GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/25285

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

24 February 2020 .....

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. This is an application brought by the Passenger Rail Agency of South Africa (Pty) Ltd (*"PRASA"*) for leave to appeal my judgment of 8 October 2019 in which I made the following order:

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

2. The effect of the order is that I granted a stay of execution in respect of that part of the judgment of 23 July 2019 which dealt with the MB2 stations which was in an amount of R15 935 422 but not in respect of that part which dealt with the quite distinct MB1 stations. This meant that Mbita was entitled to proceed with its writ execution against PRASA in respect of R971 098 only. The reasons for granting a stay in respect of the claim regarding the MB2 stations and not the MB1 stations is contained in my judgment which is reported in [2019] 4 AllSA 794 (GJ). It is also reported in SAFLII as [2019] ZAGPJHC 385 to which is also appended my summary

3. PRASA relies on the following main submissions to support its application for leave to appeal:

a. that instead of dealing with a stay of application I treated the matter as if it were a rescission of judgment;

b. my order amounted to a review of an arbitration award

c. the court failed to acknowledge that the *causa* for the execution of the judgment was placed in dispute and therefore a stay should have been granted in respect of the entire order.

4. I believe that the judgment is self-explanatory and that the arguments presented for leave to appeal fail to engage it. Ordinarily the reasons for refusing leave to appeal are contained in a few paragraphs. However more should be said because the application for leave to appeal reveals that PRASA has failed to grasp the gravamen of the judgment and has obfuscated the issues.

FIRST CONTENTION: COURT DEALT WITH THE MATTER AS A RESCISION APPLICATION AND NOT A STAY OF EXECUTION

5. The submission was repeated at the hearing, Adv Nhamuravate submitted that my judgment was one decided on the basis of a rescission of judgment.

6. The judgment was divided into two parts. The first dealt with the initial concern I had that my order may have been improperly sought or obtained as the applicant contended that there had not been service on it and that the cause of action had been misrepresented, or at the least mistakenly identified, to me as liquid or liquidated claims whereas they were illiquid being based on an enrichment claim and were furthermore the subject of an arbitration award which had rejected both the MB1 and MB2 claims.

7. If these submissions were correct then there would have been no need to engage the stay of execution application as I could *mero motu* set aside my judgment if there had not been service or under Uniform Rule 42(1) (a) or on common law grounds if the judgment had in fact been erroneously sought or granted or if I had been misled. This is dealt with in particular at paras 7 to 11

8. However it became evident during my judgment preparation that PRASA had in fact been served with the application for judgment. I was also concerned that the other grounds raised which might have permitted me to *mero motu* set aside my own judgment were not supported on an analysis of the papers. This was set out in para 12 of the judgment.

   Since there was no ground available to *mero motu* set aside my own judgment I then proceeded to consider the application for stay of execution under r 45A and the basis on which a court was entitled to do so where there had been service of the initiating process. This appears clearly in para 13 and elsewhere in the course of the judgment.

9. It also appears from my summary which is to be found at the SAFLII citation *supra* the relevant text reading:

> ***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.*

10. If there was any doubt then para 71 of the judgment again pertinently mentions that *"there is no lawful reason to find that real and substantial justice will be served in staying execution or as it is otherwise put, that an injustice or irreparable prejudice will be suffered"*. See also para 63. Finally on this score, the judgment itself confirms that I granted a stay of execution in respect of the MB2 claims but not the MB1 claim.

SECOND CONTENTION: THE ORDER AMOUNTED TO A REVIEW OF THE ARBIRATION

11. Para 14 of the judgment sets out that PRASA was afforded an opportunity to deal with certain anomalies. The anomalies were pertinently identified (see para 15). For the reasons set in paras 54 and 56, the Arbitrator in her own words confirmed that the MB1 contract did not form part of the referral. It therefore follows that the arbitrator made no finding in respect of the MB1 stations. The point is accordingly devoid of merit.

THIRD CONTENTION: COURT FAILED TO RECOGNISE THAT THERE WAS A DISPUTE RE PAYMENT

12. The founding papers in the stay application raised issues of service, *lis pendens,* that Mbita's claim was illiquid and the other points dealt with in my judgment. The issue of whether there had in fact been payment made in respect of the MB1 contract arose when PRASA's counsel relied on the rescission application papers to demonstrate payment through its running account statements. The difficulty was that they did not show payment for the amount in issue of R R971 098 for the MB1 station.

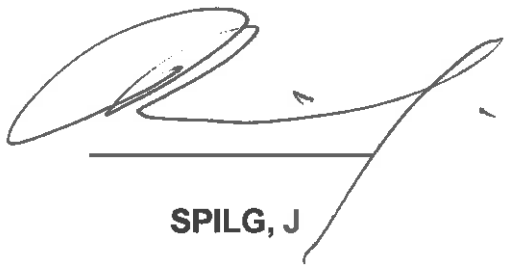
13. Alive to the case of *SA Bank of Athens v van Zyl* [2006] 1 All SA 118 (SCA) where a party had relied on incorrect legal submission which resulted in the true issue not being canvassed I afforded an opportunity to PRASA to demonstrate payment. If I had not then there would not be a genuine dispute before me, let alone *a de facto* one.

14. Under the heading *"Subsequent hearing and opportunity to produce proof of payment of July 2017 invoice re MB1 contract"* of the judgment (paras 63-73) *I* dealt fully with affording PRASA a further opportunity to produce some proof of payment for this amount. In short it refused to. As a consequence there was no *bona fide* dispute raised, let alone any *de facto* dispute. That being the case it

could never be an injustice or irreparable prejudice to PRASA as it had failed to set up a genuine dispute regarding the amount outstanding in respect of the MB1 stations, nor could they ignore the courts request for proof in an attempt to assist them to shore up their failure to raise a *bona fide* dispute.

ORDER

1. I was accordingly satisfied that PRASA does not have a reasonable prospect of success in respect of the grounds raised and on 19 February dismissed the application with costs.



SPILG, J

DATES OH HEARING:	19 February 2020
DATE OF ORDER:	19 February 2020
DATE OF JUDGMENT:	5 March 2020
FOR RESPONDENT IN STAY:	
(APPLICANT IN MAIN)	Adv JB Smit
	Carol Coetzee & Associates
FOR APPLICANT IN STAY:	Adv N Nharmuravate
	Msikinya Attorney & Associates