


REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
	
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CASE NUMBER: 42056/2015

In the matter between:

PASSENGER RAIL AGENCY SOUTH AFRICA

Plaintiff

and

MSHUSHISI DANIEL MTHIMKHULU

Defendant

JUDGMENT

WINDELL J:

INTRODUCTION

[1] This is a delictual action based on fraudulent misrepresentations.

[2] The plaintiff, ("PRASA"), alleges that, during March 2010, the defendant, "Mr Mthimkhulu", (who was, at the time, an employee of PRASA), misrepresented to PRASA that he had a National Diploma and a Bachelors Degree from the Vaal University of Technology ("VUT"). As a result of the misrepresentation, PRASA was induced to appoint Mr Mthimkhulu to the position of Executive Manager: Engineering Services. Furthermore, a few months later, Mr Mthimkhulu falsely represented to PRASA that he had been awarded a doctorate by the Technische Universitat Munchen and that he had received a job offer for a position as an engineering services specialist at a salary of R2, 8 million per annum. As a consequence, PRASA made Mr Mthimkhulu a counter-offer in September 2010 at a salary of R2,8 million.

[3] PRASA avers that Mr Mthimkhulu's misrepresentations caused it to suffer patrimonial loss because he was paid remuneration at a level far higher than he would have received, but for the misrepresentations. Mr Mthimkhulu denies that he made any of the alleged misrepresentations. His defence is that there is an overarching conspiracy to destroy his career and that he has become "*the sacrificial lamb to appease other people*".

[4] The particulars of claim were amended during the trial to align it with the evidence led during the trial.

BACKGROUND

[5] During March 2010, the position of Executive Manager: Engineering Services at PRASA became available. On 1 April 2010, Mr Mthimkhulu was appointed to that position. PRASA avers that he was appointed after the position was advertised and an interview was held, and that the successful candidate had to meet certain minimum requirements. Mr Mthimkhulu avers that there was no advert, no interview, and no minimum requirements, and that he was appointed internally after *“moving from the ranks”*.

[6] On or about 14 September 2010, Mr Mthimkhulu provided PRASA with a letter from a German entity in which he was offered employment. The specific entity and details of the letter are in dispute. PRASA avers it was a letter from DB Schenker (which turned out to be fake), and Mr Mthimkhulu avers that it was a letter from a company by the name of P-Tech. In any event, it is not in dispute that as a result of the letter, PRASA made a counter offer to Mr Mthimkhulu increasing his salary to R2, 8 million per annum.

[7] Five years passed. Early July 2015 there was a newspaper report in the Rapport newspaper regarding the purchasing of locomotives from Europe at a price of R600 million. It was alleged that the locomotives, the Afro 4000, were unsuitable for use on South Africa railroad tracks. On 8 July 2015 PRASA held a press conference to address the media report. The press conference was attended by Mr Mthimkhulu, Mr Mosenngwa Mofi, the Chief Executive Officer (“CEO”) of PRASA Rail Operations

Division, and Mr Lucky Montana, the Group Chief Executive of PRASA. During the press conference Mr Montana sang Mr Mthimkhulu's praises and introduced him as "*Dr Mthimkhulu*". He said that "*Dr Mthimkhulu*" was one of the top engineers on rolling stock in the country and that "*many companies in the world wants to have his services, wants to employ him*". He further said that "*Dr Mthimkhulu*" studied in Germany and that "*German companies want his service to run on maintenance engineering and everything.*"

[8] The day after the press conference there was an article carried by News24 that raised doubts about Mr Mthimkhulu's qualifications and his registration with the Engineering Council of South Africa ("ECSA"). As a result, PRASA decided to institute an inquiry into his qualifications. Mr Mthimkhulu was notified about the investigation in a letter (which Mr Mthimkhulu denies) which read as follows:

"Dear Dr Mthimkhulu

The company has noted allegations levelled against you, which have been the subject of recent media reports.

Please be advised that the company has decided to institute a formal inquiry into the allegations relating to your qualifications and the registration issue with the Engineering Council of South Africa (ECSA).

You are therefore kindly requested to furnish me with all copies of your qualifications, which qualifications will be checked against company records by close of business on Tuesday, 14 July 2015, before the inquiry can get underway."

[9] Mr Mthimkhulu called in sick the next day. An envelope containing two certificates and a letter, in compliance with the request to submit the qualifications, was, however, delivered to Mr Mofi's office a few days later. It is in dispute who delivered the envelope. Mr Mofi testified that it was Mr Mthimkhulu. This is denied by Mr Mthimkhulu. In the envelope were the following three documents:

1. A certificate headed "*Technikon Vaal Triangle Nasionale Diploma Engineering Mechanical*";
2. A certificate headed "*Technikon Vaal Triangle Baccalaureas Technologiae, Engineering Maintenance*";
3. A letter from the Technische Universitait Munchen referring to Mr Mthimkhulu as "Dr Mthimkhulu" wherein the following was stated:

"To whom it may concern

We confirm that Dr Daniel Mthimkhulu obtained this recognition since he did his research work in Germany as part of the collaboration with the Technische Universitait Munchen." Focussing in specializing in rolling stock and networks. This serves as recognition for his great contribution into the various . Testimonials can be sort from various experts in the field.

Sincerely

Signed Professor Fruadenstein."

[9] All three documents were certified as true copies by attorney Andile David Horner on 15 July 2015, an important aspect which I will return to later.

[10] Enquiries were made at Vaal Technikon and PRASA was informed that although Mr Mthimkhulu had been registered for a National Diploma in Mechanical engineering at the Technikon, he never completed the course. On the strength of this information it was decided that there were sufficient grounds to suspend Mr Mthimkhulu. A letter of suspension was sent to Mr Mthimkhulu by email. Mr Mthimkhulu responded by tendering his resignation. PRASA was, however, advised that Mr Mthimkhulu was required to serve a full calendar months' notice and his resignation would only be effective at the end of August 2015. In the meantime, the disciplinary process against Mr Mthimkhulu commenced. Mr Mthimkhulu did not attend and was found guilty and given notice of termination of his employment with PRASA.

THE EVIDENCE

[11] PRASA's action, as stated previously, is based on fraudulent misrepresentations. It is alleged that Mr Mthimkhulu's misrepresentations led PRASA to suffer patrimonial loss as they appointed him in the position of Executive Manager: Engineering Services when he did not have the necessary qualifications and paid him remuneration at a level far higher than he would have received but for the misrepresentations. Evidence was adduced by PRASA to establish mainly two instances and/or periods where Mr Mthimkhulu knowingly made false representations:

[1] Mr Mthimkhulu misrepresented to PRASA prior to 31 March 2010 that he had a National Diploma and a Bachelors' degree from the VUT. He made the representation expressly in writing in a Curriculum Vitae ("CV") submitted to PRASA, together with a completed application form, setting out his qualifications (**"the first misrepresentation"**).

[2] Mr Mthimkhulu misrepresented to PRASA prior to 14 September 2010 that he had been awarded a doctorate by the Technische Universitat Munchen and that he had received a job offer for a position as an engineering services specialist at a salary of R2,8 million per annum. He made the representation regarding the doctorate expressly in writing in the CV submitted to PRASA and through a letter from DB Schenker and failed to correct Mr Montana's belief that he had such qualification (**"the second misrepresentation"**).

[11] The plaintiff led the evidence of five witnesses. Mr Dingiswayo, PRASA's acting Group Executive Legal Risk and Compliance, was the first person called to testify. His testimony, in brief, was that the position for Executive Manager: Engineering Services at PRASA became available during March 2010. At that time Mr Kevin Moonsamy was acting in that position. An advert was circulated internally and interested parties had to complete an application form, which was attached to the advert. The advert, which formed part of PRASA discovered documents, also included the minimum requirements for the post, i.e. a degree in engineering.

[12] Mr Dingiswayo testified that it would have been grossly irresponsible of PRASA not to have set minimum requirements, as the position was very senior and the failure to set minimum requirements for such a position would result in stripping PRASA of its technical capacity. Proper recruitment processes therefore needed to be followed. He remembered two people applying for the position, namely Mr Mthimkhulu and Mr Moonsamy. Only Mr Mthimkhulu was, however, interviewed as Mr Moonsamy was overseas at the time. The recruitment file with all the relevant documents (application forms, interview notes etcetera) has in the meantime gone missing. Mr Mthimkhulu denied that there was any advert or any minimum requirements for the position and submitted that he was promoted internally based on his skill and experience.

[13] Mr Dingiswayo's evidence was corroborated by Ms Madumo, who was employed as a personal assistant to Mr Moonsamy during March 2010. As previously stated, Mr Moonsamy was, at that time, the acting Executive Manager: Engineering Services. Ms Madumo testified that she received an email from a certain Tu Dlamini on 23 March 2010 with the subject "*Forward Vacancy Adverts*" attaching the advertisement for the position of Executive Manager: Engineering Services. Mr Moonsamy was on holiday at this time and she realised that the advert related to his current position and that he was qualified for the position. She therefore took the initiative to apply for the position on his behalf. She sent a number of emails requesting the internal application form to complete. She received the form by email from Ms Norma Zulu. The application form required the applicant to include a description of his or her qualifications and the name of the institution, as well as a

declaration that the information was correct. Ms Maduma testified that she liaised with Mr Moonsamy and his brother to ensure that the application form was completed and signed by Mr Moonsamy and sent to her by fax. She took the completed form and a copy of Mr Moonsamy's CV and placed them in an envelope. She contacted Ms Norma Zulu and requested that she collect the application, which she did. Mr Moonsamy's completed application forms part of the discovered documents.

[14] Mr Mofi joined PRASA in 2011. He was the CEO of PRASA Rail Operations Division between March 2011 and November 2016. He testified that he "*found Dr Mthimkhulu*" at PRASA in the position of Executive Manager: Engineering Services when he first arrived. Everyone referred to Mr Mthimkhulu as "Dr Mthimkhulu" and he also signed his emails as "Dr". He even had a business card reflecting the title "Dr". Mr Mofi was present at the press conference on 8 July 2015 and confirmed what was said during the press conference. Mr Mofi testified that he was alerted to a media article carried by News24 that raised doubts about Mr Mthimkhulu's qualifications and his registration with the Engineering Council of South Africa the day after the press conference. He was surprised and immediately phoned the Group CEO, Mr Montana to express his concerns. He indicated to Mr Montana that he intended to institute an inquiry. He testified that Mr Montana was also very surprised about the reports, but gave him the go-ahead to proceed with the inquiry. He called Mr Mthimkhulu a day or so after the press conference and told him about the inquiry. Mr Mthimkhulu was given a letter wherein he was requested to furnish Mr Mofi with copies of all his qualifications by close of business on Tuesday, 14 July 2015 before

the inquiry could get underway. Mr Mthimkhulu did not provide the copies in time and contacted Mr Mofi to ask for an extension as he was unwell. An extension was granted and Mr Mthimkhulu submitted the documents in a brown envelope to Mr Mofi a few days later. After he left Mr Mofi opened the envelope in the presence of Mr Phakathi, the acting Human Resources Executive at PRASA. Inside they found the three documents referred to earlier, namely, a diploma from Vaal Technikon, a BTech degree certificate and a letter addressed to PRASA from the Technische Universitait Munchen referring to Mr Mthimkhulu as "Dr Mthimkhulu".

[15] Mr Phakathi started his investigation into the qualifications of Mr Mthimkhulu by asking for his personnel file from Corporate. He received two files. The first was the file from Mr Mthimkhulu's time at Metro Rail Cape Town and the second was a file from the period after Mr Mthimkhulu began working at head office. In the second personnel file received from the Payroll Office, Mr Phakathi found Mr Mthimkhulu's CV as well as an appointment letter to the position of Executive Officer. In addition the file also contained the following letters.

1. A letter purportedly from Johannes Graber at DB Schenker offering Mr Mthimkhulu a position at a salary of R2.8 million.
2. A second letter purportedly from Srandklin Grahoner at DB Schenker reiterating this offer.
3. A letter from Mr Montana with a counter-offer for remuneration of R2.8 million dated 14 September 2010.
4. Acceptance of the counter-offer.

5. The letter from Mr Montana regarding internal transfer.

[16] Mr Phakathi investigated further. Mr Mofi instructed him to ascertain what qualifications were in Mr Mthinkulu's personnel file. He looked for copies of diplomas or degrees in Mr Mthimkhulu's personnel files but there were none. Mr Phakathi testified that his personal assistant, Ms Zanele Hlatswayo, assisted him with enquiries to the Vaal University of Technology. The information received was that Mr Mthimkhulu had been registered for a National Diploma in mechanical engineering but that the status was "*incomplete*". Based on his report a letter of suspension was sent to Mr Mthimkhulu via email.

[17] Mr Mthimkhulu disputed handing the envelope with the documents to Mr Mofi and contends that he was unable to do so as he was sick and booked off ill from 14 to 17 July 2015. Mr Mthimkhulu did not dispute that Corporate holds a personnel file for him, but refused to accept the authenticity of any of the documents in the personnel file on the basis that they were copies and he did not have the original documents with him in order to verify. He conceded that certain documents "*looked like*" copies of existing documents. Mr Mthimkhulu's version was that something untoward occurred between the file leaving Corporate and Mr Phakathi looking through it and basically accused Mr Mofi and Mr Phakathi of fabricating false documents in an attempt to destroy his career. Mr Phakathi testified that it was not possible for someone to place documents in the file between Braamfontein and Pretoria and Mr Mofi testified that he had no reason to harm Mr Mthimkhulu's career. During cross-examination, Mr Mthimkhulu put it to Mr Phakathi that there were

inconsistencies between his affidavit and Mr Mofi's affidavit in the criminal case that was opened. Mr Mofi's affidavit stated that he gave the certificates to Mr Phakathi on 17 July 2015, and Mr Phakathi's affidavit stated that he had "*discovered the fraudulent certificates*" on the 16 July 2015. Mr Phakathi was not able to explain the inconsistency and suggested that it was an error when writing the affidavits. Mr Mthimkhulu put it to Mr Phakathi that the inconsistencies in the affidavits demonstrated malicious intent to destroy his career. Mr Phakathi denied this.

[18] Ms Rika Retief holds the position of Specialist Payroll in the PRASA Corporate Division since 1 September 2000. She testified that she was requested by Mr Phakathi to perform a set of calculations. The instruction was to calculate the money paid by PRASA to Mr Mthimkhulu between September 2010 and July 2015. She also performed a calculation of Mthimkhulu's salary discounting the increased salary arising from the counter-offer. (Her evidence is discussed in more detail at a later stage in the judgment.)

[19] That concluded the evidence for PRASA. Mr Mthimkhulu elected to testify and indicated his intention to call several witnesses, amongst others, Mr Montana. Despite a postponement to secure the attendance of these witnesses, he called no witnesses.

[20] Mr Mthimkhulu testified that he "*grew organically through the ranks*" of PRASA. In 2010, when he held the position of General Manager, he was called to see the

head of Human Resources, Mr Mphefu Ramuthla. Mr Ramuthla explained that the business was restructuring and would merge with Metrorail. Mr Ramuthla gave him a letter to say that he had been appointed to the position of Executive Manager. He accepted the position. There was no advert, no application process and no interview. He was appointed solely on the basis of his experience, previous performance and skills. It was therefore not possible for him to have made any representations about his qualifications, or for PRASA to have been induced by those representations.

[21] On 16 September 2010 PRASA increased Mr Mthimkhulu's annual remuneration in terms of the appointment, with effect from 1 September 2010, to the sum of R2, 8 million. Mr Mthimkhulu denied receiving a job offer from DB Schenker, but in a response to further particulars confirmed that his version was that he was given an increase on the basis of the representation that a different German company, P-Tech System, had made him an offer of €200 000.

ADMISSION OF HEARSAY EVIDENCE

[22] PRASA relies on documentary evidence gathered during the investigation conducted by Mr Phakhati. This includes the documents that were found in Mr Mthimkhulu's personnel file. PRASA therefore applied for the admission of hearsay evidence under section 3(1) of the Law of Evidence Amendment Act 45 of 1988 and submits that it is in the interests of justice to admit the hearsay evidence.

[23] The Law of Evidence Amendment Act requires this Court to consider six factors in determining whether the interests of justice will be served by admitting the evidence. This Court must exercise a discretion in considering how best the interests of justice can be served having regard to the six factors.

[24] In *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd*¹, PRASA was successful in its application to review and set aside one of the key corrupt contracts for locomotives awarded by PRASA, the so-called “Swifambo contract”. The judgment and order of the High Court was upheld by the Supreme Court of Appeal² (“the SCA”) and the present defendant, Mr Mthimkhulu, has been found by the SCA to have played a central role in the award of that tender. The Constitutional Court has recently refused leave to appeal against the judgment of the SCA. In the appeal, Swifambo, *inter alia*, challenged PRASA’s evidence that Swifambo was implicated in the corruption that led to the award of the tender on the basis that it was hearsay evidence and should not be admitted. Both the High Court and the SCA accepted hearsay evidence adduced by PRASA. At paragraphs 20 and 21 the SCA held:

“Section 3(1) of the Law of Evidence Amendment Act provides that hearsay evidence is inadmissible unless the court, having regard to the nature of the proceedings; the nature of the evidence tendered; its probative value; the reason why the evidence is not given by the person upon whose credibility it depends; any

¹ [2017] 3 All SA 971 (GJ).

² *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa (1030/2017)* [2018] ZASCA 167 (30 November 2018).

prejudice to the party who objects to its admissibility; and any other factor which, in the opinion of the court, should be taken into account, is of the view that the evidence should be admitted in the interests of justice. As Francis J held, the evidence in the documents supporting both the founding and replying affidavits was not alleged to be unreliable and the facts and documents were discovered by independent investigators in the course of their broader investigation into corruption within PRASA. The reasons why direct evidence could not be given were explained by Molefe in the passages quoted above: some employees of PRASA had resigned, others were uncooperative, records were concealed, and in so far as possible documentary evidence was adduced. Swifambo had the opportunity to examine all the evidence and to respond to it. But since it did not dispute that there was corruption, claiming ignorance, it was not in any way prejudiced by the admission of the evidence. The application was manifestly in the public interest. And it was in the interests of justice to admit the evidence adduced by PRASA. Swifambo did not take issue with any of the allegations of PRASA's corruption. Francis J thus correctly admitted the evidence."

[25] The key factors considered by the SCA to support the admission of the hearsay evidence were that: (1) PRASA had provided the reasons why direct evidence could not be given; (2) The probative value of the evidence was high; (3) Certain parts of the evidence were not disputed; (4) Swifambo had claimed ignorance about certain aspects; (5) Swifambo had an opportunity to examine all the evidence and respond to it; and (6) The application was in the public interest.

[26] PRASA submits that all these considerations also apply to the present matter for the following reasons: Firstly, Mr Dingswayo testified and gave a brief background about the difficulties at PRASA over the last ten years. During 2014, the Board of PRASA instituted a number of investigations into relationships and contracts that appeared generally corrupt. He was involved in these investigations in his capacity as General Manager: Group Legal Services. He testified that the investigators were faced with a number of difficulties in obtaining evidence of the alleged corruption. There was an absence of record keeping and/or documentation and information, documents and data were either missing altogether, misplaced, possibly destroyed or not made available to the auditors.

[27] Secondly, PRASA has seen unprecedented resignations and dismissals over the previous few years. Many of the people who had first-hand knowledge of certain events were no longer employed at PRASA and their whereabouts were unknown. Certain employees were unwilling to cooperate with any inquiry or investigation to uncover corrupt and unlawful activities that occurred during Mr Montana's tenure. It became apparent that there were also employees who sought to deliberately obstruct the investigations as certain records had been concealed or destroyed. It is submitted that these difficulties mirror those faced by the Public Protector in her investigation into allegations of maladministration, financial mismanagement, tender irregularities and appointment irregularities against PRASA. She makes specific reference to these in her report³ where she stated:

³ "Derailed: A report on an investigation into allegations of maladministration, financial mismanagement, tender irregularities and appointment irregularities against PRASA".

“I must record that the investigation team and I had immense difficulty piecing together the truth as information had to be clawed out of PRASA management. When information was eventually provided, it came in dribs and drabs and was incomplete. Despite the fact that the means used to obtain information and documents from PRASA included a subpoena issued in terms of section 7(4) of the Public Protector Act, many of the documents and information requested are still outstanding.”⁴

[28] Mr Dingaswayo confirmed that PRASA has faced similar difficulties procuring the necessary evidence and witnesses in the present case. In particular certain original documents have gone missing including the original recruitment file for the appointment of Mr Mthimkhulu. PRASA was able to obtain a copy of Mr Mthimkhulu’s personnel file from the payroll office, but that file contains only copies of documents. Ms Norma Zulu, who was a key individual involved in the appointment of Mr Mthimkhulu and the counter-offer, has passed away.

[29] Thirdly; Mr Montana cannot be trusted to testify as to the truth of what actually occurred. The SCA confirmed the High Court findings in relation to Mr Montana, and confirmed that Mr Montana acted fraudulently while in his position at PRASA. The SCA found that Mr Montana “*controlled PRASA and its staff*” during his tenure⁵; and that he “*was obstructive, and attempted to cover up his role in various corrupt transactions, including the award of the tender to Swifambo*” during the

⁴ Public Protector South Africa, Derailed (2015), (xix), p. 21

⁵ Ad [34]

investigations initiated by the board. The SCA confirmed the High Court's acceptance of Dr Popo Molefe's evidence that:

"Mr Montana held sway over PRASA through the active assistance of his associates and the intimidation of those who would not do his bidding. PRASA employees who did not bend to his will were victimized, suspended or dismissed;

And while the investigation was in progress, Montana instructed certain employees to delete electronic documents;

Montana, who was implicated in the irregular and unlawful activities, prevented the dissemination of information to investigators even after he had left PRASA."

[30] PRASA contends that the evidence has substantial probative value and no evidence has been advanced by Mr Mthimkhulu that the evidence is unreliable. Mr Phakathi has testified as to the source of the documents and how they were discovered. The documents are contemporaneous recordals of what occurred and almost all of the evidence had been captured in documents that had not been refuted by Mr Mthimkhulu at the time. Some of the documents were indeed counter-signed by Mr Mthimkhulu. All of the hearsay evidence is consistent with PRASA's version and confirmed by the other evidence tendered by PRASA. Certain of the hearsay evidence relates to facts that have been admitted by the defendant.

[31] The defendant is prejudiced only to the extent that he is not afforded an opportunity to test the evidence under cross-examination. He has, however, had an

opportunity to test the evidence of Mr Phakhathi about the investigation, and Ms Rika Retief regarding the source and integrity of the documents in the personnel file. The evidence was included in the plaintiff's initial discovery. The defendant had ample opportunity to digest the evidence and to find evidence in rebuttal. The mere fact that the evidence strengthens PRASA's case and weakens Mr Mthimkhulu's case is not a basis for prejudice. The final factor that PRASA submits should be considered is the fact that this is a matter involving fraud and corruption within a State-Owned Enterprise ("SOE"). Mr Dingaswayo testified that this is a very important case for PRASA. PRASA is enjoined to recover losses arising from fraudulent or corrupt conduct. It has also suffered reputational damage. More importantly, Mr Mthimkhulu's conduct in inducing PRASA to appoint him to these senior positions stripped PRASA of its technical capacity. This is its core business, and the impact is felt most severely by the South African public who have no choice but to rely on PRASA's services to commute every day.

[32] I wholeheartedly agree with PRASA's submissions above. This is a matter involving fraud. PRASA cannot be expected to have first-hand evidence of the dealings and conduct between Mr Montana and Mr Mthimkhulu when they were allegations of colluding. The evidence is adduced in order to prove the necessary elements of the delictual cause of action of fraudulent misrepresentation. In particular, the fact that Mr Mthimkhulu made the representations to PRASA and that PRASA relied on the misrepresentations. These elements are central to PRASA's case. The hearsay evidence is allowed.

The first misrepresentation

[33] On 1 April 2010 PRASA appointed Mr Mthimkhulu to the position of Executive Manager: Engineering Services. It is alleged that Mr Mthimkhulu represented to PRASA, through his CV, prior to 31 March 2010, that he had a National Diploma and a Bachelors' degree from the VUT and that PRASA was induced by these false representations to appoint him to the position of Executive Manager: Engineering Services.

[34] It is common cause that Mr Mthimkhulu, at the time of his appointment, did not hold a National Diploma and a Bachelors' degree from the VUT and only had a matric qualification. He only completed the diploma after he was dismissed. Mr Mthimkhulu accepted that any statement made before July 2015 that he had completed a National Diploma and a Bachelors' degree from the VUT would be incorrect. He, however, denied that he had ever made such a statement.

[35] Mr Phakathi identified the CV as one of the documents he found in the second personnel file received from the Payroll Office. Under the heading "*Personal Profile*" in the CV the following was noted:

"Mechanical Engineering Diploma (Vaal Triangle University of Technology) 1998.

Degree in mechanical and maintenance Engineering (Witwatersrand University) 1999 (Maintenance Specialist), Pursuing Doctorate Degree.

Masters Degree in Engineering (Mechanical and Electrical 2006).

Doctoral Degree in Engineering Management 2010.”

[36] Mr Mthimkhulu vehemently denied that it was his CV or that he was responsible for the information included in the CV. He testified that he did not know where the CV came from. The question is how did the CV make its way into Mr Mthimkhulu's personal file? Mr Mthimkhulu's theory is that many people employed at PRASA, intent on destroying his career, fabricated the CV and placed it into his personal file. Let me examine this theory.

Was there an advert?

[37] Three witnesses Mr Dingaswayo, Mr Phakhathi and Ms Modamo identified the document at page 327 of the bundle as the advertisement that was produced after the position of Executive Manager: Engineering Services was requested. All three witnesses testified that it was advertised internally, and that two people had applied for the job: Mr Mthimkhulu and Mr Moonsamy. The recruitment file has been misplaced and the plaintiff is therefore unable to produce the application form or evidence of the interview. The job advert stated as Minimum Requirements: “*Degree in Engineering; Post-Graduate Business Management Qualification, At least five years Management Experience at Senior Manager Level.*”

[38] The evidence confirming that there was an advert is overwhelming. I am convinced, on a balance of probabilities, that there was an advert for the position and that the candidates had to have met at least the minimum requirement. It is highly improbable that such a senior position would not have been advertised or minimum requirements. On the evidence it was proven that although Mr Moonsamy applied for the position, it was awarded to Mr Mthimkhulu with no application form or interview whatsoever.

[39] As at March 2010, Mr Mthimkhulu did not meet any of these minimum requirements for appointment to the position of Executive Manager: Engineering Services. If an engineering qualification was a minimum requirement for appointment, then PRASA must have been induced by someone to believe that Mr Mthimkhulu held such a qualification in order to appoint him into the position.

The curriculum vitae

[40] It is clear that if there was an advert, there must have been an application form and a CV. This conclusion is confirmed by the evidence of Ms Modamo. She testified that Mr Moonsamy's application was accompanied by an application form and a CV.

[41] The CV in Mr Mthimkhulu's personnel file included a great deal of information that Mr Mthimkhulu had to accept was correct and that only he would have been able to provide (for example, home address, the name of his doctor, and the name of an

old school friend). On a conspectus of all the evidence, and particularly Mr Mthimkhulu's answers during cross-examination, I am convinced that only Mr Mthimkhulu, or someone under his direction, could have been responsible for the CV. Mr Mthimkhulu clearly prepared the CV (or instructed another person to assist him in preparing the CV) representing that he had completed a National Diploma and a Bachelors' degree from the VUT. That representation was contained either on the application form, or in the CV which he either provided to PRASA prior to the application as an update to his personnel file, or as part of his application.

[42] I am satisfied that Mr Mthimkhulu falsely represented to PRASA that he held a National Diploma and a Bachelors' degree from the VUT. This false representation induced PRASA to appoint him in the position of Executive Manager: Engineering Services.

The second misrepresentation

[43] The plaintiff's case is that Mr Mthimkhulu falsely represented to PRASA prior to 14 September 2010 that he had been awarded a doctorate by the Technische Universitat Munchen and that he had received a job offer from DB Schenker for a position as an engineering services specialist at a salary of R2, 8 million per annum. It is common cause that on 16 September 2010 PRASA made a counter-offer and increased Mr Mthimkhulu's annual remuneration in terms of the appointment, with effect from 1 September 2010, to the sum of R2, 8 million.

The DB Schenker letter.

[44] Mr Mthimkhulu denied receiving a job offer from DB Schenker. He testified that he had never had a meeting with DB Schenker and had never seen the letter from DB Schenker in the personnel file. After some questioning, he accepted that the DB Schenker letter Mr Phakhati found in his personnel file was a fake document.

[45] In a response to further particulars he confirmed that his version was that he was given an increase on the basis of the representation that a different German company, P-Tech System, had made him an offer of €200 000.

The P-Tech letter

[46] Mr Mthimkhulu produced a document that he alleged was the letter from P-Tech with the offer of employment. The P-Tech letter was not discovered, nor made available at the time the defendant responded to the request for further particulars. It was only produced by Mr Mthimkhulu on the third day of the trial.

[47] Mr Mthimkhulu testified that he had requested P-Tech to re-send the letter before 8 March 2016 (as stated in his affidavit in the summary judgment application). They sent him a copy of the letter late December 2018. After receiving the letter, he forwarded a copy to his attorneys, and later handed them a hard copy at a meeting. Mr Mthimkhulu suggested that his lawyers had the letter in their possession but omitted to include it intentionally or by oversight.

[48] Mr Mthimkhulu testified that he had established a relationship with P-Tech Systems through a project conducted with the University of Munich. P-Tech wanted to grow into the African market. He testified that he received the letter containing the offer of employment from P-Tech by email on 15 June 2010 (as recorded in his response to the request for further admissions). He testified that the email was on his personal laptop. The following day, he took the letter and gave it to the Recruitment and Selection Manager, Ms Lungile Kabelo. Mr Montana subsequently received the letter and decided to make the counter offer.

[49] PRASA submits that Mr Mthimkhulu never received a job offer from P-Tech, nor did he receive the letter with an offer of employment by email in June 2010. It is submitted that the letter is a recently-created forgery.

[50] If Mr Mthimkhulu's evidence is to be believed, then his attorneys had the purported P-Tech letter from December 2018, but, for some inexplicable reason, failed to produce it through the required discovery procedures. Under the circumstances I find it difficult to accept that an attorney would fail to disclose a document that is critical to a client's defence if the document was in their possession. The irresistible inference under the circumstances is that the document was recently created or manufactured.

[51] In addition, from an analysis of the letter itself, it is doubtful that this is a genuine letter from an international company. The Euro sign is placed after the number 200 000 and not before, as is the usual convention, and is full of obvious spelling errors and different fonts. There are also banking details at the bottom of the page as one would find on an invoice and not on a letterhead. I agree with counsel for PRASA that it is highly improbable that an international company with the reputation and profile of P-Tech would send a letter containing blatant spelling and grammatical errors and formatting inconsistencies. It is more probable that Mr Mthimkhulu authored the letter by taking an invoice from P-Tech and removing the invoice contents, and inserting the typed portions containing a job offer.

Emails and other documents

[52] I have already accepted that Mr Mthimkhulu is responsible for the CV found by Mr Phakathi in his personnel file. The Personal Profile section of the CV states that Mr Mthimkhulu has a Master's degree in Engineering (Mechanical and Electrical) achieved in 2006 and a Doctoral Degree in Engineering Management in 2010.

[53] This is, however, not the only document demonstrating that Mr Mthimkhulu deliberately sought to represent that he had been awarded a doctorate degree. There are also a number of documents authored by PRASA employees that evidence their belief that Mr Mthimkhulu had been awarded a doctorate degree through the use of the title "*Dr*". There are no documents in which Mr Mthimkhulu

corrects this perception. There were many examples presented during trial. I will name but a few:

1. One of the first documents in Mr Mthimkhulu's PRASA personnel file is a form that has been completed in manuscript. Under "*Title*" it records "*Dr*".
2. Documents where Mr Mthimkhulu refers to himself as "*Dr Mthimkhulu*" or signs his name with the title "*Dr*";
3. An email from Mr Mthimkhulu dated 24 November 2010 is signed "*Dr Daniel Mthimkhulu*".
5. He signs the letter from PRASA dated 16 March 2012 as "*Dr D Mthimkhulu*".
6. Various invoices submitted for reimbursement contain Mr Mthimkhulu's handwritten signature using the title "*Dr*".
7. Emails from his Personal Assistant refer to him as "*Dr Daniel Mthimkhulu*".
8. A letter from PRASA dated 16 March 2002, notifying him of an internal transfer, records his title as "*Dr Daniel Mthimkhulu*". He signifies his acceptance of the transfer under the handwritten name "*Dr Daniel Mthimkhulu*".
9. In Minutes of a meeting of 17 May 2011, he is recorded as being "*Dr Daniel Mthimkhulu*".

10. Various Account Payment Schedules (September 2012; February 2014) and a Payment Schedule for sundry invoices dated 24 August 2014. On each schedule the “Payee” is reflected as “*Dr Daniel Mthimkhulu*”.

[54] The most telling document, however, is an email dated 5 July 2011 in which Mr Mthimkhulu requested that his email be changed to reflect the title “*Dr*”. In cross-examination, Mr Mthimkhulu accepted that he had sent this email and stated that he made this request for two reasons: firstly in order to “*synchronise*” various different email addresses and secondly to “*address the requirement on the MOU as part of the University of Stellenbosch Rail Chair*”. He was unable to explain what exactly was required by the MOU. Mr Mthimkhulu further testified that the “*Dr*” was never meant as a title. It was an “*unofficial name*” and a nickname. Mr Mthimkhulu testified that he was referred to as “*Doctor*” as a result of a comment by Professor Fourie at the University of Stellenbosch. Professor Fourie had referred to the “*rail chair*” as “*a Doctor of Trains*”. Thereafter this became part of his name.

[55] I find Mr Mthimkhulu’s explanation, although at times entertaining, highly improbable. His version is clearly false and is rejected.

The press conference

[56] The plaintiff adduced into evidence a video clip of a press conference held on 8 July 2015. Mr Mofi testified that the press conference was called because of media

reports in the Rapport newspaper regarding the purchasing of locomotives that were unsuitable for use on South Africa railroad tracks. Mr Mofi, Mr Mthimkhulu, Mr Montana and other PRASA employees were scheduled to conduct station visits and the PRASA Communications department arranged for a media briefing to allow PRASA to rebut the allegations.

[57] A transcript of the video clip forms part of the record and the video was played during the trial. Mr Mofi identified himself, Mr Mthimkhulu, and Mr Montana. Mr Mthimkhulu confirmed that he was present at the press conference. In the video clip, Mr Montana said the following:

"Daniel will talk. You know Daniel. You see him. Daniel Mthimkhulu, is one of our top engineers on rolling stock in the country. He is Dr Mthimkhulu. We invested in him. Many companies in the world wants to have his services, wants to employ him. And I'm very proud that we've been able to keep ... he's been leading the team that entered into design process, not only with ... Transnet, the RSR but with ... he's been spending half his time in Spain in the design of these locomotives. One of the best rolling stock engineers. But maybe because he's black. Isn't it ... that his... authority cannot be taken seriously. German companies ... he studied in Germany too. German companies want his service to run on maintenance engineering and everything."

[58] Mr Montana's reaction to the news reports, in my view, clearly demonstrates that Mr Montana believed that Mr Mthimkhulu had a doctorate degree and that he had received job offers. I am confident in finding that PRASA was indeed induced to

increase Mr Mthimkhulu's annual salary to the amount of R2 800 000 by fraudulent misrepresentations made to it by Mr Mthimkhulu.

Events after June 2015

[59] Counsel for PRASA submitted that Mr Mthimkhulu's subsequent behaviour in June and July 2015 bolsters these conclusions, and supports the inference that he had intentionally falsely represented his qualifications to PRASA. I agree. The first example was the first meeting at Mr Mofi's office after the press conference. After receiving Mr Montana's approval to conduct an investigation, Mr Mofi phoned Mr Mthimkhulu and invited him to his office. Mr Phakathi was present at the subsequent meeting, and confirmed Mr Mofi's evidence that Mr Mthimkhulu was informed about the inquiry and that he was requested to submit copies of his qualifications. A formal letter was subsequently sent to Mr Mthimkhulu via email. That letter forms part of the trial bundle. Mr Mthimkhulu denies this evidence in its totality. He alleges that he was off sick and never attended a meeting or received any letter.

[60] I accept the evidence of Mr Mofi and Mr Phakathi, and their evidence relating to the procedure that was followed, as it makes perfect sense. As a result of the media reports PRASA had to investigate Mr Mthimkhulu's qualifications and he had to submit proof of his qualifications.

[61] The second meeting at Mr Mofi's office is also disputed by Mr Mthimkhulu. Mr Mofi and Mr Phakathi both testified that a brown envelope was received in

compliance with the letter requesting Mr Mthimkhulu to submit copies of his qualifications. In the envelope were copies of Mr Mthimkhulu's alleged qualifications. An important aspect of the case is the fact that the documents inside the envelope, which were certified as true copies by attorney Mr Andile Horner, turned out to be false. In order for this court to accept Mr Mthimkhulu version that he did not submit the false documents, I have to find that Mr Mofi, Mr Phakathi **and** Mr Horner conspired against him, and designed an elaborate plan, which includes fabricating qualifications, all in an attempt to ensure that he loses his job.

[62] Mr Mthimkhulu denied any knowledge of when, how or why the documents had been stamped by Mr Horner on 15 July 2015. Mr Mthimkhulu explains it as follows: After he became ill, he heard reports in the media that people were questioning his qualifications and registration with ECSA. He decided that he needed a lawyer and contacted Mr Horner who had been recommended to him. He testified that he had never met Mr Horner, but that they had spoken over the phone about whether Mr Horner would be able to assist him. Mr Mthimkhulu denied that he had ever given Mr Horner instructions and that after their brief telephonic engagement, Mr Horner was *"really not helpful"* and that he *"just turned against him and then he had an attitude"*. Mr Mthimkhulu persisted with this version even when presented with email correspondence on 22 July 2015 between Mr Maserumule acting for PRASA and Mr Horner in which Mr Horner acknowledges receipt of a letter from Mr Maserumule wherein Mr Horner indicates that he will take instructions stating that *"our client's rights remain reserved."*⁶ Mr Mthimkhulu refused to accept that he was Mr Horner's

⁶ See page 316 of the Bundle. Transcript, p472, lines 16 – 22.

client during this period. This denial is highly improbable in light of the fact that, on his own version, Mr Mthimkhulu approached Mr Horner to assist him in a “labour matter” and had been in communication with Mr Horner between 14 July and 22 July 2015 regarding the queries around his qualifications.

[63] The version of Mr Mthimkhulu regarding Mr Horner’s involvement in the false qualifications is palpably false. The more probable version is clearly that Mr Mthimkhulu had secured the services of Mr Horner to assist him with the potential disciplinary inquiry into his qualifications. The inescapable inference is either that Mr Horner certified the documents after seeing what he thought were originals, or that he conspired with Mr Mthimkhulu to create the forged documents. Mr Mthimkhulu did not explain why he had not called Mr Horner to testify as to how his stamp came to be on the documents.

[65] PRASA has proven, on a balance of probabilities that Mr Mthimkhulu presented forged qualifications to PRASA in July 2015 when his qualifications were questioned. He did this in an attempt to mislead PRASA into believing that the representations he had made in order to obtain the position he had been appointed to on 1 April 2010 were true.

QUANTUM

[66] Ms Retief, the Specialist Payroll in the PRASA Corporate Division, testified that Mr Phakathi had requested Mr Chris Venter to perform a set of calculations. The instruction was to calculate the money paid by PRASA to Mthimkhulu between September 2010 and July 2015. She also performed a calculation of Mthimkhulu's salary discounting the increased salary arising from the counter-offer. She testified that she assisted Mr Venter to perform the calculations.

[67] She identified the spreadsheet and workings at page 269 of the trial bundle as the calculations they prepared at the time. Ms Retief testified that she had been instructed by PRASA's attorneys the previous day to perform another calculation of Mthimkhulu's salary discounting both the appointment to Executive Manager Rolling Stock and the subsequent increased salary arising from the counter-offer. Ms Retief provided three calculations to the Court:

1. She first calculated the amount that Mr Mthimkhulu was actually paid by PRASA as salary between April 2010 and July 2015. This figure was **R15 174 459.4 ("the actual remuneration paid")**.
2. She then calculated the monthly salary that Mr Mthimkhulu would have received had he not been appointed to the position of Executive Manager, or received the salary increase. This calculation took Mr Mthimkhulu's salary as at March 2009 when he was appointed as the general manager on a package

of R1 381 250 and calculated his monthly salary at the normal annual increases for his level. The difference between this figure and the actual remuneration paid is an amount of **R7 072 281.04**. This calculation is at page 9 of Bundle B.

3. In 2015, Ms Retief had calculated the monthly salary that Mr Mthimkhulu would have received had he not received the salary increase from the counter-offer. This calculation took Mr Mthimkhulu's salary as at September 2010 when he was appointed as the Executive Manager on a package of R1 650 000, and calculated his monthly salary at the normal annual increases for his level. The difference between this figure and the actual remuneration paid is an amount of **R5 771 854.39**.

CONCLUSION

[68] I am satisfied that all the elements of the plaintiff's cause of action have been established. Mr Mthimkhulu's made a very poor impression in the witness box. He was evasive and his testimony was incoherent and not supported by any extrinsic evidence. His evidence in its totality is rejected as false. The various witnesses that he stated he would call to support him failed to appear. The only inference that can reasonably be drawn from their failure to testify is that they were not prepared to give untruthful evidence in Mr Mthimkhulu's defence.

[69] The plaintiff has established that it has suffered patrimonial damage as a result of Mr Mthimkhulu's fraudulent misrepresentations. In this regard, PRASA suffered, at

the very least, damages in the amount of R5 771 854.39. This amount reflects the total of the additional payments made by PRASA to Mr Mthimkhulu as a result of having been induced to pay him a substantial increase in his salary as a consequence of the fraudulent misrepresentations made by him.

[70] PRASA submits that a punitive costs order be made against Mr Mthimkhulu. I am of the view that such an order is warranted. Not only has fraud been established, which of itself warrants the award of punitive costs, but his conduct during the trial justifies it.

[71] In the result, the following order is made:

1. Payment of damages in the amount of R5 771 854.39;
2. Interest on that sum at the prescribed rate of 9% per annum *a tempore mora* from the date of service of the summons, to date of payment;
3. Costs on the scale as between attorney and client, including the costs occasioned by the employment of two counsel.



L. WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

Counsel for the plaintiff:

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Advocate F. Hobden

Instructed by:

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Counsel for the defendant :

Advocate E. van der Merwe

Advocate V. Mabuza

Instructed by:

Phakedi Attorneys Inc.

Date of hearing:

25 February 2019 to 1 March 2019,
26 June 2019.

Date of judgment:

24 September 2019