Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1464/18
Heard on: 25/06/2018
Delivered on: 27/06/2018

In the matter between:

IFU TRAINING INSTITUTE (PTY) LTD **APPLICANT**

And

MINING QUALIFICATIONS AUTHORITY **1ST RESPONDENT**
SHERIFF OF THE COURT, JOHANNESBURG NORTH **2ND RESPONDENT**

JUDGMENT

MAMOSEBO J

Introduction

[1] This is an urgent application in terms of which the applicant sought an order in the following terms:

1. Dispensing with the forms and service provided for in the Rules of this Court and disposing of this matter by way of semi-urgency in terms of Rule 6(12) alternatively 6(11) of the Rules of this Court;

2. Directing that the order of this Court dated 13 June 2018 (under case no: 1393/18) be set aside, alternatively, declared as void;
3. That the first respondent is directed to comply with the order of this Court dated 22 March 2017 under case no: 437/2017, particularly in that it must make quarterly payments to the applicant as contemplated by prayer 3 of the said order;
4. The first respondent is liable to the applicant for payment of a quarterly tranche for the quarter ending 31 March 2018, and, to the extent necessary, the Service Level Agreement between the parties concluded on 31 March 2016 is rectified to make provision for tranche 9 to be made on 01 April 2018, and the remaining tranches to follow the successive quarters thereafter, commencing with tranche 10 to be made on 01 July 2018.
5. The first respondent is liable to pay to the applicant the sum R3 392 852.93;
6. The second respondent is directed to forthwith pay over the sum of R3 392 852.93 to the applicant;
7. Costs of suit on the scale as between attorney and client as against the first respondent.

The parties

[2] The applicant is IFU Training Institute (Pty) Ltd (IFU). The first respondent is the Mining Qualifications Authority, a sector education training authority (SETA) responsible for the administration of skills development programs for the mining and minerals sector in the country. The second respondent is the sheriff of the court (sheriff) for the district of Johannesburg North. The application is opposed by the Mining Qualifications Authority.

[3] The background to this application is necessary. The applicant applied for and was awarded a tender by the Mining Qualifications Authority to the total amount of R41 834 040 including Value Added Tax (VAT). The Mining Qualifications Authority, duly represented by its then Chief

Executive Officer, Mr Sam Seepei and the applicant duly represented by Ms Yvette Francis, its Chief Executive Officer, concluded a three year contract, the Service Level Agreement (SLA) on 30 March 2016. The SLA made provision for the payment terms to the applicant as reflected on Annexure B as follows:

3.1 A 30% payment of R12 550 212 was payable as Tranche 1 by 31 March 2016. The amount would cater for recruitment and selection, planning, set-up, accommodation, travel, training materials, tools and property plant equipment (PPE);

3.2 A 6.3% payment in the amount of R2 662 166.18 as Tranche 2 by 01 July 2016 which will cater for signed agreements with employers, learners and MQA, MQA database updated with learners and programme details, service provider arrangement for venues and accommodation, proof of learner induction attendance, report from project manager and report from service provider;

3.3 A 6.3% payment in the amount of R2 662 166.18 as Tranche 3 by 01 October 2016 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.4 A 6.3% payment in the amount of R2 662 166.18 as Tranche 4 by 02 January 2017 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.5 A 6.3% payment of R2 662 166.18 as Tranche 5 by 01 April 2017 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.6 A 6.3% payment of R2 662 166.18 as Tranche 6 by 01 July 2017 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.7 A 6.3% payment of R2 662 166.18 as Tranche 7 by 01 October 2017 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.8 A 6.3% payment of R2 662 166.18 as Tranche 8 by 02 January 2018 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.9 A 6.3% payment of R2 662 166.18 as Tranche 9 by 01 July 2018 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.10 A 6.3% payment of R2 662 166.18 as Tranche 10 by 01 October 2018 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.11 A 6.3% payment of R2 662 166.18 as Tranche 11 by 02 January 2019 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.12 A 3.15% payment of R1 331 083.09 as Tranche 12 by 01 April 2019 which will cater for proof of stipend payments, report from service provider and report from project manager;

3.13 A 3.15% payment of R1 331 083.09 as Tranche 13 by 01 May 2019 which will cater for proof of stipend payments, full and final close out report from service provider and full and final close out report from project manager.

[4] According to the answering affidavit, the first respondent sought to terminate the SLA following a report by the Auditor-General dated 31 March 2016 and discussed with its management on 08 July 2016. The parties engaged in settlement negotiations to no avail. The failure to find one another culminated in the applicant launching an urgent application in this Court and the parties taking an order by agreement under case

number 2614/16 on 02 December 2016 with the terms to the following effect:

"By agreement between the parties, it is agreed that:

1. The respondent [the Mining Qualifications Authority] is to:
   1.1 make immediate payment to the first applicant of the sum of R2 316 953.29 (two million three hundred and sixteen thousand nine hundred and fifty three rand and twenty nine cents);
   1.2 issue and serve its application to review the award of the tender to the first applicant by no later than 15 December 2016;
   1.3 <u>make timeous payment to the first applicant in terms of the Service Level Agreement on a "cost-only" basis until such time as the review application referred to in para 1.2 (including any appeal process) above is finalised and the final decision as to the validity of the award of the tender is made</u>;
   1.4 pay the taxed party and party costs of this application.
2. The parties agree that this settlement agreement be made an order of court." (own emphasis added)

[5] The applicant alleged that it was supposed to be paid on a quarterly basis as appearing on the SLA and the April 2018 payment is omitted and as averred by Ms Francis, the deponent to the founding affidavit, the omission was an inadvertent and patent error considering the patterns of payment followed in other years. She maintained that there was no reason for the variance in 2018. This, she asserted, was also supported by a telephone conversation and an email between herself and the first respondent's Regional Manager in the Northern Cape, Mr Masixole Bangeni, who on 10 May 2018 suggested that she should redraft the payment schedule reflecting the dates and he will submit the revised schedule to his legal department. Despite the fact that she has raised the issue regarding the error in the SLA several times the acting Chief Executive Officer, Mr Tebogo Mmotla, addressed an email to her

dated 29 May 2018 refuting the existence of an agreement to an amendment of the SLA. The applicant further argued that the letter by the first respondent's CEO is inconsequential based on the fact that the agreement with Mr Bangeni about the error was already in place. In any event, she continued, the terms of the SLA were superseded by the terms of the court order dated 22 March 2017 under case number 437/2017.

[6] IFU brought a second urgent application on 24 February 2017 under case number 437/17 demanding payment in the amount of R3 644 596.39 and, inter alia, for the respondents to make its payment in terms of clause 1.3 of the order granted on 02 December 2016 which is recorded at para 4 (above).

[7] The aforementioned order by Lever AJ dated 22 March 2017 ordered that:

1. Within 3 days of this application providing a reasonable explanation for any discrepancy in the number of learners still engaged in the program the respondent is to pay the applicant the amount due up to the maximum provided for in tranche 4;
2. Any invoice not paid in or not fully paid in any particular tranche may be rolled over to the next tranche, subject to the total amount <u>never exceeding the R41 million odd being the price at which the tender was awarded</u>;
3. In respect of subsequent quarterly tranches, the applicant will duly fill in the details required in the template being annexure TGM5 to the A.A;
4. The respondent will pay such costs in such updated template <u>if it finds them to be reasonably and satisfactorily in compliance with the SLA</u> and subject to any such judgment not exceeding the amount due in the relevant tranche;
5. The respondent is to pay the taxed or agreed party and party costs, including the cost of the postponement on 03 March 2017. (emphasis added)

[8] The first respondent contended that it has made payments up to tranche 8. It was however served with a writ of execution on 04 June 2018 whereat the sheriff was ordered to attach and remove its movable assets to the value of R2 972 755.53 allegedly comprising an amount of R2 662 166.00 for tranche 9 and R310 589.53 carried over from previous tranches. The first respondent vehemently disputes the queried amount of R310 589.53 and maintains that in terms of the SLA the next tranche is due on 01 July 2018. The first respondent paid the amounts appearing on the writ over to the sheriff and subsequently also launched an urgent application to this Court under case number 1393/18. The Court per Coetzee AJ granted the following order by agreement:

1. The forms and service provided for in the rules of this Court are dispensed with and the matter is disposed of in an urgent manner as contemplated by Uniform Rule 6(12);
2. Pending the final determination of the relief in Part B of the application –
    2.1 the first respondent [sheriff for the jurisdiction of Johannesburg North] is interdicted and restrained from transferring encumbering or in any manner whatsoever dealing with the monies in the sum of R3 329 852.93 paid over to the first respondent by the applicant [Mining Qualifications Authority] on 06 June 2018;
3. The costs of Part A of the application be reserved for determination with Part B thereof.
4. Part B of the application is enrolled on the unopposed roll for 29 June 2018.

[9] The relief sought in Part B of the application in case number 1393/18 is the following: an order setting aside the writ of execution issued out of this Court on or about 28 May 2018 under case number 437/2017 and for any party opposing the application to be ordered to pay the costs thereof including the reserved costs in Part A.

<u>The order dated 13 June 2018</u>

[10] The applicant sought to convince me that I must set aside the order of this Court dated 13 June 2018 alternatively, declare it void. Mr Alli, counsel for the applicant, submitted that the applicant's erstwhile attorney, Mr M R Phala, did not carry out the applicant's mandate when he took the order by agreement and there is no basis for this court to place the yolk on the applicant. Counsel referred me to an email by the applicant's CEO to the attorney which reads:

> "Good morning
> Our instructions are to oppose the matter in its entirety- both Part A and Part B. We must oppose that the money remains in the sheriff's account – we do not agree that it must remain there.
> Regards."

[11] Feedback was provided to the applicant on the same afternoon of 13 June 2018 by its erstwhile attorney that an interim interdict was taken by agreement. The founding papers record that the same attorney met in person with the applicant's CEO on 17 June 2018 to explain to the CEO why he had consented to the order. The applicant's counsel relied on the following cases to substantiate its argument about the erstwhile attorney's lack of mandate that entitles me to make a ruling that the order by Coetzee AJ is void: *Tödt v Ipser*[1], *Toto v Special Investigating Unit and Others*[2] and *Mogotsi and Others v Pienaar and Others*[3].

[12] In *Tödt's* case, the order for eviction was granted by default without a proper service of the notice of motion to the applicants. In *Toto's* case a legal representative had altered information on Resolution 17/1993 and the Judge granted an order based on that altered information. In

[1] 1993(3) SA 577(A) at 589C - D
[2] [2000] 2 All SA 91 (E) at 105
[3] 2000 (1) SA 577 at 580

Mogotsi's case an order was sought declaring void, alternatively, rescinding the eviction order due to the lack of jurisdiction of the High Court. The instructive remarks by Leach J in *Toto*[4] are apposite*:*

"As is apparent from what is set out below, the judgment of the Full Bench of the Transkei High Court, reported as Konyn and others v Special Investigating Unit 1999 (1) SA 1001 (THC), is pertinently relevant to the result of this appeal. It is trite that it is the duty of a litigating party's legal representative to inform the court of any matter which is material to the issues before court and of which he is aware – see for example Schoeman v Thompson 1927 WLD 282 at 283. This Court should always be able to accept and act on the assurance of a legal representative in any matter it hears and, in order to deserve this trust, legal representatives must act with the utmost good faith towards the court – cf Ex parte Swain 1973 (2) SA 427 (N) at 434. A legal representative who appears in court is not a mere agent for his client, but has a duty towards the judiciary to ensure the efficient and fair administration of justice – see the remarks of De Villiers JP in Cape Law Society v Vorster 1949 (3) SA 421 (C) at 425. As was observed by James JP in Swain's case (supra), in a passage since followed inter alia in Society of Advocates of Natal and another v Merret 1997 (4) SA 374 (N) at 383 and Pienaar v Pienaar en andere 2000 (1) SA 231 (O) at 237, the proper administration of justice could not easily survive if the professions were not scrupulous of their dealings with the court."

The above authorities support the assertion that Coetzee AJ had no reason to doubt that the attorney for the applicant had pertinent instruction to agree to an order by consent.

[13] Of importance and what remains inexplicable is that the applicant did not invite an affidavit from its erstwhile attorney that would put the allegations against him in perspective. He is an officer of the court and it is a risk to his profession. I find it strange that the applicant would expect this Court to take its word alone without the affidavit from the erstwhile attorney. In any event, there is no basis for me to set aside the order of

[4] At 100b -e

this court dated 13 June 2018. This order was taken by agreement between the parties and not by default. It was not erroneously sought or erroneously granted. There is further no ambiguity or allegation thereof in the order. Neither was there a mistake common to the parties. In my view, the applicant has not made out a case for the setting aside of this order. In any event, only Part A thereof was heard and Part B is still pending. I do not see how I can set it aside when Part B thereof must still be argued. I am not persuaded that a case has been made out on this aspect.

[14] Central to the dispute was the allegation by the first respondent that it does not owe the applicant any money and it is therefore not entitled to the money held by the second respondent (the sheriff). It therefore makes sense as provided for in the order by agreement that the challenge to the writ of execution be determined first to determine to whom must the money be paid.

<u>Compliance with the order dated 22 March 2017 under case number 437/2017</u>

[15] The applicant's counsel also submitted that the respondent must be ordered to comply with the order dated 22 March 2017 by making quarterly payments to the applicant as contemplated in prayer 3 of that order. It is clear to me that the Court granting the order was mindful of the SLA terms hence its reference to payment not to exceed the R41 million and that the respondent must pay costs it finds to be reasonably and satisfactorily in compliance with the SLA and not exceeding the amount due in that relevant tranche. I have not discerned the basis for the applicant's CEO to insist on the omission of the payment of 01 April 2018 because a simple calculation of the tranches as they appear in Annexure B does not support her argument. It is also not discernible on

the papers how she can conclude that the conversation between her and the said Mr Bangeni was an agreement to cure the purported omission when Mr Bangeni suggested that she should reduce into writing what she is referring to and he will refer it to his legal department. An agreement is the meeting of two minds. Clearly, from the reading of his response, one cannot see any agreement.

[16] In *Propfokus 49 (Pty) Ltd and others v Wenhandel 4 (Pty) Ltd*[5] where Van Heerden JA explained rectification to this effect:

"In order to succeed with its claim for rectification, Wenhandel had to allege and prove the following:

(a) That an agreement had been concluded between the parties and reduced to writing;

(b) That the written document does not reflect the true intention of the parties – this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing, be established;

(c) An intention by both parties to reduce the agreement to writing – in the present case, the agreement was for the sale of land and, therefore, had to be in writing in order to be valid and binding;

(d) A mistake in drafting the document, which mistake could have been the result of an intentional act of the other party or a bona fide common error; and

(e) The actual wording of the true agreement."

Applying the Plascon-Evans rule, Mr Eillert, counsel for the first respondent, was correct that rectification cannot be resolved in urgent motion proceedings. Price J pronounced in *Hadiaris v Freeman and Freeman*[6] that rectification should be claimed by action and not by notice of motion or petition. See also *Christie's Law of Contract in South Africa*[7].

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[5] [2007] 3 All SA 18 (SCA) at 21g – 22c

[6] 1948 (3) SA 720 (WLD) at 728

[7] Seventh edition GB Bradfield LexisNexis

If the applicant intended for the contract to be rectified, the process followed to do so is incorrect.

[17] Clause 25.1 of the SLA stipulates:

"Variation, Cancellation and Waiver

No contract varying, adding to, deleting from or cancelling this Agreement, and no waiver of any right under this Agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties."

The applicant has not, in my view, attached any form of document contemplated by this clause. I therefore find the communication between the applicant's CEO and Mr Bangena inadequate for this purpose.

[18] In actual fact, the applicant has, in my view, failed to show that the tranches have not been paid as alleged by the first respondent and thereby complying with the order. Instead, they rushed for a writ in execution for the attachment and removal of the first respondent's movable property. This they did without even serving notice on the first respondent and one wonders why that was the case.

<u>Payment of a quarterly tranche</u>

[19] On face value it seems as if the payments are quarterly. However, on close scrutiny one needs to pay particular attention to the specific dates agreed upon because this agreement was concluded on 30 March 2016. There is clearly no provision for 01 April 2018. It is unclear what the basis is for the applicant to continue to insist that the SLA is rectified to make tranche 9 to be paid on 01 April 2018. A case has not been made out on the papers for this submission. I am not convinced that there is a mistake in respect of the schedule of payments agreed to. This contract was entered into between the parties represented by its most senior

officials on both sides, the Chief Executive Officers. That is not the only reason that makes me to doubt if there was a mistake or not, I have calculated the amounts as reflected in the tranches and they do not seem to make provision for 01 April 2018.

[20] The applicant's counsel placed heavy reliance on the fact that the applicant's failure to pay as ordered has prejudiced the indigent learners who, as a result of this failure, have not received their stipend, could not pay for their accommodation. Counsel submitted that the applicant cannot afford to pay the stipends and carry the cost under this contract. It remains inexplicable however, why this application had to be heard today when the review application heard in Gauteng High Court is expected to be handed down on 26 June 2018 and the return day for the other application is 29 June 2018. In my view, these applications are interrelated. It would have been preferable to have waited for the other matters to be disposed of to avoid the piecemeal approach. It is therefore incomprehensible for the applicant's Counsel to argue that the review application has no bearing on this case when all these applications are intertwined and the first respondent agreed to make timeous payments to the applicant in terms of the SLA on a "cost-only" basis pending the final determination of the review application.

[21] I am empathetic towards the plight of the learners. I urge all the parties concerned to do their best to protect the interests of the learners who are not to blame for this protracted dispute. Our developing economy can only benefit from the development of the skills of the youth and the community in general and lay a solid foundation for the future of this country.

[22] Counsel for the first respondent reiterated what was negotiated before the court started that the first respondent had tendered an amount of R414 960.00 which is said to be the monthly costs for the learner's portion which was declined by the applicant.

[23] There remains the question of costs. There is no reason why costs should not follow the result.

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

The application is dismissed with costs.

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MAMOSEBO J
NORTHERN CAPE DIVISION

For the appellant:	Adv Y Alli
Instructed by:	Vally Chagan & Associates
	Duncan & Rothman Attorneys
For the first respondent:	Adv A Eillert
Instructed by:	Hogan Lovells (South Africa) Inc
	Engelsman Magabane Inc