IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 12331/12

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.
27 MAY 2016 ....
DATE SIGNATURE

In the matter between:

THE STATE

Versus

VAN DER LINDE: IVAN DON **Accused**

Coram : NICHOLLS J

Heard : **18 April – 23 May 2016**

Delivered : **26 & 27 May 2016**

Summary : Fraudulent VAT refunds – Fraud – Forgery – Money laundering – Uttering

ORDER

Accused is found guilty of 255 counts of fraud, 1 count of forgery and 1 count of uttering.

JUDGMENT

NICHOLLS J:

[1] The accused, Mr Ivan Don van der Linde, was arrested on 30 August 2005 and tried in the Regional Court Germiston on 255 charges of fraud. After a protracted trial characterized by ordinate delays, the accused was discharged and acquitted at the end of the state's case in terms of section 174 of the Criminal Procedure Act.

[2] The State appealed this matter to the High Court in terms of section 310 of the Criminal Procedure Act and on 12 December 2013 the appeal was upheld. It was ordered that the trial start *de novo* before a different Magistrate. On 12 December 2014 the matter was transferred to the High Court for trial. On 18 April 2016, the first day of this trial, the defence raised a point *in limine*. Essentially three points were argued: firstly that the order of the Appeal Court was not competent; secondly, that the undue delays rendered the trial unfair; and, thirdly that the State was not entitled to charge the accused with additional charges of money laundering.

[3] The point *in limine* was dismissed on 18 April 2016 and the trial proceeded forthwith.

[4] The accused is charged now with the following counts:
Counts 1 to 255 fraud, read with the provisions of section 51(2)*(a)* of Act 105 of

1997.

Count 256 forgery, read with the provisions of section 51(2)*(a)* of Act 105 of 1997.

Count 257 uttering, read with the provisions of section 51(2)*(a)* of Act 105 of 1997.

Counts 258 to 262 and count 273 were withdrawn.

Counts 263 to 326 (with the exception of count 273) money laundering, in terms of Section 4(1), 4*(b)*(i) read with the provisions of sections 1 and 8 of the Prevention of Organized Crime Act 121 of 1998 ('POCA').

Counts 327 to 381 acquisition of the proceeds of unlawful activities in terms of section 6*(a)* read with the provisions of sections 1 and 8 of POCA.

[5] The accused tendered a written plea explanation in which he challenges the constitutionality and the fairness of the trial but states that despite severe prejudice to him he will nonetheless subject himself to this trial. Although in his plea explanation the accused categorically stated that he would not make any admissions, during the testimony of the first witness Mr du Toit, a SARS investigator, the accused did indeed make certain admissions in terms of section 220 of Act 51 of 1997, which form part of the record.

[6] The State's case is that the accused in this matter, Mr van der Linde, acted as the accounting officer or representative of an accounting firm Ivan van der Linde and Associates, and acting with common purpose with Mr John Mmemo Nkosi ('Nkosi') who is now deceased, Mr Antonio Carlos Olim ('Olim') and Ms Fabienne Anne Francillon ('Francillon'), operated a fraudulent VAT scheme. The accused was the mastermind behind the scheme to defraud SARS by claiming fraudulent tax refunds in respect of four entities during the period June 1997 to March 2005. The accused's accounting firm was itself not registered for VAT and was used as a vessel to perpetrate the fraudulent VAT scheme against SARS.

[7] The first of the four entities is Andeltru CC trading as Trans Lebombo Exports ('Andeltru'), of which Mr Nkosi was the sole member. According to Schedule A of the indictment, 86 VAT refunds were claimed in respect of Andeltru.

The second entity is Siani Trade (Pty) Limited trading as Johnny Paulos Liquor Merchants (‘Siani Trade’), of which a Mr ADM De Gouveia (’De Gouveia’) was the sole director. According to Schedule B of the indictment, 17 VAT refunds were claimed in respect of Siani Trade.
The third entity is Limoges Impex Trading CC (‘Limoges’), of which Ms Francillon was the sole member. This close corporation was previously known as Ivan Prop 10 CC and changed its name to Limoges shortly before registering for VAT. According to Schedule C of the indictment, 56 VAT returns were claimed in respect of Limoges. The fourth entity is Allied Charcoal CC trading as Cambia Commodity (‘Allied Charcoal’), of which Laura Olim, Mr Olim’s elderly mother was the sole member. According to Schedule D of the indictment, 94 VAT returns were claimed on behalf of Allied Charcoal.

[8] It is further alleged that SARS conducted several audits on the respective entities from which it became apparent that the supplier’s invoices substantiating the VAT refund claims were false. This is the basis for the forgery and uttering charges levelled against the accused.

[9] The accused, it is then alleged, laundered the proceeds of the fraudulent VAT refunds relating to Andeltru, Siani Trade and Allied Charcoal. The accused entered into agreement, relating to the acquisition of proceeds, with Mr Olim and Ms Francillon whereby the accused was to share in the proceeds of all the fraudulent refund payments paid out to the four entities.

[10] The primary witness for the State was Mr Morné du Toit (‘du Toit’), a criminal investigator employed by SARS and stationed at the SARS office in Alberton. He commenced his testimony with an explanation of the VAT system, which he described as an indirect self-assessment system. The registration of a company as a VAT vendor occurs when its turnover exceeds a certain amount. At the time when the four entities were registered this threshold was R150 000 per annum. The registration document for VAT which is submitted to SARS is the VAT101.

The VAT registration documents for the four entities are Exhibits A1 to A4.

[11] Mr du Toit explained that most entities submit VAT returns every second month but if an entity has a turnover, which at the time was over R1 million, it submits VAT returns on a monthly basis. At the request of the accused's accounting firm, the VAT period for all four of the entities was changed to once a month instead of the bi-monthly returns.

[12] Once an entity has been registered it will be allocated a VAT number and will have to submit VAT returns completed according to the VAT201 form. If sales are made within the Republic of South Africa these attract VAT of 14%, but if goods are exported they will attract no VAT, the purpose being to incentivise exports to neighbouring countries. Where the input amount for VAT is higher than the output amount a VAT refund can be claimed. On the other hand when the VAT output amount is higher, a payment is then due to SARS. No supporting documents are attached to the VAT201 form and it is based upon the honesty of the VAT vendor. However, the VAT vendor is required by Section 11 to keep a record of all the supporting documents when a VAT refund is claimed.

[13] The veracity of the VAT refund can be checked by an audit done by SARS. According to Mr du Toit, SARS does five types of audits. The first is a telephone audit; the second is a routine audit of verification; the third is a routine visit where the vendors' premises are visited. The fourth is a refund audit where the SARS auditor looks at all sales documents, purchase documents and bank statements. If a transaction is zero-rated a request is made for export documents CCA1 as proof of payment. The fifth audit is an in-depth audit done on site.

[14] A refund paid into a vendor's bank account in terms of a VAT201 form reflects as "BIN-INK" together with the VAT number of the entity concerned. An irregularity in VAT returns is detected by the computer when it runs through the returns. When a risk is detected an auditor will then be allocated to that particular

entity. During the capturing of a VAT201 return a hard copy and a soft copy are generated. According to section 55 of the VAT Act 89 of 1991 all documents must be retained by SARS as well as the vendor for five years, although SARS still keeps a soft copy after five years.

[15] Mr du Toit said the investigation of all four entities was triggered when he investigated another company. He found the VAT201 returns for all the four entities stapled together. He checked the original VAT101 files and found that previous audits had been conducted at the business premises of the accused. He then requested Mr Andrew van der Merwe ('van der Merwe'), a VAT auditor employed by SARS, to have a look at these returns. He and Mr van der Merwe verified the invoices by contacting and visiting the suppliers, who told them the tax invoices had been falsified. The accused was contacted as the accounting or public officer of the four entities and was requested to submit all supporting documents for that tax period.

[16] Other possible suspects were investigated and it was found that Mr Nkosi, the sole member of Andeltru, had passed away on 3 June 2002. Mr de Gouveia of Siani Trade had disappeared and a very old lady, Ms Laura Olim was the director of Allied Charcoal. Ms Francillon of Limoges became a section 204 witness after the accused was arrested. Mr Olim entered into a plea bargain with the State and also became a section 204 witness.

[17] Mr du Toit spent a significant amount of time explaining the exhibits. He testified that the four entities claimed the VAT refunds as per Schedules A to D. SARS then paid out the refunds as per column 5 of the aforementioned schedules. His evidence was that he certified all the exhibits in the three court files which contain the original documents for the four entities. Where the original documents were not available, he made use of section 15(4) of The Electronic Communications and Transactions Act 25 of 2002 duplicate originals that were printed from the SARS computer system.

[18] Although the admissibility of the section 15(4) documents was initially challenged on the basis that they amounted to inadmissible hearsay evidence, after the evidence of two witnesses from SARS on the procedure that is followed when capturing these documents, the defence admitted the section 15(4) documents. Mr Roets, on behalf of the accused confirmed during argument that the reliability of these documents was no longer in question. This being the case, it is unnecessary for me to deal with the argument on the admissibility of these documents.

[19] Schedules A to H were handed in during Mr du Toit's testimony. Schedules A to D each reflect the name of one of the four entities and eight columns appear on each Schedule. Mr du Toit testified that Column 1 is the count that the accused is charged with. Column 2 indicates the relevant tax period. Column 3 reflects the VAT amount claimed in the VAT201. Column 4 reflects the exhibit number filed as proof of the VAT returns. Column 5 reflects the amount of VAT paid out to the entity. Column 6 reflects the date on which the VAT refund amount was paid. Column 7 reflects the specific bank statement/document into which the VAT refund amount was deposited. Column 8 reflects whether the exhibit is an original or a Section 15(4) duplicate original. Exhibits A1 to A4 contain the VAT101 registration documents as well as the CK documents relating to the registration of the close corporation or company and setting out the members or shareholders in the relevant entity.

[20] During the course of Mr du Toit's evidence the accused made the following Section 220 admissions:

1. The information captured on the computer system of SARS as reflected in column 8 of Schedules A to D of the indictment is correct.
2. Column 5, payments as reflected in Schedules A to D of the indictment were made into the respective bank accounts of the four entities namely Andeltru CC trading as Trans Lebombo Transport, Siani Trade (Pty) Ltd, Limoges

Impex Trading CC and Allied Charcoal CC.

3. Column 6 as reflected in Schedules A to D of the indictment is the dates that these payments were made.
4. The registered names of the four entities are reflected in Exhibits A1(9), A2(3) and (7). That the entities were registered for VAT as per Exhibit A3.
5. The accused was the sole member of SPI Brokers CC (‘SPI Brokers’) since September 2000 (Exhibit E). He was also the account holder of SPI Brokers’ bank account and Andeltru issued cheques to SPI Brokers in terms of Exhibits J87 to J94.
6. That the following entities: Andeltru CC (Exhibit C1), Siani Trade (Pty) Ltd (Exhibit C2), and Limoges Impex Trading CC (Exhibit C3) held the bank accounts as reflected in the aforementioned exhibits.
7. That his accounting firm Ivan van Der Linde and Associates, was the accounting firm that rendered accounting services to all four entities. In this regard see Exhibits A1(4), A2(3) and A4(4).
8. The letterhead of his accounting firm was used to confirm to SARS the bank accounts of Andeltru CC (Exhibits A1(9)), Siani Trade (Pty) Ltd (Exhibit A2(7)), and Limoges Impex Trading CC (Exhibit A3(15)).

[21] Mr du Toit’s evidence on the documents is set out hereunder. Schedule A deals with counts 1 to 86 relating to the entity Andeltru. Exhibits B1 to B86 reflect the VAT201 refunds which amount to 86 in total. The accused admitted that Mr Nkosi was a member of the entity Andeltru (Exhibits A1(3) as well as A1(a)) and that Mr Nkosi passed away on 3 June 2002 (Exhibit D). He further admits that a chequebook (Exhibit P) was seized at his residence, 4 Kurt Street, Glenvista after his arrest and that this chequebook contained blank signed cheques, signed by the late Mr Nkosi. The accused admits that three loose cheques (Exhibits P9 and P10) were found in this chequebook, Exhibit P. Exhibit J reflects payments made in cash and payments made to SPI Brokers from this chequebook.

[22] Schedule B deals with counts 87 to 103, relating to the entity Siani Trade

for which 17 VAT returns were claimed. The accused admitted that the registered shareholder is GabyDom Family Trust (Exhibit A2(5)) and further that this company traded under the name of Johnny Paulos Merchants (Exhibit A2(3)(7)).

[23] Schedule C deals with counts 104 to 160, relating to the entity Limoges for which 56 VAT returns were claimed. The accused admitted that Ms Francillon was the registered member (Exhibit A3(3)).

[24] Schedule D relates to the entity Allied Charcoal, for which 94 VAT returns were claimed. The accused was a founding member of this entity, (see Exhibit A2(7)) and he admitted that this entity was sold to Mr Olim (Exhibit A4(14) – (20)). The conclusion Mr du Toit reached after comparing the computer printout with the original VAT returns was that the printouts were an accurate reflection of the original VAT returns. The bank documents in Exhibits C1 to C4 reflect the bank statements and the bank account numbers as well as the amounts refunded. The original documents were verified against the duplicate originals and from that Mr du Toit concluded that the duplicate originals were accurate.

[25] Schedule F read with Exhibits C1 to C4 reflect the deposits excluding the VAT refunds of the four entities. The fraudulent refunds were deposited into these bank accounts. Only copies exist for the following VAT201 returns: B49, B77 and B89 to B94. All the other VAT201 returns are original and were signed by the accused for all four entities.

[26] The accused’s signature on the VAT documents was compared with his signature in Exhibit H1(12), which is his affidavit when he applied for bail and a letter written by the accused to Mr Edward Kieswetter of SARS. This letter (Exhibit L) is admitted by the accused. The accused’s signature appears at the end of this letter, Exhibit L1(3).

[27] In summary Mr du Toit testified that the accused committed fraud by

submitting fraudulent claims to SARS. SARS then deposited the amounts claimed in column 5 of Schedules A to D into the bank accounts as reflected in column 7 of Schedules A to D. The accused acted in his capacity as a representative of Siani Trade and Allied Charcoal. Mr du Toit said the accused had access to the fraudulent VAT refund amounts deposited into the bank accounts of the four entities.

[28] In respect of Andeltru, he had access to the account by virtue of being in possession of the blank chequebook signed by the deceased Mr Nkosi, which was seized at the accused's residence. Exhibit J reflects the signed cheques and Exhibits J87 to J94 show that these cheques were paid into an account of SPI Brokers, of which the accused was the account holder. The accused admitted that the signed cheques by Mr Nkosi, number 94 to 97 were paid into his SPI Brokers account. According to Mr du Toit the fraudulent VAT refunds continued after the death of Mr Nkosi in 2002, up to 2005 when the accused was arrested.

[29] The accused had access to the proceeds of the fraudulent VAT refunds in the bank account of Limoges (Exhibit C3) by virtue of an agreement between himself and the sole member Ms Francillon, according to a statement that Mr du Toit had obtained from Ms Francillon. The accused also had access to the proceeds of the fraudulent VAT refunds in the bank account of Allied Charcoal (Exhibit C4), as he was the registered contact person of this bank account. (Exhibit C4(159)). Exhibit M reflects that the accounting firm of the accused, Ivan van der Linde and Associates, was never registered for VAT.

[30] Exhibit O reflects the false input and output amounts, which showed that there was no capital amount on which the VAT refunds could be claimed. Exhibit N is a VAT consolidation of the capital amount and total purchases.

[31] Mr du Toit testified that several audits were conducted by SARS at the

accused's accounting firm's premises in respect of the various entities. During the course of these audits the fraudulent suppliers' invoices (Exhibits F1 to F37) used to substantiate the VAT refund claims came to light. When he and Mr van der Merwe personally visited the suppliers, they were informed that the invoices were false. The accused was unable to supply the original tax invoices on request.

[32] The suppliers involved were Springbok Distributors CC (Exhibits F1 to F3), Paradise Liquor Market (Exhibits F4 to F17), West End Liquor Market (Exhibits F18 to F31) and Supascore Cash and Carry 2 CC (Exhibits F32 to F37).

[33] Exhibit K6 is a statement of the accused's assets and liabilities. It reflects his interests as 50% in Andeltru CC, 33% in Limoges Import and Export CC, 50% in Allied Charcoal CC and 45% in Exeter Trading No 10 CC trading as Keysers Meat ('Keysers Meat'). Exhibit R relates to the fraud counts 161 to 255 during the period 1997 to 2005. This shows cheques signed by Mr Olim in the name of Cambia Commodity Brokers.

[34] Schedule G reflects all the payments made to the accused from VAT refunds by Andeltru. According to Mr du Toit, after the accused was arrested on 30 August 2005, all the VAT returns came to a standstill. When SPI Brokers's bank account was frozen, only R2,4 million was recovered. Although these four entities are currently dormant, an assessment has been raised, including a 200% additional tax penalty payment.

[35] Mr du Toit said there had been in excess of 20 field audits, most of which seemed to have been signed off by Susan du Toit from SARS. Exhibit Q contains a SARS audit report done by Ms du Toit. She noted tax invoices, customs and excise documents, customs and road freight manifest documents and exchange control documents. On the face of it, it seems that Ms du Toit herself committed fraud when she signed these audits as the bank statements clearly show that with the exception of Siani Trade trading as Johnny Paulus Liquor Merchants, there

was clearly no trading by these entities. Apart from a small number of minor deposits there were no deposits into the three entities except the VAT refunds. These were then generally withdrawn within 24 hours.

[36] Mr van der Merwe, who conducted the VAT refund audits on the four entities on behalf of SARS, corroborated Mr du Toit's evidence that the supplier invoices in Exhibit F were all falsified. He testified that he was unable to get hold of any of the entities as the business addresses of all four did not exist as reflected on the VAT101 registration forms. Nor could he get hold of the accused, who was listed as the contact person of Siani Trade. Mr van der Merwe examined the bank statements of all four entities and found that although the VAT refunds were deposited into the bank accounts, no other trade was reflected therein. In effect these bank statements were opened for the sole purpose of receiving the fraudulent VAT refunds.

[37] The proprietors of the business entities in whose names the false invoices had been produced were also called to verify that the invoices, although bearing the names of their businesses, were indeed false. Mr Antonio Mala, the owner for the past 25 years of the West End Liquor Market Krugersdorp confirmed that invoices F18 to F31 were fraudulent. Exhibit G2 reflects the format of what he said was his original invoice at the time. The names Canbia Commodity Brokers and Trans Lebombo Exports were unknown to him, nor did he know the accused or Ms Francillon. He did say that he has known Mr Olim for the past 20 years but last saw him in Madeira some years ago.

[38] Mr Alberto Quintal testified that he was the owner of Springbok Distributors CC which was liquidated in June 2000. He also stated that Exhibits F1 to F3 were false invoices. The accused and Ms Francillon were unknown to him but he had met Mr Olim once or twice at Portuguese festivals.

[39] Mr Jose de Gouveia testified that he had owned Paradise Liquor Market

since 1987 - it is currently called Paradise Liquor City. He said that the invoices F4 to F16 were not those of his company. He said that Mr Olim was an old friend that he last saw over a year ago. It should be noted that Mr Jose de Gouveia is not one and the same person or in any way related to the Mr A de Gouveia who is listed as the sole member and/or director of Siani Trade.

[40] Similarly Mr Carlos Cardosa testified that he used to be the director of Supascore Cash and Carry situated at 12 South Road Midrand. This business closed down in 2012. The invoices Exhibits F32 to F37 were not issued by his company. He said that he does not know the accused but that his brother is a friend of Mr Olim.

[41] It seems that all the traders who testified were Portuguese and knew Mr Olim, as he was part of that community. Apart from confirming the falsity of the invoices issued in their names they stated that the amounts reflected therein were far too large to have emanated from their particular businesses.

[42] Mr Basie Flemming ('Flemming'), an employee of ABSA Bank and the Relationship Manager of the accused at the time, also testified. He confirmed that Exhibit K6, a statement of the accused's assets and liabilities, was given to him by the accused. This was in support of an application for a bank loan. According to the information reflected therein the accused stated that he had the following assets or interests: 100% in SPI Construction, 50% in Allied Charcoal CC, 33% in Limoges Import and Export CC, 50% in Andeltru CC and 45% in Exeter Trading No 10 CC trading as Keysers Meat.

[43] Mr Flemming also testified that Exhibit K30 is a facsimile on the letterhead of the accused's accounting firm dated 25 August 2005 regarding Andeltru, where the accused confirmed the identity document and the notice of registration with SARS of Mr Nkosi. He said that the bank was never informed that Mr Nkosi had passed away on 3 June 2002.

[44] Ms Francillon and Mr Olim testified as to how the VAT scheme operated. As previously stated Ms Francillon became a section 204 witness and provided information that led to the arrest of the accused, whom she described as the mastermind behind the scheme. Mr Olim entered into a section 105(A) plea agreement and was fined R100 000. He too, was warned in terms of section 204 of the Criminal Procedure Act.

[45] Ms Francillon testified that she was born in Limoges in France, which is why the entity in which she had an interest was named Limoges Impex Trading CC. She testified that she started working for Mr Olim as his administrative assistant in late 1995 or early 1996. At the time Mr Olim was involved in exports and imports and had a warehouse at City Deep. Even at that time, according to Ms Francillon, he was involved in underhand and dishonest schemes and she assisted him in what was known as "round tripping". This is a scheme whereby goods would be bought at the export price (without VAT), taken to the border and then brought back into South Africa and sold on the local market with the VAT added. Ms Francillon stated that as time went by she and Mr Olim merely submitted false claims to customs and excise by using forged documentation without purchasing any goods at all.

[46] When she first started her employment with Mr Olim, Ms Francillon was paid a salary. The source of revenue as a result of round tripping dried up when the goods were seized in the warehouse by customs and excise. After this she left Mr Olim's employ for a few months only to be re-employed by Mr Olim a little later. The business then relocated to 1 Kramer Street, Bedfordview where Mr Olim shared offices with Mr De Gouveia, who had an interest in Siani Trade.

[47] According to Ms Francillon they all were involved in underhand schemes to defraud customs and excise. There was no legitimate business. She continued forging different types of documents required for the export and import purposes.

It is apparent from Ms Francillon's evidence that Mr Olim had a very serious drinking problem as well as various other psychological difficulties. Ms Francillon, who is clearly a highly capable and intelligent woman, took over his affairs. Mr Olim himself confirmed that Ms Francillon had taken him to the psychiatric ward on several occasions and that in 2000 he suffered a mental breakdown. He equated her role in his life as being like "eyes for a blind man". At the time he was going on drinking binges lasting for five days or more and he became increasingly dependent on Ms Francillon.

[48] In about 1998 Ms Francillon met the accused at Presley's Night Club which was situated at City Deep. Later the same year the four entities were registered and soon thereafter registered for VAT. She said that she, Mr Olim and the accused had discussed the fraudulent VAT scheme at a meeting in his office. Mr Olim said that the scheme was hatched over a few whiskeys at Presley's.

[49] According to Ms Francillon the scam operated in the following manner. Apart from Siani Trade with which she had no dealings, the other three entities were set up with the sole purpose of claiming fraudulent VAT refunds. These refunds would be deposited into the bank accounts of the entities and then would be divided as agreed between her, Mr Olim and the accused. In respect of Limoges she, Mr Olim and the accused each took a third of the proceeds. In respect of Andeltru and Allied Charcoal the accused and Mr Olim shared 50% each.

[50] Her role was to supply the false supplier invoices as and when they were required for a VAT audit. When an audit was to take place she would be contacted by the accused to supply documents. She would then go to his office and would produce the false documents for whatever entity they were required. She added that the fraudulent documentation was produced at the accused's office and was also signed by Darryl van der Linde, the accused's brother. Other than this she said that the accused did the rest by himself. She commented that she was

surprised to find that the VAT scheme was much easier than the customs and excise scam as far fewer fraudulent documents were required. During the course of her testimony the State warned Ms Francillon that she had only been offered indemnity relating to the current matter and not relating to any defrauding of customs and excise. She replied that she wanted to answer the questions in order to 'marry' the skills she had obtained from forging customs documents with the falsified supplier invoices that she produced for the VAT scam.

[51] Ms Francillon, although she prepared the false invoices for all entities, had a financial interest only in one, namely Limoges. She confirmed the VAT registration documents A3, the VAT101 registration form that reflects her as the registered owner of Limoges and that this entity applied for VAT registration on 8 June 1998. She confirmed that the address reflected thereon is that of her sister, where she resided. After the registration of Limoges for VAT she opened a bank account with Lisbon Mercantile Bank. She was the only person who had signing powers on this account.

[52] Into this account VAT refund payments from SARS in the sum of R9.1 million were received. These are counts 104 to 160 of Schedule C. The fraudulent refunds relating to this entity were drawn on a monthly basis and split between herself, the accused and Mr Olim as agreed. Ms Francillon testified that she has nothing left of her share of the proceeds which she spent on various luxuries. She also has no assets.

[53] When the original chequebook of Limoges was presented to her in court she admitted that all the stubs in this chequebook were written by her (Exhibits Y1 to Y17). She also confirmed that either cash cheques were drawn or payments were made to the accused into the account of SPI Brokers.

[54] In respect of Andeltru, Ms Francillon said that the sole member was Mr Nkosi. She said that Mr Nkosi was a driver employed by Mr Olim. He was an

uneducated man and it appeared that he was also a sickly man. She said that she compiled the false invoices for Andeltru at the accused's office when an audit was called by SARS. She was told that Andeltru received R10.3 million in VAT refunds but stated that she herself did not receive any of this as the proceeds were split between the accused and Mr Olim.

[55] Ms Francillon was aware that Mr Nkosi passed away in 2002 and that a chequebook with blank cheques signed by Mr Nkosi had been found at the accused's residence many years later when he was arrested. She admitted that Exhibit P26, a chequebook stub for cheque number 32 dated 16 April 1999 was completed in her handwriting for the amount of R127 000. She explained that the "Ivy" that appeared in the cheque stub was a reference to Ivan, the accused.

[56] Ms Francillon testified that she produced all the invoices in Exhibit F, other than F1 to F3, the invoices of Springbok Distributors. The last VAT refund claim paid by SARS in respect of Limoges was received in January 2002. Ms Francillon said that she would be called by the accused's office, or on occasion by the accused personally, when the VAT refunds had been deposited into any of the accounts. She would then go to the bank and cash the cheques. If Mr Olim was away she would either leave the cash at the accused's office or with an old friend of his in Kensington.

[57] Ms Francillon admitted that after she was informed of the accused's arrest in 2005 she fled to Brazil. She was joined by Mr Olim in Brazil, who was in Madeira with his mother at the time. Mr Olim advised her that she was a soft target and that she would be arrested in South Africa. After five weeks in Brazil she decided to return to South Africa where she appointed an attorney to assist her. She eventually became a Section 204 witness and not only testified in this trial but also in the Regional Court trial.

[58] Ms Francillon's version was largely corroborated by Mr Olim. He stated

that he was frequently out of Johannesburg over the relevant period, either in rehabilitation centres or to visit his mother in Madeira. Initially the State indicated that he could not be located and called Colonel Uekermann to verify this. An adjournment was granted at the request of the accused who indicated that Mr Olim can be found in Komatiepoort. Apparently Mr Olim himself telephoned the State Prosecutor and made himself available before any search for him by the accused could commence.

[59] Mr Olim testified that although he was meant to receive a share in all three entities, after the first few payments they then dried up. He said that Allied Charcoal was initially set up in order to do legitimate business. Because the income from his import and export business was substantially higher than the threshold required for VAT registration, he bought a shelf entity Allied Charcoal CC from the accused in 1997.

[60] The accused was the accounting officer and registered this entity for VAT (see Exhibit A4(6)). The bank account was in the name of his mother and she was the sole member of the close corporation. The reason for this he stated was that he was in the middle of an acrimonious divorce and did not want any assets in his name. Although the bank account was in the name of his mother, he had signing powers on this account.

[61] Mr Olim testified that he did not complete or sign any of the VAT returns of Allied Charcoal and that these returns were completed and submitted by the accused's office. He admitted that he left signed cheques in the name of Canbia Commodity Brokers at the accused's office and was aware that some of these cheques were found in a chequebook that contained blank cheques signed by Mr Nkosi.

[62] As regards Andeltru and Limoges, Mr Olim confirmed that both did not trade or conduct any business whatsoever. He was to receive 50% of the VAT

refunds from Allied and Andeltru with the accused getting the other 50% and one third of the VAT refunds from Limoges with the accused and Ms Francillon getting the other one third each. Mr Olim claims to have only received his share of the VAT refunds in Allied Charcoal for approximately three to four months. He testified that he had no knowledge of the entity Siani Trade.

[63] Mr Olim denied that Mr Nkosi was his driver, but said he was a Mozambican citizen who repaired radios. Mr Nkosi was paid to drive his mother from the White River area to Johannesburg from time to time. Mr Nkosi was an uneducated Mozambican citizen who had obtained a South African ID document illegally. He was the sole member of Andeltru. When asked why Mr Nkosi was chosen for this position Mr Olim said that they had no other volunteers and Mr Nkosi was paid for this service. He also confirmed that Mr Nkosi was very ill at the time and would be taken to hospital by Ms Francillon from time to time.

[64] Exhibit AB is an undated affidavit in which Mr Olim admitted he was part of the fraudulent VAT refund scheme introduced by the accused. In Exhibit Z, a Section 105(A) plea agreement dated 18 November 2014, he stated that he made the proceeds available to the accused and that he issued thirteen cheques to be cashed to share the fraudulent VAT refunds relating to Allied Charcoal. Although in his plea agreement he stated that Allied Charcoal was registered in 1993 he said this was an error and the correct date was 1997. He confirmed that Allied Charcoal received fraudulent VAT refunds but did not think the amount was as high as R10 million and estimated it rather at approximately R5 million.

[65] Mr Olim confirmed that he did not receive any bank statements at his address and that the bank statements were sent to the accused, who also administered the account. Mr Olim continued to receive payments from the illegitimate VAT scheme up until a few months before the accused was arrested in 2005. Thereafter all payments stopped. He said that after Limoges had stopped submitting VAT claims, Ms Francillon received no money from the VAT scam so he

and the accused gave her R20 000 a month to keep her quiet. He indicated that he believed this to be a form of blackmail as she was aware that he and the accused were still benefitting from the VAT scheme. He later began to doubt her loyalty and even started to believe that she had taken advantage of him. This was particularly when she turned State witness after her return from Brazil.

[66] Mr Olim corroborated Ms Francillon's testimony that liquor in the warehouse was seized by customs and excise. He also confirmed their involvement in round tripping. He confirmed that Ms Francillon was in possession of signed cheques and she would withdraw cash when he was out of Johannesburg to leave with friends in Bedfordview.

[67] At the end of the evidence for the State, the defence sought a discharge in terms of section 174, in respect of the money laundering counts, excluding counts 258 to 236. After hearing argument the court dismissed the application for discharge on these counts.

[68] The accused gave evidence in his own defence and called one witness, a former employee. Mr van der Linde testified that he was arrested on 30 August 2005 at the offices of SARS in Alberton and released on bail of R500 000. He ran an accounting firm under the name and style of Ivan van der Linde and Associates; it was not registered for VAT. He has a BComm Degree and an Honours Degree from UNISA, practised as an accountant and is registered with the SA Institute of Professional Accountants.

[69] The first address of his practise was 6 Vernon Drive Mulbarton. After one year it moved to 99A Garden Street Turffontein and when his practise expanded he moved to 21 Exeter Street. His postal address is Private Bag 1647 Houghton and his business renders accounting services to individuals, CC's and private companies.

[70] Essentially the accused admits that his office registered the four entities for VAT and submitted their VAT returns. He admits that all four operated fraudulent VAT schemes but states that he was not involved in these schemes and knew nothing whatsoever about them. He admits the documents produced by the State including the deposits into his other businesses, SPI Brokers and Keysers Meats.

[71] The accused's version is that he merely submitted the VAT returns on behalf of the entities based on schedules drawn up and provided to him by his client. When a SARS VAT audit was to take place he called for the original supplier invoices which were duly supplied to him by the relevant client. He denies knowing of, or being involved with, the production of any falsified invoices.

[72] His explanation for the sums of money deposited into SPI Brokers and Keysers Meats is that these were predominantly cash businesses and in order to avoid the exorbitant bank charges for cash deposits he gave his clients cash and in return they would deposit cheques.

[73] It was confirmed during argument that the accused admits the documentary evidence. The only issue in dispute is the evidence of Ms Francillon and Mr Olim as to his involvement in the VAT scheme. The accused says he was introduced to Mr Carlos Olim by Mr Chris da Silva of Presley's Night Club. They became friends and even went on a cruise to Maputo together. On their return Mr Olim asked him to be the bookkeeper of Mr Olim's business. Mr Olim's business at the time was an unregistered entity trading as Canbia Commodity Brokers. The accused sold a shelf company Allied Charcoal CC to Mr Olim for R800. Through the accused's office, Mr Olim's mother Laura Olim was registered as the member of the close corporation because Mr Olim had told him that he previously experienced problems with SARS and with customs.

[74] The accused does not dispute that he advised Mr Olim to open a trust

bank account for this entity and he registered Allied Charcoal for VAT. He does not dispute that the claims were submitted initially every two months by himself, then they were changed to a one month VAT period because of the income that the close corporation was generating. The accused says that he did not suspect that these entities were not trading and merely acted on information given to him by Mr Olim and Ms Francillon. He was not involved in the operation of Allied Charcoal and did not know how the business generated income.

[75] The accused also registered another two entities, Andeltru for Mr Olim and Limoges for Ms Francillon. Mr Nkosi, a man he knew as Spiros, was the sole member of Andeltru. As he understood it Andeltru – trading as Trans Lebombo – traded in the same commodities across border as did Allied Charcoal. He was aware that Mr Nkosi had a fraudulent South African identity document and that Mr Nkosi did not reside at 90A Garden Street Turfontein. Nonetheless he signed as an accounting officer. Exhibit B9 is a refund return dated 25 January 1999 containing this false information which he verified was true and correct.

[76] Ms Francillon, Mr Olim's personal assistant, provided the documentation for the registration of Andeltru and later the invoices for the SARS VAT audits of Andeltru. She would drop these documents off at the reception of his office. He had a good relationship with Ms Francillon and Mr Olim and they would meet once a month or so to discuss business activities. Ms Francillon was also very friendly with one of his employees, Ms Shirley Meintjies.

[77] The accused admitted that the Andeltru chequebook which contained blank cheques signed by Mr Nkosi was seized at his residence in 2005. His explanation for this was that when Mr Olim left for Cape Town during 1999 or 2000 he was requested to draw cash for Mr Olim and pay Mr Olim's creditors. Although the accused said that this was not a regular function which his company performed, he agreed to do this for Mr Olim as he was a friend. Once the cash was drawn it would be given to Ms Francillon or a friend Mr Figuera who resided in

Kensington, to be kept in safe keeping for Mr Olim.

[78] The accused was unable to explain any of the entries on the cheque stubs in Exhibit P – the Andeltru chequebook that was seized shortly after his arrest. Even where these entries reflected his name Ivan, 'cash', SPI Brokers, or Keysers Meats he was unable to explain. Exhibit P46 is a cheque that was withdrawn after the death of Mr Nkosi. He stated that he only became aware that Mr Nkosi had died after his arrest. He explained that SPI Brokers was a labour broking firm in which he had 100% interest. Keysers Meats was a meat retailer where he had a 45% interest with Keyser, who had since passed away.

[79] The accused said he also rendered accounting services to Siani Trade, which was an already established entity trading as Johnny Paulos Liquor Merchants. Although he dealt with Mr Ollie De Gouveia, the director of this entity was his brother Albert De Gouveia. The accused said he believed that Siani Trade was exporting liquor. Siani Trade's place of business according to Exhibit A2(3) was 21 Exeter Street, Robertson, the accused's premises. Ivan Prop 4 CC was the letting agent according to Exhibit A2(4). Ivan Prop is one of the accused's assets, which is listed in Exhibit K6.

[80] SARS conducted more than twenty audits relating to these three entities and audits were done in the presence of two or more SARS officials. When documents were requested from clients for an audit the client would deliver the documents a day before to his office and after the work was completed the client was contacted and asked to collect the files, boxes or envelopes as they did not supply any storage facility at his office. He denied any knowledge of the falsified invoices in Exhibit F. He said that he had never met Carlos Cardosa or Mr Jose De Gouveia, who were the owners of some of the businesses for which fraudulent supplier invoices were fabricated. It was only after his arrest that he became aware that the invoices were fraudulent.

[81] The accused admitted that he had an ABSA banking account and had approached Mr Basie Flemming of ABSA for a loan. He needed a loan because Keysers Meat, a wholesale distributor of meat, had problems with the consistency of beef supply. He was interested in purchasing a farm in Delmas for between R15- and R17 million to ensure a regular meat supply. To do this he required a loan and he drew up the document in Exhibit K6, the statements of his assets and liabilities, for this specific purpose. He admitted that his signature appears on Exhibit K6 but says that the information contained therein is not accurate and that he lied to the bank in order to inflate his income. In truth and reality he says that he did not have the 50% interest in Allied Charcoal, nor did he have a 33% interest in Limoges and nor did he have a 50% interest in Andeltru, as is stated in this exhibit. The accused explained that Ivan Props 4 CC and Ivan Props 5 CC are property holding companies.

[82] The accused admitted that he addressed the letter, Exhibit L, to Mr Kieswetter at SARS. He was given Mr Kieswetter's name by an acquaintance at church. He agrees that in the letter he asked that the matter be settled. This was not an admission of guilt – he explained – but rather a request for a speedy resolution of the case and the charges levelled against him. The accused agreed that he had interaction with Mr Olim after his arrest in 2005 when Mr Olim returned from Brazil but he cannot recall having any interaction with Ms Francillon since her return.

[83] The defence called one witness apart from the accused. This was a former employee of his accounting firm, Gillian Venter. She was employed by the accused during May 1998 at his accounting firm Ivan van der Linde and Associates at 21 Exeter Street, Turffontein. She did administrative work and registered companies and close corporations.

[84] Ms Venter confirmed that more than twenty SARS audits were done relating to the three entities Andeltru, Allied Charcoal and Limoges. She recalled

receiving documents from Ms Francillon and from Mr Olim when audits were going to be conducted. These documents were received at the reception area of the office. Ms Venter said that she never saw any invoices being created or manufactured at the offices of the accused and she only heard of the fraudulent VAT scheme after the accused had been arrested.

[85] Taking into consideration the documentation and the admissions the undisputed common cause evidence is as follows:

1. Andeltru, Limoges, Siani Trade and Allied Charcoal were all registered for VAT by the offices of the accused as per Exhibits A1 to A4. The accused was the accounting officer for all four entities.
2. The four entities fraudulently claimed VAT refunds as per Schedules A to D.
3. The supporting documents for the VAT refunds are all false.
4. These entities did not trade.
5. SARS paid out the refunds claimed as reflected in Schedule A.
6. The total VAT refunds were with withdrawn from the entities' respective account within a day or two of being deposited by SARS into their bank accounts.
7. The accused received payments in respect of the VAT refunds as per Exhibit J.

[86] The only real factual question to be determined is whether the version of the accomplice witnesses, Mr Olim and Ms Francillon, should be believed, namely that the accused was integrally involved in the VAT scam.

[87] It is trite that the evidence of an accomplice should be treated with caution and can be accepted only if there is independent corroboration of the evidence.[1] The test in assessing the evidence of an accomplice was set out by Leon J in *S v Masuku* 1969 (2) SA 375 (N). At page 376-377 he said the following:

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[1] *R v Gumede* 1949 (3) SA 749 (A), *S v Hlapezula and Others* 1965 (4) SA 439 (A)

"(2) An accomplice is a witness with a possible motive to tell lies about an innocent accused; for example, to shield some other person, or to obtain immunity for himself. (3) Corroboration, not implicating the accused but merely in regard to the details of the crime, not implicating the accused, is not conclusive of the truthfulness of the accomplice. The very fact of his being an accomplice enables him to furnish the court with details of the crime which is apt to give the court the impression that he is in all respects a satisfactory witness or has been described to convince the unwary that his lies are the truth. (4) Accordingly, to satisfy the cautionary rule, if corroboration is sought it must be corroboration directly implicating the accused in the commission of the offence. (5) Such corroboration may, however, be found in the evidence of another accomplice provided that the latter is a reliable witness. (6) Where there is no such corroboration, there must be some other assurance that the evidence of the accomplice is reliable. (7) That assurance may be found where the accused is a lying witness, or where he does not give evidence. (8) The risk of false incrimination will also, I think, be reduced in a proper case where the accomplice is a friend of the accused. (9) In the absence of any of the aforementioned features, it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is only permissible where the merits of the accomplice as a witness and the demerits of the accused as a witness, are beyond question."

[88] It was submitted on behalf of the defence that both witnesses were unreliable, untruthful and evasive and contradicted each other in material respects. It is quite correct that both were involved in various dishonest and underhand schemes. Ms Francillon had been forging documents for years to defraud the fiscus. She concealed her conduct from her fiancé and fled to Brazil once the accused was arrested.

[89] It is quite probable that had this avenue not being closed off with the arrest of the accused she would still be involved in some dishonest activities today. Even Mr Olim thought she was blackmailing him. She is not a stranger to

fraudulent activity and is clearly highly intelligent. However, her evidence did have a ring of truth to it. She did not minimize her role. Even when she was warned by the prosecution that she had not received indemnity for the fraudulent customs and excise scam, she continued to incriminate herself. This she said was so as to put the forging of the falsified invoices in perspective and marry the skills she had acquired in forging the customs and excise documents with fraudulent invoices. She was subjected to protracted and lengthy cross-examination by able counsel and confronted with numerous exhibits. Her testimony remained relatively consistent. When the accused's version was put to her she denied it confidently and coherently.

[90] Mr Olim on the other hand was a poor witness, as was conceded by Mr Oosthuizen for the state. He was forgetful, especially of certain dates and seemed to underplay his role, complaining in particular that he only received his share of the proceeds of the scheme at the initial stages and not thereafter. This contradicted his evidence that he was surprised to receive money right up to the arrest of the accused.

[91] There are contradictions between his oral evidence, his affidavit (Exhibit AB) and his plea agreement (Exhibit Z). It is generally accepted that oral testimony carries more evidentiary weight than written statements. He did not understand what money laundering entailed although he pleaded guilty to it in his plea agreement. It should also be borne in mind that the undisputed evidence of both Mr Olim and Ms Francillon is that Mr Olim was very vulnerable at the time, with a serious drinking problem. He suffers from psychiatric disorders. In his affidavit it was stated that he was bipolar.

[92] Notwithstanding the above, there are consistencies in the versions of Mr Olim and Ms Francillon. Both attributed a major role to the accused. Both said that the proceeds from the fraudulent VAT funds were divided as follows: 50% to the accused and 50% for Mr Olim in Andeltru and Allied Charcoal and 33% each in

Limoges. It is no coincidence that this shareholding is reflected in the statement of assets and liabilities (Exhibit K6) that the accused presented to ABSA when he applied for a bank loan. In addition, the evidence of the suppliers that the invoices were false provides independent corroboration for the versions of Mr Olim and Ms Francillon.

[93] The existence of the scam and its *modus operandi* is further corroborated by the admitted documents, which are evidence that the accused registered the entities, submitted the VAT returns and that the VAT refunds that were fraudulently claimed were paid out. The bank statements are objective evidence that the entities did not trade and existed solely to submit false VAT claims, as testified to by Mr Olim and Ms Francillon.

[94] Not every error, inconsistency or contradiction made by a witness will affect his or her credibility. A court is enjoined to weigh up the evidence of the witness as against the totality of the evidence produced by the state.[2] The evidence of an accomplice, although subject to the cautionary rule, needs not be wholly reliable, or wholly truthful. The ultimate test is whether after treating the evidence with the due circumspection, the court is satisfied beyond a reasonable doubt that the story told is essentially true.

[95] The state submitted that there was no need to rely on the evidence of Mr Olim and Ms Francillon at all, as there is sufficient evidence to convict the accused in the absence of their evidence. There is merit in this proposition, but nonetheless I am satisfied that there is sufficient independent oral and documentary evidence to corroborate the versions of Mr Olim and Ms Francillon. I accept the overall thrust of their evidence – that they conspired with the accused to operate the VAT scam. I accordingly reject the exculpatory version given by the accused.

[2] *S v Sithole* [2006] SCA 126 (RSA), *S v Francis* 1991 (1) SACR 198 (A), *S v Gentle* 2005 (1) SACR 420 (SCA).

[96] It is trite that the onus rests upon the state to prove the guilt of the accused beyond reasonable doubt, after weighing up all the evidence before court and in a holistic manner. This has been stated in a long line of cases and needs no further elaboration.[3]

[97] It may be, that even if an accused's version is improbable, he is entitled to an acquittal if it is reasonably possibly true. In *Monageng v S*[4] the court described proof beyond reasonable doubt as:

> "… evidence with such a high degree of probability that the ordinary man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged[5]."

[98] In addition to the evidence of Mr Olim and Ms Francillon that the accused was the mastermind behind the scam, the following undisputed facts point to the guilt of the accused.

1. The entities were not registered for VAT until the accused registered them.
2. It was through his office that the VAT refunds were claimed.
3. The accused received and responded to all correspondence from SARS on behalf of the entities.
4. The bank statements of all four entities were sent to either one of the accused's postal addresses being Private Bag 1647, Houghton, or PO Box 75279 Garden View. (Ms Francillon said she collected the Limoges bank statements from this post box and took them to the accused's office for him to file away.)
5. The accused, therefore, had access to all the bank statements from which it would have been immediately apparent that the entities received

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[3] *S v Trainor* 2003 (1) SACR 35 (SCA), *S v van der Meyden* 1999 (2) SA 79 (W), *S v van Aswegen* 2001 (2) SACR 97 (SCA).
[4][2009] 1 All SA 237 (SCA).
[5] See also *R v Mlambo* 1957 (4) SA 727 (A) at 738 and *S v Phallo & Others* 1999 (2) SACR 558 (SCA) para 10 and 11.

no income other than the VAT refunds.

6. Mr du Toit, in Exhibit N calculated that a total of R249 486 719 in purchases would have had to go through in respect of the four entities to justify the VAT that was claimed on their behalf. A cursory glance at the bank statements, whose contents are not disputed and which were sent to the accused's address, would have revealed that these entities do not trade and never had these amounts, or anything vaguely resembling these amounts, in their bank statements. It would have been immediaitely apparent that refunds in the amounts claimed, or at all, were fraudulent.
7. The accused received large sums of money in respect of the VAT refunds into his SPI Brokers bank account, which also had the address Private Bag 1647, Houghton.
8. No further refunds were claimed after the accused was arrested.

[99] Another improbality in the accused's version was that the exculpatory version given when the accused testified, was withheld from SARS and the police for 11 years, although he said he became aware that his clients had perpetuated a fraud soon after his arrest. While fully acknowledging an accused's right to remain silent, the probability of the accused never providing this version to the authorities if he were indeed an innocent party in the VAT scam, is in my view remote.

[100] It is common cause that the following amounts were fraudulently obtained by submitting fraudulent VAT statements. For Andeltru the amount claimed was R10 619 275.84 and the VAT paid was R10 388 394.86; for Siani the VAT claimed was R2 259 771.29 and the VAT paid out was R1 996 379.53; for Limoges the VAT claimed was R6 090 121.63 and the VAT paid out was R4 996 128.72; for Allied the VAT claimed was R11 699 554.20 and the VAT paid out was R10 814 336.74. That means the total VAT claimed was R30 538 719 and the total VAT paid out was R28 195 239.

[101] In view of the above and taking the evidence into account in its totality, it is my view that the state has indeed discharged its onus and the accused's involvement in the VAT scam has been proven beyond reasonable doubt. Any inferences to be drawn from the documents are consistent with the proven facts and exclude any other reasonable inference, save that the accused is guilty of fraud as per counts 1 to 255. Certain of the fraud counts, 29 in total, are the so-called "potential prejudice counts", where fraudulent VAT claims were submitted, but not paid out.

[102] Snyman[6] defines fraud as: *"The unlawful and intentional making of a misrepresentation which causes actual prejudices, or which is potentially prejudicial to another."* I accept the state's argument that the 29 VAT claims were potentially prejudicial to SARS, and therefore amount to completed acts of fraud. The accused should, accordingly be found guilty of fraud on these 29 counts as well.

[103] What remains to determine is whether the accused is guilty of the other counts, namely uttering (count 257), forgery (count 256), money laundering (counts 263 to 326 excluding count 273) and acquisition of the proceeds of unlawful activies in terms of POCA (counts 327 to 381).

[104] Snyman's definition of forgery is that it *"consists in unlawfully and intentionally making a false document to the actual or potential prejudice of another."*[7] It is common cause that the supplier's invoices in Exhibit F were false and were submitted to SARS with the intention of defrauding SARS by securing VAT refund claims.

[105] The evidence of Ms Francillon is that she and the accused forged the invoices at the office of the accused on the accused's computer and using his Dot Matrix Printer. The evidence is therefore that the accused was aware of, and

[6] C R Snyman *Criminal Law* 6 ed (2014)
[7] Snyman (supra) at 532

played a role in the forging of these documents and must be accordingly be found guilty of forgery.

[106] Snyman defines uttering as consisting in *"unlawfully and intentionally passing off a false document to the actual or potential prejudice of another."*[8] It is common cause that the false invoices were handed to SARS when the audits took place at the accused's office. The accused personally assisted the auditors when the more than twenty SARS audits were conducted on the four entities. It is Ms Francillon's evidence that she was always asked to stay away during the audits, which were handled solely by the accused in his office. Exhibit O is a letter of the accused's firm Ivan van der Linde & Associates where various of the false invoices, F26, F37, F35 and F36 were forwarded to SARS under cover of his letter.

[107] The only conclusion to be drawn, is that the accused uttered and presented forged documents to SARS well knowing that they were false and in the knowledge that they would result in actual or potential prejudice to SARS. As a result of the submission of these false documents, VAT refunds which were not owing were paid out as a result of the uttering. The state has, therefore shown beyond reasonable doubt that the accused is guilty of forgery and uttering as per counts 256 and 257.

[108] Counts 263 to 326 are charges of money laundering in terms of section 4*(b)*(i) of POCA. Money laundering is the process by which the proceeds of crime are converted into assets which appear to have a legitimate origin so that they can be retained permanently, or recycled into further criminal enterprises. Because money laundering was linked with the funding of cross-border terrorism, the flow of money from the proceeds of crime became of a crucial importance to international authorities in the 1990's. This led to financial institutions the world over, including South Africa, being urged to introduce stringent measures to control money laundering and the flow of the proceeds of crime in general.

[8] Snyman (supra) at 535

[109] South Africa's response to this was the enactment of POCA and the Financial Intelligence Centre Act 38 of 2001, commonly known as FICA. FICA, which members of the public know very well from the FICA processes demanded by their respective banks from time to time, defines money laundering in Section 1 of FICA as:

> "Any activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and this includes any activity which constitutes an offence in terms of section 64 of this Act or section 4, 5 or 6 of the Prevention Act."

[110] The main motivation for the laundering of the proceeds of crime is to avoid detection. It is an activity conducted with the intention to disguise the illegal source of money. The funds are thus made to appear legal through a series of transactions, or a single transaction. A money laundering scheme is designed to avoid raising suspicion and is often backed by authentic documentation for it to appear legitimate. It must be difficult to unravel, so sophisticated, complex and often transnational schemes are devised to make it difficult and expensive for investigative authorities to detect and trace the proceeds.[9]

[111] Money laundering is said to take place in three stages namely placement, layering or integration.[10] Placement takes place when the proceeds of crime enter the banking system. Typically, the criminal with a large sum of cash moves it to another country or location so that placement can take place with greater safety. Frequently a large sum is split up into smaller amounts which can then be deposited into different bank accounts without raising suspicion.

[112] The second stage is known as layering, which is the process of separating the funds from their illegal source. The source of money is disguised by moving the funds through accounts of financial institutions, thereby, blurring the trail of the

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[9] Albert Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2008).
[10] De Koker *South African Money Laundering and Terror Financing Law* (2014)

money. De Koker[11] gives the following examples of layering:

1. Drawing money from an account at one bank, splitting the amount and depositing it into three banks in three different accounts.
2. Purchasing property to be sold immediately thereafter.
3. Depositing money into an attorney's trust account and from there requesting it to be repaid, or paid into other person's personal accounts.

[113] Integration occurs when the illegitimate funds, now laundered, are placed under the control of the criminal.

[114] Although de Koker cautions against expecting all three stages to be present in the South African context, where often only the placement takes place, the above description is useful to understand the intention behind any money laundering scheme and the harm that the legislator wished to combat when the necessary legislation was enacted.

[115] The accused in this matter has been specifically charged in terms of Section 4*(b)*(i) of POCA. Section 1 of POCA defines the proceeds of unlawful activity as:

> "…any property or any service, advantage, benefit or reward which was derived, received or retained directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived."

Section 4 of POCA reads as follows*:*

> "4. Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-
>
> (a) enters into any agreement or engages in any agreement or transaction with anyone in connection with that property, whether such agreement,

[11] Supra.

arrangement or transaction is legally enforceable or not, or

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

which has, or is likely to have the effect-

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

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

(aa) To avoid prosecution; or

(bb) To remove or diminish any property acquired directly, or directly as a result of the commission of an offence,

shall be guilty of an offence."

[116] The accused is charged with section 4*(b)*(1) - concealing or disguising the nature and source of the funds which he knew to be from the proceeds of unlawful activities. Firstly it must be shown that he knew or ought to have known that the property formed the proceeds of unlawful acivities. The accused was the mastermind of the VAT fraud scheme and had such knowledge as required by section 4. It is common cause that the VAT refunds were the proceeds of crime. The accused initiated and managed the scheme, and as such, knew the refunds represented the proceeds of unlawful activities, namely fraud. In terms of section 4*(b)* he must perform "*any other act in connection with such property, whether it is performed independently or in concert with another person*". The accused performed the following actions in connection with the proceeds of unlawful activities: he received 26 cheques in respect of the laundering counts 277, 278, 279, 280, 283, 288, 300 to 222. These proceeds were deposited into the accused's SPI Brokers bank account, of which he was the sole member. The cheque stubs in Exhibit P reflected the name of the accused as the beneficiary. All cheques drawn after June 2002 were issued after the death of the accused holder Mr Nkosi. The

accused had access to all the proceeds for Andeltru, as he had Andeltru's blank, signed cheque book under his control. The state submits that the possession of the said cheque book warrants the inference of the accused having laundered the remaining funds and is thus guilty of counts 263 to 326.

[117] The final and crucial requirement of Section 4*(b)*(i) is whether the accused's actions had the affect of concealing or disguising the nature, source, location or disposition of the funds. The state alleges that the cash cheques issued in respect of money laundering counts 267 to 272, 274 to 278, 281 to 288, 290 to 295 and 300 to 301 once cashed, have the inherent effect of concealing property.

[118] It was submitted in the State's heads of argument that a cash cheque, once cashed, has an inherent affect of concealing the source, nature, property or location of the property. It is impossible to trace, or follow, or investigate. This submission is in direct contradiction to what was stated in argument that money drawn directly from the bank statements of the four entities would not constitute money laundering, and neither would cash cheques from that bank account.

[119] As far as disguising is concerned, the state submitted that the drawing of the cash cheques disguised the origin of the money. Similarly the cheques deposited into the SPI Brokers bank account were likely to disguise the origin. The reasoning is that once deposited into the SPI Brokers bank account, the proceeds co-mingled with other legitimate funds and became difficult to trace. It was further contended by the state that the cheques represented unlawful proceeds which, once deposited into an active account that ordinarily receives deposits from lawful business, has the effect of legitimising these proceeds. Such conduct is said to be money laundering.

[120] In *S v de Vries & Others*[12] the court dealt with a situation where the British

[12] 2012 (1) SACR 186 (SCA)

American Tobacco Company of South Africa ('BATCSA') was a victim of a series of armed robberies, carried out by an armed gang which hijacked BATCSA trucks and stole consignments of cigarettes. The appellants in that matter were charged with racketeering in terms of Section 2 of POCA, as well as money laundering in terms of Section 4. The court found, in respect of one of the appellants, that by receiving the cigarettes, knowing that they were stolen, the appellant made himself guilty of theft by proceeding to use the cigarettes as part of his stock and trade as a wholesaler, as if they were goods lawfully acquired. This conduct had the affect of concealing the source, movement and ownership of the cigarettes thereby enabling and assisting the robbers to avoid a prosecution, or to remove the property acquired in the robberies. In so doing, said the Supreme Court of Appeal, the appellant had made himself guilty of a contravention of Section 4.[13]

[121] In *Prinsloo & Others v The State*[14], the SCA dealt with a so-called Ponzi Scheme in the Vaal Triangle, a scheme into which investors invested over a billion rand. The appellants were charged with an excess of 213 000 charges, including some in terms of POCA, such as racketeering and money laundering. The money laundering charges in respect of one appellant dealt with a situaltion where approximately 11 properties were purchased in the name of the Trust with monies deposited by investors. It was alleged that the source of the money derived from the racketeering activities was concealed by purchasing the properties through the Trust. This particular appellant argued that she had not attempted to conceal or disguise the nature, source, location, disposition or movement of these properties, or the ownership thereof. The court found that this argument had no merit, as the monies pertained to the disguising and concealing of the proceeds of the unlawful scheme through its various identities, and not to the ownership of the property.

[122] Another of the appellants was also convicted in terms of section 4 of POCA after purchasing fixed properties in the name of three Trusts. There was no

[13] *S v de Vries & Others (*supra) para 56
[14] (827/2011) [2015] ZASCA 207 (4 December 2015)

documentation such as loan agreements disclosing the source of the funds utilised to purchase the properties. In addition, in court papers in another matter, she falsely stated that her income of R2 million, together with her husband's farming income had been utilised to pay for the properties, failing to disclose that the income she had received through the illegal scheme, amounted to more than R27 million that year.

[123] In the unreported case of *S v Moosagie & Another*[15], the accused was found guilty of money laundering after depositing a VAT refund cheque in the amount of R797 000 into an estate agent's trust account. The proceeds of the VAT fraud were withdrawn from the trust account in many small amounts, some as little as R5 000, and deposited into various disparate bank accounts.

[124] What is apparent from the above cases is that in order to be found guilty of money laundering, there must be a clear intention to hide or conceal what is often referred to as 'hot' money. This entails the laundering of the illegal funds to convert them into 'clean' money, which the criminal can safely spend. As stated in de Koker, money laundering is by its very nature a secretive practice. I am not persuaded that by spending the proceeds of fraud, a conviction of money laundering should follow axiomatically. Instead, there has to be an element of concealment which must be proven or inferred.

[125] In this matter, the monies were merely divided and spent by the parties. On occasion, cheques were deposited into the SPI Brokers bank account. This was an entity wholly owned by the accused and no extensive investigation would have been required to trace the money. That this was a business belonging to the accused seemed to be well-known by his staff at the accounting offices – Ms Gillian Venter certainly did not hesitate to explain that it was a labour broking business of the accused, when asked if she knew anything about SPI Brokers. It seems that one of the weaknesses of the fraudulent VAT scheme was the ease with which the

[15] (CC 29/2010) [2012] ZAECPEHC 31 (17 May 2012)

money trail could be followed. Almost immediately after the VAT refund was deposited into one of the bank accounts of the four entities, it was withdrawn in full and cashed, or deposited into the SPI Brokers bank account. There was no attempt whatsoever at concealment. There was no interruption in the flow of money, which may make it difficult for the authorities to investigate or trace. It is therefore my view, that the accused cannot be found guilty of the money laundering counts.

[126] Counts 327 to 381 are 55 counts relating to the acquisition of proceeds of unlawful activities in terms of section 6 of POCA, read in conjunction with sections 4 and 5. Section 5 provides:

> "5. Assisting another to benefit from the proceeds of unlawful activities.
>
> Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities and who enters into any agreement with anyone or engages in any agreement or transaction, whereby-
>
> (a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or
>
> (b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,
>
> shall be guilty of an offence."

[127] Section 5 self-evidently deals with the situation where a third party assists a person to benefit from the proceeds of his or her criminal activities, by entering into an agreement with that person. This is not applicable but should be differentiated from Section 6 of POCA, which reads as follows:

> "6. Acquisition, possession or use of proceeds of unlawful activities
>
> Any person who-
>
> (a) acquires,
>
> (b) uses, or
>
> (c) has possession of
>
> property and who knows or ought reasonably to have known that it is or forms part of the proceeds of the unlawful activities of another person, shall

be guilty of an offence."

[128] Section 6 is therefore aimed, not at the agreement as provided for in section 5, but the use or possession of the property from the proceeds of crime by a third party. It is clear that it refers to the conduct of the third party and not to the person or persons who actually perpetrated the money laundering. It criminalises the rendering of assistance to the criminal to enable him or her to benefit from crime. This section is self-evidently not applicable to the accused in these circumstances.

[129] On the state's own version, the accused was the mastermind behind the unlawful VAT scheme, together with Ms Francillon and Mr Olim. The fact that the accused was neither a member nor a director of the four entities is neither here nor there. The purpose of this section is to criminalise the acquisition and possession of the proceeds of the crime of another. In any event this section cannot be read in isolation and must be read in conjunction with sections 4 and 5. Once the finding is made that there was no money laundering in terms of section 4, there can be no acquisition in terms of section 6. The accused must therefore be acquitted on counts 327 to 381.

[130] In conclusion I am satisfied that the section 204 witnesses Ms Francillon and Mr Olim answered frankly and honestly to the questions put to them. The said witnesses are hereby granted indemnity for the stipulated offences relating to the period 1 June 1997 to 31 December 2005 in respect of the four relevant entities.

[131] I am also satisfied that the state has discharged the onus resting upon it of proving beyond reasonable doubt that the accused, Mr Ivan Don van der Linde, is guilty of fraud as set out in counts 1 to 255, of forgery as per count 256 and of uttering as per count 257. On counts 263 to 336, money laundering, he is found not guilty and on counts 327 to 381 – the acquisition of the proceeds of unlawful activities – he is found not guilty. Counts 258 to 262 and count 273 were

withdrawn. In summary the accused is found guilty of counts 1 – 257 and acquitted on the remaining charges.

C H Nicholls

Judge of the High Court

Gauteng Local Division, Johanneburg

APPEARANCES

THE STATE :	Adv. M Oosthuizen Instructed by Director of Public Prosecutions, Johannesburg
DEFENSE :	Adv. F Roets Instructed by Botha Attorneys