REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG)

Case no: JA46/2012

In the matter between:

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIAITON — **Appellant**

and

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION — **First Respondent**

SOUTH AFRICAN MUNICIPAL WORKERS' UNION — **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL — **Third Respondent**

Heard: **20 AUGUST 2013**

Delivered: **04 March 2014**

Summary: **Collective agreement- dispute relating to its implementation date- no requirement for signature by third respondent constitution- practice and custom- principle that practice or custom is well-entrenched- practice that agreement binding when signed by all parties- no agreement reached on 20 April 2010 without it being signed-**

Rectification- principle that party seeking rectification must prove that contract does not reflect the true intention of the parties restated- no rectification can take place as there was no agreement reached by parties. Appeal upheld- Court- *a quo's* judgment set aside.

CORAM: **WAGLAY JP, et C J MUSI et MOKGOATLHENG AJJA**

JUDGMENT

C J MUSI AJA

[1] This appeal, which was brought with the leave of the court *a quo*, is against the judgment of the Labour Court (Basson J).

[2] The South African Municipal Workers Union (SAMWU) and the Independent Municipal and Allied Trade Union (IMATU) sought the following relief in the court *a quo*:

> 'i) An order declaring that the 20 April Wage Curve Agreement constitutes a binding collective agreement between IMATU, SAMWU and SALGA.
>
> ii) Alternatively to (i) above, rectification of the wage Curve Agreement signed on 21 April 2010 by deleting clause 8.2 thereof and inserting clauses 8.2 and 8.3 of the 20 April Wage Curve Collective Agreement.
>
> iii) If the order in (i) is granted, then an order is also sought declaring that the Wage Curve Agreement signed on 21 April 2010 does not constitute a valid agreement.'

[3] SAMWU approached the court *a quo* on an urgent basis for an order declaring the purported agreement signed on 21 April 2010 as *void ab initio*. The order was sought in order to prevent the third respondent (The South African Local Government Bargaining Council (SALGBC) from implementing the purported Wage Curve Collection Agreement signed on 21 April 2010, until the dispute relating to the said "agreement" could be resolved. Due to irreconcilable factual disputes, that could not be resolved on the papers, the matter was

referred to oral evidence. After a protracted trial, the court *a quo* made the following order:

> '1. The categorisation and Job Evaluation Wage Curves (sic) Collective Agreement signed on 21 April 2010 by the first applicant and the first and second respondents is rectified by deleting clause 8.2 thereof and inserting clauses 8.2 and 8.3 of the categorisation of Job Evaluation Wage Curves (sic) Collective Agreement on pages 42 – 53 of Bundle C, subject to the amendment to clause 7.2.3 agreed to just before the signing ceremony.
>
> 2. The first respondent is ordered to pay the costs of the applicants and the second respondent including the costs of two council (sic)'

[4] Mr Brassey, on behalf of the appellants, did not have any quarrel with the court *a quo*'s analysis of the primary facts. The facts can therefore be summarised as follows. In 2003, IMATU and SAMWU (the Unions) and the South African Local Government Association (SALGA) concluded a Job Evaluation Collective Agreement. The parties, thereafter, were engaged in negotiations to conclude a Wage Curve Collective Agreement to give effect to the Job Evaluation Collective Agreement. Agreement could not be reached. On 27 January 2009, SAMWU referred a dispute to the third respondent for conciliation. It demanded that a collective agreement be concluded to create a wage curve for all the different job categories in municipalities.

[5] The dispute could not be resolved during the conciliation process. On 26 March 2010, SAMWU issued a strike notice. On 12 April 2010, its member's embarked on a strike in furtherance of its demand for a Wage Curve Agreement and the conclusion of a new Disciplinary Code Agreement.

[6] During the strike, the parties resumed negotiations. During bilateral engagements between SALGA and SAMWU, it was agreed that the wage curves in the local government sector would be based on the 50th percentile market position as determined by Delloite & Touche in its survey of September 2009. Draft collective agreements relating to the wage curves and disciplinary code were written.

[7] The parties met formally, under the auspices of the third respondent on 19 and 20 April 2010, in order to conclude collective agreements relating to the wage curves and disciplinary code. They met as a Bargaining Committee of the third respondent. In terms of clause 7.2.1 of the third respondent's constitution, a Bargaining Committee consists of 20 seats divided equally between employer parties and trade union parties. SALGA therefore had 10 seats allocated to it. SAMWU, because of its superior membership was allocated 6 seats, whilst IMATU had 4 seats allocated to it.[1]

[8] After members of the Bargaining Committee and others had considered the draft collective agreements, and sufficient consensus achieved, the parties decided that a team would refine the agreements reached in the Bargaining Committee and draft the final agreements, for consideration by the principal decision-makers of the parties. The Bargaining Committee adjourned when the drafting team, consisting of Messrs. Koen (IMATU), Forbes (SAMWU), Lebello (SALGA), Yawa (SALGA) and Van Zyl (SALGA), started its work. Many of the members of the Bargaining Committee remained at the venue whilst the drafting team were refining the draft agreements.

[9] The drafting team considered at least two issues on which the Bargaining Committee did not reach consensus i.e. the period over which back pay should be paid and the date on which the wage curve scales would be increased. After some deliberations and consultation with their respective principals, the parties agreed on nine months' back pay over the ensuing nine months. The date on which the wage curve scales would be increased is the subject of a factual dispute that is at the heart of this case. According to the appellant, no agreement was reached. According to the unions, it was agreed that the implementation date for the increases would be 1 July 2010. The "agreement" relative thereto reads as follows:

---

[1] In terms of clause 5.4 of the SALBC's Constitution the allocation of representations amongst Trade Union Parties shall be determined by the following formula:

$$\frac{A}{B} \times \frac{C}{1}$$

Where
A equals the membership of the Trade Union in question.
B equals the total joint membership of the Trade Union Parties.
C equals the number of seats allocated to the Trade Union Parties.

> '8.2 The initial minimum salary on TASK Grade 1 of R 4,000.00 (four thousand rand) per month shall increase by the same percentage as agreed to in the current Wage and Salary Collective Agreement.
>
> 8.3 The salary scales referred to in Annexures "B1" to "B8" will be adjusted with effect from 1 July 2010 and then annually thereafter by the same percentage as agreed to in the applicable Wage and Salary Collective Agreement.'

[10] SALGA's version was that the implementation date would be 1 July 2011. The court *a quo* found that the union's version is the correct version and rejected SALGA's version.

[11] The drafting committee concluded their deliberations and refining of the draft agreements whereafter Adams (the Deputy General Secretary for Legal Matters of IMATU) was requested to print hardcopies of the "agreements". Adams gave Yawa a copy of the two agreements. The unions indicated that they and SALGA discussed the contents of the agreements with their principals who were satisfied therewith and prepared to sign the agreements. Some Johannesburg branch members of SAMWU were dissatisfied with the agreement reached. According to Forbes, SAMWU would have signed the agreement irrespective of the dissatisfied members' protestations.

[12] On 20 April 2010, between 19H13 and 19H19, Mr George (SALGA's CEO) was interviewed on national television by Jeremy Maggs. When asked whether the matter was close to resolution he replied as follows:

> 'We have resolved the matter now. We have a deal on the table that we have worked on this afternoon as a culmination of what was worked off overnight, last ..., I mean yesterday at the South African Bargaining Council, so now we have a deal that as I leave the studio, I will be going back to the bargaining council to formalise the signing of the deal ... there is a deal Jeremy, that has been accepted by SAMWU, it has been accepted by IMATU remember there is (sic) three parties in the Bargaining Council SAMWU, SALGA, IMATU, all parties have now accepted the deal on the table.'

Jeremy Maggs then said the following:

> 'Alright, one more time, I want to get this 100 percent on the record. I do not want to report this inaccurately, deal on the table, the two unions involved have agreed, you are off to go and make sure that pen hits paper, that the deal is inked, strike is over.'

George replied as follows:

> 'Yes, that is a (sic) correct position Jeremy, there is a deal on the table, parties have agreed, I am going back now to the negotiating table to formalise those arrangements.'

[13] When George returned to the venue of the negotiations he did not sign any document. The signing ceremony was postponed to 21 April 2010 at 14H00.

[14] On 20 April 2010, at 19H09, Forbes e-mailed the agreements to Yawa and Lebello, on Yawa's request. According to Forbes, the implementation date of 1 July 2010 appeared on the document that he e-mailed to Yawa and Lebello. The subject of the e-mail was final collective agreements.

[15] On 21 April 2010, at 08H37, Yawa forwarded the e-mail sent to him by Forbes to his colleagues as an attachment. He wrote the following message to them

> 'Morning Colleagues
>
> Herewith the final versions of the agreement (sic) meant for signature today.
>
> Kindly comb and advice if your (sic) sport (sic) something untoward.'

[16] At 10H25, on 21 April 2010, Yawa sent another e-mail to his colleagues wherein he wrote:

> 'Quickly tell whether 8.3 (in red) here means when we increase salaries in July, we increase these scales or as I think it should be, we increase the salaries per the wage and salary agreement.'

Clause 8.3 refers to the implementation date of 1 July 2010.

[17] At 12H48 on the same date, Yawa sent an e-mail to Forbes, Lebello and Van Zyl and later to Koen and Thaledi wherein he stated the following:

'Guys

1. See some improvements in the drafting we did not translate the agreement reached on the Wage Curve. In particular note our removal of the initial clause 8.1 on increase on the R4 000,00 minimum wage as that is taken care of by the current wage and salary agreement.
2. See the improvement on 7.2.3 where we tried to remove vagueness in the wage curve applicable higher notch by using the applicable Task Grade.'

[18] Forbes responded, by e-mail, on 21 April 2010 at 01.02pm by stating the following:

'See my revised working of 7.2.3 below

4.1.1 Employees whose existing basic salary is higher than the maximum notch of the Task grade to which he/she is entitled to, must be placed in the wage curve applicable to his/her municipality and will retain his/her basic salary. We have to retain the old 8.1 to indicate what the starting minimum wage is.'

[19] It is not disputed that Forbes meant 8.2 and not 8.1. It is further common cause that neither Forbes nor any of the other negotiating parties were made aware of the change effected on clause 8.3.

[20] Shortly before 14H00, Molope (SAMWU) arrived at the signing ceremony venue with hard copies of the agreements to be signed, given to him by Forbes the previous evening. Yawa gave him two documents and informed him that those were the documents to be signed. When Yawa was asked whether he effected any changes to the agreements he answered in the negative. This he said whilst knowing that he had effected far-reaching changes to the documents that Forbes e-mailed to him the previous evening. Before the changes the "agreement" read as follows:

'8.1 There shall be salary scales from TASK Grade1 to TASK Grade 26 as follows ...

> 8.2 The initial minimum salary on TASK Grade 1 of R4 000,00 (four thousand rand) per month shall increase by the same percentage as agreed to in the current Wage and Salary Collective Agreement.
>
> 8.3 The salary scales referred to in annexures B1 to B8 will be adjusted with effect from 1 July 2010 and then annually thereafter by the same percentage as agreed to in the applicable Wage and Salary Collective Agreement.'

[21] After the changes, the "agreement" that was signed reads as follows:

> '7.2.5 Annual salary adjustments, in terms of 8.3 below, will be applied to the basic salary of those employees referred to in clause 7.2.3 and 7.2.4 above; and ...
>
> 8.1 There shall be salary scale from TASK Grade to TASK Grade 26 as follows...
>
> 8.2 The salary scales referred to in annexure B1 to B8 will be adjusted with effect from 1 July 2011 and then annually thereafter by the same percentage as agreed to in the applicable wage and Salary Collective Agreement.'

[22] The following picture emerges from the above. Clause 7.2.5 was amended. Clause 8.2 of the initial draft was deleted. The original 8.3 became 8.2 with the date changed from 1 July 2010 to 1 July 2011.

[23] The unions were of the view that the drafting team agreed on 1 July 2010 whilst SALGA was adamant that it was agreed that the upward adjustment would be from 1 July 2011.

[24] When these changes were discovered, the union parties were, understandably, furious and some hard words were exchanged between the parties. SALGA, however, was adamant that 1 July 2010 was an error and that it ought to be 1 July 2011.

[25] The court *a quo* resolved all the factual disputes in favour of the unions. It correctly criticised the evidence of Yawa and found that he unilaterally, without the knowledge of his principals or counterparts, amended the "agreement".

The court *a quo* found that although there was non-compliance with the Constitution of the third respondent, the practice was that the drafting team would refine the terms of the agreement whereafter it would be presented to the principals for signature. The court *a quo* found, lastly, that the document signed on 21 April 2010 was signed on the basis that it was the agreement reached on 20 April 2010 subject to the amendment of clause 7.2.3 agreed to minutes before the signing of the Wage Curve Agreement and the Disciplinary Agreement.

[26] Mr Brassey submitted that the court *a quo* erred firstly, in finding that a practice or custom can override the express terms of the Constitution of the third respondent. Secondly, it erred in finding that there was a valid collective agreement on 20 April 2010 because such "agreement" was not signed. Thirdly that the court *a quo* erred in finding that the agreement should be rectified because the terms of the "agreement" were not agreed to by both parties.

[27] Mr Van Riet on behalf of the unions argued that an agreement was reached on 20 April 2010 by the parties. He submitted that the parties agreed and irrespective of the requirements of the Constitution regard must be had to the practice followed by the parties.

[28] The relevant clauses of the Constitution of the third respondent read as follows:

> '7.2 **Bargaining Committee**
>
> 7.2.1 The Bargaining Committee shall consist of 20 (twenty) seats divided equally between the Employer Parties and the Trade Union Parties.
>
> 7.2.2 The allocation of Representatives amongst the Employer Parties shall be determined *mutatis mutandis* by the formula in sub-clause 5.4
>
> 7.2.3 The allocation of Representatives amongst the Trade Union Parties shall be determined by the formula in sub-clause 5.4
>
> 7.2.4 The delegates shall, at the first meeting of the year, appoint a chairperson from amongst the delegates to the Bargaining Committee. The

Bargaining Committee may appoint a chairperson from outside the delegates of the parties' representatives.

7.2.5 The Bargain Committee shall meet at such place, date and time it or the Executive Committee may determine.

7.2.6 The Bargaining Committee shall have the power to conclude any collective agreement relating to terms and conditions of service or any other matter referred to it for bargaining by the Executive Committee.

7.2.7 A dispute that arises in the Bargaining Committee shall be resolved in terms of clause 11.'

[29] The decisions taken by the different bodies of the third respondent are governed by clause 16 of its Constitution which reads:

'16. **Decisions**

16.1 All decisions of the Central Council, Division or any Committee concerning substantive matters shall require a two-thirds concurrent majority of the Employer Representatives on the one hand and a two-thirds concurrent majority of the Trade Union Representatives to the Council on the other hand.

16.2 No decision of the Central Council, Division or any Committee concerning substantive matters shall be binding on the Parties unless-

16.2.1 the subject matter of the decision has been reduced to writing before the decision is taken; or

16.2.2 if not reduced to writing before the decision is taken, the subject matter of the decision is reduced to writing and adopted by a subsequent decision of the Council.

16.3 Decisions of the Central Council, Division or any Committee concerning administrative matters shall require a simple majority of those Representatives present.

16.4 The Central Council shall determine from time to time which matters are substantive and which are administrative in terms of the process as is set out in clause 16.1 above.'

[30] In *Cape United Sick Fund Society v Forrest,* it was said that:

> 'It is of prime importance to decide in the first instance how to approach the problem raised in this appeal. The Society's Constitution is in writing and to use the words of Stratford, JA, in *Wilken v Brebner and Others* 1935 AD 175 at 187:
>
> 'We have only to solve the question submitted to us by ascertaining the meaning of a written document according to the well-established rules of the construction.'
>
> This dictum is in consonance with a long line of cases in which emphasis is laid on the necessity of adhering to the terms of the Constitution of a body like a society.'[2]

[31] In my view, the same should apply to the Constitution of the third respondent. The three parties embroiled in litigation in this matter are the parties who drafted and signed the Constitution of the third respondent. They decided how decisions taken under the auspices of the third respondent should be taken and what body should have the power to conclude collective agreements.

[32] The problem with the entire procedure followed in this matter is that the Constitution does not make provision for a drafting team. If the parties decide to refer an administrative or substantive matter to an unrecognised sub-committee, it is incumbent on them to refer the matter back to the recognised Council, Division or Committee so that a resolution or decision can be taken in terms of the Constitution.

[33] In this matter, it is common cause that the Bargaining Committee did not reconvene after the drafting team was requested to refine the agreement. It is also common cause that the drafting team reached an agreement on one substantive issue relating to back pay. There was a dispute relating to the implementation of the increase date, it is not clear, on the proven facts, that there was also an agreement relating to the implementation date. These substantive decisions or agreements were never put before the Bargaining

[2] 1956 (4) SA 519 at 527H to 528A. See also *Absa Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund* (under curatorship) 2012 (3) SA 585 (SCA).

Committee so that it could vote thereon or for it to ratify the process that the drafting team embarked upon.

[34] The union's case was that the practice has also been that after the drafting team had settled an agreement it is then taken to the principals, for vetting and signature. The court *a quo* found that the practice had been established and that the Wage Curve Agreement and the Disciplinary Code Agreement were validly inferred into in terms of the practice. I disagree.

[35] Firstly, the practice itself has not been properly established. There is no evidence as to when this practice was started; how many collective agreements have been adopted by following this practice or whether this practice was only followed in respect of administrative matters or both administrative and substantive matters. Even if one assumes that in some circumstances a practice by parties can override what they specifically agreed to in their Constitution, there must be sufficient evidence establishing that the practice or custom is well-entrenched. Such evidence is lacking in this matter. The existence of this practice was never put to the appellant's witnesses. Mashilo, who was the facilitator and senior member of SALGA and the third respondent, was not asked a single question relating to the existence of this practice. George, who signed agreements on behalf of SALGA, was not asked about the practice. Lebello, a member of SALGA and the Bargaining Committee, was also not asked about its existence.

[36] Secondly a practice cannot trump the express and unambiguous terms of a Constitution. The decisions taken by the drafting team clearly have far-reaching implications, financial and otherwise. If this degree of deviation from the express provisions of the Constitution is tolerated it would effectively write the decision-making requirements set out in clause 16 out of existence. The Constitution of the third respondent should not, without justification, be frittered away by practice or judicial decree. This would indeed be a dangerous path to take because the parties testified that the intention was always to request the Minister of Labour to extend the agreement to non-parties to the agreement that are within the registered scope of the third respondent.

[37] The decision of the drafting team is not a decision of the Bargaining Committee. The reason why two thirds concurrent majority of the employer representatives on the one hand and two-thirds concurrent majority of the Trade Union Representatives on the other hand is needed for a decision is very important. Trade Union Representatives to the council are there with a mandate but as individuals. They have individual votes. If for an example three members of SAMWU who had six votes decided to agree with IMATU in favour of a proposal that would be seven Trade Union Representatives voting in favour of a proposal and if all the employer representatives also voted in favour; that decision would be a legal decision of the Bargaining Committee, irrespective of the mandate of the SAMWU delegation. The purported agreement was therefore not a binding agreement in terms of the third respondent's constitution. Considerations of equity cannot, when the provisions of the Constitution of the third respondent are clear and unambiguous, affect the interpretation to be placed on it.

[38] The constitution does not require the collective agreement to be signed. Although Forbes testified that they regarded the unsigned "agreement" of 20 April 2010 as binding it is clear that it was within the contemplation of the parties – whether by way of practice or custom – that the agreement would only become binding after it had been signed. It is also clear from the evidence that the parties did not consider themselves bound by the agreement of 20 April 2010 before it was signed. I say so because the parties had their principals ready to sign the agreement. When it could not be signed on 20 April 2010 a signing ceremony was arranged for 21 April 2010. George also told Maggs that he is going back to sign the agreement – which he did not do on 20 April 2010. The parties amended the "agreement" on 21 April 2010 without formality because it was not yet a binding agreement. None of the unions complained or demurred to the amendments being made because they believed that the agreement will only become binding on signature.

[39] Distasteful as Yawa's conduct may be, it is clear that on the morning of 21 April 2010 he sent e-mails to his colleagues to recheck the "agreement". This also indicates that SALGA at least did not regard the agreement as binding

before it was signed on 21 April 2010. The formality that the agreement should be signed before it is binding was not adhered to.

[40] In my view nothing much turns on what George said during the interview. There was sufficient agreement in the Bargaining Committee during the afternoon of 20 April 2010. His statement that the parties agreed is in sync with the evidence that the drafting team was tasked with refining the agreement that the parties reached – without a formal decision in the Bargaining Committee.

[41] The "agreement" of 20 April 2010 was not signed therefore it was at best a draft or an in principle agreement. In my view the unions failed to prove that an agreement was entered into on 20 April 2010. All the appellant's witnesses testified that all collective agreements are signed by the parties. That is the practice. Their evidence in this regard was not challenged by the respondents. It stands uncontroverted. I accept that there was no agreement before it was signed. There was therefore no binding agreement on 20 April 2010.

[42] A party is entitled to rectification of a written agreement which, through common mistake or mistake in transcription which the other party deliberately caused or knew about, incorrectly records the agreement which they intended to express in the written agreement.[3] It is well accepted that a party seeking rectification must show the facts entitling him to obtain that relief in the clearest and most satisfactory manner. [4] The prior agreement or common intention of the parties should therefore be proved on a balance of probabilities by the party seeking rectification.[5] Such party must prove that the contract was entered into by the parties; that the contract does not reflect the true intention of the parties; what the real intention was; that the contract must be rectified to reflect the true intention of the parties.[6]

[43] The court *a quo* said the following relating to the signed agreement and rectification:

---

[3] See *Boundry Financing LTD V Protea Property Holdings (PTY) LTD* 2009 (3) SA 447 (SCA) at para 7
[4] See *Bardopoulos and Macrides v Miltiadous* 1947 (4) SA 860 (W) at 863 – 864.
[5] See *Edelson v Glenfields Estates (Pty) Ltd 1955* (2) SA 527 (E) 530A.
[6] See LAWSA 2nd Ed Vol 5 Part 1 page 377 to 378.

> 'In the event, the signed agreement is rectified to reflect the intention and agreement of the parties on the evening of 20 April 2010 subject to the amendment of clause 7.2.3.'

[44] It is clear that the court *a quo* proceeded from the premise that there was an agreement on 20 April 2010. The members of the drafting team were, at best, agents of their principals. The unions must therefore prove that all the principals were satisfied with the agreement reached by the drafting team on the evening of 20 April 2010 and that the signed recordal of their agreement does not reflect that consensus.

[45] Much has been said about the principals but we do not know who the principals were and whether the final document was shown to them on the evening of 20 April 2010. What we do know, as established by the evidence, is that Forbes e-mailed the final document to Yawa at 19H09 on 20 April 2010. I will also accept that Adams gave Yawa hard copies. Yawa only e-mailed it to his colleagues and presumably his principals at 08H37 on 21 April 2010. George – who we know was one of the SALGA principals- testified that he did not see the document on 20 April 2010. There is in any event no evidence that George saw the finale document on 20 April 2010. When he spoke to Maggs on National TV he could not have seen the "final agreement" because the interview ended at 19H19 whereas the document was sent to Yawa at 19H09. Lebello also did not see the document on 20 April 2010.

[46] The only evidence adduced by the unions in relation to the SALGA principals agreeing to the "final agreement" is that Mashilo said that SALGA agreed thereto. It was put to Mashilo that Forbes was entitled to assume that he is conveying SALGA's position. He denied it and pointed out that SALGA was represented by, *inter alia*, George and Yawa. Mashilo was one of the facilitators and not a spokesperson or principal of SALGA. He had no mandate to speak on SALGA's behalf. He testified that SALGA principals did not see or agree to the document containing the increase date of 1 July 2010. Lebello's evidence was to the same effect.

[47] The evidence of Yawa, discredited as he was, that they did not discuss the document with the SALGA delegation on the evening of 20 April 2010 because they were not there is uncontroverted. The e-mail which he sent to his colleagues asking them to explain what clause 8.3 means is also indicative of the fact that there was no agreement on the issue. If there was one would have expected him to know what he agreed to.[7]

[48] SAMWU was also not ready to sign the agreement because some of its members were protesting against the adoption thereof. They had to be convinced that that the document is in order before it could be signed by SAMWU. That was not done on the evening of 20 April 2010. It was going to be done on 21 April 2010.

[49] It is clear that Roger Falken, one of the SALGA members, gave his input, wherein he suggested changes to the document, on 21 April at 13H47. He must have received the document after it was sent by Yawa during the morning of 21 April 2010.

[50] This clearly illustrates that the principals did not reach an agreement on 20 April 2010. There having been no agreement on 20 April 2010 there can be no rectification. The respondents failed to prove that all the parties wanted the date to be 1 July 2010. The court *a quo* was in my view wrong to conclude, that the parties entered into an agreement on the implementation date on 20 April 2010.

[51] It is Yawa's conduct, by not informing the other negotiating parties about the amendments, which led to this unfortunate state of affairs and litigation.

[52] The requirements of law and fairness, given Yawa's conduct, dictate that no order as to costs should be made, irrespective of the appellant's success. The same applies to the costs in the court below.

[53] I accordingly make the following order:

The appeal is upheld with no order as to costs.

[7] The content of the email is quoted at para 16 above.

The order of the Court *a quo* is set aside and replaced with the following order: *The application is dismissed with no order as to costs.*

_____

C J Musi AJA

I agree.

_____

Waglay JP

I agree.

_____

MOHGOATLHENG AJA

APPEARANCES:

FOR THE APPELLANT:	Adv. M.S.M. Brassey SC, Adv. A. Cook Instructed by Tshiqi Zebediele Inc KEMPTONPARK
FOR THE RESPONDENT:	Adv. J.G. Van der Riet SC, Adv. H. Barnes Instructed by Francois du Plessis Attorneys, Cheadle Thompson and Haysom BRAAMFONTEIN