GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/25285

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

8 October 2019 .....

SIGNATURE

In the matter between:

MBITA CONSULTING SERVICES CC Applicant

And

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA (PTY) LTD TRADING AS PRASA REAL ESTATE SOLUTIONS Respondent

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JUDGMENT

SPILG, J:

INTRODUCTION

1. The respondent in the main application is The Passenger Rail Agency Real Estate Solutions which describes itself as a division of the Passenger Rail Agency of South Africa (Pty) Ltd (*PRASA)*. In terms of company law the legal entity is PRASA and in terms of the Uniform Rules it may be cited by its trading name. It is however inappropriate to describe itself as "*The Passenger Rail*

Agency of South Africa (Pty) Ltd Corporate Real Estate Solutions as it does in its application for a stay of execution.

2. On 23 July 2018 I granted an urgent application in terms of which PRASA was ordered to pay the applicant an amount of just under R17 million together with interest.

   For ease of reference I will continue to refer to the parties by their citation in the main application.

3. The urgency arose because employees of the applicant had not been paid, their provident fund contributions were outstanding and certain creditors who had obtained judgments were threatening to attach assets which were necessary for the applicant's continued functioning while there were others who intended to apply for its liquidation.

4. It was alleged that this situation arose from PRASA's failure to pay for cleaning services rendered at certain railway stations which were divided between MB1 and MB2 stations. The distinction between claims for services rendered in respect of MB1 and MB2 stations was at the heart of an arbitration award. The relevance will become evident later.

5. In order to ensure that the money was used to urgently overcome the dire straits which the applicant relied on to justify urgency I directed in the order itself that the money received was to be immediately appropriated to pay the employees, their provident fund contributions and the proven claims of their suppliers. The applicant had no difficulty with the suggestion. Indeed it would be surprising if it were otherwise since a failure to pay over immediately would bring into question the claim of urgency.

6. Judgment was granted on 23 July and on 26 July PRASA brought an application to stay execution of the writ that had by then been served pending an application for rescission of judgment. The application also sought an order that the applicant

and its attorney pay the costs *de bonis propriis.* This is the application presently before me.

THE ISSUES

7. PRASA contends that the applicant obtained the order on an urgent basis without service, that the matter was not urgent and that the order was erroneously sought or granted in its absence. This would entitle this court to rescind its own order *mero motu* and without the need for a substantive application for rescission. It further submitted that it was entitled to a stay of execution pending an application for rescission of judgment under rule 45A[1] or in terms of the court's inherent jurisdiction under the common law in order to prevent an injustice. PRASA also contends that there was a failure to disclose material facts.

8. The argument initially proceeded on the basis that there had not been service of the original application on PRASA and that both the applicant and I had been under the misapprehension that this was a liquid or liquidated claim whereas it in fact was not. At the time the applicant applied for judgment I had taken time to engage *Adv Boonzaier* on understanding why the two sets of amounts claimed were either liquid or liquidated. I believed that I had understood the argument and therefore granted the judgment based on the claims being liquid or liquidated. .

   In seeking a stay of execution *Adv Platt* contended that at least in respect of the MB2 stations the claim could not be based on liquidated damages, only on unjust enrichment. This was because the arbitrator had determined that the agreement in respect of the MB2 stations had been lawfully terminated prior to the rendering of the services which formed the basis of those claims. This would mean that the claim could neither be liquid nor liquidated since the applicant would only be entitled to recover the lesser of the expenses incurred by it or the benefit derived

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[1] Rule 45A is headed *"Suspension of orders by the court"* and provides that a court; *"may suspend the execution of any order for such period as it may deem fit."*

by PRASA; not the amount claimed to have been agreed between the parties at any particular time.

9. In view of these submissions, and since an application for rescission had not been brought by then[2], I was quite comfortable to *mero motu* consider setting aside the judgment of 23 July if there had not been service of the application on PRASA or if the order had been erroneously granted in the absence of PRASA as envisaged by r 42(1) (a). The rule provides that:

> *(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*

See for example *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA); *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA); *Kgomo v Standard Bank of South Africa* 2016 (2) SA 184 (GP) and *First National Bank of South Africa Ltd v Jurgens and others* 1993 (1) SA 245 (W) at 247E (without necessarily accepting that the limitation set out there correctly expresses the law)

I was also concerned that the applicant may have attempted to mislead the court into believing that the judgment in respect of the MB2 stations was a liquidated claim. For this reason too I was prepared to accept that a common law ground of rescission may exist.[3]

10. It is trite that a court of equal[4] or superior jurisdiction can set aside an order in such circumstances, whether under r 42, the common law or on inherent

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[2] The application for rescission was only brought on 20 August

[3] *Bristow v Hill* 1975 (2) SA 505 (N); *Tshabalala and another v Peer* 1979 (4) SA 27 (T) particularly the minority concurring judgment of Cilliers AJ (at the time)

[4] This includes the judge who granted the order which is sought to be set aside.

jurisdictional grounds. Case law recognizing that there are these certain limited circumstances which are exceptions to a court being considered *functus officio.*

11. I heard argument on 27 July and 2 August. Due to the heavy work load indicated that I would deliver judgment on 13 August. On both those occasions it was accepted that execution could not proceed until I had decided the application for stay.

12. While preparing the judgment it became apparent that PRASA had in fact been served with the application and that this court may not be in a position to rescind the judgment *mero motu,* in which event I would have to consider whether to stay the execution of the judgment, since an attachment had already been made under the writ well before any application for rescission of judgment had been launched.

13. In order to succeed with an application under r 45A for a stay of execution where the papers had been properly served it would be necessary for PRASA to demonstrate that real and substantial justice required it.

This would clearly be the case if the order had been erroneously granted on the grounds mentioned earlier. It would then be for the court considering the rescission of judgment to determine whether or not some more stringent test was required to be met in order to permit a rescission, bearing in mind that in cases such as *Tshabalala* and *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) a failure on the part of representatives of a litigant to inform its attorneys or, once informed its attorneys failed to attend court, resulted in the requirements of rule 42(1)(a) not being met where there had been proper service of the initiating process.

14.. It has been said that a suspension of the execution of a judgment ought to be exercised in exceptional circumstances where those cases where there had been proper service of an application. I stood the matter down and in the course of considering the stay application I became satisfied that the challenge to proper

service should fail and that the application had reached the minds of those in authority prior to the hearing date.

In addition a number of anomalies arose from the submissions made. I therefore did not deliver judgment on 13 August but afforded PRASA's legal representatives an opportunity to deal with these issues.

The issues concerned whether or not the arbitrator had in fact made a ruling on the MB2 claim; whether the quantum of the MB2 claim had in fact been determined and that the only issue was whether there had been payment; if there was ambiguity regarding the ruling whether the court could have regard to the proceedings which resulted in the case being referred to arbitration in order to appreciate what issues were in dispute; and what meaning was to be attributed to certain communications from PRASA which at face value conceded liability to pay the applicant in respect of cleaning performed at the MB2 stations after the date when , in terms of the arbitrator's determination, the agreement regarding those stations had been lawfully terminated, all of which suggested that the applicant had correctly identified its claim as one for at least liquidated damages and not one in respect of unjust enrichment.

15. The issues I raised were the following:

1. *Did the arbitrator find that Mbita had no claim against PRASA or did he find that because the MB2 contract was a separate contract from the principal contract (i.e. the MB1 contract) that in terms of the referral he did not have to make a finding on any aspect of the MB2 claim?*

2. *Since the arbitration arose pursuant to court proceedings out of the Johannesburg High Court can I have regard to those papers in interpreting the award?*

3. *Was the reference to payment in respect of the period from November 2015 to January 2016 part of the terms of reference and if so can I question the amount identified by the arbitrator as being payable while the arbitration was ongoing until the date of the award or the date on which Mbita stopped its cleaning services whichever was sooner;*

4. *How is Vally J's order to be interpreted in respect of any amount that was to be payable for the duration of the interdict in respect of;*

    a. *the MB2 stations;*
    b. *the MB1 stations*

    and what was the period?

5. *How is the first para of FA5 to the main application to be interpreted in the sense of whether it is or is not independent of the outcome of settlement? And what relevance does the email of 8 August 2017 have in interpreting that paragraph?*

16. As indicated earlier, PRASA contended that the application had not been served on it and also relied on the contention raised during argument that the claim was one for unjust enrichment and not for liquidated damages. It was also submitted that the application was not urgent. This was a self-standing ground and also formed the basis for seeking a special order for costs against the applicant because of a failure to disclose previous court proceedings between the parties.

THE ISSUE OF SERVICE

17. The founding affidavit in the application to suspend execution of the writ pursuant to the judgment granted against it on 23 July 2019 was deposed to by Mr. Dingiswayo who confirmed that he is PRASA's General Manager: Group Legal Services.

18. In the affidavit he contends that the original application had not been served on PRASA. Clearly a failure to serve would have been fatal to the grant of the judgment and I would have been entitled, on that ground alone, to set aside my own order.

19. However it was apparent that the application had been served not only on the division's principal place of business on 10 July, which was some 13 days before

the hearing, but an email had also been sent by the applicant's attorneys to Dr Sishi who is the Group CEO of PRASA.

Although no affidavit was deposed to by Dr Sishi explaining what he did on receipt of the email which contained the application, the affidavit of Mr. Dingiswayo alleges that on the morning of 22 July he received an email from Dr Sishi attaching the earlier email from the applicant's attorneys. It is common cause that there was no appearance by anyone on behalf of PRASA on 23 July when the matter came before me.[5]

20. Both Mr. Dingiswayo, as the most senior person responsible for legal matters, and the Group CEO of PRASA therefore had express prior knowledge that the application was to be heard on 23 July.

Despite this the only explanation offered by Mr. Dingiswayo for not instructing PRASA's attorneys to attend court on 23 July was because he believed that they had been served with the papers and, that being so, they would attend court and demonstrate that there had not been proper service. Dingiswayo said that he was at a group executive's meeting for the whole of 22 July.

21. The explanation for the failure of any legal representation at court on 23 July does not make sense. If Mr. Dingiswayo believed that PRASA's attorneys had been served then clearly that would have been adequate bearing in mind that elsewhere in the same affidavit he was at pains to explain why they should have been served with the papers. Yet he claims that if PRASA's attorneys had been served he expected them to have gone to court and taken the point that service on the attorneys was not proper service on PRASA itself.

22. Moreover he ought to appreciate that in urgent applications proper service may be effected other than by the sheriff. The fact that the PRASA's Group CEO personally received the papers and responded by forwarding them a day before

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[5] See para 34 of the affidavit deposed to by Mr Dingiswayo who is PRASA's General Manager: Group Legal Services

the hearing to the head of its legal department confirms that PRASA cannot complain about the nature of service.

23. The course adopted by the applicant *de facto* turned out to be the most expeditious method of bringing the application to the attention of the person responsible for taking steps to deal with it, if they were so minded; namely the Group CEO who in turn had handed the papers prior to the hearing to the Group Legal Services General Manager. .

24. As appears from Mr. Dingiswayo's affidavit it was the embarrassment of the media enquiring, at approximately 13h30 on 23 July, about the grant of the judgment that prompted him into action which resulted in counsel confirming some two and a half hours later what he already knew- that judgment had been granted earlier the same day.[6]

25. The order was therefore granted after proper service on PRASA. Its failure to attend court is illogical and therefore rejected. Its failure to take the elementary step of contacting its own attorneys by phone or email at some stage during the course of the 22nd July regarding the application is inexcusable considering the nature of the matter.

26. I was satisfied that the matter was urgent. I was also satisfied that there could not be a proper challenge to notice. The fact that attorneys had been appointed in other matters did not necessarily mean that they would be appointed again.

However on the facts of this case and having regard to the number of cases involving the applicant and PRASA there was no reason to in addition have served on PRASA's attorneys. I say this bearing in mind that PRASA's most senior executive had acted on the email he received and handed the matter over to Mr. Dingiswayo who in any event would have had to be notified by any attorney on whom the application might have been served.

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[6] Annexure MMD3A read with paras 36 and 40 of Dingiswayo's affidavit

27. There is no acceptable excuse for PRASA's failure to contact its attorneys before the hearing when it obtained knowledge of the application. It cannot sit back and rely on a court to find some procedural flaw even if it existed. I recall a reported judgment of Didcott J during the 1970s or 1980s when he was presiding in the present day KwaZulu-Natal where this very point was made.[7]

28. The court is concerned with the number of occasions government departments and state owned enterprises fail to attend court despite the papers being served on them in a manner which suffices in the case of all other litigants whether individuals or legal entities . It is difficult to appreciate why they believe that the law of civil procedure is somehow different for them.

29. In the past there have been occasion when I have asked counsel for an applicant to notify the State Attorney because I had difficulty appreciating that the applicant had made out a case. In each of these cases it was apparent that the respondent had just not bothered to approach the State Attorney to consider the matter. These cases almost invariably were matters involving Home Affairs. However metropolitan councils are not immune from similar criticism.

30. The belief that courts will come to the assistance of SOE's or Government bodies when they ignore papers properly delivered suggests a belief that they will receive beneficial treatment. This not only places the court in an invidious position when dealing impartially with litigants but is also disrespectful to a party's right to approach a court and have its matters dealt with expeditiously, without having to look over its shoulder in case the order is rescinded, and of course it affects the due administration of justice.

31. Without just cause for failing to attend court, on an application of *Minister of Land Affairs & Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) there ought to be no further consideration given to the papers as it may be contended that there can be no basis for finding that real and substantial justice requires a stay in cases where a rescission of the judgment cannot succeed.

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[7] I have spent a considerable time trying to locate the judgment without success; even a three word digital search produces many hundreds of results.

32. I indicated earlier my concern that, as a matter of law, I had allowed a claim of liquidated damages when it was one of unjustified enrichment which by definition is completely illiquid and requires very different considerations when quantifying the monetary value of the claim.

However before proceeding to deal with that, it is necessary to consider the other two grounds set out in Adv Platt's heads of argument of 22 August for justifying a stay of execution of the judgment and a special cost order.

LACK OF URGENCY

33. While I was in private practice a number of judges still maintained that there was no such thing as commercial urgency. The incorrectness of that position was put to rest a long time ago.

34. Case law demonstrates the myriads of forms in which commercial urgency manifests itself. It is difficult to imagine a more pressing one than where a company is about to have its equipment attached and is therefore unable to continue its business, or is about to be placed in liquidation because its own debtor has refused to pay without any lawful basis (at least on paper). It is also difficult to appreciate a situation of greater hardship to employees of an applicant since they too cannot be paid if there is no receipt of funds for work properly done over a long period on a single contract. One is also aware of some debtors who are in a strong position and may withhold or delay payments to force the creditor to accept a discounted settlement even to the point of insolvency.

35. A court should therefore not be slow to determine urgency where the debtor does not come to court to oppose in circumstances where there is no apparent defence to the claim but whose failure to pay may result in the creditor being unable to conduct its business, be wound up or where it could be shown that employees could directly suffer to a significant degree.

36. In the present case there is a letter from PRASA, to which I will return later, which mentions that the failure of the applicant to pay its employees in respect of work they did at the railway stations was of concern to it because of the ethos it as a government body upheld.

MATERIAL NON-DISCLOSURE, RES IUDICATA and LIS ALIBI PENDENS

37. PRASA contends that there are a number of other proceedings between the same parties involving the same subject matter. The one is a challenge to the arbitration award. As I will demonstrate when dealing with the actual contents of the award those proceedings cannot impact on the outcome of the narrow issues dealt with here as the arbitrator was confined to her terms of reference (and said as much).

38. Therefore to the extent that the submission is based on an argument of *res iudicata* it is misplaced. Moreover at best the other grounds would amount to a dilatory plea of *lis pendens.* In this regard a court has a discretion as to whether such a plea should stay the litigation.[8]

In the present case there is no basis, since on what is before me there are very clear and limited issues based on credit notes, payment and possibly journal entries which may be mainly of an accounting nature. If I am correct (and I do not have to decide that at this stage in respect of anything other than the MB1 amount) then it appears that PRASA has succeeded in tying up the applicant in what comes down to amounts that were accepted both in relation to the MB1 and MB2 stations, and in the latter case even post cancelation as determined by the arbitrator. If my assessment is correct then the issue is mainly accounting related or simply factual in respect of the MB2 stations.

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[8] *Belmont House (Pty) Ltd v Gore and ano* NNO 2011 (6) SA 173 (WCC).

WHETHER CLAIM IS FOR UNJUST ENRICHMENT OR OTHERWISE ILLIQUID

39. In the present case the applicant relied on obligations undertaken by PRASA to pay the applicant for cleaning services in respect of;

    a. Stations categorized as MB1s pursuant to a one year tender which commenced on 1 November 2012 (albeit that the principal agreement was only signed in November 2013) and was extended annually. It was brought to an end on 31 July 2017.

       The outstanding amount said to be owing was in respect of the *contractual* obligations incurred in respect of the MB1 stations was R971 098.43 which had remained unpaid for the month of July. Any contention by PRASA to the contrary would be disingenuous.

    b. Additional stations categorized as MB2s pursuant to an agreement concluded on 14 November 2012 and which was also for a period of one year but was similarly extended. In terms of this agreement PRASA was to pay the applicant R774 283.31 per month.

       There was a dispute between the parties as to whether this agreement could be separately terminated by notice. This is an issue that went to arbitration.

40. The applicant claimed that it was common cause that PRASA purported to terminate the MB2 agreement by giving one month's notice by letter dated 1 October 2015. However it continued to render cleaning services at the MB2 stations until 31 July 2017 which coincided with the date when the arbitration award was made.

    The applicant did so in disregard of the notice, contending that the MB2 agreement was part and parcel of the principal agreement and therefore could only have been terminated when the MB1 agreement terminated.

The applicant furthermore contended that even on PRASA's version the additional agreement did not terminate prior to 1 November 2015.

41. The applicant then approached the court and obtained an order precluding PRASA from appointing anyone else to perform the cleaning services until the final determination of the arbitration proceedings.

The court order which appears to have been granted by consent before Vally J was attached to the founding papers. At first sight it supports the applicant's position. It reads:

> *"Pending the 31st January 2016 and until such time that the question of whether or not the train stations listed in annexure MB2 form part of* (the principal) *contract is resolved through arbitration ..."* PRASA;
>
> a. is interdicted from appointing another service provider ... *"to replace the applicant as the current duly appointed service provider under* (the principal) *contract"* in respect of the MB1 stations *"until the expiry of the contract on 31 January 2016 and the subsequent appointment of a service provider through an open and competitive tender process";*
>
> b. is directed to comply with its contractual obligations in respect of the MB1 stations until the expiry of the contract on 31 January 2016

42. Since the arbitration was only concluded much later the applicant continued to clean the stations to the exclusion of anyone else pursuant to the interim order until 31 July 2017. The issue of whether the consent order was ambiguous or contained a clear error appears to have been cleared up by PRASA's reconciliation account and its conduct but for reasons which appear later is unnecessary to decide.

43. The applicant relied on an email dated 8 August 2017 from PRASA's senior finance manager at its Corporate Real Estate Solutions division which unequivocally refers to "*employees under your (i.e.* the applicant's) *employment who were providing a service at PRASA stations*" and, according to the applicant, the list which was attached contained the names of the applicant's employees who were rendering cleaning services at both MB1 and MB2 stations.[9]

44. The applicant also relied on a draft consent order prepared by PRASA which it claimed demonstrated that PRASA knew that the applicant was continuing to perform cleaning services at the MB2 stations at least until December 2016. It also sought to contend that there was an undertaking to remunerate. It was alleged that the document was signed by both parties and the arbitrator. [10]

The applicant submitted an email from PRASA dated 22 December 2016 which related to a proposed settlement order. *Prima facie* para 1.1 contained a statement against interest; it acknowledged that the applicant had as a fact performed cleaning services at MB2 stations for the 14 month period from the beginning of November 2015 until the end of December 2016.

I however accept that the document was not made an order of court. The question as to whether this was a self-standing statement or formed part of the settlement proposal was one of the issues the parties were requested to address in terms of my note of 13 August. The reconciliation account attached to PRASA's application for rescission of judgment which was subsequently brought on 20 August appears to have provided the answer.

45. The applicant claimed in para 77 that it vacated both the MB1 and MB2 stations on 31 July 2017 because PRASA had failed to pay for the services it had received (this date also coincided with the handing down of the arbitrator's award). It referred to the email of 8 August 2017 from PRASA which complained that the applicant had failed to pay its employees for the work they had performed and that: "*As government entity it is our responsibility to ensure that our service*

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[9] FA paras 59-60

[10] Applicant's founding affidavit para 65 read with annex FA4 (at p49).

providers (contractors appointed by PRASA) comply with the laws and regulations of labour you are therefore urged to pay the outstanding salaries of your employees".

46. In addition the applicant attached a copy of the arbitration award but contended that it was manifestly incorrect since the arbitrator had found that the MB2 contract did not endure post the 31 October 2015 termination date.

47. The applicant also attached an opinion obtained by PRASA from senior counsel in February 2018 which was attached to a letter from PRASA to Attorneys Morobadi Inc. The opinion advised PRASA to recognise that the cleaning services were rendered and to meet its contractual obligations arising from the principal agreement and the additional stations agreement together with their renewals. PRASA said that the opinion was unlawfully obtained. I did not consider the document as relevant and I understood it to be an opinion given under attorney client privilege. The applicant sought to demonstrate that the opinion was provided by PRASA's erstwhile representatives but that did not persuade me to consider it.

48. It was further contended that the respondent had failed to pay any amounts in respect of the MB2 stations since 1 November 2015 and that;

    a. There was a clear admission of liability for the 14 months from then until 31 December 2016 and that the amount was an agreed rate of R774 283.31;

    b. PRASA's email of 8 August 2017 acknowledged that the applicant was engaged in providing services in relation to the MB2 stations up to 31 July 2017. This is an additional 7 months from the period referred to in the previous subparagraph;

    c. The total liability for the 21 months from November 2015 until 31 July 2017 in respect of the MB2 stations was R 15 935 421.66.

d. In addition the admitted liability for the MB1 stations of R971 098.43. The only question was whether PRASA had made payment.

49. The applicant's papers ran to 114 pages in a crowded urgent court week where I dealt with 26 cases over half of which were opposed. I was therefore acutely aware that, despite having read the papers, I may have made incorrect assumptions.

50. In its application for stay PRASA argued that the claim for payment of monies from November 2015 to July 2017 was dismissed by the arbitrator, that the award is the subject of a review application presently before the court and that the same claim is pending before this court under two different case numbers.

51. It also contended that part of the applicant's claim is based on a privileged legal opinion obtained from attorneys and counsel, appointed *inter alia* by PRASA employees who wished to conclude a secret settlement agreement with the applicant by excluding PRASA's legal department, and failed to place relevant information before counsel. In its answering affidavit the applicant claims that PRASA had itself attached the opinion to papers in a previous application. I have already mentioned that I had placed no reliance on it.

52. PRASA further contended that it wishes to bring an application to rescind the order on the basis that it was erroneously sought and granted in its absence. It submitted the following:

a. The arbitrator had in fact dismissed the applicant's claim for damages in relation to the MB2 stations. I will return to this averment because it is incorrect.

b. The applicant has pursued action proceedings out of the Pretoria high court in August 2018 for approximately R19million in damages on the current cause of action.

However the applicant in response demonstrated that this matter related to a case involving another division of PRASA, namely its Autopax division

c. Another urgent application had previously been brought in the Gauteng Local Division during June 2019 to enforce a purported settlement agreement. PRASA contends that the agreement is a forgery. It also alleged that the applicant has not proceeded with this application although the court referred it to oral evidence.

The applicant's response was that it engaged a handwriting expert who has verified the authenticity of the signatures. It contended that PRASA is attempting to outlitigate it knowing that it does not have resources to continue with the litigation. The applicant also produced a notice of withdrawal dated 25 July 2019; however it is unstamped and had not been served by that stage.

53. The applicant repeated that the claim under MB2 arose from contract and in para 55 of its answering affidavit repeated what it contended were common cause facts which were not addressed by PRASA in its application to stay execution.

The applicant's answering affidavit is replete with invitations to PRASA to deal with the merits of the case made out by it. The response was blunt. It referred to the arbitration award and contended that these issues were fully ventilated before the arbitrator. It repeated that there was no settlement agreement concluded between the parties.

It is therefore necessary to analyse the award as read with the referral.

THE ARBITRATION

54. The terms of reference to appoint an arbitrator arose from an action brought by the applicant against PRASA. The issue was clearly defined; namely whether the MB2 stations formed part of the principal contract (which was in relation to the

MB1 stations), and if it was so found whether the applicant was entitled to damages for the period 1 November 2015 to 31 January 2016 and in what amount. There was also an unrelated issue of whether the applicant was entitled to the cost of uniforms and equipment totaling R458 498.88.

55. The terms of reference did not form part of the applicant's papers but could be gathered from the contents of the award itself.

56. In her award , which included a section headed "*Do the MB2 stations form part of the same contract as the MB1 stations"* the arbitrator;

a. Confirmed that the contract in respect of the MB1 stations was extended until the end of June 2017;

b. Found that with effect from 1 November 2012 the applicant and PRASA had agreed that the MB2 stations would be cleaned for an amount of R751 731.34 per month which was later increasing by 3% to R774 283.31;

c. Stated that PRASA had given notice of termination of the MB2 contracts with effect from 1 November 2015 but the applicant continued to clean some of the MB2 stations.

The arbitrator also stated that the applicant continued cleaning all the MB1 stations.

This meant that the first main issue for determination was whether the MB2 cleaning contract could be terminated separately from the contract in respect of the MB1 stations or whether it was an extension of the former subject to the same qualification as to termination.

d. Mentioned PRASA's contention that the MB2 contract was irregular, illegal and null and void. She stated that this had not been persisted with but in the absence of other evidence appeared to have been justified on the grounds of emergency circumstances;

e. Stated that it appeared that the MB2 stations were either omitted erroneously or were allocated to community co-operatives but confirmed that it was also common cause that PRASA was satisfied with the cleaning of the MB2 stations by the applicant; (emphasis added)

f. Found that the MB 2 stations were part of a separate agreement (paras 14 and 15 of the award) in terms of which the applicant would clean some of the stations until PRASA was ready to hand them over to co-operatives and others. For this reason and the fact that the contracts were monthly, PRASA could terminate these contracts separately from the MB1 stations and that the extension of the MB1 contracts to 31 January 2016 therefore did not apply to the MB2 stations.

g. Concluded that PRASA was entitled to give the applicant one month notice.

In the result the arbitrator found that PRASA's notice to terminate was competent and valid and was not dependent on a public tender process.

57. There is also a section in the award titled "*Is Mbiti entitled to damages in the event that the MB2 stations form part of the main contract*". It runs from paras 36 to 39.

In para 37 the arbitrator found that the applicant cleaned 21 MB2 stations and tendered its services for the balance from 1 November 2015 until 30 June 2016.

58. The arbitrator also said that invoices had been paid during the course of the arbitration up to January 2016. I pause to mention that the applicant contends that this was incorrect and that no such payments were made.

Of relevance is that this passage in the award indicated that the monthly amount for cleaning services in respect of the MB2 contract (now found by the arbitrator to have been separate from the MB1 agreement) was accepted as being the amount in terms of the agreement and therefore either liquid or, since the

contract had been lawfully terminated in terms of the award on 1 November 2015, a liquidated amount in the same sum for every month after termination.

It is for this reason that the ambit of the arbitrator's powers was raised with counsel on 13 August. Depending on the answer, the claim would not be one for enrichment but rather a purely accounting one based on whether payment had been made- as indicated by the arbitrator, for a portion only of the post-termination period from date of termination to January 2016 which still left the subsequent months from 1 February 2016 to the end of July 2017.[11]

59. The question is whether the arbitrator dealt with the damages issue in regard to the MB2 stations. In para 39 the arbitrator states:

> *"As the formulation suggests, the ambit of the question I am required to answer is narrowed by the finding I make on the question of whether the MB2 stations are part of the main contract. For reasons that I have set out above in the paragraph dealing with the question whether the MB2 stations are part of the main contract, I have found that the MB2 stations are not part of the main contract. Accordingly, I must find that Mbita is not entitled to damages".*

60. As already demonstrated the arbitrator's finding was that the MB2 stations did not form part of the principal contract and therefore the pre-condition for the finding of damages, namely that the MB2 contracts form part of the principal contract did not arise since the arbitrator appreciated that she was confined to the terms of reference.

She could therefore not make any findings in regard to whether the applicant was entitled to amounts based on the separate contract concluded between the applicant and PRASA regarding the MB2 stations which were actually serviced by the applicant, or what the effect of the termination effective from 1 November 2015 had.

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[11] The award was dated 29 July 2017.

61. The suggestion that this immutably resulted in the claim being one for unjust enrichment as argued before me was clearly refuted by the application for rescission of judgment. I have no hesitation in having regard to that application in determining whether an injustice would be suffered by PRASA if a stay was not granted.

62. It became apparent that the defence was not based on unjust enrichment but rather that there had been a full accounting for all amounts due. This then made sense of the arbitrator's statements and the correspondence which I had requested Adv Platt to explain in my note of 13 August.

SUBSEQUENT HEARING AND OPPORTUNITY TO PRODUCE PROOF OF PAYMENT OF JULY 2017 INVOICE RE MB1 CONTRACT

63. It was evident that this court could not go behind the dispute regarding payments made in respect of the MB2 stations as this appeared to require some response from the applicant even if only through a bookkeeper or accountant.

    At the hearing of 30 August I suggested to the parties that it appeared (from the statements made by the arbitrator and the documents before) that the issue regarding the MB2 stations was likely to be a simple accounting matter. Nonetheless it was evident that there would be an injustice if I did not accede to a stay in respect of the MB2 stations as it may be paying amounts that had already been paid.

64. However the amount in regard to the MB 1 stations stood on a different footing. It was evident from PRASA's detailed reconciliation account attached to the rescission of judgment application[12] that it had not included the final account from the MB1 station. This was for an admitted contractual amount of R 971 098 for which no payment was reflected as the reconciliation ended in June 2017. This was pointed out by Adv Boonzaier and Adv Platt had no answer since the

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[12] Annex BMK6 at pp 89 to 102

reconciliation provides readily comprehendible description and date for each entry.

65. It is trite that if payment is alleged then it must be demonstrated. It is to be born in mind that PRASA did not attend court to oppose the application on 23 July and it cannot meet the requirements of showing an injustice and irreparable prejudice to enable a court to grant a stay if it is unable to produce payment in respect of an admittedly owed contractual liability for cleaning services effected at the MB1 stations in July 2017. PRASA had its chance on 23 July and again in the stay application.

    I believe I made it clear at the hearing that without proof of payment I would apply the summary judgment principles that if payment is alleged by a party then it must provide the proof which is to be attached to the opposing affidavit.

66. Since it was unnecessary to hear further argument the parties were advised that I would hold back on the judgment until 4 September and that PRASA was afforded an opportunity to provide proof of payment of the outstanding amount by 3 September.

67. Despite being given this further opportunity my registrar received by hand a letter addressed by Msikinya Attorney & Associates dated 3 September 2019 and written by Attorney LP Adonisi. The letter does not purport to have been copied to the applicant's attorneys.

68. In the letter Atty. Adonisi referred to the opportunity I had afforded his client to produce proof of payment for the July 2017 services at the MB1 stations. He records that after consulting with PRASA his firm had been instructed to make a number of points setting out why in its submission the order of 23 July was erroneously granted, which by this stage was irrelevant as the issue was whether I should grant a stay, having earlier discounted the possibility that I could rescind *mero motu* for the reasons set out earlier.

69. The points raised also sought to amplify submissions made in argument, amongst which was that the amount of the judgment "*and any portion thereof, as*

granted … was, and is still clearly not a liquidated amount". Aside from the underlining the words were also highlighted in bold.

Atty. Adonisi then proceeded to state on instructions that:

> *"… the Applicant has submitted and maintains that it has paid the Respondent all amounts that were due to the Respondent."*

He adds that the court sought "*further submissions in order to satisfy a portion of the Respondent's claim which our client submits, is incorrect, based on the application at hand*" and that:

> *"In light of the above, we are not able to provide the Court with the requested documentation. The applicant's indebtedness as well as the amount, are in dispute as it is tied up with the amounts paid as indicated in the rescission application.* "

70. The last cited extract from the letter is a non-sequitur. To make such a statement and claim that the court should be content to accept the very submission that I made plain a few days earlier was inadequate without further proof is of grave concern. The court attempted to assist PRASA by giving it a final opportunity to produce proof in circumstances where it could quite easily have said that a litigating attorney knows full well what is required if payment is alleged and there and then have dealt with the matter.

I am also concerned that the reconciliation account which runs throughout the contested period and provides detail of invoices submitted and payments made or credit notes passed for both the MB1 and MB2 stations contradicts the argument advanced that the claims could only be for unjust enrichment or an unliquidated claim for damages.

71. It appears that PRASA decided that it would not demonstrate proof of payment as every other litigant who opposes a claim based on having paid is required to do,

even at the very low threshold in the summary judgment scenario in order to be granted leave to defend.

Whereas litigation sometimes is a matter of one party blinking first, courts are not challenged in this way. Courts do not blink. They apply the law. The law is clear. If the defence is payment then it must be demonstrated. Despite giving PRASA a further extension to produce such payment it expressly refused to do so as the extracts from Atty. Adonisi's letter demonstrate.

PRASA therefore only has itself to blame if it did in fact make payment. Without proof of payment there is no lawful reason to find that real and substantial justice will be served in staying execution or as is otherwise put, that an injustice or irreparable prejudice will be suffered. On the contrary the opposite is true since the applicant can then receive some payment for distribution among its creditors, including employees and the contributions that are required to be made to their provident fund.

72. To suggest that there will be an injustice if PRASA is obliged to make payment in circumstances where the applicant may go under is to put the cart before the horse.

If an amount is due then there is no basis to avoid payment particularly when it may stave off insolvency (the avoidance of which is a prominent feature of our Companies Act in order to stimulate a viable and broad based economy). It is only if there is some defence disclosed that a court will be concerned about the risk of it being sound and recovery minimal: But in the case of payment being the only defence raised it is for the debtor to demonstrate payment before that stage is reached.

73. Since reading the judgment in court it occurred to me that I should do more than simply rely on the *Road Accident Fund* case in support of treating the MB1 stations contractual claim for July 2017 separately- particularly in view of PRASA attorney's letter of 3 September 2019.

Firstly, the claim based on contract in an agreed amount under the MB1 stations' agreement was treated separately from the MB2 claim in the founding papers. Secondly the arbitration award which PRASA relies on found that there were indeed two separate contracts. It therefore does not lie in PRASA's mouth to belatedly contend that there was only one indivisible illiquid amount in issue and on which judgment was granted. That this was not so was clearly indicated by the court when hearing argument and the amount in respect of the MB1 contract is considerable in its own right.

CONDUCT OF LITIGATION BEFORE COURT

74. This brings me to the probity of PRASA's attorneys addressing a letter to the court, and for present purposes I will assume that a copy was given to the applicant's attorneys although there is no evidence of that from the letter itself.

Legal representatives do not make submissions in contested cases by way of letters addressed to a judge. They are made through the court processes including arguments and submissions at an open hearing. If Atty. Adonisi believed that it was necessary to engage the court further on a matter that had already been argued then he should have done so by requesting a further hearing after notifying his counterpart and asking that judgment be reserved until the further submissions could be addressed. I consider the conduct of the attorney most inappropriate. Whatever instructions a client may give, an attorney is expected to temper the manner in which he deals with them in conformity with his duty as an officer of court.

ORDER

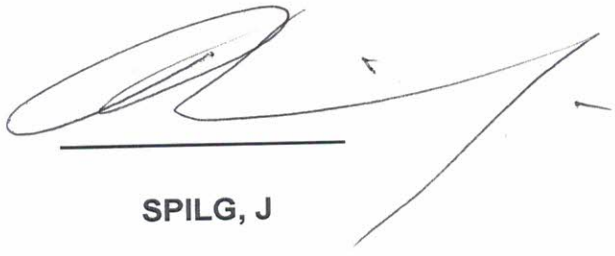
75. It is for these reasons that I granted the following order on 10 September 2019:

1. *Execution of the order granted by Spilg J in favour of Mbita Consulting Services CC (the applicant) against PRASA (the respondent) on 23 July 2019 under case no. 19/25285, to the extent*

only of R15 935 422.00 (being in respect of the MB2 stations) with interest thereon calculated at 10% per annum a tempore mora from 1 November 2015 to date of payment, is suspended pending the final outcome of the rescission of judgment application brought by the respondent under this case number.

The effect of this order is that execution of the aforesaid order of 23 July 2019 is not suspended in respect of the amount of R971 098.00 (which relates to the MB1 stations for the month of July 2017) together with interest on that amount calculated at the aforesaid rate from 1 September 2017 to date of payment. The amount of R971 098 represents the difference between the total amount granted in terms of the order of 23 July 2019 and the aforesaid amount of R15 935 422

2. *The respondent shall pay the applicant's costs on the opposed party and party scale*



SPILG, J

DATES OH HEARING:	27 July, 2, 13, 22 and 30 August 2019
DATE OF ORDER:	10 September 2019
DATE OF JUDGMENT:	8 October 2019
FOR RESPONDENT IN STAY:	
(APPLICANT IN MAIN)	Adv WB Boonzaier
	Carol Coetzee & Associates

FOR APPLICANYT IN STAY:	Adv A Platt SC
	Adv N Nharmuravate
	Adv K Potgieter
	Msikinya Attorney & Associates