REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

Case Number: 51569/2020

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

25/05/2026 SIGNATURE

In the matter between:

AVIWE NTANDAZO NDYAMARA N.O.	First plaintiff
MANDLA PROFESSOR MADLAL N.O.	Second Plaintiff
JOHANNES ZACHARIAS HUMAN MULLER N.O.	Third Plaintiff
TIRHANI SITOS DE SITOS MATHEBULA N.O.	Fourth Plaintiff
DIMAKATSO ARNOLD MICHAEL MOHASOA N.O.	Fifth Plaintiff

(In their capacities as the duly appointed liquidators

of **SWIFAMBO RAIL LEASING (PTY) LTD (IN LIQUIDATION)**,

Master's Registration No 2010/007968/07)

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Defendant

JUDGMENT

Lenyai J

Introduction

[1] This is an action proceeding in which the plaintiffs, being the liquidators of Swifambo Rail Leasing (Pty) Ltd ("Swifambo") seek an order that each of the Value Added Tax ("VAT") payments made by Swifambo to the South African Revenue Services ('SARS") be set aside as dispositions not made for "value" as contemplated in Section 26(1) of the Insolvency Act.[1] The plaintiffs accordingly seeks an order setting aside of those payments in terms of Section 26(1) of the Insolvency Act.[2]

[2] It is noteworthy to mention that at the beginning of the proceedings by agreement between the parties, the court granted an order dated 7 March 2025 which provides as follows:

1. In terms of rule 33(4) of the Uniform Rules of Court the issues set out in paragraph 14 of the plaintiff's particulars of claim and paragraph 11 and 15.2 of the defendant's plea are to be determined separately from the remainder of the issues between the parties.

2. The further proceedings are stayed until the abovementioned issues have been finally disposed of.

Facts

[1] 24 of 1936 (hereinafter referred to as the Insolvency Act).
[2] the Insolvency Act.

[3] PRASA originally procured 70 dual electric/diesel locomotives from Swifambo at a purchase price of R3.5 billion, inclusive of VAT. VAT payments were made to the SARS pursuant to Swifambo supplying PRASA with 13 locomotives, which in turn were provided in terms of agreement ("the purchase agreement") entered into between PRASA and Swifambo during March 2013. It is common cause that Swifambo paid a total net VAT amount of R235,311,026.00 to SARS.

[4] This Court subsequently reviewed and set aside both the procurement decision and the purchase agreement on the basis of material irregularities, including corrupt conduct in the tender process. Following the setting aside of the purchase agreement, the plaintiffs now seek to undo the financial consequences thereof, including recovery of output VAT paid to SARS in an amount of approximately R235 million to R325 million.

[5] SARS contends that Swifambo was statutorily obliged to account for and pay output VAT to SARS in respect of the taxable supplies made. Accordingly, SARS submits that VAT payments were not made in error or without consideration, but constituted amounts properly due in terms of the Value-Added Tax Act (VAT Act).[3]

[6] Furthermore, the plaintiffs contend that, should this court find that the supply of the 13 locomotives gave rise to an obligation on the part of Swifambo to pay VAT in terms of section 7(1)(a) of the VAT Act, the value of such supply is only R91 million, and that the balance of R144 million (R235 million less R91 million) should be refunded by SARS.

[7] The plaintiffs argue that section 26 of the Insolvency Act applies because the VAT payments made by Swifambo were dispositions of its property not made for value. They contend that, once the purchase agreement was set aside retrospectively and declared void ab initio, no taxable supply ever existed in law, and no VAT obligation could arise. The plaintiffs argue the VAT payments were made *sine causa*, discharged no valid liability, and conferred no value on

[3] 89 of 1991.

Swifambo. For these reasons, the payments fall squarely within the reach of section 26 of the Insolvency Act and are liable to be set aside and repaid.

[8] The defendant submits that the Insolvency Act is inapplicable because section 26 of Insolvency Act only permits the setting aside of dispositions not made for value. Each VAT payment made by Swifambo discharged a lawful statutory obligation under the VAT Act and therefore constituted value in the form of a reduction of liabilities. The retrospective setting aside of the purchase agreement does not extinguish VAT liability that had already arisen at the time of invoicing and payment, nor does illegality negate fiscal consequences. The defendant submits that the VAT payments were not made *sine causa* and cannot be clawed back under section 26 of the Insolvency Act.

[9] The underlying factual matrix is unusual and troubling. The evidence establishes that the tender process conducted by PRASA was fatally tainted by corruption and irregularity, resulting in Swifambo unlawfully benefitting from the award of a multi-billion-rand public contract. Francis J in *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ)[4] stated that—

> "I accept that Swifambo will suffer some financial hardship if the tender is set aside. They simply brought this upon themselves when they had no right to have been awarded the tender in the first place, and they cannot benefit from an unlawful tender."

[10] Furthermore, Francis J stated that—

> "Any prejudice to Swifambo, and particularly Swifambo Rail Holdings who devised the scheme, is immaterial in comparison to the prejudice to the public interest. The public interest and not the successful tenderer's is the guiding interest when a court is determining the appropriate remedy."[5]

[11] What the court was emphasising was that the prejudice to Swifambo was immaterial in comparison to the prejudice to the public interest, and that the guiding consideration in setting aside the contract was the protection of the public

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[4] *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at para 123.
[5] See n 5 above at para 128.

fiscus. It is therefore against this backdrop that the present claim before me must be assessed.

Issues before the court

[12] The principal issue to be decided by this court at this stage is whether VAT payments made by Swifambo were made for "value" or not within the context of and as contemplated in section 26 of the Insolvency Act.

[13] This enquiry necessarily requires determination of the following subsidiary issues:

(a) Whether the VAT payments discharged a lawful statutory obligation arising under the VAT Act;

(b) Whether the retrospective invalidation of the Purchase Agreement extinguished the VAT liability retrospectively;

(c) Whether the supplies made by Swifambo constituted "supplies" made in the course or furtherance of an "enterprise" as contemplated in section 7(1)(a) of the VAT Act; and

(d) Whether the alleged excess VAT payments were made without value.

Legal Principles and Analysis

[14] Section 26 of the Insolvency Act provides that every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent—

(a) "More than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."

[15] In *Cohen v Absa Bank Limited 2024 JDR 0430 (SCA)*[6] the supreme court of appeal stated that—

"The purpose of ss 26, 29, 30 and 31 of the Insolvency Act is to empower a trustee or liquidator to institute proceedings against the parties (or beneficiaries of the dispositions) listed in those sections, for the setting aside of an 'improper disposition', and to obtain the remedies therein provided for the benefit of the body of creditors."

[16] It is common cause between the parties that the VAT payments made by Swifambo to SARS constitute "dispositions" as contemplated in section 2 of the Insolvency Act. The only dispute relevant to the separated issue is whether those dispositions were made "for value" as required by section 26(1) of the insolvency Act.

[17] Section 2 of the Insolvency Act define disposition as—

"Any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and "dispose" has a corresponding meaning"

[6] *Cohen v Absa Bank Limited* 2024 JDR 0430 (SCA) at para 24.

[18] *In Estate Jager Appellant v Whittaker and Another Respondents 1944 AD 246*[7] the Appellate division stated that—

> "The words "disposition not made for value" mean, in their ordinary signification, a disposition for which no benefit or value is or has been received or promised as a quid pro quo. The most obvious example of such a disposition is a donation and if we call to mind the definition of a donation given in Digest (50.17.82) donari videtur quod nullo jure cogente conceditur, it would appear prima facie that any payment, purporting to be made solely in discharge of an existing obligation, is in effect a donation if no obligation to make such payment in fact exists. If a lawful obligation to pay the money in fact exists, then the obvious benefit which the payer receives in return for such payment is a discharge from his liability to pay. Such a payment decreases his assets, but at the same time it diminishes his liabilities, and in transactions which are entered into in the ordinary course of business such a discharge from a liability would be value for the payment made."

[19] A payment made in discharge of an existing legal obligation ordinarily constitutes value because it reduces the debtor's liabilities. Conversely, a payment made purportedly in discharge of a non-existent obligation is regarded as a disposition made *sine causa* and therefore not made for value.

[20] The mere fact that a disposition takes the form of a tax payment does not exclude the application of section 26 of the insolvency act. However, neither does section 26 of the Insolvency Act permit the re-characterisation of a lawfully due statutory tax liability as a donation.

[21] Although the plaintiffs' claim is framed under section 26 of the Insolvency Act, the applicability of that provision depends on whether the VAT payments were made for value or not, which in turn requires a determination of whether Swifambo was under a lawful obligation to make those payments at the time they were made. Section 26 of the Insolvency Act does not operate in isolation and does not itself define when value exists, rather, it presupposes an anterior enquiry into the legal source and validity of the obligation purportedly discharged by the disposition.

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[7] *Estate Jager Appellant v Whittaker and Another Respondents* 1944 AD 246 at 250-251.

[22] In the matter beforehand, and absent of a statutory VAT liability on Swifambo, would mean payment of VAT to SARS discharged no lawful obligation and would, as contended by the plaintiffs, have been made *sine causa* and for no value within the meaning of section 26 of the Insolvency Act.

[23] Section 7(1)(a) of the VAT Act imposes VAT on the supply of goods or services by a vendor in the course or furtherance of an enterprise carried on by that vendor.

[24] Section 9 of the VAT Act contains the time of supply rules, which determine when a supply of goods or services is deemed to take place for tax purposes. Section 9(1) of the Vat Act provide that—

> "For the purposes of this Act a supply of goods or services shall, except as otherwise provided in this Act, be deemed to take place at the time an invoice is issued by the supplier or the recipient in respect of that supply or the time any payment of consideration is received by the supplier in respect of that supply, whichever time is earlier."

[25] It is therefore necessary to determine whether the factual conduct relied upon by the defendant constituted a "supply" made in the course or furtherance of an "enterprise" as contemplated in section 7(1)(a) of the VAT Act.

[26] Conversely, if VAT liability did arise at the time of invoicing or receipt of consideration under sections 7 and 9 of the VAT Act, the payment of VAT would have had the legal effect of extinguishing that liability and would therefore constitute value for purposes of section 26 of the Insolvency Act.

[27] Section 1 of the VAT act defines supply as—

> "Performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of "supply" shall be construed accordingly."

[28] In *Shell's Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Service 2000 (3) SA 564 (C)*[8] the Court held that—

> "section 7(1)(a) of the VAT Act has two requirements before VAT can be levied, namely (1) there must be a supply; and (2) such supply must be in the course or furtherance of an enterprise carried on by a vendor. The word supply is defined as meaning all forms of supply, irrespective of whether the supply is effected, and any derivative of supply shall be construed accordingly."

[29] The plaintiffs' central contention is that the retrospective invalidation of the purchase agreement created a legal vacuum in terms of which the statutory requirements necessary to sustain VAT liability under the VAT Act were never legally satisfied. In this regard, the plaintiffs rely on section 7(1)(a) of the VAT Act, which imposes VAT upon the supply of goods or services by a vendor in the course or furtherance of an enterprise carried on by that vendor. The plaintiffs submit that two jurisdictional requirements must exist before VAT may validly be levied, namely:

(a) the existence of a "supply" of goods or services; and

(b) that such supply must have been made in the course or furtherance of an "enterprise" conducted by the vendor.

Supply of Goods and Services

[30] The plaintiffs accordingly contend that, once the purchase agreement was declared invalid and set aside, the juridical basis underpinning the alleged supply ceased to exist retrospectively. On this basis, they argue that the payments made by Swifambo to SARS as output VAT were never legally due and are therefore recoverable.

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[8] Shell's Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Service 2000 (3) SA 564 (C), at 572B-C.

[31] The defendant contends, by contrast, that both requirements were satisfied at the time the invoices were issued and payments received, and that later invalidation of the contract does not negate VAT liability that had already arisen.

[32] The breadth of the definition of supply indicates that the enquiry is directed at factual conduct, namely whether goods or services were provided or made available, rather than at the ultimate validity or enforceability of the underlying contract.

[33] Furthermore, the section 1 of the VAT Act makes it clear that performance in terms of the purchase agreement would amount to a supply. The plaintiffs argument here is that because the purchase agreement was rendered void as a result of the High Court judgment,[9] any performance in terms of that agreement is also void, which in turn has the effect of nullifying the "supply" as contemplated in the VAT Act.

[34] This position relies on a "supply" having to be premised upon the existence of a valid contract. But the definition of "supply" includes "other forms of supply" which (of necessity) are supplies provided other than those pursuant to a valid contract.

[35] It is common cause that, prior to the Purchase Agreement being set aside, Swifambo issued invoices to PRASA and delivered thirteen locomotives pursuant to the agreement. Accordingly, there was a supply of goods by Swifambo for purposes of the VAT Act.

Supply made in the furtherance of an enterprise conducted by Vendor

[36] The plaintiffs contend that Swifambo was a shelf company that carried on no genuine enterprise and that any activities it undertook were once-off and tainted by illegality.

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[9] See n 5 above.

[37] An "enterprise" is defined in section 1 of the VAT Act as "an activity carried on continuously or regularly for consideration". Swifambo carried on an enterprise through the procurement and supply of locomotives over an extended period, funded by "progress payments", even if such activities were carried out through subcontractors. It does not matter whether the performance was made by subcontractors or not. This position was confirmed by the Supreme Court of Appeal in *XO Africa Safaris v CSARS (395/15) [2016] ZASCA160*[10] where the court stated that—

> "The fact that in order to perform its obligations towards the FTO's it in turn had to acquire those goods and services from local suppliers was neither here nor there. Its contract was to provide those goods and services. How it did so was no concern of the FTO"

[38] It is common cause that payments under the PRASA contract were made over a period from 2013 to 2015 and were structured as progress or milestone payments. The continuity and regularity of these activities are inconsistent with the characterisation of the transaction as a purely once-off event. The fact that the enterprise was carried on pursuant to a contract later declared unlawful does not, without more, exclude it from the ambit of the VAT Act.

[39] In *MP Finance Group CC (In Liquidation) v Commissioner for the South African Revenue Service 2007 JDR 0416 (SCA),*[11] the Supreme Court of Appeal said that "an illegal contract is not without all legal consequences; it can, indeed, have fiscal consequences." This position was also illustrated by the Appellate Division in *Commissioner for Inland Revenue v Insolvent Estate Botha 1990 (2) SA 548 (A)*[12] where Hoexter JA stated that "it is not to be inferred that because an agreement is illegal a Court will in all circumstances and for all purposes turn a blind eye to its conclusion; or deny its very existence."

[40] It is further common cause that Swifambo issued tax invoices to PRASA and received payments in accordance with those invoices. Section 1 of the VAT act

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[10] *XO Africa Safaris v CSARS* (395/15) [2016] ZASCA 160 at para 29.
[11] *MP Finance Group CC (In Liquidation) v Commissioner for the South African Revenue Service* 2007 JDR 0416 (SCA) at para 12.
[12] *Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture'* 1990 (2) SA 548 (A) at 556 C-E.

defines invoice as "a document notifying an obligation to make a payment. VAT liability arose, if at all, at the time the invoices were issued or payments received, and not at some later stage when the contract was set aside.

[41] Swifambo supplied goods, issued invoices, received consideration, and accounted for VAT in accordance with the VAT Act during the relevant tax periods. At the time the VAT payments were made, Swifambo was under a statutory obligation to account for and pay VAT arising from those transactions. The payment of VAT therefore had the legal effect of extinguishing an existing statutory liability. That extinction of liability constitutes value for purposes of section 26 of the Insolvency Act.

Fictitious or invalid supplies

[42] The plaintiffs accept, in the alternative, that if VAT was legally payable at all, it could only have been payable on the 13 locomotives actually delivered to PRASA. They contend that VAT was nevertheless paid on progress or milestone invoices reflecting payments far exceeding the value of those 13 locomotives, with the result that VAT was paid in excess of any genuine VAT liability.

[43] The plaintiffs' approach in this issue is performance based (VAT tracks lawful supply). SARS' approach is the transaction and consideration based (VAT tracks invoicing and payment).

[44] On the plaintiffs' approach, the difference between the value of the locomotives actually delivered and the total consideration upon which VAT was paid constitutes an "excess amount" which, they contend:

(a) discharged no legal obligation;

(b) conferred no value on Swifambo's estate; and

(c) is therefore recoverable under section 26 of the Insolvency Act.

[45] I accordingly disagree with the plaintiff argument because VAT is not levied on physical delivery alone, but on consideration invoiced or received. Progress or milestone payments are deemed supplies under the VAT Act. VAT liability therefore arose on the full invoiced consideration, not merely on delivered goods. All VAT paid by Swifambo was lawfully due at the time it was paid.

[46] There is no "excess" amount because VAT is calculated on monetary consideration, not on post-hoc assessments of contractual performance. Each VAT payment discharged an existing statutory liability and thus constituted value.

[47] For all the foregoing reasons, the plaintiffs have failed to establish that the VAT payments made by Swifambo to SARS constituted dispositions not made for value as contemplated in section 26 of the Insolvency Act. The evidence demonstrates that, at the time the payments were made, Swifambo was under a lawful statutory obligation to account for and pay VAT arising from taxable supplies made in the course or furtherance of an enterprise. The subsequent invalidation of the Purchase Agreement did not retrospectively extinguish the fiscal consequences that had already arisen under the VAT Act.

[48] Furthermore, the plaintiffs have failed to establish that any portion of the VAT paid constituted an "excess" payment made without value. VAT liability arose upon the issuing of invoices and the receipt of consideration, including progress and milestone payments, and not solely upon the ultimate delivery of the 13 locomotives. Each VAT payment accordingly discharged an existing statutory liability and therefore constituted value in law.

[49] To permit recovery of the VAT paid to SARS in the present circumstances would undermine the public-interest considerations emphasised by this Court in the review proceedings relating to the PRASA tender. The effect would be to shift the financial consequences of an unlawful and corrupt procurement process onto the public fiscus, notwithstanding that Swifambo had already accounted for VAT in accordance with the VAT Act during the relevant tax periods.

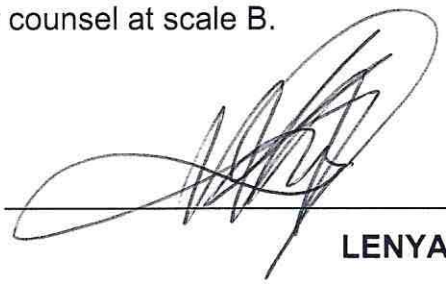
[50 In reaching this conclusion, I am mindful that the setting aside of the Purchase Agreement was necessary to vindicate the constitutional principles governing public procurement and to protect the integrity of the public fiscus. However, the

unlawfulness of the underlying contract does not, without more, invalidate the independent statutory obligations arising under the VAT Act. Fiscal consequences may continue to flow from unlawful transactions, particularly where taxable supplies were in fact made, invoices issued, and consideration received.

Order

[51] (1) It is declared that VAT payments made by Swifambo were made for "value" within the context of and as contemplated in section 26 of the Insolvency Act.

(2) The plaintiffs' action is dismissed with costs including the costs of two Counsel, senior counsel at scale C and junior counsel at scale B.



LENYAI J
JUDGE OF THE HIGH COURT
PRETORIA

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