

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/25285

In the matter between:

MBITA CONSULTING SERVICES CCApplicant/ Respondent in
stay application

And

**THE PASSENGER RAIL AGENCY OF SOUTH AFRICA
(PTY) LTD TRADING AS PRASA REAL ESTATE
SOLUTIONS ("PRASA")**Respondent/Applicant in
stay application

SUMMARY

SPILG, J:**CIVIL PRACTICE & PROCEDURE*****Stay of Execution and Rescission of Judgment***

- Where a stay of execution pending a rescission is brought before the judge who granted the judgment then it is competent for that judge to *mero motu* rescind the order under r 42(1) (a) even if the rescission application has not yet been prepared provided the other party is heard.
- *In casu* the allegations that there had not been proper service or that the cause of action on which the judgment had been granted was erroneous since the claim was in fact illiquid allowed the court to consider rescinding the judgment *mero motu* under the rule alternatively under the common law.
- Held: There had been proper service and the CEO as well as the GM of Legal Services were aware of the application prior to the hearing. The reason advanced for non-appearance was rejected. Accordingly the court could not *mero motu* rescind but had to concern itself with whether to grant a stay pending the outcome of a formal application for rescission which by then had been served and which should be dealt with by another court
- In regard to the stay application, less stringent requirements were applicable. The court therefore granted a stay in respect of the claim in relation to what were

described as MB2 stations, which an arbitrator had found to be a separate agreement which PRASA had been entitled to cancel on a date prior to the claims arising but which appeared to be subject to the terms of an interim consent order granted by a previous court.

- In respect of the MB1 stations contract which was still alive at the time, PRASA's defence was that it had paid the contractually stipulated amount of just under R1million claimed in terms of the contract for the month in question..
- It however failed to produce proof of payment, despite the court itself affording PRASA a further opportunity to do so. Instead its attorney addressed a letter to the court on instructions stating that it had "*submitted and maintains that it has paid ... all amounts that were due*" and that "*we are not able to provide the Court with the requested documentation*". This was said to be also in light of submissions which were effectively a regurgitation of the arguments presented in court by its counsel before the court afforded it an opportunity to produce proof of the alleged payment since no other defence had been raised to the MB1 stations contractual claim.

ATTORNEYS- CONDUCT OF LITIGATION

- Legal representatives do not make submissions in contested cases by way of letters addressed to a judge.
- 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 the court