is desirable in terms of its nature, utility and value.'*

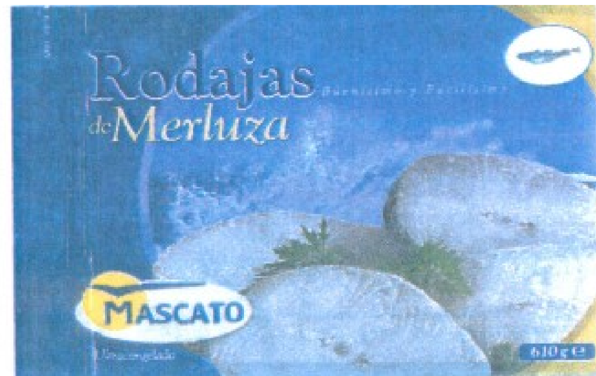
graphically illustrated as follows:

Product Examples

<u>HAKE / MERLUZA</u>



WHOLE HAKE

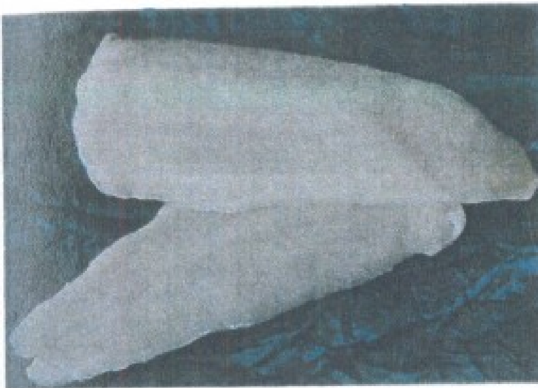


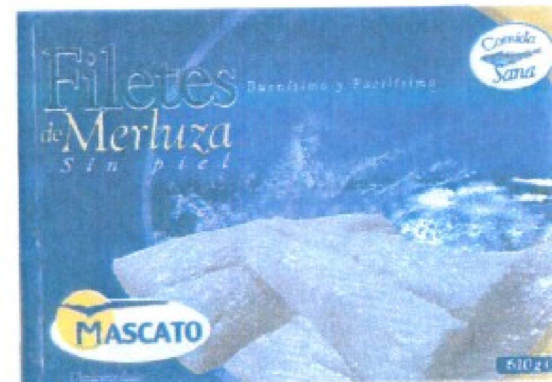
HAKE STAKES **STEAKS RETAIL BAG**

Whole hake is headed and gutted, trimmed and neck end and steaks are cut of approximately 2 cm each, glazed for protection, portioned and packed in retail plastic bags ready for Supermarket

HAKE MEDALLIONS **MEDALLIONS RETAIL BAG**

Whole hake is headed and gutted, skinned and filleted. Smaller fillet pieces are compressed into a sausage form from which medallions are cut of approximately 2 cm thick, glazed for protection, portioned and packed ready for Supermarket





SKINLESS HAKE FILLET **SKINLESS FILLET RETAIL BAG**

Whole hake is headed and gutted, skinned and filleted, glazed for protection, portioned and packed in retail bag ready for Supermarket

MASTER CARTON

Retail bags are neatly packed into a marked master carton and sealed.

[78] It appears that the alleged transformation is not merely insignificant.

[79] In so far as the word *'new'*, as used in the in the definition section of the statute, is capable of more than one meaning, and as the legislature's intention cannot immediately be ascertained from the language employed, it appears that the concept *'new product'* requires interpretation.

[80] "As in a case of interpretation of all other statutes, fiscal legislation is to be interpreted by ascertaining what the legislature intended in using the words it chose to use (*Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 727G-H. Of cardinal importance is the scope and purpose of the legislation and the context in which the words or phrases are used (*Standard General Insurance Co Ltd v Commissioner for Customs and*

Excise 2005 (2) SA 166 (SCA) para 25 [also reported at [2004] 2 All SA 376)"[46]

[81] On examination of the scope and purpose of this part of the Namibian Income Tax Act in its context it becomes apparent that its express scope and purpose is to allow for, and to enable companies to achieve recognition as *'registered manufacturers'* for Income Tax purposes, particularly if this would be beneficial to the Namibian economy by way of net employment creation, net value addition, replacement of imports or an increase in net exports; and represents or will represent an investment in a new manufacturing activity or a substantial expansion of an existing manufacturing activity[47]. In return, the scheme, created by the Act, grants certain tax benefits,[48] to a tax paying company, after such company has achieved the recognition of such status. To interpret the phrase restrictively - given the declared purpose of the Act which clearly is intended to benefit the nation as a whole - would surely be counter-productive to - and would only restrictively achieve - those listed aims, purposes[49] and objects of the scheme created by the Act. It is highly unlikely that the legislators, in this context, intended to only restrictively achieve these benefits for the nation – surely this is not what the legislator's had in mind – and I thus find that a narrow interpretation would be in conflict with the legislator's intention, as expressed here.

[82] By that same token it becomes clear that if a wide, and general, interpretation would be given to the meaning of the words used in the definition, that such interpretation would not defeat the apparent scope and purpose of the

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[46]*Commissioner, South African Revenue Service v AIRWORLD CC & Another* 2008 (3) SA 335 (SCA) at [10]

[47] See sections 5A (3) (a) and (b) of Act 24 of 1981

[48] In terms of sections 17A, 17B, 17C and 17D of Act 24 of 1981

[49]See : *Commissioner, South African Revenue Service v Airworld CC & Another* at [25] were Hurt AJA stated : *'In recent years courts have placed emphasis on the purpose with which the legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator's intention.*

Income Tax Act[50] and would thus also not lead to the absurdity contended for on behalf of Respondent.[51] The assigning of a wide meaning to the word 'new' would, as Nienaber JA has so aptly put it, then also give the word the *'colour', 'like a chameleon, would take its colour from its setting and surrounds in the Act'[52].*

[83] I am in the premises driven to the conclusion that the degree of transformation required by way of the *'manufacturing activity',* as defined in section 1 of the Income Tax Act 24 of 1981, for purposes of section 5A thereof, is not only the transformation of *(raw) 'materials'* into *'new products',* in the sense that the required degree of transformation is to only entail the transformation of raw products into products *not existing before or now made for the first time*, but that the legislature intended the concept *'new products'* to be wide enough to also include a transformation which results in a '*changed'* or '*different'* product.

[84] The latter is then also what the Applicant's manufacturing process actually achieves - at the very least – and – accordingly - I hold that the Applicant conducts a *'manufacturing activity'* within the ambit of the meaning assigned to it by the definition contained in section 1 of the Income Tax Act 24 of 1981, as amended, which finding will entitle the Applicant further, in accordance with such declaration, to be recognized as such, and accordingly to apply afresh for the sought registration - in respect of the above considered 'manufacturing

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[50]In *Standard General Insurance Co Ltd v Commissioner for Customs and Excise* 2005 (2) SA 166 (SCA) para [25] at 174H - 175A - also reported at [2004] 2 All SA 376 - Nugent and Lewis JJA said: *"Rather than attempting to draw inferences as to the drafter's intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation. As pointed out by Nienaber JA in De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Service 2002 (5) SA 136 (SCA)* para [7] - also reported at [2002] 3 All SA 181 – *'… when dealing with the meaning of 'export' for the purpose of s 20(4) - which draws a distinction between export and home consumption - the word must 'take its colour, like a chameleon, from its setting and surrounds in the Act'."*

[51]Even the process of making Biltong and Boerewors etc -,depending on the facts of the particular matter - may thus possibly and conceivably also fall within the ambit of the definition-

[52]*De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Service* at [7]

activities' - in terms of Section 5A (1) of the Act, - should it be so advised and if it so chooses.

[85] The declaratory relief sought is accordingly granted with costs.

[86] In so far as I have already indicated that I deem it also appropriate to cure any resultant prejudice occasioned to the Respondent through the abandonment, by the Applicant, of the review relief – I also direct that the Applicant is to pay the Respondent's wasted costs occasioned thereby.

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GEIER, AJ

Counsel for Applicant: Adv TJ Frank SC

Instructed by: HD Bossau & Co

Counsel for Respondent : Adv P.C.I. Barnard

Instructed by : Government Attorney