REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 59922/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

19/1/2021 **.....**
DATE SIGNATURE

In the matter between:

WENCO INTERNATIONAL MINING SYSTEMS LTD First Applicant
(Registration No: BC0854695)

WENCO INTERNATIONAL MINING SYSTEMS LTD Second Applicant
(Incorporated in British Columbia , Canada)
(Registration No: 2014/082425/10)

and

THE COMMISSIONER FOR THE Respondent
SOUTH AFRICAN REVENUE SERVICE

J U D G M E N T

D S FOURIE, J:

[1] This is a review application in terms whereof the applicants apply for the following relief:

> "1. Reviewing, declaring unlawful and setting aside the VAT Ruling dated 21 February 2019 issued by the Commissioner for the South African Revenue Service to the first applicant;
>
> 2. Directing the respondent to issue a VAT Ruling in terms of which the second applicant shall register for Value-Added Tax as envisaged in the definition of 'Enterprise' in section 1(1) of the Value-Added Tax Act No 89 of 1991;
>
> 3. Directing the second applicant upon registration as ordered in paragraph 2 to account for VAT at the zero rate on the services supplied to the first applicant in terms of section 11(2)(*o*) and section 11(2)(*k*) of the VAT Act;
>
> 4. That the respondent be ordered to pay the costs of the application."

[2] During argument the applicants applied for leave to amend paragraph 3 of their notice of motion as follows:

> "3. Directing the second applicant upon registration as ordered in paragraph 2 to recount for VAT at the zero rate on the services supplied to the first applicant as set out in the request for a VAT Ruling dated 5 September 2018 in terms of section 11(2)(*o*) and section 11(2)(*k*) of the VAT Act."

The respondent did not object to the proposed amendment and the amendment is therefore granted.

BACKGROUND

[3] The first applicant is incorporated and also has its principal place of business in British Columbia, Canada. The second applicant, also incorporated in British Columbia, Canada has its principal place of business and registered address in Centurion, South Africa. The second applicant has been registered as a branch of the first applicant in South Africa.

[4] The first applicant specialises in the development of software for the mining industry. It supplies its clients with management systems software, maintenance, safety and machine guidance to manage mining operations.

[5] The second applicant is responsible for rendering services such as training, system support, site visits and installation to South African and other African clients of the first applicant. These services are rendered by the second applicant for and on behalf of the first applicant. All contracts between the first applicant and its clients are concluded and signed in Canada. The second applicant is paid a management fee by the first applicant for the services supplied to the first applicant.

[6] In order to obtain certainty on their VAT registration obligations, the first applicant submitted an application to the respondent for a VAT Ruling in terms of section 41B of the VAT Act. On the basis of the submissions made in the application, the first applicant requested a ruling confirming that:

(a) The second applicant (the South African branch) should register for VAT as opposed to the first applicant, as envisaged in the definition of "enterprise" in section 1(1) of the VAT Act;

(b) The second applicant should account for VAT at the zero rate on the services supplied to the first applicant in terms of section 11(2)(*o*) and section 11(2)(*k*) of the VAT Act.

[7] On 21 February 2019 the VAT Ruling was issued. The substance thereof can be summarised as follows:

(a) Based on the information provided, the first applicant, being a non-resident of the Republic, does carry on an activity partly in the Republic that is continuous or regular;

(b) The training services rendered by the first applicant while being situated outside the Republic constitutes a supply as the first applicant's clients are in South Africa;

(c) The services are required to be supplied to any other person for a consideration in the course or furtherance of that "enterprise" or activity. Accordingly, the second proviso to the definition of "enterprise" in section 1(1) of the VAT Act must be satisfied in order to regard the "branch enterprise" in the Republic as a separate person from its main business situated permanently outside the Republic;

(d) The provisions of section 8(9) of the VAT Act are only applicable when there is an "enterprise" and therefore supplies resulting from section 8(9) of the VAT Act cannot create an "enterprise";

(e) The second proviso to the definition of “enterprise” in section 1(1) of the VAT Act, never intended to create a situation where a branch is registered or required to register in the Republic purely for supplies that it makes to its business permanently situated outside the Republic.

[8] In the end the respondent holds the view, as appears from the VAT Ruling, that the first applicant must register as a VAT vendor in the Republic to the extent of the second applicant’s activities, the first applicant should charge VAT at the standard rate in respect of the services rendered to clients in the Republic and the services physically rendered by the first applicant in other African countries should be zero rated, provided that section 11(3) of the VAT Act is complied with.

GROUNDS OF REVIEW

[9] According to the founding affidavit the relief is sought under section 8(1)(*c*)(ii)(*aa*) of the Promotion of Administrative Justice Act No 3 of 2000. It is also stated that the dispute centres mainly on the interpretation of the definition of “enterprise” in section 1(1) of the VAT Act, read with section 8(9) of the VAT Act.

[10] Various grounds of review have been pleaded in the founding affidavit. Taking into account that the dispute centres mainly on the interpretation of the definition of “enterprise”, it is not necessary to deal with each of the grounds of review. The substance of these grounds can be summarised as follows:

(a) The content of and conclusions reached in the VAT Ruling are materially influenced by an error of interpretation and application of the law to the information that was provided in the application;

(b) The VAT Ruling is not rationally connected to the purpose as envisaged in the aforesaid provisions of the VAT Act, the information before the respondent and the reasons given for it by the respondent;

(c) If the VAT Ruling is to be implemented, it would render the registration of the second applicant nugatory and the second applicant will not be in a position to deduct any input VAT incurred by it which will impact negatively on the profitability of the second applicant.

LEGAL FRAMEWORK

[11] In section 1(1) of the VAT Act, an "enterprise" is defined (in relevant part) as follows:

> "(*a*) in the case of any vendor other than a local authority, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing or professional concern or any other concern of a continuing nature or in the form of an association or club;
>
> (*b*) …
>
> (*c*) …
>
> Provided that:
>
> (i) anything done in connection with the commencement or termination of any such enterprise or activity shall be enterprise or activity;
>
> (ii) any branch or main business of an enterprise permanently situated at premises outside the Republic shall be deemed to be carried on by a person separate from the vendor, if -
>
> (*aa*) the branch or main business can be separately identified; and
>
> (*bb*) an independent system of accounting is maintained by the concern in respect of the branch or main business."

[12] Section 7 of the VAT Act makes provision for the imposition of VAT. Subsection (1)(*a*) provides as follows:

> "Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the Value-Added Tax—
>
> (*a*) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him."

[13] Section 8 of the VAT Act contains certain deeming provisions. Subsection (9) provides as follows:

> "For the purposes of this Act, where any vendor in carrying on an enterprise in the Republic consigns or delivers goods to an address outside the Republic or provides any service to or for the purposes of his branch or main business outside the Republic in respect of which the provisions of paragraph (ii) of the proviso to the definition of 'enterprise' in section 1 are

applicable, the vendor shall be deemed to supply such goods or services in the course or furtherance of his enterprise."

[14] In terms of section 23(1) of the VAT Act, every person who, on or after the commencement date, carries on any enterprise and is not registered, becomes liable to be registered either at the end of any month where the total value of taxable supplies made by that person in the period of twelve months ending at the end of that month in the course of carrying on any enterprise has acceded R1 million (subparagraph (*a*)), or at the commencement of any month where the total value of the taxable supplies in terms of a contractual obligation to be made in the period of twelve months reckoned from that date exceeds R1 million (subparagraph (*b*)).

CASE FOR THE APPLICANTS

[15] According to the founding affidavit the first and second applicants can be separately identified and they maintain an independent system of accounting. They are therefore to be viewed as separate persons in terms of the VAT Act. The second applicant renders the services referred to above and not the first applicant. The applicants also point out (in the replying affidavit) that the second applicant has a distinct company registration number and income tax registration number in South Africa. In addition to that the applicants also rely on a balance sheet and income statement of the second applicant to submit that an independent system of accounting is maintained.

[16] According to the applicants the respondent failed to consider the activities of the second applicant with reference to the relevant provisions contained in the VAT Act. Taking into account the provisions of section 1(1) of the VAT Act, supplies made by a branch or main business situated outside the Republic are not subject to VAT. Such branch or main business is deemed to be a separate person for VAT purposes. Any supplier of goods or services by a South African branch to such an independent main business situated outside the Republic would attract VAT, unless the supply is exempt or zero-rated.

[17] In the context of the second proviso to the definition of "enterprise" in section 1(1) of the VAT Act, "the branch" is the business of the second applicant and the "main business" is the business of the first applicant situated outside the Republic of Canada. In terms of the aforesaid second proviso, the main business of the first applicant is excluded from the definition of "enterprise" in section 1(1) of the VAT Act. According to the applicants the VAT Ruling of the respondent attempts to rely on the activities of the second applicant. This it cannot do as the first and second applicants are functioning as separate persons.

[18] It is contended that the definition of “enterprise” in section 1(1) of the VAT Act, read together with section 8(9), means that where any vendor carrying on an “enterprise” in the Republic, provides any service to or for the purpose of his branch or main business situated outside the Republic and the branch or main business can be separately identified and maintains an independent system of accounting, the vendor is deemed to have supplied the goods and services in the course of carrying on that “enterprise”.

[19] Therefore, so it is submitted, the approach followed by the respondent in the VAT Ruling runs counter to the definition of “enterprise” in section 1(1) of the VAT Act read with section 8(9) of the VAT Act.

CASE FOR THE RESPONDENT

[20] According to the respondent the legal person constituting the applicants (the company incorporated in Canada) conducts an “enterprise” in South Africa for VAT purposes, in the sense that, using locally situated resources, it continuously and regularly carries on activities in the course or furtherance of which it provides software support and training services to clients both in South Africa and elsewhere in Africa in exchange for consideration.

[21] The primary question is whether the second applicant (i.e. the alleged South African “branch” of the legal person) can be said to be conducting such an enterprise separately from the first applicant in the sense envisaged in proviso (ii) to the definition of “enterprise” in the VAT Act. The respondent believes not. It has concluded that the first applicant (the foreign entity) conducts an enterprise in South Africa, and that the enterprise cannot be separately attributed to the second applicant for VAT purposes.

[22] It is also pointed out that a second question involves the VAT treatment (i.e. zero-rating) of supplies alleged to be made by the second applicant to the first applicant in terms of sections 11(2)(*o*) and 11(2)(*k*) of the VAT Act. These issues only arise if the applicants in fact fall to be treated as separate persons for VAT purposes. The applicants did not seek a ruling as to the VAT treatment of supplies made by the first applicant to its clients, if it transpires that the first applicant conducts the VAT enterprise.

[23] Attached to the answering affidavit is a copy of a service level agreement purportedly concluded between the first and second applicants (annexure “A3”). It is not denied by the applicants that the service level agreement was concluded between them. It is contended by the respondent that in terms of this agreement the second applicant cannot be separately identified from the first applicant as it only “serves” the first applicant in South Africa, being no more than an extension of the first applicant.

[24] In the circumstances the respondent contends that the second applicant cannot be separately registered as conducting an "enterprise" separate from or different to that of the first applicant. According to the respondent it is the first applicant that conducts the enterprise, and that it should accordingly be registered as a VAT vendor to the extent that it does indeed carry on an enterprise in South Africa.

DISCUSSION

[25] It was contended on behalf of the applicants that supplies made by a branch or main business situated outside the Republic are not subject to VAT. Such branch or main business is deemed to be a separate person for VAT purposes. Any supply of goods or services by a South African branch to such an independent main business situated outside the Republic would attract VAT at the standard rate, unless the supply is zero-rated or exempt. Therefore, so it was submitted, in the context of the second proviso to the definition of "enterprise" in section 1(1) of the VAT Act, the main business of the first applicant (in Canada) is deemed to be carried on by a person (the first applicant) separate from the second applicant. In this context the branch is the business of the second applicant.

[26] Counsel for the respondent submitted that for purposes of the VAT Act, the first and second applicants are a single legal entity. The first applicant supplies goods (computer software) and services (system support services, training, site visits and installation) to its customers situated *inter alia* in South Africa. The first applicant contracts with clients for the provisions of these supplies and all such contracts are concluded and signed in Canada. The first applicant has set up the second applicant as a branch in South Africa to serve the first applicant and to enable it to provide a service to its clients. The first applicant is therefore the party that invoices the clients for its supply of goods and services to them. It is then concluded that the second applicant can therefore not be said to provide goods or services to other persons as is required by the definition of "enterprise". The provisions of proviso (ii) to that definition accordingly do not apply to render the second applicant separately identifiable from the first applicant for VAT purposes.

[27] I have already pointed out above that the dispute between the parties centres mainly on the interpretation of the definition of "enterprise" in section 1(1) of the VAT Act, read with section 8(9) thereof. However, before I consider the definition of "enterprise", it is necessary to understand the applicants' structure.

THE APPLICANTS' BUSINESS STRUCTURE

[28] In *CSARS v Res Publica (Pty) Ltd* [2018] ZASCA 109 par [12] reference is made to the general principle (as recognised in other VAT jurisdictions) "that the VAT consequences of a supply must be assessed by reference, first and foremost, to the contractual arrangements under which the supply is made".

[29] The first applicant's business as explained in the founding affidavit is to supply goods and services to its customers situated inter alia in South Africa. To enable it to do this kind of business the second applicant has been registered as a branch of the first applicant in South Africa. These services are rendered by the second applicant for and on behalf of the first applicant to clients of the first applicant. All contracts between the first applicant and its clients are concluded and signed in Canada. The second applicant is paid a management fee by the first applicant for the services supplied to the first applicant.

[30] The contractual arrangement between the applicants is contained in a service level agreement that was entered into on 17 September 2018. In terms of this agreement the first applicant appointed the second applicant as the "service provider" to "solely and exclusively ... provide the services". The services are defined in clause 1.1.9 as "services provided by the Service Provider to Wenco for the operation of Wenco's business as detailed in clause 3 ... ". In clause 3 the services, duties and powers of the service provider are set out in more detail.

[31] Taking into account the aforesaid contractual arrangements under which the supply is made, it does not appear that the second applicant (as the service provider) is providing services "to South African and other African clients of the first applicant" as maintained by the applicants. According to the service level agreement (clause 2 thereof) it should be accepted that the second applicant was appointed by the first applicant to provide the services "solely and exclusively" to the first applicant. This appears in the definition of "services" (clause 1.1.9) where it is stated that these "services" are to be provided by the second applicant (service provider) to the first applicant (Wenco) for the operation of the first applicant's business (and not that of the second applicant).

[32] Apart from the contractual arrangement between the applicants, I think one should also look at the geographical arrangement between them. Taking into account the contractual arrangement between the applicants, one should be careful not to conclude that the services rendered by the second applicant to clients of the first applicant in South Africa, that those services are therefore not rendered by the first applicant. It is clearly stated in the founding affidavit that the services are rendered by the second applicant for and on behalf of the first applicant. Put differently, the rendering of services by the second applicant may constitute the

physical act of doing so in South Africa, but viewed from a legal viewpoint it seems that the position of the second applicant as a branch of the first applicant in South Africa, is merely that of an agent acting on behalf of the first applicant "for the operation of Wenco's (first applicant) business" in South Africa. Usually, no rights or obligations ensue between an agent and third parties. This may also explain why all contracts are concluded and signed between the first applicant and its clients in Canada.

THE APPLICATIONS FOR A VAT RULING

[33] Taking into account the applicants' business structure as well as the geographical arrangement between them, it is important to understand the context within which the VAT Ruling was requested. The applicants refer in the founding affidavit only to the application for a VAT Ruling (annexure "C") dated 5 September 2018. In that application certain background facts were supplied, legal submissions were made and then the request was formulated as follows:

> "Based on the facts and discussions above, we request the Commissioner to issue a ruling in terms of section 41B of the VAT Act read with section 72 of the VAT Act and Chapter 7 of the TAA, to confirm that:
>
> - Wenco SA (the South African branch) should register for VAT as opposed to Wenco (main business situated in Canada), as envisaged in section 1(1) of the VAT Act under the definition of 'enterprise' and
> - Wenco SA should account for VAT at the zero-rate on the services supplied to Wenco in terms of section 11(2)(*o*) and section 11(2)(*k*)."

[34] Taking into account the formulation of the request, the question arises whether it was the idea that only one of the applicants should be registered for VAT and, if so, with regard to which enterprise was a ruling sought? The application of 5 September 2018 does not give a direct answer to these questions.

[35] However, this issue has been addressed in the answering affidavit. It is pointed out that on 7 April 2017 the first applicant, through another representative, applied for a VAT Ruling in relation to issues similar to those to which the present application relates. In that application (annexure "A1") the first applicant was referred to as "WHC" and the second applicant as "WHA". In that application for a VAT Ruling certain background facts were presented, similar to those contained in the second application for a VAT Ruling dated 5 September 2018. The ruling requested in the first application for a VAT Ruling dated 7 April

2017 reads as follows:

> "28. On behalf of WHC (first applicant) and WHA (second applicant) we request that the Commissioner issues a ruling in terms of section 41B of the VAT Act, read together with Chapter 7 of the TA Act to confirm that:
>
> 28.1 WHC (first applicant) is not conducting an enterprise in the Republic and therefore is not required to registered as a VAT vendor;
>
> 28.2 WHA (second applicant) is conducting an enterprise and required to register for VAT;
>
> 28.3 WHC (first applicant) and WHA (second applicant) are in terms of proviso (i) to the definition of 'enterprise' deemed to be separate persons for VAT purposes; and
>
> 28.4 WHA (second applicant) will be required to zero-rate on the supply of services by WHA to WHC, which is physically rendered by WHA to the South African customer in South Africa, under the provisions of section 11(2)(1)."

[36] The respondent advised the first applicant that it was not prepared to grant the ruling sought as set out above. The respondent was then informed that the ruling sought in the application of 7 April 2017 was withdrawn. Taking into account the ruling that was sought in the application of 7 April 2017, it appears that the applicants had the following in mind:

(a) The first applicant is not required to register as a VAT vendor as it is not conducting an enterprise in the Republic;

(b) The second applicant should be required to register for VAT as it is conducting an enterprise in the Republic;

(c) The second applicant would be required to zero-rate on the supply of services to the first applicant which is physically rendered by the first applicant to South African customers.

[37] According to the above analysis it is not difficult to understand what the applicants had in mind with the first request for a VAT Ruling: remove the first applicant from the VAT arena and register the second applicant for VAT who will then be required to zero-rate on the supply of services. The result would be that neither the first applicant, nor the second applicant would be liable for the payment of any VAT on the supply of services to the mining industry in the Republic.

[38] However, this is not the end of the story. On 5 September 2018 a second application for a VAT Ruling was served. How does the second application differ from the first one dated 7 April 2017? Comparing the two applications, it appears that the applicants are the same entities. It also appears that their business structure as well as the geographical arrangement between them, are substantially the same. There also appears to be no material difference between both the rulings that were sought, first on 7 April 2017 and later on 5 September 2018.

[39] In the application dated 5 September 2018 the respondent was also requested to confirm that the second applicant should register for VAT "as opposed to Wenco (main business situated in Canada)" and that the second applicant should account for VAT "at the zero-rate on the services supplied". Comparing the two applications, it is not difficult to see and to conclude that also the second application dated 5 September 2018 had in mind that neither the first, nor the second applicant would be liable for the payment of any VAT on the services supplied in the Republic. Can this approach be justified in terms of the relevant provisions of the VAT Act?

THE VAT ACT

[40] Both parties accept that the interpretation of statutes is a unitary exercise to be conducted in accordance with the approach set out in *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012 (4) SA 593 (SCA) par [18] where it was explained that the process entails attributing meaning to the relevant statutory provision, in the light of the language used, the context in which the provision is set, including the material known to the drafters, and the purpose which the provision is intended to serve. In addition thereto, an interpretation that is sensible and business-like is to be preferred over one that leads to insensible consequences or those that appear to frustrate the statutory objective.

[41] The term "enterprise" in section 1(1) of the VAT Act is defined as any enterprise or activity which is carried on continuously or regularly by any person in the Republic in the course of which goods or services are supplied to any other person for a consideration. The primary question is, in my view, whether the second applicant can be said to be conducting such an enterprise separately from the first applicant in the sense envisaged in proviso (ii) to the definition of "enterprise" in the VAT Act referred to above.

[42] The alleged enterprise of the second applicant consists solely, according to the applicants, of the supply of services to the first applicant in exchange for a fee. On this basis the first applicant has the sole and direct contractual relationship with clients, being companies conducting mine operations in South Africa. In accordance with the service level agreement the services provided by the second applicant to the first applicant shall be for the operation of the first applicant's business. Put differently, the second applicant cannot be separately identified from the first applicant as it only serves the first applicant as described in the service level agreement, being no more than an agent of the first applicant, notwithstanding a different company registration number and a different system of accounting. This is confirmed by the explanation of the applicants that the services rendered by the second applicant are for and on behalf of the first applicant.

[43] It has been pointed out by counsel for the respondent that the applicants' case is dependent upon a finding that the second applicant conducts an independently recognisable "enterprise" in South Africa in the course of which it makes taxable supplies. On that basis, it is contended by the applicants that the business of the first applicant is deemed to be carried on separately from it by virtue of proviso (ii) of the definition of "enterprise".

[44] However, it is important to take into account that the applicants do not and cannot contend that the second applicant is engaged in an enterprise in which it makes supplies to the end-clients. According to the service level agreement it appears to be common cause that the supplies upon which it relies are supplies only to the first applicant. It therefore seems that the second applicant only serves the first applicant. The second applicant supplies no service "to any other person" as required by the definition of "enterprise" in section 1(1) of the VAT Act. It can therefore not be said, in my view, that the second applicant is conducting an "enterprise" in South Africa. Furthermore, taking into account the wording "in the Republic or partly in the Republic" as they appear in the definition of "enterprise", I do not think that one can seriously content that the second proviso to the definition contemplates a situation where a branch is registered in the Republic purely for supplies that it makes to its business permanently situated outside the Republic.

[45] It was also submitted on behalf of the respondent that section 8(9) of the VAT Act presupposes the existence of an "enterprise". I agree with this submission. Only after it has been determined that the second applicant indeed conducts an enterprise, will the provisions of section 8(9) become applicable. I have already concluded that the second applicant does not conduct an "enterprise" in South Africa as defined in the VAT Act and therefore, in my view, section 8(9) does not come into play.

[46] For these reasons I am of the view that there is no basis to set aside the VAT Ruling or to direct the making of a different ruling. The second question which involves the VAT treatment of a zero rating is therefore no longer relevant as these issues only arise if the applicants in fact fall to be treated as separate persons for VAT purposes. In my view the second applicant cannot be separately registered as conducting an “enterprise” separate from or different to that of the first applicant. In the result the application cannot succeed.

ORDER

The application is dismissed with costs, including the costs of two counsel.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA