

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

(EXERCISING ITS ADMIRALTY JURISDICTION)

Case No: AC 29/2018

In the matter between:

ACTING DEPUTY SHERIFF FOR WALVIS BAY

APPLICANT

and

DEUTSCHE BANK A.G.

**(As assignee of all rights of DEUTSCHE BANK
NEDERLAND N.V., formerly known as NEW
HBU II N.V. AND HOLLANDSCHE BANK-UNIE N.V.)**

FIRST RESPONDENT

**THE FUND CONSTITUTED FROM THE SALE
OF THE MT "EMRE-T"**

SECOND RESPONDENT

Neutral citation: *Acting Deputy Sheriff for Walvis Bay v The Fund constituted from the sale of the MT "Emre-T"* (AC 29/2018) [2020] NAHCMD 544 (27 November 2020)

CORAM: NDAUENDAPO, J

Heard: 30 July 2020

Delivered: 27 November 2020

Flynote: *Shipping* – Admiralty proceedings –Value Added Tax- Arrest of ship – Custody and preservation of arrested ship by sheriff – VAT charged on goods supplied to the ship – Ship sold – Fund – Referee Recommendation - VAT on goods supplied not recoverable from Fund - Goods supplied to Foreign-going ship - VAT – Zero Rated.

Summary: The applicant launched an application seeking payments of VAT claims charged on invoices of Namibia Marine Services (Pty) Ltd ('NMS') and Namibia Ship Chandlers (Pty) Ltd ('NSC'), in the amounts of N\$195,308-50 and N\$15,174-65 respectively. The applicant also sought payment of the principal claim (tax invoices) of NSC in the amount of N\$101,164-30. The goods (food) were supplied by NMS and NSC to the applicant whilst he had(was) *custodis legis* over the arrested ship (EMRE-T). The arrested ship was sold and a Fund was established out of the proceeds from the sale. The applicant submitted the invoices of NMS and NSC to the Referee who was appointed by the court to receive, examine and report to this court on the validity, quantum and ranking of claims against the Fund.

The referee recommended that the VAT claims of NMS and NSC cannot be recovered from the Fund. It must be recovered from the Receiver. He relied on the judgment of *Pricewaterhouse Meyernel v Thoroughbred Breeders* 2003(3) SA 54(SCA) at para 20 - 21 where the South African Supreme Court of Appeal held:

'Where a party is entitled to claim from the receiver the VAT which it was required to pay to some other party, as an input tax, then it does not, in respect of such input tax, incur an out of pocket expense.'

As far as the principal claim (tax invoices) of NSC is concerned, the Referee found discrepancies in the invoices. He found, inter alia, that the invoices reflect the supply of 229 cartons of cigarettes, but the supporting documents provided by the sheriff indicate that only 40 cartons were actually delivered to the Vessel, on that basis the

Referee did not approve the principal claim of NSC and requested an explanation for the discrepancies.

Disenchanted with the findings and recommendations, the applicant launched this application. The applicant submitted that the Referee erred in disallowing VAT payment from the Fund and that the principle relied on in *Pricewaterhouse* is not applicable in Namibia. He argued that section 18 of the VAT Act allows as a deduction from the output tax payable by a registered person, the total amount of input tax payable in respect of taxable supplies made to the registered person during the VAT period in question. However, where the goods so supplied are considered by the Receiver to constitute goods and services which resort under the definition of entertainment, then despite the input charge of VAT thereon to the customer, such person may not claim the input charge there on. Entertainment is defined as including the provision of food. NMS and NSC supplied food and therefore applicant cannot claim VAT from the Receiver, but from the Fund. As far as the principal claim (tax invoices) of NSC is concerned, the applicant and NSC explained that the discrepancies were caused by typing errors and administrative incompetence on the part of the staff of NSC and that a revised and reduced claim was then submitted.

The First respondent opposed the applicant's application. It states that NMS and NSC are not entitled to the VAT claims as per the principle set out in *Pricewaterhouse case*. In any event, it submitted that VAT on the invoices of NMS and NSC was zero-rated, as the goods supplied were supplied to a foreign-going ship and in terms of the Act the VAT on those goods is zero-rated. First respondent also submitted that the explanation proffered for the discrepancies in the initial invoices of NSC was not acceptable and that the matter should be referred to oral evidence to interrogate the circumstances around the invoices.

Held that the Referee was wrong to rely on the *Pricewaterhouse* judgment to recommend that VAT on the invoices of NMS and NSC was not recoverable from the Fund.

Held further that, in terms of s18 of the Act if the goods supplied are considered by the Receiver to constitute goods which resort under the definition of entertainment, such a person may not claim the input VAT charged thereon from the Receiver. The

goods (food) supplied by NMS and NSC falls under entertainment and therefore they cannot claim from the Receiver.

Held further that the goods supplied by NMS and NSC were supplied to a foreign-going ship to be consumed on the ship and in terms of Schedule III (section 9) of the VAT Act goods supplied to a foreign-going ship are zero-rated.

Held further that the ship is a foreign-going ship registered in Turkey, operating outside Namibia and owned by a non-resident as per the definition of the Act and therefore the goods supplied by NMS and NSC were zero-rated and they should not have charged VAT on those invoices.

Held further that the applicant's claims of VAT payments are dismissed with costs. Held further the applicant claim for payment of the principal claim is granted.

ORDER

1. The applicant's claim of payments of VAT in relation to the invoices of NMS and NSC in the amounts of N\$195,308-50 and N\$15,174-65, respectively, are dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.
2. The applicant's principal claim in relation to the invoices of NSC in an amount of N\$101,164-30 is granted, with the prescribed interest at the rate of 20% per annum.

JUDGMENT

NDAUENDAPO, J

Introduction

[1] This an application brought before this Court sitting in admiralty in terms of the Colonial Courts of Admiralty Act of 1890. The applicant's notice of motion dated 6 December 2019, seeks the following relief:

- '1. Payment of VAT in relation to the invoices of Namib Marine Services (Pty) Ltd (NMS) (lines 22-23 on page 21 of the Referee's Report) in an amount of N\$195,308-50;
2. Payment of VAT in relation to the invoices of Namibian ship Chandlers (Pty) Ltd (NSC) (lines 3-7 on page 22 of the Referee's Report) in an amount of N\$15,174-65;
3. The principal claim in relation to the invoices of Namibian Ship Chandlers (Pty) Ltd (lines 25-26 on page 23, and 27-28 of the Referee's Report) in an amount of N\$101,164-30;
4. The taxed costs payable to the Applicant;
5. Prescribed interest at the rate of 20% per annum on the claims by Applicant;
6. Costs of this application; and
7. Alternative relief.'

Background facts

The parties

[2] The applicant is the Acting Deputy Sheriff for the district of Walvis Bay, duly appointed in terms of the High Court Act No. 16 of 1990. The First Respondent is Deutsche Bank A.G, a banking corporation incorporated pursuant to German law, acting through its Amsterdam branch, having its business address at De entrée 195, 1101, HE Amsterdam. The Second Respondent is the Fund constituted from the sale of the MV "Emre T" (the Vessel).

[3] The facts giving rise to this application are the following: On 22 January 2019 this Court ordered that:

- (a) The MV "Emre T" (the Vessel), which was anchored at Walvis Bay, be sold by public auction, and that the proceeds of such sale should be paid into a Fund (the Fund) and that (b) Adv. Darryl Cook, be appointed as the Referee to receive, examine and report to the Court upon the validity and ranking of claims submitted

against the Fund. The final report of the Referee dated 16 October 2019, was confirmed by this Court on 8 November 2019. The Court Order dated 8 November 2019 confirming the Referee Report directed that (paragraph 2.5.5.)

‘(i) That an amount of USD30, 000 be retained in the Fund pending the final determination of any proceedings to be commenced by Applicant for payment of such amounts.’

The application before this Court relates to the final determination of the amount of USD30, 000 which is in the Fund.

The issues for determination

[4] (a) The first issue for determination is whether the applicant is entitled to claim VAT (value added tax) charged by NSC and NMS on invoices for goods supplied and services rendered to the applicant whilst he had (was) *custodia legis* over the vessel under arrest from the Fund or Receiver of Revenue?

(b) The second issue is whether VAT is payable on goods and services supplied to a foreign-going ship in terms of the VAT Act?

(c) The third issue is whether NSC is entitled to be paid its principal claim, despite the discrepancies found in its tax invoices by the Referee?

In order to understand the background of the application, it is important to consider the recommendations of the Referee in the final report as it pertains to the claims of the applicant.

The Referee's final findings and recommendations

Payment of VAT

[5] Each of the VAT claims was disallowed by the Referee in his report.

In respect of the Sheriff for Walvis Bay the Referee stated the following in the final report:

‘6 (i) The approach normally taken in relation to admiralty funds in South Africa is that the Sheriff is not entitled to claim the VAT components of his disbursements on the basis of the reasoning in *Price Waterhouse Meyernel v Thoroughbred Breeders* 2003(3) SA 54 SCA.

(ii) This judgment holds that where a party is entitled to claim from the receiver the VAT which it was required to pay to some other party, as an input tax, then it does not, in respect of such input tax, incur an out of pocket expense.

(iii) On this logic the sheriff is entitled to recover the VAT components of the disbursements from the receiver, and therefore they do not represent a “cost” to the sheriff.

(vii) Therefore, in relation to the NMS invoices, I do not agree that the supplier issued the invoice directly to the customer and not to the sheriff.

(ix) the principle set out in the Price Waterhouse case applies and the sheriff should not be allowed to recover the VAT on the NMS...invoices from the Fund.’

On that basis and reasoning, the Referee refused to pay the applicant the VAT charged by Namibia Marine Services (NMS) and Namibia Ship Chandlers (NSC) from the Fund.

The principal claim /tax invoices of NSC

[6] The Referee in his report stated the following:

‘b. The Bank (now First respondent) denied that the sheriff had discharged the burden of establishing that this part of the claim amounted to preservation claim and put the sheriff to the proof by providing evidence in support of the expenditure.

c. In reply the sheriff asserted that orders had been forwarded via WhatsApp messages, which in turn was forwarded to NSC for action. The sheriff did not disclose any WhatsApp messages relied upon.

d. The sheriff also contended that the goods had been supplied and said proof of delivery would be provided. This proof came in the shape of certain delivery notes and provision lists. This documents present several problems:

i The amounts invoiced for cigarettes are not supported by delivery notes and the provision lists. Specifically:

1. The invoice dated 15 December 2018 (for goods ordered on 13 November 2018) includes an item for 100 cartons of cigarettes in the amount of N\$38,424. However, the delivery note dated 13 November 2018 only reflects supply of 10 cartons.

2. The invoice dated 31 January 2019 (for goods ordered on 16 January 2019) includes an item for 20 cartons of cigarettes in the amount of N\$6,976, yet the delivery noted dated 17 January refers only to 10 cartons.

3. The invoice dated 11 February 2019 (for goods ordered on 11 December 2018) includes an item for 70 cartons of Winston cigarettes in the amount of N\$27,440, although the delivery note dated 12 December 2018 records the supply of only 20 cartons.

4. The invoice dated 25 March 2019 (for goods ordered on 22 February 2019) includes an item for 11 cartons of Winston cigarettes in the amount of N\$4,178.24, although, the delivery note dated 22 February 2019 does not itemize any cigarettes.

5. The invoice dated 10 June 2019 (for goods ordered on 5 April 2019) includes an item for 28 cartons of Winston cigarettes in the amount of N\$9,835.84, but the provision list dated 3 April does not include any cigarettes.

ii, the invoices thus reflect the supply of 229 cartons of cigarettes, but the supporting documents provided by the sheriff indicate that only 40 cartons were actually delivered to the vessel.

iii. It is correct that the sheriff has withdrawn this part of his claim. However, assuming the accuracy of the delivery notes and provision lists, the invoices are “prima facie fraudulent” (pages 22-23 of the report)

iv. Notwithstanding the withdrawal, serious questions ought to be raised as to why NSC included significant quantities of cigarettes in its invoices, which are not supported by delivery notes, and which were apparently not authorized by the sheriff. The sheriff also has failed to explain how these egregious errors in the invoices were (seemingly) not detected by him and his accounting staff at any time, including in the preparation of his claim.

The referee concluded that viii. “On the evidence to hand, I do not consider that I am able to recommend that the NSC part of the sheriff’s claim be allowed”p24 report, record 127 line 27).

x. It may be that the sheriff can, by affidavit, satisfy the Court that the concerns raised above are without foundation. In such instance I recommend that the Court award N\$134,365.57 for this head of claim (i.e. N\$153,619.95-N\$19,254.38).

xi. If the court is not satisfied, then I recommend that this part of the sheriff’s claim be referred to oral evidence (p 24 report, 127 record line 42)’

Applicant’s reply to the Referee’s findings and recommendations

[7] The applicant in his founding affidavit states that the Referee erred by not allowing payment of VAT on the claims of NMS and NSC, which the Referee accepted as being valid, for the following reasons:

(a) That all previous Referees appointed by the High Court of Namibia approved and allowed payments of VAT on tax invoices submitted by local suppliers for goods supplied for preservation of vessels under admiralty arrest pending a sale and distribution of the Fund;

(b) That the principle set out in the South African case law of *Price Waterhouse Meyernel v Thouroughbred Breeders' Association of South Africa* 2003 (3) SA 54(SCA), relied on by the Referee, does not apply to VAT charged in Namibia in terms of the VAT Act No. 10 of 2000 on the supply of goods for a vessel under arrest in Namibian waters and the VAT on the NMS and NSC Tax invoices should be recovered from the Fund.

(c) That if the VAT is not paid by the Fund to NMS in an amount of N\$195,308-50 and NSC in an amount of N\$15,174-65 as registered VAT vendors in Namibia, the local suppliers will be out of pocket.

(d) That the supplies by NSC are not a supply to the Sheriff for fees in his personal capacity nor supplies to a non-resident person.

(e) That the VAT was properly charged by NMS and NSC in terms of the provisions of the VAT Act of the Republic of Namibia under the circumstances as set out in:

- (i) The position paper by the Department Inland Revenue, office of the Ministry of Finance in Namibia dated 1 November 2019.
- (ii) The opinion on the 'Indirect tax implications on the supply of goods and services to a vessel under arrest' by PriceWaterHouseCoopers Tax Advisory Services (Pty) Ltd dated 4 November 2019, attached hereto as "AV 2.1 and 2.2 respectively and which the contents applicant submits

reflect the correct position regarding the payment of VAT in the Republic of Namibia.

[8] The applicant further states that: 'NSC was prepared to assist him from time to time as *custodian legis*, acting on behalf of arresting creditors to secure the supply of goods on credit to foreign vessels under arrest, on the basis that NSC had comfort that it will have a claim that will rank preferent for payment as preservation expenses against the Fund created from the proceeds of the sale of the vessel for such goods supplied.'

Applicant's reply to the discrepancies in the tax invoices (principal claim) of NSC identified by Referee

[9] The applicant states that he has been working with NSC for the past decade and never experienced the same problems before and was shock and surprised by the problems identified by the Referee. He immediately addressed a letter to the management of NSC setting out the findings of the Referee as they relate to the invoices of NSC (the letter is annexed as "AV3"). NSC responded by letter (AV4), the letter from NSC in summary: 'blame the discrepancies between the numbers of the cigarettes cartons ordered and delivered on typing errors, for instance invoice 39032 dated 15 December 2018 includes an item for 100 cartons but only 10 supplied, the typing error being an additional "0" was added to the 10 cartons ordered to make it 100, instead of the 10 delivered.' The letter from NSC further explains that: 'Where there is a discrepancy between delivered and invoiced cigarettes, for all such differences Credit Notes have been issued. These differences are once again a result of human error, poor administration and mixing of orders.'

[10] The applicant further states that according to the calculation of the amended and updated NSC Tax invoices, after correction of all the amounts credited by NSC, the total reduced amount in respect of the principal amount due to NSC (inclusive of VAT) payable from the Fund is now N\$116,338-95.

[11] In his replying affidavit, the applicant, in summary, states: He denies that any recovery of VAT from the Fund in respect of NMS and NSC would amount to double

recovery as he is not entitled to recover VAT on NMS and NSC invoices from the Receiver of Revenue. He further states that the claims for preservation costs so submitted emanated from NSC and NMS who supplied such goods on credit and simply fails to accept that the goods are obtained from local suppliers for local consumption and could thus not be zero-rated. He further states 'I am advised and respectfully submit that the goods so supplied by NMS and NSC to a vessel under arrest is viewed by Namibian law as a local supply of goods and not considered an export of goods which would be the case of a foreign-going vessel, as defined by the Act, hence the fact that such supply of goods is subject to VAT at the standard rate of 15%.'

[12] The applicant further states that the goods so supplied by NSC and NMS is in terms of the Namibian VAT Act considered to be goods falling under the definition of "Entertainment", which definition is strictly applied in practice and are in any event dealt with by the Act on the basis of a denied input claim which has the effect that the VAT so charged becomes a direct cost attributable to the preservation of the vessel and which cost may not be claimed by either the arresting creditor or himself as an input VAT claim, and to that end the legal position in Namibia differs materially from that of the RSA.'

First respondent answering affidavit

[13] The answering affidavit, on behalf of the first defendant, was deposed to by Mark Robert Van Velden, an attorney. He states that he was duly authorized to act on behalf of the first respondent. A confirmatory affidavit by Mr. Stam, the Vice president of the first respondent and special power of attorney were filed of record. From the onset Mr. Van Velden states that the explanation given by the applicant to the discrepancies found by the referee pertaining to the tax invoices of NSC should be rejected and the matter be referred to oral evidence. He States: 'Without proper interrogation of the circumstances surrounding these specific invoices, the court cannot be satisfied as to the veracity of any other part of NSC claim.'

[14] He states that the Referee dealt in detail with the *PriceWaterhouse* case in his Final Report: '*The judgment holds that where a party is entitled to claim from the*

receiver the VAT which it was required to pay to some other party, as an input tax, then it does not, in respect of such input tax, incur an out of pocket expense.' He states that applying this principle to the facts of this matter, if the applicant is a registered VAT vendor, as he ought to be, then by the application of the input and output VAT system, any recovery of VAT from the Fund in respect of NMS and NSC would amount to double recovery because the applicant is entitled to recover the VAT components of the disbursements from the Receiver.

[15] He states that the applicant, is not entitled to recover VAT from the Fund and that the Referee's recommendations in this regard should stand and be confirmed by this Honorable Court.

[16] He further states that although the applicant submits that 'all previous Referees appointed by the High Court of Namibia approved and allowed payment of VAT on Tax invoices submitted by local supplier...' he fails to provide any examples of these reports. Mr. Van Velden further states that the vessel was a foreign going ship, registered in a foreign jurisdiction and its purpose was to trade commercially in international waters. The services and goods were rendered and supplied by the sheriff to a foreign registered vessel and as a matter of law, no VAT was payable on those invoices.

Points in Limine raised by applicant

[17] The applicant submitted that the first respondent's opposition to the application and its consequent answering affidavit in several respects fall short of the requirements necessary to be admissible in this court for the following reasons:

- a. No proper authority had been given to either Bowman Gilfillan Inc. ("Bowman's") and/or Koep & Partners whereby any of the two firms of legal practitioners could oppose the current application;
- b. The belated special power of attorney allegedly issued by Deutsche Bank A.G in several respects fall foul of inter alia the preemptory provisions of Rule 128

of the Rules of the High Court of Namibia as well as those relating to companies;

- c. The affidavit filed in opposition to the application has been deposed to by an attorney by Bowman Gilfillan Inc, the legal firm acting for Deutsche Bank A.G.

[18] It is to be noted that at a previous hearing (Case No. AC 17/2018) heard on 28 February 2020) issues similar to these raised in *limine* herein and involving the same legal counsel and firm of attorney, were argued. Yet both the same local as well as foreign legal counsel of the first respondent herein persisted with their improper conduct despite being alerted to the local legal position and precedence as it appears from the case law so cited at the time. In the circumstances it will be asked at the hearing herein that the court should first deal and dispose of the points in *limine* so raised herein, before it hears and considers argument on the merits of the application.

Submissions by applicant on the points in limine

Lack of proper authority

[19] Counsel argued that, in any application or action launched by an artificial legal entity, requires the necessary authority through the adoption of a proper worded resolution to that effect for the reason that such an entity can only act through its agents. It consequently follows that it cannot be assumed, on the mere say so and because such proceedings have been brought in its name, that those proceedings have in fact been authorized by the artificial person concerned.

[20] Further and most importantly it is incumbent upon the person deposing to any affidavit in opposition to the application that he or she has the necessary authority to oppose the application (and not only authority to depose to the affidavit in opposition thereof). Nowhere in the answering affidavit deposed to by Mark Robert Van Velden does he state that he has the necessary authority to oppose the application on behalf of Deutsche Bank A.G. To that end, nothing is also stated in the affidavit

confirming that Bowman's have been appointed as the legal practitioners of Deutsche Bank A.G that does not per se clothe them with the required authority to oppose the application in question.

[21] It is evident that the so-called belated special power of attorney now relied upon by the applicant (or rather Bowman's) in several respects fall short of what would in law be deemed and considered to be a proper authority. So much is clear from the following:

[22] The power of Attorney lacks any resolution adopted by the Directors of Deutsche Bank A.G expressly appointing and authorizing Bowman's or any other person for that matter to act in his stead;

The alleged special power of attorney dated 1 June 2020 also fails to ratify all steps already undertaken prior to that date with reference to the steps already taken and papers filed for and on behalf of Deutsche Bank A.G. It is trite that a resolution (and special power for that matter as well) operates from the date it was adopted unless it provides otherwise;

- (a) It is submitted that the so-called special power of attorney does not possess any probative or evidential value for purposes of rendering any authority to Bowman's and/or its professional employees to institute the application in question;
- (b) There is also no confirmatory affidavits from either J de Blok and/or a van Dijk whereby it can be inferred that such ostensible authority was given to them and/or Bowman's. Consequently, it is submitted that for this reason alone the special power of attorney is inadmissible due to its hearsay nature;
- (c) It also an enigma as to in which capacity de Blok and/or van Dijk signed the special power of attorney which also renders it of no legal force and effect. It is submitted that a legal entity can only act through the organ identified in its articles but to that end it is usually the appointed directors or board of directors who have the necessary authority to act and adopt resolutions which binds the company.

Instructing attorney main deponent of answering affidavit

[23] Counsel submitted that a further aggravating factor (and which further raises questions about the ostensible authority so given to Bowman's) is the fact that the main deponent (as well as the only deponent) of the answering affidavit filed in opposition to the application is Mark Robert Van Velden, the alleged instructing attorney acting on behalf of Deutsche Bank A.G. as part of the professional staff at Bowman's.

[24] The significance of this relates to two aspects namely –

- (a) The fact that it is unbecoming of an instructing attorney to become the main witness in his client's case;
- (i) The fact that such deponent in no conceivable manner could make the allegation that he or she has personal knowledge concerning the merits of his client's case without committing perjury in the process;
- (iii) Nowhere in the alleged special power of attorney is any mention made about the knowledge which Van Velden may possess to depose to the affidavit in question.

[25] The fact that an attorney should not become a witness in his client's case has been stated repeatedly in various case law to that effect, and it must be accepted that Bowman's are much aware of and familiar with this rule. The same also applies to Koep & Partners, the alleged local representatives of Deutsche Bank A.G.¹.

[26] Counsel relied on *First National Bank of Namibia Ltd v Musheti* where the learned judge Angula DJP stated the following concerning this issue –

'The supporting affidavit in respect of the application for stay proceedings has been deposed to by Mr. Musheti's legal practitioner. It is a practice which is frowned upon by this court. No explanation has been given why Mr. Musheti could not depose to the affidavit

¹ *Hendricks v Davidoff* 1955 (2) SA 369 (C).

himself. Mr. Musheti however filed a confirmatory affidavit. It has been stressed numerous times by this court that a legal practitioner cannot be a witness for his or her client and a legal practitioner in the matter at the same time. The two roles are mutually exclusive.^{1 2}

[27] Counsel argued that in *casu* no explanation at all is given by Van Velden why the client and/or someone with personal knowledge such as J de Blok and/or A van Dijk could not depose to the affidavits in question. Further there are no confirmatory affidavits from either or both of them which accompany the answering affidavit to at the very least confirm the contents thereof.

Submissions by the first respondent on the *points in limine*

[28] Counsel argued that the attorneys of the first respondent have been duly authorized to oppose the application. That is evident from the answering affidavit of Van Velden where he stated that he 'was duly authorized to bring this application and depose to this affidavit on its behalf' (first respondent). There is also a confirmatory affidavit of Mr. STAM, the Vice President of the first respondent, in its Amsterdam branch office in which he, inter alia, confirms the contents of all affidavits filed of record by both Mr. Van Velden and Ms. Nicola-Ann Nel. A special power of attorney dated 11 June 2020 was filed of record, signed by Ms. Jacqueline de Blok and Mr. Aitze van Dijk respectively, both proxy holders of the first respondent in which they, inter alia authorize Mr. Van Velden to act on its behalf and further "ratified" anything and everything done by them in accordance with the terms of this power of attorney

[29] Counsel further argued that although the affidavit was deposed to by the attorney, there is a confirmatory affidavit from the Vice President of the first respondent confirming the contents of all the affidavits.

Points in limine considered

[30] In the answering affidavit, Mr. Van Velden clearly stated that he was authorized by the first respondent to bring the application on behalf of the first respondent. There is also the confirmatory affidavit from Mr. Stam, the Vice President of the first respondent confirming the contents of the affidavit of Van

² 2018 (1) NR 144 (HC) at 148G.

Velden. A special power of attorney by Mrs van Blok and van Dijk, proxy holders of first respondent authorizing Mr Van Velden to act on behalf of first respondent was also filed. The special power of attorney also provides for ratification.

[31] The affidavit in support of the application was deposed to by the attorneys acting on behalf of the First respondent. On that score, this court expressed its disapproval of the fact that an attorney should become a witness in his or her client's case.

[32] In *First National Bank* supra the court said: 'The supporting affidavit in respect of the application for stay proceedings 'In the matter supporting affidavit in respect of the application for stay proceedings has been deposed to by Mr. Musheti's legal practitioner. It is a practice which is frowned upon by this court. No explanation has been given why Mr. Musheti could not depose to the affidavit himself. Mr. Musheti however filed a confirmatory affidavit. It has been stressed numerous times by this court that a legal practitioner cannot be a witness for his or her client and a legal practitioner at the same time. The two roles are mutually exclusive.' Although such a practice is frowned upon by the court, the facts of this matter allow for an exception. The subject matter of the application happened in this court, the directors of the first respondent client who are based in Amsterdam, will not have personal knowledge of the facts before the Referee and the court. In addition, there is a confirmatory affidavit from the Vice President of the First Respondent. For all those reasons, there is no merits in the *points in limine* raised.

Applicant's submissions on the merits

[33] Counsel argued that the Referee accepted that as a matter of fact that part of the preservation and supervision expenses incurred by the applicant forming part of the claims submitted by the applicant included a VAT component. It follows that the Referee had no issue with the fact that such expense was indeed incurred. Counsel further argued that premised on the remarks made by the Referee, it is evident that he applied the position as is in South Africa and that it is common cause that the admiralty and tax regimes of Namibia and South Africa differ from each other and that different legislation apply in both countries.

[34] Counsel submitted that according to the applicant the goods and services so supplied in respect of the invoices of NSC and NMS are considered to be goods falling under the definition of “entertainment” and NSC and NMS are by law bound to charge VAT on those goods and services. In terms of the VAT Act all supplies rendered by NSC and NMS are regarded as consumed locally and is thus not susceptible to be zero-rated. NSC and NMS and other VAT registered suppliers are thus compelled by law to charge the standard 15% VAT rate on all goods so sold and supplied.

[35] Counsel further argued that section 18 of the VAT Act allows as a deduction from the output tax payable by a registered person, the total amount of input tax payable in respect of taxable supplies made to the registered person during the tax/VAT period in question; however, and where the goods so supplied are considered by the Receiver to constitute goods and services which resort under the definition of “Entertainment”, then despite the input charge of VAT thereon to the customer, it is considered to be “denied input claim” by the registered person who supplied the goods and rendered the services concerned, meaning that such registered person may not claim the input VAT charged thereon. The VAT Act defines: “Entertainment” to mean *the provision of food, beverages, tobacco, accommodation, amusement, recreation or hospitality of any kind by a registered person, whether directly or indirectly, to any person in connection with any taxable activity carried on by the registered person.*

[36] Counsel further argued that the applicant is not considered to have incurred costs in his personal capacity but is receiving VAT invoices for and on behalf of the arresting creditors and in that context it follows that the applicant does not possess an input claim. Counsel further submitted that insofar as the arresting creditor in this case being a non-resident non-registered entity for VAT purposes in Namibia, it follows that it also is not entitled to submit an input tax claim and consequently, it follows that the input tax thus becomes a direct cost attributable to the preservation of the vessel.

[37] On the argument that the goods so supplied to the vessel should be construed to be zero-rated, counsel argued that this is a legal argument which completely ignores the factual position of the claims so submitted by the applicant for the simple reason that even if these were construed to be zero rated goods then the invoices of NMS and NSC would not have contained any VAT charge, which is not the case herein. Counsel further submitted that a clear distinction is to be drawn between a situation where goods are considered to be for export purposes and thus qualify to be zero-rated *vis-à-vis* the factual position the applicant finds himself in namely where VAT is charged as part of the preservation costs so incurred.

[38] Counsel argued that it is evident that the Referee never contemplated a situation where the issue revolved around zero-rated goods and by implication accepted that the goods so supplied to the vessel indeed carried a VAT charge. Consequently, counsel submitted that the argument concerning zero-rated goods does not apply in this case and even if it does, then the Court would also be bound for purposes hereof to accept the ruling from the Receiver as set out in the position paper namely that a vessel under arrest is not regarded as a foreign-going vessel as defined in the Act.

[39] Concerning the Referee's finding and recommendation that the NSC claim is a "fraudulent" claim and as such should be rejected or refer to oral evidence by this court ,counsel argued the following:

- (a) It is evident from the affidavit filed of record by the applicant herein read together with the confirmatory affidavit filed of record by Alexander Kirov that a proper explanation is given for the discrepancies in the invoices rendered by NSC;
- (b) Further Van Velden in his answering affidavit only echo the recommendations made by the Referee without making mention of any factual basis as to why the explanation given by NSC should be contested and regarded to be in dispute, especially in connection with the deputy sheriff's position and the fact that the apparent discrepancies

had been sorted out and the necessary credits given, thereby reducing the claim to the amount which corresponds with the supply in question. To that end Van Velden only relies on conjecture and speculation for his contention that this claim (as well as the explanations given by Kirov) should be considered a dispute of fact.

[40] Counsel further argued that it is evident that the Referee states the following in his report concerning this issue namely –

(i) That the deputy sheriff's claim be admitted to the tune of N\$153 619-95 less N\$19 254-38 in the event that he can by affidavit address the court's concerns in this regard,

Or

(ii) The claim be referred to oral evidence.³

[41] Counsel submitted that the deputy sheriff has not only given a proper explanation as per his affidavit but further reduced the claim to the amount of N\$101 164-30 plus VAT in the sum of N\$15 174-65. It has been held that a respondent's request to have an issue referred to oral evidence should only be in exceptional circumstances confined to cases where the respondent adduce evidence which may impugn the veracity of the allegations so made by the applicant. In this case the question the court should ask itself is whether the evidence on record is such that the court cannot with any accuracy conclude that the probabilities are in the applicant's favor⁴.

First respondent's submissions on the merits

Payment of VAT

[42] On the payment to be made out of the Fund of VAT in relation 'to the disputed VAT claims' of NMS and NSC in the amounts of N\$195 308-50 and N\$15 174-65 respectively, to the applicant, counsel argued that each of these VAT claims was

³ Index: Answering Affidavit annexure MVV1 page 127.

⁴ *Decro Paint & Hardware (Pty) Ltd v Plascon-Evans Paints (Tvl) Ltd* 1982 (4) SA 213 (O) at 223C-F.

disallowed by the Referee in his Report. In each case, the Referee concluded as follows:

‘Therefore, in relation to the... invoices, I do not agree that the supplier issued the invoice directly to the customer and not to the Sheriff. The principle set out in the Price Waterhouse case applies and the sheriff should not be allowed to recover the VAT on the... invoices from the Fund. The total of these invoices is..., which includes (according to my calculations) ... for VAT’.

[43] The reference to the *PriceWaterhouse* case is a reference to the South African Supreme Court of Appeal decision in *PriceWaterhouse Meyernel v Thoroughbred Breeders Association of South Africa*⁵ where, the Supreme Court of Appeal at 21 stated, inter alia, as follows:

‘Consequently, if plaintiff is entitled to claim from the Revenue, as an input tax, the VAT which it is required to pay to its attorney, it does not, in respect of such input tax, incur an out of pocket expense.’

Expert opinions

[44] Counsel argued that both parties have filed of record the opinions of so-called experts. In respect of the applicant the so-called Position Paper by the Department of Inland Revenue and the opinion on the “Indirect Tax Implications on the Supply of Goods and Services to a Vessel under Arrest” By *PriceWaterhouse* at record page 19 and 22 respectively.

[45] Counsel submitted that these experts have purported to construe the VAT Act, the effect of the *PriceWaterhouse* authority, supra and indeed to apply their conclusions to the facts of this matter. The expert opinion (evidence) is inadmissible as they seek to express an opinion on Namibian law and that is to be determined by this Court.

Merits of VAT claim

⁵ *PriceWaterhouse Meyernel v Thoroughbred Breeders Association of South Africa* 2003 (3) SA 54 (SCA).

[46] Counsel submitted that as a question of law no VAT is payable in respect of the invoices submitted by NMS and NSC respectively. This is because the services rendered by NMS and NSC respectively were services “exported from Namibia” as defined in section 1 of the VAT Act and which were “delivered by the registered person to the owner or charterer of any foreign-going ship contemplated in paragraph (b) of the definition of ‘foreign-going ship’ for use in such ship.” The definition of “foreign-going ship” in terms of section 1 of the Act includes in paragraph (b) of that definition “any ship or other vessel registered in an export country where such ship or vessel is utilized for the purposes of a commercial fishing or other concern conducted outside Namibia by a non-resident person who is not a registered person. At the time of its arrest the vessel was indeed a ship registered in an export country and used for commercial purposes by a non-resident person who was not a registered person.

[47] Moreover, the services were “delivered by the registered person to the owner or charterer” of a foreign-going ship; the fact of the arrest or, indeed, that the services may have been rendered to a foreign-going ship while in Walvis Bay is thus irrelevant.

[48] Counsel submitted that the fact remains that at all material times the vessel was a foreign-going ship and the services in question were delivered to its owner while in Walvis Bay.

[49] The status of the vessel as a foreign-going ship remained unaffected by its arrest – indeed its sale-given that the purchaser thereof was also a non-resident person who was not a registered person as contemplated in paragraph (b) of the definition of “foreign-going ship.”

[50] Counsel submitted that upon a proper construction of the VAT Act, no VAT was, in any event, payable in respect of the invoices rendered by NMS, and NSC respectively, essentially because the vessel was a ‘foreign’ ship as defined in the VAT Act.

[51] Indeed, in paragraph 20 of his(applicant) affidavit at record p 114 he states expressly, in respect, inter alia, of the claims of NMS and NSC that:

‘The expenses incurred by the Admiralty Marshall as Sheriff must clearly be regarded as preservation costs and it is submitted that all those claims submitted by individual suppliers in paragraph 20 as well as the further amounts claimed hereunder should therefore rank as claims by the Admiralty Marshall incurred to maintain and preserve the said vessel during the period under safe arrest to be ranks as preferent claims...’

[52] It is thus, simply incorrect to contend that the claims in question were submitted by the Sheriff as agent of NMS and NSC respectively or, even, on behalf of the vessel.

[53] To this extent the contrary allegation contained in the so-called expert reports sought to be relied upon by the applicant are simply wrong.

Input Tax Credits

[54] Counsel further argued that the contention of the applicant that he cannot claim any input tax credits in respect of the invoices submitted by NMS and NSC respectively, is premised upon the factually erroneous submission that these claims were submitted by him to the Fund as the agent of NMS and NSC respectively or on behalf of the owner of the vessel. That submission is wrong.

[55] Counsel argued that it is well established in English law- which applies in this matter because of the provisions of the 1890 Colonial Courts Admiralty Act – that the Admiralty Marshall’s charge and expenses are a first charge in the proceeds of sale and will be paid out in priority to any other claims.

[56] These expenses will include the expenses he incurred in effecting the arrest, in maintaining the arrest, for example, port dues, the cost of a ship keeper and any supplies required to maintain the ship whilst under arrest and any expenses authorized by the court to enable the ship to be sold for the best possible price, such as classification society fees.

[57] Counsel submitted that the applicant is wrong in submitting that the principle set out in *PriceWaterhouse* supra 'does not apply to Value Added Tax charged in terms of the VAT Act No. 10 of 2000 on the supply of goods for a vessel under arrest in Namibian waters...'

[58] The advice sought to be relied upon by the applicant seems to be predicated upon the contention that *PriceWaterhouse*, supra only 'refers to the recovery of legal fees by the winning party incurred in the receipt of litigation to a successful conclusion.'

[59] Counsel submitted that it is also apparently postulated upon the incorrect factual assertion that the sheriff was acting qua agent and not in terms of an order of court; thus, so it is contended, no input tax deduction is claimable by him.

[60] The approach adopted by the applicant in regard to *PriceWaterhouse*, supra, is also incorrect as a matter of construction of that judgment.

[61] Although the issue under debate in *PriceWaterhouse*, supra related, *inter alia* to disbursements in respect of counsel's fees, the distinction sought to be drawn by the applicant is inappropriate.

[62] This is demonstrated by a reference to [18] of the *PriceWaterhouse*, supra judgment which, *inter alia*, reads as follows:

'It follows that what the winner has to show and the taxing Master has to be satisfied about is that the items in the bill are costs in the true sense, that is to say expenses which actually leave the winner out of pocket. The sub-rule is consequently an empowering provision. It enables the party concerned to claim reimbursement of the items referred to but obliges the Taxing Master to allow or disallow them depending on whether they are expenses of the nature I have described.'

[63] The Supreme Court of Appeal(In *Pricewaterhouse* supra) continued in paragraph [20] that 'in terms of the definition section of the Act, the VAT payable under section 7(1)(a) on these fees is, insofar as it is charged and received by the

practitioners concerned, their output tax. They are obliged under section 7(2) to collect it and pay it to the Receiver of Revenue.'

[64] In paragraph [21] the Supreme Court of appeal then concluded as follows:

'The same VAT, insofar as it is paid by plaintiff to its legal advisers, is, by definition in the Act, plaintiff's input tax... In short, any payment of input tax will inevitably be matched by a credit or refund. Consequently, if plaintiff is entitled to claim from the Revenue, as an input tax, the VAT which it is required to pay to its attorney, it does not, in respect of such input tax, incur an out of pocket expense.'

[65] By parity of reasoning, it follows that any VAT payable by the applicant in respect of the invoices rendered by NMS and NSC is claimable from the Receiver and, as such, he does not incur an out of pocket expense.

[66] Counsel argued that, as a matter of logic, the contention of the applicant that if the VAT is not paid by the Fund to NMS in an amount of N\$195 308-50 and NSC, in an amount of N\$15 174-65 as registered VAT vendors in Namibia, the local suppliers will be out of pocket' is also wrong.

[67] On the revised principal claim of NSC, counsel argued that the discrepancies found in the invoices have not been properly explained and the attempt to explain what the Referee regarded as "prima facie fraudulent" conduct does not withstand scrutiny, and falls to be rejected on papers. In the alternative, if the court is not inclined to reject the explanations, then the claims of NSC against the Fund in their entirety should be referred to oral evidence.

Discussion

[68] Is the applicant entitled to claim the VAT on the invoices from NMS and NSC for goods or services rendered to him in his capacity as Marshall Deputy sheriff from the Fund or the Receiver? Is VAT payable on the invoices of NMS and NSC? The Referee in his final report, and relying on *Pricewaterhouse, supra*, recommended that the applicant is not entitled to recover the VAT from the Fund, but from the Receiver as an input credit/claim. The applicant is of the view that the Referee erred

in arriving at that conclusion. The First respondent, on the other hand, is of the view that the Referee was indeed correct.

[69] Was the referee correct in relying on the authority of *PriceWaterhouse* case.2003 (3) SA 54 (SCA)? The court in that case held that:

‘Where a party is entitled to recover from the receiver the VAT which it was required to pay to some other party , as an input tax, then it does not, in respect of such input tax, incur an out of pocket expense.’

At para 21 the court said:

‘Consequently, if plaintiff is entitled to claim from the Revenue, as an input tax, the VAT which it is required to pay to its attorney, it does not, in respect of such input tax, incur an out of pocket expense.’

From the onset, as a matter of law, this Court is not bound by the Pricewaterhouse judgment and the recommendation of the Referee.

[70] Counsel for applicant argued that the incurring of the VAT expense is a fact as can be gleaned from the invoices so submitted by the applicant to the Referee emanating from NSC and NMS. According to the applicant, the goods and services so supplied in respect of the invoices from NSC and NMS are considered to be goods falling under the definition of “entertainment” and NSC and NMS are by law bound to charge VAT on these goods and services. All supplies rendered by NSC and NMS are regarded to be consumed locally and is thus not susceptible to be zero-rated.

[71] Before considering whether the Referee was correct or not in concluding that the applicant was not entitled to recover the VAT charged on the invoices of NMS and NSC from the Fund, the court has to consider whether in terms of the Value-Added Tax Act, 10 of 2000 (“the Act”), VAT was payable on those invoices in the first place.

VAT Act considered

[72] Was VAT payable in respect of the invoices submitted by NMS and NSC respectively? To answer that question, the court must look at Schedule III (section 9) of the Act that deals with Zero-rated supplies.

Paragraph 2 provides: Subject to paragraph 3⁶ the following supplies of goods or services are specified as zero-rated for the purposes of section 9:

- (j) a supply of services directly in respect of-
 - (i)...
 - (ii)...
 - (iii) a supply of goods referred to in paragraph (b) or (c) of the definition of “exported from Namibia” in section 1 of this Act

“Exported from Namibia” is defined by section 1 of the Act as:

‘In relation to any movable goods supplied by any registered person under a sale or credit agreement, means-

- (a)...
- (b)...
- (c) delivered by the registered person to the owner or charterer of any foreign-going ship contemplated in paragraph (b) of the definition of “foreign-going ship” for use in such ship.’

“Foreign-going ship” is defined by s 1 of the Act as (b) ‘any ship or other vessel registered in an export country where such ship or vessel is utilized for the purposes of commercial fishing or other concern conducted outside Namibia by a non-resident person who is not a registered person.’

The law to the facts

[73] The vessel was arrested in Walvis Bay by the creditors and then sold by private treaty to a nonresident. The proceeds from the sale established the Fund. The vessel is a “foreign-going ship” as defined because it was registered in Turkey (an export country) where it was utilized for commercial fishing or other concern outside Namibia by a non-resident person who is not registered person (for VAT purposes) in Namibia.

⁶ Paragraph 2 shall not apply in respect of any supply of goods which have been or will be reimported to Namibia by the supplies.

[74] The goods or services supplied by NMS and NSC were services “exported from Namibia” by registered persons, under a sale agreement to the owner of the foreign going ship for use on the ship and therefore those goods or services are zero-rated. The fact that the vessel was under arrest in Walvis Bay when the goods were delivered by NMS and NSC does not change the status of the vessel as foreign –going ship as defined in the Act. Counsel for the applicant submitted that the fact that the vessel was under arrest, ceased to be a foreign –going ship. That is also the view of the Receiver. That is wrong. It is not supported by any authority or the Act. Counsel for the First respondent correctly argued that the fact that the ship was arrested or came to port of Walvis Bay for repair or maintenance does not change her status, the ship remains a foreign –going ship as per the definition of the Act. The goods or services delivered to the vessel are zero-rated, NMS and NSC should not have charged VAT on their invoices. They are zero rated. They are not entitled to those VAT claims.

[75] Counsel for the applicant argued that section 18 of the VAT Act allows as a deduction from the output tax payable by a registered person, the total amount of input tax payable in respect of taxable supplies made to the registered person during the tax/VAT period in question; However , and where the goods so supplied are considered by the Receiver to constitute goods and services which resort under the definition of “Entertainment”, then despite the input charge of VAT thereon to the customer, it is considered to be “denied input claim” by the registered person who supplied the goods and rendered the services concerned , meaning that such registered person may not claim the input VAT charged thereon; In terms of the Act ‘Entertainment’ means the provision of food, beverages, tobacco, accommodation, amusement, recreation or hospitality of any kind by a registered person, whether directly or indirectly, to any person in connection with any taxable activity carried on by the registered person.’

[76] I agree with that submission, because the supplies were for “entertainment” (as defined in the Act) as stated by applicant in his affidavit in support of claim for supervision and preservation expenses submitted to the Referee: NSC – ‘The

provisions were necessary to provide the crew with food...' Section 18(1) provides: 'The tax payable by a registered person for a tax period shall be the total amount of output tax payable by the registered person in respect of taxable supplies made by the registered person during the tax period less-

S19. (1) In this section-

"Entertainment" means the provision of food, beverages, tobacco, accommodation, amusements, recreation or hospitality of any kind by a registered person, whether directly or indirectly, to any person in connection with a taxable activity carried on by a registered person;

(2) No amount may be deducted under section 18 (1) by a registered person for input tax paid in respect of-

(b) a taxable supply to, or import by, the registered person of goods or services acquired for purposes of entertainment'. (My emphasis)

NMS and NSC supplied food to the applicant and that is defined as entertainment and therefore that would be considered as denied input. The Referee was therefore wrong to rely on the principle as set out in *PriceWaterhouse*. The applicant cannot recover the VAT from the Receiver because of s18 of the Act.

[77] Counsel for the applicant further argued that all previous Referees appointed by the High Court of Namibia approved and allowed payments of VAT on tax invoices submitted by local suppliers for goods supplied for preservation of vessels under admiralty arrest pending a sale and distribution of the Fund. It appears that those payments were not done in accordance with the law, were not challenged and wrong. In light of the conclusion that I reached that the supplies by NMS and NSC were zero-rated, I do not deem it necessary to consider the expert opinions that were submitted by the parties. In any event, those expert opinions are inadmissible as they attempt to construe what the law is, a function reserved for the court.

[78] As far as the principal claim (tax invoices) of NSC is concerned, the Referee found discrepancies in the tax invoices submitted and afforded the applicant and NSC to explain the discrepancies. On that score, the Referee found, *inter alia*, 'The invoices thus reflect the supply of 229 cartons of cigarettes, but the supporting

documents provided by the sheriff indicate that only 40 cartons were actually delivered to the Vessel.' Those invoices were withdrawn by the applicant and NSC and they submitted an explanation as to how those discrepancies were arrived. The discrepancies is ascribed to typing errors by NSC and administrative incompetence by the staff of NSC. Although, the discrepancies are attributed to NSC, there was a duty on the applicant (the sheriff), as an officer of the court to make sure that all claims are properly scrutinized and are above board. After the invoices were corrected, a revised and reduced claim in the amount of N\$101,164-30 was submitted. The conduct of NSC and the sheriff in submitting invoices with egregious errors, is totally unacceptable and the Referee cannot be faulted to describe the conduct of both as "prima facie fraudulent". Despite that, an explanation was given, although the veracity of that explanation is suspect, the Court will accept the explanation and will not refer the matter to oral evidence. However, as a mark of its displeasure with the conduct of the applicant and NSC, the Court will not grant them costs for the principal claim.

[79] In the result, I make the following order:

Order

1. The applicant's claim of payments of VAT in relation to the invoices of NMS and NSC in the amounts of N\$195,308-50 and N\$15,174-65, respectively, are dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.
2. The applicant's principal claim in relation to the invoices of NSC in an amount of N\$101,164-30 is granted, with the prescribed interest at the rate of 20% per annum.

G N NDAUENDAPO

Judge

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