

IN THE AD HOC ARBITRATION

Between

SA FENCE & GATE INVESTMENT HOLDINGS (PTY) LIMITED

CLAIMANT

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

RESPONDENT

FINAL AWARD

A. INTRODUCTION

1. The claimant is SA Fence and Gate Investment Holdings (Pty) Limited ("**SAFIH**") and the respondent is Passenger Rail Agency of South Africa ("**PRASA**"). The parties shall, henceforth, be referred to with the appellations SAFIH and PRASA, respectively.
2. At the pre-arbitration meeting of 26 March 2019, the parties confirmed that a valid arbitration agreement, within the meaning ascribed to those words in section 1 of the Arbitration Act, 42 of 1965, is extant.
3. The scope of this reference has been determined by the Arbitrator' s partial award published on 17 August 2019, to include the both the main claim and the counterclaim.
4. In terms of the main claim, SAFIH seeks payment in the amount of R7 915 073,85, representing a disputed set-off by PRASA against the last payment of R67 697073.85 to SAFIH ("**the main claim**").
5. The main claim turns on the proper interpretation of sub-clauses 6.1 and 6.3 of the consent award published by PMM Lane SC on 6 December 2018 ("**the Lane Award**").¹
6. In terms sub-clause 6.1 thereof, SAFIH undertook to deliver materials it held off-site, which materials must accord with the BTKM report dated 18 October 2017 ("**the 18 October**

¹ Pleadings Bundle (PB), p.8.

Report") and must have a cumulative value of R67 697 028.81 ("**the Lane Amount**").² Sub-clause 6.3 provides, in its turn, that should there be a shortfall in the materials stored off-site, the value of the shortfall shall be determined "**as per the BTKM report dated 28 October 2017.**"³

7. PRASA denies SAFIH 's entitlement to the claimed amount and avers that it was "**entitled to deduct the value of the shortfall materials in the amount of R 7 915 073.85 from the settlement amount ...**"⁴
8. PRASA 's claim in reconvention is for the return of the amount of R45 101 179.69 allegedly overpaid, and thus recoverable, for the provision of lighting.
9. SAFIH raised, inter alia, the following defences against the counterclaim:
 - 9.1. That the procurement, storage, and installation of lighting does not form part of the contract entered into between the parties; and
 - 9.2. That the BTKM assessment and the verification report relied upon is inaccurate and incorrect.

² Transcript, p.3, lines 5-7.

³ Transcript, p.3, 9 – 12; PB, p.9.

⁴ PB, p.33, para 13.1.

10. In what follows, I deal, firstly, with the evidence adduced in regard to both the main claim and the counterclaim, and thereafter, with the analysis of these claims, separately.

B. THE EVIDENCE - MAIN CLAIM AND THE COUNTERCLAIM

(i) Introduction

11. As stated, SAFIH claims an amount of R7 915 073.85 representing the amount of the disputed set-off of the value of the shortfall of materials stored off-site, against the settlement amount of R67 697073.85 payable to SAFIH.
12. The Lane Award was published on 6 December 2018. Clause 6 thereof provides that:

“6.1 Upon payment and by no later than 15 February 2019, the claimant shall deliver to the respondent all materials stored offsite by the claimant, which materials shall accord with the BTKM report dated 18 October 2017 and shall have a cumulative value of R67 697 012.95... Delivery shall be made to Umjantshi House ...With not less than 24 hours’ notice to the respondent and the respondent shall advise the name and contact details of a person with whom delivery must be arranged.

6.2 The delivery of the materials shall be coordinated by a representative of the Respondent and a representative of the Claimant and properly indexed and signed off by both parties.

6.3 Should there be a shortfall in the materials stored off-site, the value of the shortfall shall be determined as per the BTKM report dated 18 October 2017.”

13. A dispute arose about the interpretation of clause 6 of the Lane Award. More specifically, the dispute is about whether the Lane amount was to be calculated with reference, only, to annex B to the statement of claim, captioned: **“VERIFICATION- EXECUTIVE SUMMARY, VERIFICATION WORKS FOR THE FENCING, PROJECT EXECUTED IN EIGHT DEPOTS PRASA - REV 1, 18- Oct- 17”** (“the Executive Summary”) or with reference, also, to the associated schedules.
14. SAFIH’s pleaded case is that the Lane amount was to be calculated with reference to the Executive Summary, only, whereas PRASA contends that it was to be calculated with reference to the 18 October Report, together with its associated schedules.
15. It is not in dispute that SAFIH tendered materials with a cumulative value of R67 697 012.95 to PRASA. It is also not in dispute that PRASA retained an amount of R7 915 073.85 from the last payment to SAFIH, representing the value of the alleged shortfall in the materials stored off-site.

16. The crisp issue on which the main claim turns is whether paragraph 6.1 of the Lane Award, properly construed, requires SAFIH to provide any materials (to the cumulative value of R67 697 012.95) or whether SAFIH is required to provide materials to the value of R67 697 012.95, which accord with the 18 October Report and its associated schedules.
17. PRASA 's claim in reconvention is for payment in the amount of R45 101 179.69 being an amount allegedly overpaid, and thus recoverable, for the provision of lighting.
18. SAFIH raised, inter alia, the following defences against the counterclaim:
 - 18.1. That the procurement, storage, and installation of lighting does not form part of the contract entered into between the parties; and
 - 18.2. That the BTKM assessment and the verification report relied upon is inaccurate and incorrect.

(ii) SAFIH's Evidence

19. It was agreed by the parties, and determined by the Arbitrator, that witnesses' statements be delivered in advance of the arbitral evidentiary hearing.
20. Consequently, SAFIH delivered witnesses' statements of four witnesses but urged the Arbitrator to disregard the witness' statement of Mr. George Els. Thus, the evidence of three witnesses, namely, Messrs. Kersagan Reddy ("**Mr. Reddy**"); Leon Wolmarans ("**Mr. Wolmarans**") and Geoffrey Edward Greyling ("**Mr. Greyling**") was adduced by SAFIH.

21. Mr Reddy was the first to testify on behalf of SAFIH. He confirmed his three witness' statements hitherto delivered, under oath. The nub of Mr. Reddy's evidence in chief (including that contained in his witness' statements) was that:

21.1. He is a Director at SA Security Solutions and Technologies Group of Companies.

21.2. SAFIH agreed to settle on the terms set out in the Lane Award based on the Executive Summary only, to the exclusion of the associated schedules.⁵

21.3. PRASA unilaterally applied a set-off against the settlement amount based on the Final Report of BTKM, dated 25 January 2019 ("**the Final Report**").⁶

21.4. He compiled a settlement report⁷ to highlight the discrepancies he had found in the reports sent to SAFIH by PRASA.⁸

⁵ SAF&G Witnesses Statements Bundle, p.4,para 9.

⁶ SAF&G Witnesses Statements Bundle, p.5,para 13.

⁷ SAF&G Witnesses Statements Bundle, p.126.

⁸ Transcript, p. 11, line 9-13.

21.5. During the stock count, it transpired that SAFIH had more field network switches, by way of example, than were required for the project. Consequently, certain of these were removed to arrive at the settlement value of R67 697 012.95, set out in the Lane Award.⁹

21.6. He was not present when the parties agreed the content of the Lane Award.¹⁰

22. Under cross-examination, the following emerged:

22.1. His Lordship Mr. Justice Ranchod had ordered PRASA to appoint an independent engineer and consultant (or verifier), as contemplated in the agreement, to **“do all things necessary to consider and approve, or reject, as the case may be, the various charges for labour as claimed by [SAFIH] in terms of payment certificate 17a”**.

22.2. Pursuant to the above, PRASA appointed BTKM, as the independent verifier, and SAFIH accepted the said appointment.¹¹

⁹ Transcript, p. 16 &17, line 23-21.

¹⁰ Transcript, p. 17, line 22-25.

¹¹ Transcript, p.120, line 1-5.

- 22.3. Subsequently BTKM rendered, *inter alia*, three verification reports, dated 15 September, 16 October, and 18 October 2017. SAFIH relied on the Executive Summary, to the exclusion of its schedules, on the computation of the Lane amount.¹²
- 22.4. The Lane amount was derived from the 18 October Report, being representative of the off-site materials verified by BTKM. SAFIH and PRASA agreed that when SAFIH hands off-site materials over to PRASA, it must ensure that the materials accord with the 18 October Report.¹³
- 22.5. The Lane amount is made up of the cumulative value of the verified off-site value in respect of the eight (8) depots, being the subject-matter of the agreement between the parties. By way of example, the value of the verified off-site materials in respect of the Braamfontein depot is R 16 397 549.20, excluding VAT.
- 22.6. The schedule to the Executive Summary dealing with Braamfontein demonstrates, with reference to specific items of materials, how the amount of R 16 397 549.20 verified off-site materials was arrived at. Mr. Reddy, however, maintained that the verification of Braamfontein was flawed because when the counting was done, none of the stock had been separated into different sites.¹⁴

¹² Transcript, p.125, line 1-6.

¹³ Transcript, p.135, line 16-22.

¹⁴ Transcript, p.149 at 150.

- 22.7. The Executive Summary¹⁵ sets out the verified off-site materials per depot.
- 22.8. According to Mr. Reddy, since the 18 October Report had no schedules attached to it, no detail was provided as to how the Lane amount was to be determined.¹⁶
- 22.9. However, Mr. Reddy conceded that the first 9 pages of the 18 October Report make clear that it is nothing more than a summary.¹⁷
- 22.10. The Executive Summary expressly states that **“The included Financial Verification and associated schedules are representative of the [verification] process ...in terms of the revised verification of the scope of work completed and payments made up to and including Payment Certificate 21a Revision 1 (Fencing) and 20b (Lighting).”**¹⁸
- 22.11. Mr. Reddy contends that clause 6.1 of the Lane Award contemplates SAFIH giving over to PRASA materials to the value of the Lane Award **“in relation to items that are required for the project itself”**. He testified, in this regard, metaphorically that:

¹⁵ At page 98.

¹⁶ Transcript, p.160, line 1-5; 22-25.

¹⁷ Transcript, p.163, line 8 -24.

¹⁸ PRASA Witness Statement Bundle, p.94.

“we wouldn’t provide a toaster; it would be things that we are aware ... are required ... and ... were purchased for the project itself.”¹⁹

22.12. According to him, SAFIH could give PRASA any materials to the cumulative value of the Lane Award, which accord with the Bill of Quantities.²⁰ He went on to state, again metaphorically, in this regard that: **“We could not provide a toaster because a toaster was not in the Bill of Quantities.”**²¹

22.13. SAFIH finds the 18 October Report objectionable, even though it had been amended based on SAFIH’s input. Mr. Reddy contends that not all the input provided by SAFIH were incorporated in the 18 October Report.²²

22.14. Yet, despite the alleged objectionable character of the 18 October Report, SAFIH was content to settle the delay damages claim based thereupon, on 6 December 2018, hence the Lane Award.²³

¹⁹ Transcript, p.186, line 16 -20.

²⁰ Transcript, p.188, line 17 -25.

²¹ Transcript, p.189, line 16 -18.

²² Transcript, p.235&236.

²³ Transcript, p.237,line 1 -7.

22.15. Mr. Reddy was unable to explain the anomaly of SAFIH obtaining a consent award based on a report whose content it was challenging. In this regard, he testified that Mr. Leon Wolmarans, who had attended the arbitration, would be better placed to explain this anomaly.

22.16. It also emerged during the cross-examination of Mr. Reddy that the Statement of Claim does not challenge the correctness of the 18 October Report. All it does, is take issue with the reliance by PRASA on the schedules associated therewith without having availed them prior to 4 December 2018.²⁴

22.17. Mr. Reddy referred the tribunal to annex 9 of the PRASA settlement report dated 28 February 2018 where it is stated that the quantum referred to in the verification report needed to be jointly verified and agreed upon, which joint verification had not occurred as at the date of the arbitration.²⁵ This was the high watermark of his challenge to the numbers contained in the 18 October Report, this despite SAFIH having agreed thereto and the Lane Award having been based thereupon.

23. During his re-examination, Mr Reddy testified that he was not able to testify on the legality or otherwise of the approval of the extension of scope of the contract to include the lighting component.

²⁴ PB, p.4, para 17.

²⁵ Transcript, p.278, 1-9.

24. The next witness to testify on behalf of SAFIH was Mr. Leon Wolmarans (“**Mr. Wolmarans**”). Mr. Wolmarans had, similarly, delivered a witness’ statement in advance of the arbitral evidentiary hearing as per the procedural order hitherto published. In terms thereof:

24.1. He is SAFIH ‘s Operations Manager with 15 years’ experience in civil engineering.

24.2. He was not involved in the lighting scope of the works.

24.3. He attended numerous verification inspections with BTKM representatives for each of the depots except the East London depot.

24.4. After each inspection, he compiled agreed quantities and emailed same to BTKM.

24.5. SAFIH disputed BTKM’s 5 September 2017 report, provided comments thereupon and BTKM amended its report, accordingly.

24.6. The purpose of the reports dated 16 and 18 October 2017, respectively, was to settle what work would be required to complete the project and not to verify the materials on and off site.²⁶

²⁶ SAF&G Witness statements Bundle, p.134, para11 and 12.

- 24.7. SAFIH was not given the full reports dated 16 and 18 October 2017, respectively. Had that occurred, SAFIH would have disputed the values of the materials off-site.
- 24.8. He attended the handover inspection on 23 January 2019 to count, verify and hand over the off-site materials to the Lane amount value. There, SAFIH presented schedules to BTKM and PRASA of all the materials in SAFIH storeroom and SAFIH was instructed by PRASA to remove materials from the schedule.
- 24.9. Materials off site were counted, agreed, and verified by SAFIH and PRASA to the Lane amount.²⁷
- 24.10. Subsequently, the accuracy of the above was challenged. Further, there was a challenge as BTKM failed to consider materials procured after Payment Certificate 21a Revision 1.
25. Mr. Wolmarans confirmed the correctness of the content of his witness' statement under oath and that he was involved in the conclusion of the settlement agreement which led to the Lane Award.²⁸ He testified that SAFIH agreed to settle on the Lane amount because it

²⁷ Ibid.

²⁸ Transcript, p.294,line 20 -25.

knew that it had stock to hand to the value of the Lane amount.²⁹ Further, SAFIH had not seen the associated schedules and sought to have the agreement cancelled.

26. Under cross- examination, Mr. Wolmarans confirmed that:

26.1. SAFIH commented on BTKM's prior reports.

26.2. The 18 October Report contained the comments furnished by SAFIH to BTKM.

26.3. The Lane amount was agreed to by SAFIH as SAFIH had the equivalent number of materials in hand.³⁰

26.4. SAFIH settled on the Lane amount, based on the 18 October Report and not on the Bill of Quantities value.³¹ In this regard Mr. Wolmarans 's evidence contradicts Mr. Reddy's.

27. There was no re-examination of Mr. Wolmarans.

28. The next witness to testify Mr. Greyling.

²⁹ Transcript, p.295,line 1 -18.

³⁰ Transcript, p.308-309, line 25 -1.

³¹ Transcript, p.311,line 16 -18.

29. His evidence was confined to the counterclaim. He, similarly, confirmed his witness' statement under oath and proceeded to clarify and/ or highlight certain of its content.
30. He testified that he remembers a certain meeting of 4 September 2014, also referred to as the kick-off meeting.
31. According to his recollection, PRASA had signed off on the perimeter lighting procurement project and SAFIH had paid Top 6 for the lights, in consequence.
32. Top 6, in its turn, did not pay the full amount of the procurement of the lights BEKA. The lights so purchased landed up in a storage facility as SAFIH was disinclined to take responsibility for the storage fees as, according to it, PRASA ought to have taken the lights to its stores.
33. Under cross-examination Mr Greyling was taxed on the contractual arrangement between SAFIH, Top 6 and PRASA; and a certain settlement agreement concluded by BEKA and Top 6, to which PRASA was no party.
34. Mr. Greyling testified that PRASA was no party to either agreement. In essence, Mr. Greyling conceded that there was no privity of contract as between PRASA and the allegedly nominated sub-contractor.³²

³² PRASA Witness 's statement Bundle, p113, Annex SW 21.

35. Additionally, Mr. Greyling confirmed annex “**SW16**”, dated 1 October 2014, in terms of which the procurement of lights was to be excluded from the extension of scope and the price adjustment of R256 958 290.17.

(iii) PRASA’s Evidence

36. PRASA delivered four witness’ statements of Messrs Hanif Moosa (“**Mr. Moosa**”), Johannes Swart (“**Mr. Swart**”), Mavhungu Muhanganeï (“**Ms. Muhanganeï**”) and of Ms. Martha Ngoyi (“**Ms. Ngoyi**”).

37. First to testify was Ms. Muhanganeï. She confirmed the content of her witness statement under oath.³³ In it she states that:

37.1. On 25 March 2013, PRASA and SAFIH entered into a contract for the provision and installation of a security fence at PRASA’s depots nationally.

37.2. In terms of the contract, the initial completion date for the works under the contract was 31 March 2014. However, this date was extended from time to time due to compensable and non-compensable events which have since been resolved between the parties.

³³ PRASA Witness Statements Bundle, p.163 -172.

- 37.3. The initial scope of work was for SAFIH to deliver an Integrated Security Management Solution (“**ISMS**”) for PRASA.
- 37.4. After the commencement of the works, the parties discussed an increase in the scope of work to include installation of better steel mesh panels as well as switching from a fibre detection system to a kinetic detection system and to include the provision of lighting.
- 37.5. However, on 26 May 2014, the Acting Executive Manager of PRASA issued an instruction that no additional work should be executed which would bring the value of the works above the amount of R 209 874 559.79.
- 37.6. On 20 August 2014, PRASA revised the contract amount from R 209 874 559.79 to R 256 958 290.17 in line with the approved additional scope of work.
- 37.7. Consequently, SAFIH submitted a revised Bill of Quantities (“**BoQ**”), annex “**MM7**” to the witness statement, reflecting the terms of the variation order in terms whereof the contract price was increased to R 256 958 290.17.
- 37.8. Subsequently, and on 1 October 2014, PRASA issued a notice to proceed with the implementation of the contract in terms of the change in the scope of work referred to above. It was, however, stated that the lighting component, which was reflected in the revised BoQ, were not to be procured as the terms of their procurement were still under discussion.

- 37.9. On 21 January 2015, the Depot Modernisation Program Executive Manager authorised the purchase and installation of lights at an estimated cost of R58 153 296.72.
- 37.10. The procurement and installation of lights was approved by PRASA 's supply chain management and ratified by the Acting Group CEO on 20 January 2015. This decision was also ratified by the steering committee of the Board of Control on 17 December 2015.
- 37.11. The authorisation to purchase and install lights constituted an order for additions, modifications, and extras, alternatively, an amendment in terms of clause 15.11 of the contract and, thus, amounted to a tacit variation in terms of clause 31 of the contract.
- 37.12. The provision of lights was approved under the contract and formed part thereof.
- 37.13. A dispute having arisen between the parties, an application was brought to the High Court of South Africa by SAFIH which culminated in the appointment of an independent verifier in the name of Bham Tayob Khan & Matunda Quantity Surveyors ("**BTKM**").
38. Under cross-examination, the following emerged:
- 38.1. In terms of the contract there should have been an engineer and a consultant appointed to assist with the execution of the contract, but those entities whenever

appointed. The first time that a similar type skill entity was appointed was considerably later when BTKM was appointed.³⁴

38.2. She did not recall the meeting which took place on 4 September 2014.³⁵

38.3. As at the date of the meeting of 4 September 2014, PRASA had already paid for a portion of the lighting component of the project.

38.4. The condonement recommendation report signed by the Acting Group CEO on 20 January 2015 and the certified extracts of the steering committee minutes, constitute the approval by PRASA for the lighting component of the project.³⁶

38.5. The steering committee potentially acted under delegated authority, but she could not say for certain as she had no supporting documentation to that effect in her possession.

38.6. Mr. Lebaka was subjected to a disciplinary inquiry at which he was found guilty of, and dismissed for, irregularly committing PRASA to work falling outside the scope

³⁴ Transcript, p.347, 16-25.

³⁵ Transcript, p.348, 8 -9.

³⁶ Transcript, p.350, 12-21; PRASA Witness Statements Bundle, p.497 - 503.

of R209 million contract and of unauthorised expenditure in March 2013, in respect of the procurement of lights.³⁷

39. During re-examination, Ms. Muhanganei testified that:

39.1. The group CEO had delegated authority of up to R 100 000 000.00, at the time.

39.2. Prior to the condonement referred to above, the transaction was unauthorised.

39.3. She has no communication, in her possession, in terms of which SAFIH informed PRASA that it believed that the extension of scope was unauthorised.

39.4. It would not have been possible for PRASA to effect payment if the transaction were unlawful.

40. The next witness to testify for PRASA was Mr. Moosa who, similarly, confirmed the content of his witness statement under oath. He testified, in chief, as follows:

40.1. BTKM was appointed to perform a verification of works and material on each of the PRASA depots. Pursuant thereto, BTKM calculated the value of the work that had been performed, materials on site and materials off site. BTKM then performed a

³⁷ Transcript, p.358, 1 -25.

reconciliation with the payments that had been made at that point in time in order to establish whether any payment was due to SAFIH.

- 40.2. Payment Certificates 21a Revision 1 and 20b were used as the base for the verification process, although not totally relied upon, as the verification was an independent physical count of what had been done.
- 40.3. In regard to the reports A, B and C on exhibit A, the initial report (A) was tabled for discussion. Certain comments made by PRASA that BTKM was unable to verify. Then they issued the second report (B), on items that they were unable to verify and the third version (C) came out after those items were re-looked at and incorporated.³⁸
- 40.4. Certificates 21a Rev 1 and 20b were used, during the verification process, as reference documents.
- 40.5. The value of work that was verified was R84 001 582.27 on 5 September 2017 as per report A on Exhibit A.
- 40.6. On 16 October 2017 the value of the work was verified at R 92 875 026.60, as per report B on Exhibit A.

³⁸ Transcript, p.376 -377.

- 40.7. On 18 October 2017, the value of the verified work stayed the same, as per report C on Exhibit A.
- 40.8. The same logic obtains in regard to the value of verified materials off site. In terms of report A, the verified value was R 68 003 012.92. In terms of report B, the verified value was R 67 697 012.95 and the value remained the same in respect of report C.
- 40.9. The adjustment from R 68 003 012.92 to R 67 697 012.95 came about as a sequel to the process of engagement with SAFIH about verifying the numbers.
- 40.10. The first nine pages of the 18 October Report contain a summary of verified works and amounts recoverable.³⁹ It fixes the value of verified off site materials at R67 697 012.95. The rest of the 18 October Report⁴⁰ sets out the calculation behind those numbers.⁴¹
- 40.11. In regard to the lighting component of the contract, R 1 644 406.00 is the verified actual value of the work performed at the Wolmerton depot, which amounts to R1 932 849.01 inclusive of escalation. PRASA had paid R47 034 028.70 against the

³⁹ PRASA Witness' Statements Bundle, p. 96.

⁴⁰ PRASA Witness' Statements Bundle, p.104 - 149.

⁴¹ Transcript, p.384, 5-7.

lighting component hence, R47 034 028.70 less R1 932 849.01 yields the recoverable amount of R45 101 179.69.⁴²

40.12. The letter of 4 December 2018⁴³ was a confirmation of the value of materials on and off site that was incorporated into the 18 October Report, and it was a confirmation that these are the items that needed to be recovered from SAFIH. ⁴⁴

41. During cross-examination, the following emerged:

41.1. Mr. Moosa disagreed with the proposition that even as at March 2018 there was no agreement on the numbers that BTKM had put up.⁴⁵ He testified that he had explained the differences between the three versions of the report, followed by a discussion and, ultimately, agreement among the parties as to what had to be included and what had to be excluded. He testified, in this regard, that: **“[t]hose were the agreed numbers that were included in the report of the 18th of October 2017.”**

⁴² Transcript, p.387, 23-25.

⁴³ PB, p.22.

⁴⁴ Transcript, p.388, 20 and further.

⁴⁵ Transcript, p.392, 21 and further.

- 41.2. There was no declaration, as there ought to have been in a proper case, that some of the materials would be arriving post the verification date of June 2017.⁴⁶
- 41.3. Mr. Moosa was not sure as to whether the lighting component of the project was part of the contract concluded between the parties.⁴⁷
- 41.4. In regard to the change in the verified value of work from R84 001 582.27 to R92 875 026.60⁴⁸, Mr. Moosa testified that that was not as a result of a miscalculation but as a result of items that had been unverifiable at the time, that typically being items such as trenching, items buried underground, in terms of which there was no way of establishing whether they had, in fact, been physically executed or not. PRASA, subsequently, provided guidance on what it had approved, and hence the change in value between the two reports.
- 41.5. There were three unverifiable items, being the PC sums, the sleeves of 54 000, and the acceleration costs for Wolmerton totalling the amount of R22 257 657.18.
- 41.6. The materials that had been stored off site were not so stored with reference to a particular PRASA depot, but were stored together.

⁴⁶ Transcript, p.395, 5-14.

⁴⁷ Transcript, p.396,9-15.

⁴⁸ PRASA Witness' Statements Bundle, p. 6, para 18.

- 41.7. BTKM's objective was to count and to report. Mr. Moosa testified that he did not have personal knowledge of taking out materials so as to meet the R67 million threshold.
- 41.8. Mr. Moosa disagreed with the proposition, as postulated in Mr. Reddy's settlement report, that certain items, by way of example, BoQ item number 5.5.01, were reduced by mutual agreement between BTKM, PRASA and SAFIH "**because the stock counted on the 23rd of Jan 2019 had a higher value than the agreed value of the Arbitration Award**"⁴⁹
42. There was no re-examination.
43. PRASA elected not to call Mr Swart.
44. The next witness to testify for PRASA was Ms. Onica Martha Ngoye ("**Ms. Ngoye**"). She testified in relation to annex "**MM10**" that it was submitted by the Chief Procurement Officer of PRASA requesting approval from the CEO, on the transaction pertaining to the National Fencing and Security Project, of the condonement of certain aspects thereof.
45. Ms. Ngoye approved the condonement in the total amount of R58 153 296.72 (VAT inclusive).

⁴⁹ SA&FG Documents Bundle, Bundle 1,p138, BoQ Item 5.5.01.

C. ANALYSIS OF THE MAIN CLAIM

46. The primary question facing this tribunal, in regard to the main claim, is what is the proper interpretation of clause 6 of the Lane Award.
47. In particular, this tribunal is called upon to interpret the following words in the Lane Award **“...SAFIH shall deliver to Prasa all materials stored off site by SAFIH, which materials shall accord with the BTKM report dated 18 October 2017 and shall have a cumulative value of R67 697 012.95.”**
48. In **KPMG Chartered Accountants (SA) v Securefin Ltd 2009 (4) SA 399 (SCA)** at para **39**, the SCA held as follows:

“[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent Fourth, to the extent that evidence may be admissible to contextualise the document (since ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, ‘one must use it as conservatively as possible’ The time has arrived for us to accept that

there is no merit in trying to distinguish between ‘background circumstances’ and ‘surrounding circumstances’ ...”

49. Subsequent to the judgment in *KPMG*, Wallis JA re-stated the principles for the interpretation of contracts and documents in **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [17]-[18]** and in **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) para 12**.
50. In **Bothma-Batho**, the SCA held that the approach to interpretation of contracts which was long followed and set out in **Coopers & Lybrand and Others v Bryant 1995 (3) SA 761 (A) at 768A-E**, is "no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents ...".
51. The Court reiterated a passage from the **Endumeni judgment** which it stated reflected developments in regard to contractual interpretation as set out in, *inter alia*, **KMPG**. The following passage from **Endumeni** was quoted with approval:

“[18] ... [t]he present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to

the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. ... The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so ... (i)n a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’,... read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

52. On the ordinary interpretation, the materials stored off site which are to be returned by SAFIH had to meet the following two requirements:

52.1. They had to accord with the 18 October Report; and

52.2. They had to have an accumulative value of R67 697 012.95 (“**the Lane amount**”).

53. Ms. Pillay SC submitted that the ordinary interpretation set out above is fully consistent with PRASA's position adopted in this arbitration, namely, that SAFIH cannot tender any random materials and then claim to have complied with the Lane Award.
54. Ms. Pillay SC argued that what SAFIH was obliged to do was to provide materials which accord with the 18 October Report and which had a accumulative value of R67 697 012.95. I, respectfully, agree with these submissions.
55. PRASA maintains, further, that the interpretation advanced by SAFIH is completely untenable for the following reasons:
 - 55.1. The first nine pages are explicitly referred to as the "**executive summary**";
 - 55.2. It only accommodates the second requirement set out in the clause 6.1 of the Lane Award, namely that the materials should amount to the Lane amount, leaving out of consideration the requirement that the said materials ought also to accord with the 18 October Report. In other words, SAFIH was not entitled to furnish any material to the Lane amount value, such material had also to accord with the 18 October Report and its associated schedules;
 - 55.3. It overlooks the fact that the Executive Summary incorporates and summarises the schedules;

- 55.4. It disregards the fact that the Executive Summary breaks down the materials according to the various depots. It therefore incorporates the particularisation of materials; and
- 55.5. It makes no commercial sense as delivering any materials as long as the cumulative value of the materials is the Lane Amount is unbusinesslike and lacks in business efficacy.
56. I respectfully agree with the above.
57. Furthermore and as a matter of law, a compromise or settlement (*transactio*), being a contract the purpose of which is to put an end to litigation, is a complete defence to a claim based on the original claim and it has the force of *res judicata*.⁵⁰ It is thus legally incompetent to unscramble the compromise proverbial egg except upon a showing of fraud or mistake provided the error vitiated true consent.⁵¹
58. The delay damages claim was compromised. It is that compromise that resulted in the Lane Award. The Lane Award has the effect of *res judicata*. It is legally incompetent to challenge its terms at this stage.

⁵⁰ Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd 1978 (1) SA 914 (A).

⁵¹ Rowe v Rowe 1997 (4) SA 106 (SCA).

59. The Lane Award sets out the two requirements referred to above. Those requirements had to be satisfied by SAFIH. Issues of the furnishing materials in accordance with the BoQ and of the inaccuracy of the 2018 October Report are simply irrelevant.
60. During December 2018, BTKM was requested by PRASA to confirm the material off site that BTKM had verified in its 18 October Report. BTKM acceded to the request and furnished a letter confirming the verification of material as recorded in the 18 October Report and attaching the supporting quantity schedules to the 18 October Report.⁵²
61. The quantities of material measured and counted during this verification process were confirmed with SAFIH and agreed upon resulting in BTKM dispatching an email to that effect on 25 January 2019.⁵³
62. At the conclusion of the exercise, BTKM noted that there were quantity discrepancies which included the under supply of numerous items to the value of R 7,915,073.85.⁵⁴
63. Based on the above, it must follow that the material material stored offsite by the SAFIH and delivered to PRASA had a shortfall of R 7,915,073.85 which fell to be treated in accordance with the provisions of clause 6.3 of the Lane Award.

⁵² PRASA Witness' Statement Bundle,p.8, para. 21.

⁵³ Ibid.

⁵⁴ PRASA Witness' Statement Bundle,p.155, para.3.

64. I, accordingly, find that PRASA was entitled to apply the shortfall set-off to the last payment in the amount of R 7,915,073.85.

65. Accordingly, the main claim is dismissed with costs.

D. ANALYSIS – THE COUNTERCLAIM

66. In respect of the counterclaim, it is not in dispute that PRASA paid for the lighting in the amount of R 47 034 028.70. It is also not in dispute that SAFIH only delivered and installed lights in the amount of R 1 932 849.01. PRASA claims repayment of the overpaid amount of R45 101 179.69.

67. SAFIH raised three preliminary points in respect of the counterclaim:

67.1. First, Lack of jurisdiction;

67.2. Second, Prescription and

67.3. Third, Lack of authority.

68. I deal with these, in turn, before turning to the merits of the counterclaim.

(i) Lack of Jurisdiction

69. The contention advanced by SAFIH is that since the lighting provision did not form part of the contract between SAFIH and PRASA for the installation of security fencing, BTKM had no authority to verify the lighting provision and in that regard BTKM had exceeded its mandate.
70. PRASA maintains that a variation order was issued under the main contract which extended the scope of work to include lighting, and that this is corroborated by certain invoices issued by SAFIH using the reference of the main contract.
71. PRASA maintains, further, that lighting provision was never subject to a distinct procurement process or contractual arrangement since it was dealt with as a variation to the main contract.
72. I am satisfied, on the totality of the evidence before me, that lighting was a component of the main contract for the installation of security fencing.
73. Accordingly, this preliminary point must fail.

(ii) Prescription

74. SAFIH contends that since the facts relating to the counterclaim were known to PRASA by 11 September 2014, a period in excess of three years prior to the reference, the counterclaim has prescribed.

75. PRASA disputes the above for the following reasons:

75.1. The counterclaim is based on overpaid amounts as verified by BTKM in its 18 October Report.

75.2. The full facts relating to the counterclaim only became apparent to PRASA from 18 October 2017.

76. I am satisfied that the counterclaim is not extinguished by prescription as the facts and circumstances upon which it is based reasonably came to the knowledge of PRASA on 18 October 2017.

77. The counterclaim, thus, fully accrued on 18 October 2017⁵⁵ since the right of action, in sense of the transpiration of every fact necessary to sustain a cause of action, accrued to PRASA on that date.

78. Accordingly, this preliminary point must fail.

⁵⁵ Primavera Construction SA v Government, North-West Province, and Another 2003 (3) SA 579 (B).

(iii) Lack of Authority

79. SAFIH contends that since the procurement of lighting was not authorised by the Board of PRASA, the agreement to procure and install lighting is void *ab initio* and of no force and effect.
80. PRASA contends, inter alia, that the procurement and installation of lighting was condoned by both the Acting Group Chief Executive Officer and the Steering Committee of PRASA. Under the applicable delegation of authority framework, the Group CEO was duly authorised to approve the condonement.
81. The approval of the lighting component is an administrative decision. It remains valid until set aside by a Court of competent jurisdiction.
82. This tribunal has no powers of review. The condonement must, thus, be given effect to.
83. Accordingly, this preliminary point, also, falls properly to be dismissed.
84. That then takes us to the merits of the counterclaim, that being the issue to which I now turn.

(iv) The Counterclaim

85. It is common cause that PRASA overpaid SAFIH in respect of the lighting component of the agreement to the tune of R 45 101 179.69.

86. SAFIH's main defence is that it was instructed by PRASA to appoint Top 6 as a nominated sub-contractor for the provision of lighting and that it paid the amount claimed to Top 6 in respect thereof.
87. PRASA denies the above and contends that, in any event, since there is no privity of contract as between PRASA and Top 6, PRASA's remedy lies directly against SAFIH and SAFIH's remedy, if any, lies against Top 6.
88. In terms of clause 32.1 of the contract, any nominated specialist and other sub- contractor shall be regarded as having been employed by SAFIH as a sub- contractor.
89. In terms of clause 32.2, every nominated sub-contractor shall enter into a sub-contract with SAFIH which shall provide, among others, that such nominated sub-contractor shall undertake the same obligations to SAFIH in respect of the sub-contract as those by which SAFIH is bound under the contract.
90. Significantly, clause 32.7 provides that:

“ The exercise by PRASA of the right to nominate a sub-contractor shall not render PRASA in any way liable to such nominated sub-contractor and, except as provided for in clause 28.6 hereof, no privity of contract between PRASA and any nominated sub-contractor shall be created thereby.”

91. Clause 28.6 is not applicable *in casu* as it regulates certain obligations that are expressly stipulated to continue “**after the issue of the final certificate**”. The contract never reached the final certificate milestone.
92. On the totality of the evidence before me, SAFIH has failed to show that PRASA, in the exercise of its contractual the right to nominate a sub-contractor, nominated Top 6.
93. Even if SAFIH were to show that PRASA had done so, which has not been demonstrated on the evidence, such an exercise of that right would not have resulted in privity of contract between PRASA and such a nominated sub-contractor.
94. It follows that the alleged nomination of a sub-contractor by PRASA is not a valid defence to PRASA ‘s counterclaim.
95. SAFIH also raised non-enrichment defence. In this regard SAFIH contends that it was not enriched in the amount claimed since it paid the amount received *indebite*, to Top 6.
96. As a matter of law, a defendant who, like SAFIH, disposed of the thing may rely on the disposal as evidence of non-enrichment but such a defendant must, in addition, allege and prove that the disposal was *bona fide*.⁵⁶

⁵⁶ Le Riche v Hamman 1946 AD 648 and Van Zyl v Serfontein 1992 (2) SA 450 (C).

97. Further, a party who receives money or goods, knowing such money or goods to be *indebite*, cannot deal therewith as if he were the owner thereof.⁵⁷
98. SAFIH ought properly to have known that payment in the claimed amount was *indebite*. Its disposal of the funds can hardly be said to have been *bona fide* since, firstly, there was no written sub-contract in place as required under the main contract and, secondly, the lighting purportedly paid for had not been delivered to PRASA a fact of which SAFIH ought reasonably to have been aware.
99. Accordingly, the non-enrichment defence falls properly to be dismissed.
100. In the result, PRASA is entitled to payment in the overpaid amount of R 45 101 179.69.
101. In regard to the costs of the arbitration, there is no reason in act or in law to hold that that the costs should not follow the event. Accordingly, SAFIH is ordered to pay the costs of the arbitration.

D. FINAL AWARD

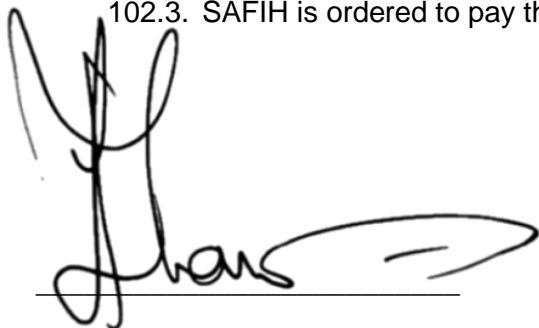
102. In the result the following award is published:

102.1. SAFIH 's claim of R7 915 073.85 is dismissed.

⁵⁷ African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd 1978 (3) SA 699 (A).

102.2. SAFIH is ordered to pay the amount of R 45 101 179.69 to PRASA.

102.3. SAFIH is ordered to pay the costs of this arbitration.

A handwritten signature in black ink, appearing to read 'L. G. NKOSI-THOMAS', is written over a horizontal line. The signature is stylized and cursive.

L. G NKOSI-THOMAS SC

ARBITRATOR

SANDTON

10 FEBRUARY 2021