



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 6290/19

In the matter between:

SACTWU INVESTMENTS GROUP (PTY) LTD

Plaintiff

and

SEKUNJALO INDEPENDENT MEDIA (PTY) LTD

First Defendant

SEKUNJALO INVESTMENTS HOLDINGS (PTY) LTD

Second Defendant

Heard: 28, 29, 30 and 31 August 2023, 4 and 26 September 2023

Delivered: 24 April 2024 (electronically)

JUDGMENT

O'SULLIVAN AJ:

INTRODUCTION

1. In these action proceedings, the claim of the plaintiff, SACTWU Investments Group (Pty) Ltd ('SIG') arises from a R150 million loan advanced by SIG to the first defendant, Sekunjalo Independent Media (Pty) Ltd ('SIM') in August 2013 ('the loan agreement'). The loan agreement, which had a maturity date of 14 August 2020, provided for interest to accrue which was due quarterly over its 7 year term. To the extent that SIM had insufficient funds to pay any accrued interest, then, in terms of clause 3.3.2, such interest would be capitalised on that interest date.
2. It is common cause that but for SIM's reliance on a written subordination agreement, which it asserts defers its obligation to make payment, and its right to argue that the interest which has accrued is capped by the *in duplum* rule, SIM was indebted to SIG in the sum of R458 606 995.07 as at 28 August 2023, plus interest accrued thereon from that date.
3. These proceedings concern the events of 2017 and 2018, at which stage SIM's accrued liability in respect of the loan was approximately R244 million. SIM and the Sekunjalo Group of companies of which it formed part, had embarked on an ambitious project termed 'Project Everest' in order to list a company called Sagarmatha Technologies Limited ('Sagarmatha') on the Johannesburg Stock Exchange ('the JSE'). Sagarmatha had aspirations to become an African leader in e-commerce, digital media and syndicated technology ventures.

4. SIG was seeking to exit the loan agreement. With a view to the proposed listing of Sagarmatha, SIG and the second defendant, Sekunjalo Investment Holdings ('SIH') and Sagarmatha entered into a Sale of Shares and Claims Agreement on 22 November 2017 ('the sale agreement') in terms of which the sale of Sagarmatha shares to SIG would divest SIG of its claim under the loan agreement. SIG's claims in relation to the loan agreement were to be sold to Sagarmatha together with the shares which SIG had been issued in SIM, and a cession would take place in terms of which SIG's claim under the loan agreement passed to Sagarmatha.

5. Shortly thereafter on 1 December 2017 a director of SIG, Mr Andre Kriel, signed a two-page subordination agreement in respect of the loan agreement ('the subordination agreement'). The circumstances under which the subordination agreement was concluded, and whether they permit SIG to resile from the agreement are at the heart of this dispute. The material terms of the subordination agreement are as follows:
 - 5.1. Clause 4 says that the subordination "*shall remain in force and effect for so long only as the liabilities of the Company, as fairly valued, exceed its assets, as fairly valued*", and adds a deeming proviso: that "*the liabilities of the Company, as fairly valued, shall be deemed to continue to exceed its assets, as fairly valued, unless and until the auditor of the Company has reported in writing, that he/she has been furnished with evidence which reasonably satisfied him/her that the*

liabilities, as fairly valued, do not exceed the assets, as fairly valued”;
and

- 5.2. Clause 5 confirms SIG’s agreement that until such time as the assets of SIM, as fairly valued, exceed its liabilities, as fairly valued, and the auditor’s report referred to in clause 4 has been issued, SIG *“shall not be entitled to demand or sue for or accept repayment of the whole or any part of the said amount”*.
6. Summons was issued on 15 April 2019, prior to the maturity date, in which SIG claimed payment in accordance with written notice it had given to SIM based on an alleged default event, and SIM’s failure to remedy the breach. When the trial commenced more than four years later, SIG premised its claim on SIM’s failure to repay the outstanding amount owed in terms of the loan agreement, despite the expiry of the maturity date on 14 August 2020.

The defences raised by SIM

7. SIM raised two defences on the pleadings.
8. The first defence related to the sale agreement. SIM claimed that the sale of Sagarmatha shares to SIG had divested the plaintiff of its claim under the loan agreement, which claim had passed to Sagarmatha on the effective date. SIM abandoned its first defence on the third day of the trial.
9. As a result, the merits of SIG’s claim turn entirely on SIM’s second defence, which relates to the subordination agreement. SIM contends that by virtue of the

subordination agreement, the plaintiff is not entitled to demand or sue for repayment under the loan agreement, until such time as SIM's auditors report in writing that its assets exceed the liabilities of SIM. It was common cause that the auditors had not issued such a report.

10. SIG initially challenged the authenticity of the signature of Mr Takudzwa Hove, SIM's representative on the subordination agreement, and his authority to contract on behalf of SIM. These challenges were abandoned, based on certain documents discovered during the hearing.¹
11. Accordingly, SIM bears the onus² of proving its allegation that SIG was a party to the subordination agreement, having become such because it was represented by its duly authorised representative, Mr Andre Kriel, who signed the subordination agreement, and who SIM claims had actual authority to conclude the subordination agreement on behalf of SIG. SIM also pleaded an alternative claim in respect of ostensible authority.
12. SIM contends that Mr Kriel derived actual authority to conclude the subordination agreement from a written resolution of the directors of the board of SIG passed on 22 November 2017 ("the November 2017 resolution"), which preceded the conclusion of the sale agreement, and which authorised any director of SIG to take any reasonable and necessary steps to give effect to and to implement the sale agreement.

¹ During the cross examination of Mr Hove, much was sought to be made of the dates of various versions of subordination agreement, but ultimately this line of enquiry proved irrelevant for purposes of SIG's defences. No inferences or claims as to Mr Hove's credibility were ultimately sought to be drawn by SIG on this basis, given its stance to credibility findings, set out below.

² See *Intramed (Pty) Ltd v Standard Bank Of South Africa Ltd* 2004 (6) SA 252 (W) at 260.

SIG's grounds of opposition

13. SIG disputes SIM's reliance on the subordination agreement on two principle but distinct grounds.
14. First, SIG disputes that the subordination agreement was validly concluded as it claims Mr Kriel lacked the necessary authority, and he was not so authorised by virtue of the November 2017 resolution. To the extent necessary, SIG also maintains that Mr Kriel also lacked ostensible authority. SIG accordingly denies that the subordination agreement is of any force or effect.
15. Secondly, if it is found that Mr Kriel was authorised and the subordination agreement was validly concluded, SIG claims that the subordination agreement is unenforceable, alternatively voidable and has been rescinded by SIG, based on the doctrine of reasonable mistake and alternatively misrepresentation. SIG ultimately did not persist with its pleaded defences based on a fraudulent misrepresentation, rectification and public policy.
16. SIG accepts that it bears the onus in relation to these grounds. The parole evidence rule requires that *"save in exceptional circumstances such as fraud or duress, where the parties to a contract have reduced their agreement to writing and assented to that writing as a complete and accurate integration of the contract, extrinsic evidence is inadmissible to contradict, add to or modify*

the contract".³ The rule explains the onus: it is on the party who wishes to avoid the implications of the contract which it has signed.⁴

17. In this regard, SIG's claim on the pleadings is that the following three material representations were made by Mr Hove to Mr Kriel, with the intention of inducing SIG to enter into the subordination agreement, and that SIG was so induced:

17.1. First, that the subordination agreement would only be utilised by SIM in the context, and for the purpose, of the listing of Sagarmatha, if and when the auditors of Sagarmatha and/or the JSE required SIG's claim to be subordinated for purposes of the listing of Sagarmatha ('the first representation' or what SIG refers to as 'the sole purpose representation').

17.2. Second, that the auditors of SIM, Grant Thornton had called for the execution of the subordination agreement to ensure that the creditors of SIM would not be able to enforce their claims or apply for the liquidation of SIM during the period leading up to the listing of Sagarmatha ('the second misrepresentation').

17.3. Third, that the subordination agreement would in any event lapse and be of no further force or effect, one week after the date on which

³ *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) at para's [38] to [41] (*per* Unterhalter AJA).

⁴ *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) para [65] fn 15, quoting with approval from the 7th edition of Bradfield Christie's *The Law of Contract in South Africa* to the effect that the parol evidence rule may be displaced by the rules concerning misrepresentation, fraud, duress, undue influence, illegality or failure to comply with the terms of a statute, mistake, and rectification; and went on to quote: "*In all such cases, of course, the burden is on a party who has signed a written contract to displace the maxim caveat subscriptor by proving lack of the necessary animus*". See also *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) SA 399 (SCA).

Sagarmatha was scheduled to be listed on the JSE ('the third misrepresentation').

18. Ultimately SIG contended for an innocent misrepresentation, because although Mr Hove had informed Mr Kriel that the duration of the subordination agreement is of no consequence, because the claims in respect of the subordination would lapse upon the listing of Sagarmatha when it acquired those claims, Mr Hove had not also dealt with the consequence if Sagarmatha did not list.

THE EVIDENCE

19. Mr Kevin Govender and Mr Kriel testified on behalf of SIG:

- 19.1. Mr Govender is an accountant who holds three degrees, a Bachelor of Accounting Science, a Bachelor of Commerce and a Bachelor of Commerce Honours. He is a current executive director of Hosken Consolidated Investments ('HCI'), which is a black economic empowerment ('BEE') investments holding company listed in the finance sector of the JSE. The South African Clothing and Textile Workers Union ('SACTWU') is a major shareholder in HCI. Mr Govender worked for SACTWU in the 1990's. He and Mr Johnny Copelyn, the CEO of HCI established SIG for SACTWU, after they had established HCI. The board of directors of SIG seek their advice in relation to its investments. Mr Govender testified that HCI has no shareholding in SIG, the sole shareholder of which is the SACTWU Educational Trust.

- 19.2. Mr Kriel had been the General Secretary of SACTWU from July 2009 and held that position during these events. He is also a director of SIG. He confirmed that during the relevant time period in 2017 and 2018 all of SIG's board members were national office bearers of SACTWU, including its President Mr Themba Khumalo, and that SIG's Board of Directors reported to and took directions from the National Executive Committee of SACTWU ('the NEC').
20. Mr Hove was the main witness who testified on behalf of SIM. Mr Hove is a chartered accountant by profession, as well as a chartered management accountant, chartered global management accountant and has degrees in BComm accounting and BComm accounting honours. Mr Hove is currently the Chief Executive Officer of Independent Media (Pty) Ltd. In 2017 he was the chief financial officer of Sagarmatha. Ms Kasiefah Kaffiel also testified briefly on behalf of the defendants. Ms Kaffiel is a chartered accountant who is the current head of finance at Independent Newspapers.
21. Although he played a central role in many of the events which culminated in the claim, Dr Iqbal Survé did not testify. Accordingly, the version of Mr Govender and Mr Kriel relating to his involvement (which was consistent) stands factually uncontroverted.

The SIG structure and investment decisions

22. Mr Govender confirmed that the investment decisions of SIG are made by its board of directors, which was comprised of six directors at the relevant time. Such decisions usually require unanimity. SIG does not have a managing director. These investment decisions are also either ratified by the NEC, or require its prior approval. Mr Govender understood that Mr Khumalo is also the chairperson of SIG's board of directors.
23. When the initial decision to invest in SIM was made by SIG's board of directors in 2013, a resolution of its board of directors authorised the conclusion of the loan agreement. Mr Govender did not advise SIG in relation to the decision to conclude the loan agreement, but was asked to settle and negotiate its terms.
24. SIG had then accepted that during the initial period of the loan agreement, the interest payments were likely to be capitalised in terms of clause 3.3.2, rather than paid quarterly by SIM, as a result of the debt which had to be serviced in the underlying group of companies, and in particular Independent Media, after its acquisition by Sekunjalo.
25. According to Mr Govender, Dr Survé was aware that Mr Govender was the go-to man for Mr Kriel and that any type of business or commercial decision that needed to be made by SIG required either his involvement and approval, or Johnny Copelyn's approval. Absent such approval, the union and SIG would not pursue a transaction further.

The events of 2017 – the conclusion of the sale agreement

26. Although SIM's defence relating to the sale agreement was abandoned, the circumstances surrounding its conclusion remain relevant.
27. By 2017, no interest payments had been made by SIM in relation to the loan agreement. During 2017 SIG came under pressure from a capital perspective, as its dividend income was insufficient for it to make certain necessary investments in the clothing industry, in order to preserve clothing businesses and to stem job losses.
28. Consequently, SIG wished to exit the loan agreement. In October 2017, Dr Survé contacted Mr Kriel to inform him that he had identified a manner in which SIG could do so. Dr Survé advised that he was merging the electronic and technology businesses in the Independent group into Sagarmatha, which would list on the JSE and the New York Stock Exchange ('NYSE').
29. A formal proposal to SIG followed in a letter from Dr Survé dated 23 October 2017. Prior to this a meeting was held on 14 October 2017 between Mr Govender and Dr Survé, during which Dr Survé described his plans and intentions in respect of Sagarmatha and he also confirmed that the PIC (which was also a shareholder in SIM, and had loaned it R1.3 billion) would support the listing.
30. The letter of 23 October 2017 contained two proposals which were ultimately incorporated in the sale agreement: firstly, the sale to Sagarmatha of an 8% shareholding in SIM by SIG (valued at R 58.5 million) and secondly, that the claims under the loan agreement would be discharged in the amount of

R275 664.62, thus in the aggregate amount of R334 164 627. In order to discharge SIG's loan claim and pay for the shares, Sagarmatha would allot and issue to SIM a number of ordinary shares, the value of which would equal the purchase price (at the price per share at which such shares would be listed, as set out in the pre-listing statement to be issued). The loan obligation would be ceded to Sagarmatha. In order to determine the share pricing, two independent experts would give a report to the Sagarmatha Board to establish a list price that was fair and reasonable for all shareholders who wished to subscribe for Sagarmatha shares. That price was to be used for the shareholders in SIM to swap their interest, for shareholdings in Sagarmatha.

31. On 24 October 2017 Mr Hove sent Mr Govender the introduction to the Pre-Listing Statement, which he said was in the process of being submitted to the JSE. On 9 November 2017 Mr Hove enquired whether they had a response to the offer of 23 October 2017. Mr Govender informed Mr Hove that he had spoken to Mr Kriel and that they had not made a decision yet, as they were still waiting for a prospectus for the Sagarmatha listing, which he again requested.
32. A prospectus was not forthcoming. Instead, a draft of the sale agreement, was sent by Mr Hove to Mr Govender on 19 November 2017, which included *inter alia* the terms contained in the 23 October 2017 proposal.
33. Because SIG was intending to sell its shares in Sagarmatha as soon as possible after the listing, and Dr Survé wished to avoid that prospect, he proposed a six-month lock-in period, during which the shares could not be sold. Mr Govender negotiated a reduction of the lock-in period to three-months. It was also agreed

that Dr Survé would have a pre-emptive right to acquire the shares on 48 hours' notice.

34. Neither SIG nor Mr Govender were given a draft pre-listing statement or a prospectus for Sagarmatha, despite several requests. The proposed meeting where Mr Govender and Mr Kriel would view the draft prospectus after signing a non-disclosure agreement also did not materialise. They were informed by Dr Survé that the PIC was being treated in the same manner as SIG, and was also swapping their shares held in SIM for shares in Sagarmatha.
35. Mr Kriel and Mr Govender contacted Mr Copelyn to discuss their concern that they had not been furnished with the pre-listing statement, and hence could not determine the asset base of the company. Mr Copelyn advised them that if the PIC was being treated in the same manner as SIG, they should follow suit and exit the loan agreement. Accordingly, they relied upon the independent expert's valuation statement for the company, and followed the lead of the PIC (which was in full support of the share swap and subscribing to shares in Sagarmatha) and other local and international investors, some of whom had sent letters of undertaking to Dr Survé, and, the fact that Sagarmatha was going to be listed on the NYSE (as well as the JSE). They had high expectations that they would be able to exit the loan agreement and to recover their capital and interest. Mr Govender explained further that it was not an option for SIG to remain as a shareholder in SIM in those circumstances.

36. According to Mr Govender (and Mr Kriel), in the discussions with Dr Survé preceding the sale agreement, the requirement of a subordination agreement was never mentioned.
37. Prior to signature of the sale agreement, on 22 November 2017 Mr Kriel checked with Mr Govender that he was satisfied with the terms of the agreement, that he had checked the assigned valuations carefully, and that the interest on the SACTWU loan had been properly capitalised.
38. The sale agreement incorporating the proposals set out above was concluded on 22 November 2017, having been so authorised by the six SIG directors in the November 2017 resolution. In terms of the sale agreement:
- 38.1. SIG's claim under the loan agreement of no less than R275 644 627 and its 8 ordinary shares in SIM (constituting 8 percent of its issued ordinary shares) were sold for an aggregate purchase price of R334 164 627 plus any interest on the loan which accrued up to the Effective Date (clause 6.1) ("the Purchase Price");
- 38.2. On the Effective Date, the Purchase Price shall be discharged by Sagarmatha allotting and issuing to SIG the Shares, credited as fully paid up, at an issue price equal to the Offer price (clause 6.2);
- 38.3. "Effective date" is defined in Clause 2.1.8 of the sale agreement as meaning *"the date on which the SENS announcement is to be released, as notified by the Company to the seller in writing or, if no such SENS*

Announcement is to be released, the second Business Day following that date on which the Purchaser notifies the Seller in writing that the Listing will proceed”.

The November 2017 resolution

39. In terms of the November 2017 resolution, SIG's board approved the conclusion of the sale agreement on the terms described above.
- 39.1. In terms of Resolution 1, the board approved SIG entering into the sale agreement and also to be bound in terms of *‘any other agreement, document, instrument, deed, notice or power of attorney related or incidental to the Agreement and/or the implementation thereof (collectively, the “Related Documents”)*.
- 39.2. In terms of Resolution 2, any director of SIG was authorised to *“do or cause all such things to be done, to sign and file all documents as may be reasonable and necessary, to give effect to and implement each and/or every resolution set out herein.”*
40. In authorising the conclusion of the sale agreement, and its participation in the Sagarmatha listing, Mr Govender (and Mr Kriel) testified that the directors of SIG intended to recover the payment under the loan agreement, through the sale of the Sagarmatha shares, after the three-month lock in period.

41. As described further below, it was common cause that the November 2017 resolution was the only basis upon which Mr Kriel had derived authority to conclude a subordination agreement.

The vendor finance deal

42. Prior to the proposed listing, in November 2017, Dr Survé discussed with Mr Kriel the possibility of making available to SACTWU and Trilinear Empowerment Trust so called 'free shares' in Sagarmatha, locked in for period of 5 years, provided that 50 percent of any upside would be shared with Dr Survé (*'the vendor finance deal'*). Mr Govender procured a shelf company to house the SACTWU shares, the details of which were sent to Dr Survé on 30 November 2017.
43. It is evident from the WhatsApp communication between Dr Survé and Mr Kriel on 23 November 2017 that there was some urgency in signing the documents related to the vendor finance deal. On 30 November 2017 Dr Survé indicated that the documents had to be signed on that date.
44. Mr Govender attended at the offices of Dr Survé in Claremont on the following day, 1 December 2017, at about 5 o'clock to vet the documents related to the vendor finance deal on behalf of SACTWU. Dr Survé wasn't present. Ms Nyandoro gave Mr Govender the suite of subscription agreements for the vendor finance deal, which he vetted. He was satisfied with the agreements presented, and sent a WhatsApp message to Mr Kriel, confirming he could sign them. The documents he vetted did not include the subordination agreement.

45. On 1 December 2017, Mr Kriel also attended at the Claremont offices shortly after 6 o'clock in order to sign the agreements relating to the vendor finance deal.

The signature of the subordination agreement

46. The subordination agreement which was signed by Mr Kriel on the face of it was open-ended and included terms in clause 3 and 4, which had the effect of SIG subordinating its loan claim indefinitely, until such time as SIM's assets exceed its liabilities.

47. Mr Govender, Mr Kriel and Mr Hove testified about what had transpired when Mr Kriel, subsequent to signing the vendor finance agreements, was presented with the subordination agreement for his signature by Ms Nyandoro.

48. Unlike the transaction documents relating to the sale agreement, the subordination agreement was not sent to Mr Govender for vetting, nor was it shown to him when he attended the offices of Dr Survé an hour earlier. It was also not sent to Mr Kriel in advance of its presentation to him.

49. The auditor of SIM, Grant Thornton (who was also Sagarmatha's auditor) had raised the necessity for such a subordination agreement in an email sent to Mr Hove on 26 October 2017.

50. Mr Hove could not explain why the agreement was not sent to Mr Govender or Mr Kriel in advance. He admitted that it was an oversight on his part not to have sent a pre-copy to Mr Kriel. His explanation for why the subordination

agreement was also not sent to Mr Govender to vet, in his capacity as transaction advisor on the sale agreement, was that although it was driven by the listing, it was a separate process to procure the document for SIM's auditors:

"Was the subordination agreement not part of the transaction documents? --- It came about as a separate parallel process.

But it was all driven by the listing. --- Yes, it was driven by the listing and it came about as a result of a need to get the financials signed.

I understand that.--- But again the commercial structure of the deal insofar as the swap, was a separate process to the subordination agreement. That's why I never combined the two insofar as the document was concerned."

51. In relation to his understanding of Mr Govender's role, Mr Hove testified that:

"He was introduced to me as the person that's looking to advise, that will be doing the due diligence from a SACTWU point with respect to the swap. The subordination in particular required a signature from SIG and I needed the representative of SIG. To the best of my knowledge at the time and even up to now I'm not sure what Mr Govender's relationship is with SIG, especially insofar as he's got a right to sign documents on behalf of SIG. So, when we needed this document signed from SIG it needed to have a signature from someone from SIG. Hence it went to Mr Kriel."

52. Mr Hove testified that on 1 December 2017 in a project team meeting, Mr Hove was giving Dr Survé an update on where they were with the listing process. Mr Hove's evidence was that: *"I mentioned to him that one of the challenges we are facing or hurdles that we need to cross is we need a subordination agreement because this is a request that has been provided by the auditors."*

53. In response, Dr Survé advised Mr Hove that Mr Kriel would be coming into his office that day. Accordingly, the subordination agreement was sent to Dr Survé's office in order for him to arrange for the signature of Mr Kriel.

54. Mr Hove's understanding was that during that meeting Dr Survé would take Mr Kriel through the subordination agreement and obtain his signature. Mr Hove was not aware that Mr Govender was going to the offices of Dr Survé to vet the vendor finance deal subscription documents, as he was not privy to those arrangements or documents.
55. The subordination agreement when presented to Mr Kriel was accompanied by guidelines or a template from Grant Thornton, containing guidance for an auditor when presenting a subordination agreement ('the Grant Thornton guidelines').
- 55.1. These explain that this *"is an agreement by a substantial creditor or substantial creditors (usually, but not necessarily, shareholders in the client company) whereby they bind themselves either indefinitely, or for a limited period, and either unconditionally or subject to specific conditions, not to claim or accept payment of the amounts owing to them until the happening of a particular event (for example the restoration of the finances of the undertaking to a position of solvency)."*
- 55.2. The Grant Thornton guidelines indicate that before an auditor regards such an agreement as being relevant to his or her decision as to whether or not there is reckless trading or/and an irregularity he/she or she must have regard *inter alia* to whether the subordination agreement is a written one signed on behalf of the creditor concerned with due authority. The creditor whose claim is subordinated should be *"informed that the subordination loan balance must not be allowed to be reduced"*

except when the conditions as noted in the agreement have been complied with” and referred in particular to Clause 5 of the agreement.⁵

56. Mr Kriel, when presented with the subordination agreement enquired from Ms Nyandoro whether Mr Govender had sight of it, during his earlier visit to the offices. When Ms Nyandoro advised that he had not, Mr Kriel asked who had requested that the document be signed, and was directed to Mr Hove, whom he then contacted telephonically. Mr Kriel asked Mr Hove for clarity as to who had generated the document, and enquired about its purpose and duration. Mr Kriel thereafter called Mr Govender to request his advice in relation to the document, in light of what Mr Hove had told him.
57. Before dealing with the direct evidence of Mr Kriel and Mr Hove as to the contents of their conversation, I deal with Mr Govender’s evidence, who testified as to the content of the report to him from Mr Kriel.

Mr Govender’s evidence

58. Mr Govender testified that Mr Kriel had contacted him on 1 December 2017 and informed him of the subordination agreement which had been presented to him. According to Mr Kriel when he spoke to Mr Govender he had already identified the document to be a subordination agreement. Mr Govender confirmed that Mr Kriel read the first few paragraphs of the agreement to Mr Govender during the telephone call.

⁵ Which confirms SIG’s agreement that until such time as the assets of SIM, as fairly valued, exceed its liabilities, as fairly valued, and the auditor’s report referred to in clause 4 has been issued, SIG “shall not be entitled to demand or sue for or accept repayment of the whole or any part of the said amount”.

59. Mr Govender testified that according to Mr Kriel, Mr Hove had confirmed telephonically to him that:

59.1. the subordination agreement was necessary for the listing of Sagarmatha and it was for a limited duration, and would fall away a week after the listing took place; and

59.2. Mr Kriel was signing the same agreement as that which the PIC had signed to subordinate their loan to SIM.⁶

60. On the strength of these representations from Mr Hove, Mr Govender confirmed to Mr Kriel that he could sign the subordination agreement.

61. According to Mr Govender, there was no mention that Mr Hove had told Mr Kriel that the subordination agreement was required in the normal and ordinary course of an audit procedure.

62. Mr Govender confirmed that he was aware of the risks associated with a subordination agreement. Under cross-examination, he conceded that unless a period or an event is specified in such an agreement, the subordination will be for an indeterminate period, and also that unless a subordination agreement is for a specified purpose, the subordination is open-ended as to purpose.

⁶ SIG did not persist in its alternative claim relating to a tacit term – namely that the subordination agreement would only take effect if both SIG and the Government Employees Pension Fund (“GEPF”) either entered into the subordination agreement or GEPF entered into an agreement which was identical to the subordination agreement (‘the tacit term claim’), because the GEPF had entered into a materially similar subordination agreement.

63. When asked whether he had trusted Mr Kriel to ensure that the terms of the agreement that he was going to sign coincided with what he had been informed by Mr Hove, in other words, by Mr Kriel reading the agreement, Mr Govender did not answer directly. Instead, he confirmed that although he did trust Mr Kriel, the trust he placed in Dr Survé and Mr Hove was more significant, given their previous business dealings and his belief *“that there wouldn't be anything different that would come from the agreement, given the fact that my previous discussions with Mr Hove had engaged in exactly what he had said he had sent through.”*

64. Mr Govender denied that he had adopted a casual attitude by not insisting that the entire agreement of two pages was read to him by Mr Kriel. He testified that:

“my understanding of it was Mr Kriel was given the agreement. It was necessary for the listing. We were not going to do anything that was going to jeopardise the listing or delay the process at that point in time because we were exiting our investment and what Mr Kriel had confirmed to me was that the PIC was signing the exact same agreement as Mr Hove had told me and that we were not being treated any differently to the PIC in that regard.”

65. Although Mr Govender had not read the document, and only the first few paragraphs were read to him by Mr Kriel, he confirmed that the actual terms didn't concern him:

“I wasn't concerned about the actual terms of the agreement because ... specifically for the listing and for a limited period of time, and the listing had anticipated happening in February the next year. So, if the agreement, if the subordination was going to fall away a week or so after the listing, it wasn't of concern, you know, it wasn't that it was an open-ended subordination.”

66. Mr Govender confirmed that had the two page subordination agreement been read to him he would have known that it contained an unlimited subordination

clause, which on its terms endures until such time as it is signed off by the auditor of SIM, and also that it does not correspond in duration to what Mr Kriel had mentioned, based upon Mr Hove's response. He would then have advised Mr Kriel not to sign the document.

67. Mr Govender sought to emphasise that SIG was looking to exit their investment in SIM, and if they signed an open-ended subordination agreement, they would not be able to exit their investment, had the listing failed.
68. What was plain from Mr Govender's evidence is that at that juncture there was no expectation by either party that the listing would fail, based on the assurances from Dr Survé: *"there was no doubts on our side. He was extremely confident on this and he assured us that this listing would take place, if not on the JSE it will be listed on New York."*
69. That was also confirmed by Mr Kriel in his evidence: *"it was always made crystal clear to us that the listing is imminent, there was no discussion of it potentially failing, that wasn't even part of the discussions at all, we were always led to believe that it is a definite fact that the listing will happen."* He confirmed that it hadn't occurred to anyone at the time that the listing may not take place, that *"we all believed it was imminent"*.
70. Mr Govender accepted that Mr Hove shared that belief.

71. In response to a question whether Mr Govender was happy for SIG to assume the risk of Sagarmatha not listing, he confirmed that: “[a]t that point in time, I had not considered the fact that it would not be listed.”

72. Mr Govender initially did not concede that SIG was assuming that risk, but instead maintained that there was no intention on SIG’s part that the loan claim would be sterilised in perpetuity. However, when pressed on the assumption of risk, he responded as follows:

“Now I want to come back to the point about assuming the risk. If it didn’t list there would be no listing date. That date one week after listing date would not occur and therefore SIG, even if this contract had read the way you believe it should have read, would have meant SIG would have subordinated its loan effectively indefinitely? --- The – as I had said previously that was not contemplated at all given the fact that Dr Survé had assured us that this company would list at some point in time and therefore we had not even considered the company not listing.”

“You appreciate, I take it, that if the subordination agreement had contained a clause saying this subordination will remain in place until one week after Sagarmatha has listed, then the subordination agreement would, as we stand here today, still be in place? --- Yes, the company, in hindsight the company has not listed at all so therefore it would be in place.”

73. Mr Govender also conceded that the following statements by SIM’s counsel were correct:

“even on your understanding you would still have been sterilised because as a fact Sagarmatha has not, had not listed?”

“real complaint is not that you were misled at the time because you appear to accept that Mr Hove in good faith also believed that listing was imminent, but that subsequent to listing not having taken place, SIM is relying on the subordination agreement as subordinating the loan for an unclear, uncertain duration, for what could be a very long time.”

74. Mr Govender accepted that on his understanding of the terms at the time, the agreement would result in an indefinite subordination, albeit that it was not contemplated at the time.

The first alleged misrepresentation – the evidence of Mr Kriel and Mr Hove

75. SIG alleges that Mr Hove represented to Mr Kriel that the subordination agreement would only be used by SIM in the context, and for the purpose of the listing of Sagarmatha, if and when the auditors of Sagarmatha or the JSE required SIG's claim to be subordinated for purposes of the listing of Sagarmatha.
76. Mr Kriel testified that he was presented with this document, which was completely out of sync with the vendor finance deal, and had enquired from Mr Hove as to the duration and purpose of this document. He also requested clarity as he didn't understand the issues. Although he conceded that he had significant commercial experience, he maintained that this was not his area of expertise.
77. He testified that Mr Hove had explained to him that "*the intent was to help facilitate the listing of Sagarmatha*", that the subordination agreement was being presented to him "*for the purposes of aiding and facilitating the listing of Sagarmatha*". He also claimed that Mr Hove had informed him that the subordination would "*fall away seven days after the listing was scheduled*".

78. Mr Hove said he had explained to Mr Kriel that the subordination agreement was requested by the auditors. The reason for this was that the liabilities of SIM exceeded its assets, which meant that SIM was insolvent, and given that SIM was a target investment of Sagarmatha, the financials were needed so that SIM could be signed off on a going-concern basis. The subordination agreement would assist in getting the financials signed off.
79. Mr Hove testified that the auditing of SIM (i.e. on a going-concern basis) was a step in the process of the listing of Sagarmatha: *“So, in the prelisting statement, the financials of the target company needed to be included and to include those financials needed to be audited and it was in the course of completing that audit that the subordination was required.”*
80. According to Mr Kriel (and to Mr Govender, based on Mr Kriel’s report to him), there was no mention of the subordination agreement being required in the usual and ordinary course for the audit procedure, but only for listing purposes.
81. Mr Hove accepted that he did not say to Mr Kriel that if the listing failed that the subordination agreement would be used by SIM to support SIM’s continued going concern status on an open-ended basis, unrelated to the facilitation of the listing, because the question did not arise.
82. Mr Hove accepted that Mr Kriel signed the subordination agreement, because of the fact that it might contribute to the listing eventuating.

83. Mr Hove was asked whether a scenario where the subordination agreement could be used by SIM to support SIM's going concern status on an open-ended basis, unrelated to the facilitation of the listing, in the event that the listing should fail, was present in his mind at the time when the subordination agreement was presented to Mr Kriel for signature.
84. A fair reading of his evidence shows that he did not answer any question to that effect, in the affirmative:

"Now, what we know you did not say to Mr Kriel was that if the listing fails the subordination agreement would be used by SIM to support SIM's ongoing-concern status on an open-ended basis unrelated to the facilitation of the listing. That you didn't say to him. --- Yes.

That such a scenario was present in your mind or possibly even at the forefront of your mind one can take from what you were asked to do on the 26th of October 2017 when Grant Thornton gave you text which they said ought to be included in the historical financials. You find this at the page we started out more or less at the beginning of today, page 1093. Remember that? --- Yes.

And this is all about SACTWU allegedly having entered into a subordination agreement. Don't put too fine a point on that for the moment. The draftsman just got it a bit wrong. I think they meant SIG giving them that credit. "It's all about subordination until such time as the assets of the company would on fair valuation again exceed its liabilities." ---Yes.

So, this was present in your mind, I'm putting it to you, at the forefront of your mind when you spoke to Mr Kriel by telephone on the evening or early evening of 1 December 2017, correct? --- I wouldn't say it was forefront, because that's over a month.

What? --- I wouldn't say it was forefront in my mind, because there was a over a month period between ...

But it was present to your mind, at the very least, if it wasn't the forefront --- You made no mention of that to Mr Kriel.---No mention of?

No mention of the fact that you would use the SA to support SIM's ongoing-concern status on an open-ended basis unrelated to the facilitation of the listing when he spoke to you on that evening of 1 December 2018. You've told us that ---Yes.

2017. You've told us that. --- Yes, but I think I mentioned earlier specifically with this letter they are referring to disclosures and the financials. They are not referring to the subordination agreement.

Sorry, I'm not with you? --- The email on ...

No, no, I've got you. I've got you. I'm away from the ...[indistinct]. I understand that. They are referring to disclosures, not a subordination agreement. ---Yes.

That was not what I was putting to you. What I was putting to you is that the purpose of the subordination agreement being all about forming part, on your version, of the going-concern financial statements had not been put up to Mr

Kriel at all as being for the purposes of use in support of going-concern beyond the listing date. You didn't say that to him. --- I don't think the question arose. (underlining added)”

85. The gist of his evidence is that while the purpose of the audited financial statements (as being required for a going concern for the listing) was discussed, the purpose of using them beyond the listing date was not mentioned by Mr Hove, as the question did not arise.
86. He explained that he regarded the auditing process as running parallel to the listing, even though it was necessary for the listing, as the financials had to be in the prelisting statement.
87. In response to a question as to why the subordination agreement was tailor-made for the SIM December 2016 year end, Mr Hove maintained that it is possible that it could extend to the interim results of 2017.
88. There was no evidence led in support of SIG's claim that Mr Hove had informed Mr Kriel that the subordination agreement would only be used in the context and for the purposes of the listing of Sagarmatha. SIG maintains that as the context was the imminent listing and the limited duration, the 'sole purpose representation' was made by implication.
89. The only real difference between the parties' evidence in relation to the first alleged misrepresentation relates to its impact, and whether the fact that the subordination being used for future audit purposes was not mentioned by Mr Hove to Mr Kriel is a material misrepresentation, which I address further below.

The second alleged misrepresentation

90. Mr Hove is alleged to have told Mr Kriel that Grant Thornton had called for the execution of the subordination agreement to ensure that the creditors of SIM would not be able to enforce their claims or apply for the liquidation of SIM during the period leading up to the listing of Sagarmatha.
91. Mr Kriel testified that Mr Hove said that the subordination agreement was required so that *“the creditors would not put Sagarmatha into liquidation in the run up to the listing process”*.
92. Mr Hove denied that that was what he had said. He testified to the contrary that there was no reason for Grant Thornton to request the subordination to prevent a liquidation of SIM because there were no claims / loans which were due and enforceable by SIG against SIM at that stage.
93. Under cross examination, he maintained that stance. When SIG’s counsel clarified that Mr Hove’s assumption was based on a misapprehension of the legal position, because even a contingent or prospective creditor can make a winding up application,⁷ Mr Hove then accepted that if that was the correct position, SIG could indeed have applied for SIM’s liquidation. He also accepted that none of the parties would have wished for a liquidation

⁷ See: Section 346(1)(b) of the Companies Act 1973. Chapter 14 of the Companies Act 1973 continues to govern the winding up of insolvent companies in terms of item 9(1) of Schedule 5 of the Companies Act, 2008. See in relation to ‘contingent creditor’: *Absa Bank v Hammerle Group* 2015 (5) SA 215 (SCA) relying on *Premier Industries Ltd v African Dried Fruit Co* (1950) Ltd 1953 (3) SA 510 (C) at 513D-F. See in relation to a ‘prospective creditor’ - *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* 2015 (6) SA 224 (SCA) at p. 233 para [14] referring to *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T) at 528C and *Holzman NO and Another v Knights Engineering and Precision Works (Pty) Ltd* 1979 (2) SA 784 (W) at 787E – F, and 787G.

application, in the context where a going concern certificate was needed for an unqualified audit of SIM, for purposes of the Sagarmatha listing.

94. Given Mr Hove's misapprehension of the legal position concerning SIM's creditors' claims – as a result of which he did not consider SIM to be at risk of a liquidation application by SIG – it is, in my view, unlikely on the probabilities that he would have made the second representation.
95. I find that the probabilities favour Mr Hove's version in relation to this representation, and that on the probabilities it was not made in the terms suggested by Mr Kriel, or as reported by Mr Govender. I do so as Mr Hove was under a misapprehension as to the correct legal position relating to the position of contingent or prospective creditors in liquidation proceedings. He was very unlikely to have stated, contrary to his understanding, that SIM was at any risk of liquidation proceedings, as in his view, there were no claims that were due and enforceable.
96. In any event, even if I am wrong in reaching that conclusion, in my view, standing alone, had this been said by Mr Hove, it would not be a material misrepresentation – and is not a misrepresentation which would have induced the contract.

The third alleged misrepresentation

97. It is pleaded by SIG that Mr Hove told Mr Kriel that the subordination agreement would lapse one week after the date on which Sagarmatha was scheduled to be listed on the JSE.
98. Mr Kriel confirmed this in his evidence - he testified that Mr Hove had told him that the subordination would be for a limited duration and “*would fall away seven days after the listing was scheduled*”. Mr Kriel explained that he understood that to refer to the date that Sagarmatha was supposed to be listed, or the date on which it was announced to be listed on the JSE. The effect of this being that if the listing was scheduled (as it had been) but did not proceed, the subordination agreement would fall away seven days after that announcement.
99. Mr Kriel testified that the scheduled listing date was ‘more or less’ in February the following year.
100. Notably, Mr Kriel’s evidence about ‘the seven days from when the listing was scheduled’ was contradicted by the evidence of SIG’s other witness, Mr Govender. As mentioned, he testified to the contrary, that Mr Kriel reported to him that Mr Hove had said the subordination agreement would fall away a week after the listing (of Sagarmatha) had happened.
101. When it was suggested to Mr Kriel that his evidence was not consistent with Mr Govender’s testimony and because there was no scheduled date for listing

at that stage, the alleged explanation from Mr Hove did not make sense, he could not justify the basis for such a date, other than his 'understanding', and the fact that he was never asked to sign a never-ending subordination agreement.

"Well, that's how I understood it, and I don't think I can add any more to what I've said, but that is how I understood it and that is what I was told. In other words, if I can be a bit more clearer, that at no stage at all in my engagement with Mr Hove did he, at any time, say that what you are required to sign here is a never-ending subordination agreement. That has never arisen in the discussion. It was always linked to the event for the purpose of facilitating the listing. That was very clear to me.

Yes, but what seems to me not to have occurred to anyone at the time is that the listing may not take place. You've given evidence about how confident Dr Survé was. Mr Govender gave similar evidence. You, yourselves, both you and Mr Govender, expressed confidence based on what had been told to you that the listing would take place. So, the idea of this being a never-ending subordination, it seems to me, did not come up. No one thought of that, because the listing, as far as everyone was concerned, was going to take place. Is that correct? --- That's correct. That was the singular focus and that was the explanation.

Therefore, whether it was seven days from a scheduled date or seven days from actual listing, would not have occurred to the parties as making any difference. --- No, it would make a difference because the subordination agreement that I signed, which I believe I had authority, I had authority to sign something that was reasonable and something that would be aiding the share swap agreement with the purpose of us being able to have a listed entity with listed shares where we could then sell our shares and in that way recover it. So, it was very clear to us, from that point of view, what its intention was and what its duration was. It is true that in the conversation, we didn't speak about what would happen if the listing did not take place, the listing had failed, and as far as we were concerned, that that was the end of that subordination agreement. It was presented to me, in the explanations that I had, that it would fall away. Now, for us, it was not a concern, because clearly the listing didn't happen as was it intended or scheduled, in my understanding, and therefore I wasn't concerned about it at all."

102. In his evidence in chief Mr Hove denied he had made such a statement or referred to 'a scheduled listing date'. He pointed out that (a) there was no scheduled listing date, as the parties then referred to a proposed listing, as the actual listing date was unknown and (b) a date of lapsing seven days from

the scheduled listing makes no logical sense, as there was no material event which would occur within that time period.

103. Although this was challenged in cross-examination, with reference to the time period between the date on which the pre-listing statement of 28 March 2018 was published and the actual proposed listing date of Friday 6 April 2018, in re-examination he reiterated that the reference to the pre-listing statement plus seven days is not the same as a 'scheduled listing date'. He also maintained that in December 2017 he was not aware of the actual listing dates nor the hurdles to be crossed in the listing.⁸

104. Second, Mr Hove confirmed that when Mr Kriel had asked him about the duration of the contract, he responded that '*the duration is of no consequence given that the claims in respect of the subordination would lapse at the listing of Sagarmatha because Sagarmatha was acquiring those claims. So, the duration would not be of any consequence.*' He justified the statement on the basis that the team and their advisors were highly confident that the listing would take place.

105. In this regard, Mr Kriel testified that his understanding of the agreement was that if the listing had failed, the subordination would 'be dead'. Mr Kriel accepted though that there's nothing in the wording of the subordination agreement that links it to the Sagarmatha listing.

⁸ The transcript of the proceedings omits part of this evidence.

106. Mr Kriel testified that he would not have signed the subordination agreement if he had been aware of its open-ended nature, and that it would have the effect of sterilising the loan agreement.
107. As elaborated above, during cross-examination, when Mr Hove was asked why he had not explained to Mr Kriel that the subordination agreement would continue to operate on an open-ended basis (and used in support of a going-concern status of SIM) if the listing failed, he maintained that the question did not arise.
108. Mr Hove conceded under cross-examination that his “duration is of no consequence” response could have left Mr Kriel with the mistaken impression that beyond a failed listing there would be no consequences to flow in relation to the loan arrangements.
109. Third, according to Mr Kriel’s unchallenged evidence, nobody had discharged the responsibility embodied in the Grant Thornton guidelines. Mr Kriel confirmed that if he had been alerted to its consequences by Mr Hove (or someone else) – he would not have signed the agreement.
110. Mr Hove conceded that the protocols of Grant Thornton in relation to a subordination agreement were not complied with, given the circumstances in which the subordination agreement was signed by Mr Kriel. He agreed that “in the regular course of events” the carrier of the subordination agreement who placed it before Mr Kriel, would have been obliged to show him clause 5 and ask him to please read it.

111. Mr Hove however did not think Mr Kriel would sign the subordination agreement without reading it.
112. Fourth, Mr Hove denied misleading Mr Kriel, or making the alleged misrepresentation in relation to the seven day period in order to induce him to conclude the subordination agreement. He denied putting any pressure on Mr Kriel to sign the agreement quickly. He was not present during the signing. He suggested that Mr Kriel could have asked for advice from a lawyer or others, and did seek advice from Mr Govender, who vetted SIG's transactions. He accepted though that there was some time pressure in the communications from Dr Survé, relating to the vendor finance deal when the Whatsapp's were shown to him, although he was not party to those interactions at the time.
113. Fifth, Mr Hove accepted that in concluding the subordination agreement, Mr Kriel did not intend to ringfence the loan claim of SIG against recovery – and to end up without shares in Sagarmatha or the claim under the loan agreement.
114. Mr Kriel testified that they all believed the listing was imminent and he had no reason to think that Mr Hove didn't similarly believe that listing was just around the corner:

“So, when he says to you on your evidence, effectively this will be relatively short-term, well that's because he similarly to you believes that listing is just around the corner and then it will be short-term. Correct? --- Yes, correct.”

“It was clear, we all believed this listing will happen, that was very clear to us and it was in that context that a subordination agreement of a limited duration was signed.”

115. Finally, both Mr Kriel and Mr Hove testified concerning the representation that the PIC would sign a similar subordination agreement. Mr Kriel maintained that Mr Hove informed him that they had already done so. Mr Hove recalled saying that the PIC would sign a similar agreement, but could not recall whether it had actually been signed by 1 December 2017. Mr Kriel testified that Mr Govender's agreement was also premised on this fact.⁹ As already mentioned, the tacit term claim was not persisted with, as the PIC had signed a similar agreement.

116. On the probabilities, I prefer Mr Hove's evidence to Mr Kriel's evidence in relation to the third alleged misrepresentation. I do so for two reasons. The first is that it is logically consistent, and consistent with the known facts. Whereas it is logical for Mr Hove to have expressed the view that the subordination would lapse upon the listing of Sagarmatha, it is not logical for Mr Hove to have used a time period, such as seven days from the date on which Sagarmatha was scheduled to be listed, for the lapsing of the subordination. His explanation as to why he would not have mentioned such a period is also logical. Second, on the central issue of lapsing, what Mr Govender recalls being told by Mr Kriel accords with Mr Hove's evidence, and is quite different from what Mr Kriel recalls being told by Mr Hove.

117. The terms of the subordination agreement are broadly consistent with what Mr Hove said he informed Mr Kriel, namely that the Sagarmatha listing would terminate the subordination agreement because it would extinguish the SIM

⁹ "Mr Hove ...then said, well if it is a document which is required for – to facilitate or to help with the listing and the PIC had signed a similar document which Mr Hove told me. In fact, Mr Hove told me it's not a big deal because the PIC and others had signed a similar document then if it's for that purpose then he sees no problem in me signing it."

debt to SIG. It would substitute for that debt shares in Sagarmatha. It is also broadly consistent with what Mr Govender said Mr Kriel had reported to him in relation to its duration.

118. Moreover, perhaps given these inconsistencies, SIG ultimately maintained that whether or not Mr Hove said precisely that the subordination agreement would lapse seven days after the scheduled listing date is on the evidence before the court of little importance. SIG ultimately placed reliance on the 'sole purpose' representation, discussed below.

The failed listing and Dr Survé's subsequent attempts to settle the loan

119. The abridged pre-listing statement in respect of Sagarmatha was released on SENS on 28 March 2018, and published in the press on 29 March 2018, with the listing of shares on the JSE expected on Friday 6 April 2018.
120. On or about 10 April 2018, SIG's representatives were informed through the media that the Sagarmatha listing had failed. The JSE indicated that the listing could not proceed, inter alia because the Company had not submitted its annual financial statements to the Companies and Intellectual Property Commission at the time when the pre-listing statement was published, a fact of which the JSE had not been aware at the time of approving the pre-listing statement.
121. Between April 2018 and November 2018, Mr Govender was involved in various engagements with Dr Survé, in relation to an alternative exit strategy of SIG from the loan agreement.

122. On 20 April 2018 Mr Hove asked Mr Govender to assist with obtaining a letter of support from SIG in relation to the subordination agreement, as the auditors needed to sign off on the financial statements for SIM. Mr Govender was surprised by this request, as in his view the subordination agreement had fallen away. He requested a copy of the subordination agreement from Mr Hove. He received a link to the agreement on 3 May 2018. He was shocked to discover that it was a standard subordination agreement, which auditors would usually require and that it was still valid, despite the failed Sagarmatha listing, and would subsist until SIM's assets exceeded its liabilities. This was contrary to his understanding at the time that it was supposed to be purely for listing purposes, to assist in the investment strategy of SIG and their intention to exit the investment in SIM, as it subordinated SIG's claim under the loan agreement in perpetuity.
123. Mr Govender had then also checked the prelisting statement. Although it recorded that the subordination was in perpetuity, he thought that may have been an oversight as the statement contained other errors. It also recorded SACTWU not SIG as the loan holder, and included incorrect terms, stating that 50% of the loan matured in 2018, and the balance in 2020. Thus, other terms in the prelisting statement were also incorrect. In his view, an indefinite subordination was clearly not the intention of the parties, it was a mistake.
124. Various meetings ensued with Dr Survé, during which he apologised for the failed Sagarmatha listing and accepted that SIG still sought to exit the loan agreement. Mr Kriel advised that SIG needed to recover its capital of at least

R150 million as SACTWU required that for clothing businesses which were under pressure. Dr Survé was cooperative, he indicated that he would speak to the PIC in order to assist with funding SIG's exit of SIM and the loan agreement. The initial proposal was that R150 million would be paid to SIG, plus interest, and he would issue Sagarmatha shares on a foreign stock exchange in September 2018, given that foreign investors were still interested in pursuing such a listing. Dr Survé also sought to assist in another vendor finance deal in Ayo Technologies. However, this transaction which involved the allocation of 12 million shares, required a cash injection upfront of R18 million, which SIG did not have available.

125. Mr Kriel engaged Mr Koos Pretorius, an attorney from Edward Nathan Sonnenbergs ('ENS') to assist SIG with reaching settlement with Dr Survé, in order to exit the SIG investment, and to engage with Mr Adam Ismail at Webber Wentzel Attorneys ('WW'), who was representing SIM and Dr Survé.
126. A draft agreement was to be prepared between SIG, SIM, SIH, AEEI, Ayo and Sagarmartha in terms of which the original capital amount of the loan agreement of R150 million would be repaid (as SIM would borrow that amount), and the remaining interest would be capitalised through the acquisition of Sagarmatha shares. Subsequently, it was agreed that 10 million of the 12 million Ayo shares allocated to SIG would be surrendered and they would be used to settle the R18 million liability, leaving SIG with 2 million shares.
127. On 4 May 2018 Mr Govender and Mr Kriel met with SACTWU President Mr Khumalo to explain this proposal from Dr Survé.

128. The proposal was incorporated into a settlement agreement, clause 2.1.1 of which provided for R150 million to be repaid in cash, and clause 1.1.17 and 2.1.2 dealt with interest which was limited to the amount of R100 million, notwithstanding the terms of the loan agreement. Correspondence from Mr Pretorius dated 25 May 2018 dealing with the transaction structure mentioned that all the historic agreements between the parties including the subordination agreement would terminate.
129. Mr Govender also testified that during that period SIG remained hopeful that Sagarmatha would still list on a foreign stock exchange such as the NYSE, based on Dr Survé's assurances. During these 'exit negotiations', Dr Survé made no mention of the subordination agreement and given the fact that SIM was repaying the loan, SIM did not appear to consider it to be subordinated. It was for those reasons, amongst others, that the subordination agreement was not raised immediately by Mr Govender when he came to realise that it was an open-ended subordination agreement that had been signed in error by Mr Kriel.
130. By 8 June 2018 the cash portion of the settlement proposal had been reduced to R120 million, and R30 million was to be paid in Sagarmatha shares, as Dr Survé was struggling to raise R150 million, and could only raise R120 million.
131. In June 2018 Dr Survé purportedly raised the alleged tax implications of the agreement with Mr Ismail, although those were not discussed directly with Mr Govender.

132. Mr Govender and Mr Pretorius, indicated repeatedly in correspondence that the matter had to be concluded speedily, as the cash was needed to sustain the clothing industry.
133. On 5 July 2018 a media statement was issued indicating that the PIC was to exit its investment in Independent Media. Thereafter, Dr Survé delayed signing the agreement for the R120 million and ultimately became unavailable. He indicated that he remained committed to repaying the loan, but he could not give a date for repayment, as he claimed he was busy buying out the PIC and Independent Media's Chinese shareholder.
134. Ultimately, the attempt to reach agreement on the repayment terms came to nothing, and Mr Pretorius addressed correspondence to Mr Ismail in November 2018 which was the genesis of the current proceedings.

THE ISSUES

Did Mr Kriel read the subordination agreement?

135. The parties disagreed as to whether Mr Kriel had in fact read the entire subordination agreement (aside from the first few paragraphs he read to Mr Govender). SIG maintained in argument that Mr Kriel's evidence demonstrated he had not read the whole document, as if he had, he would have noticed the indefinite subordination. SIM maintained to the contrary, that he had read the entire agreement, but not carefully.

136. Mr Kriel testified that he did not read the document 'carefully' or 'closely' and had not been aware of the precise legal or technical terms in the document, but he did take the necessary steps for advice and clarification. He explained that *'there's a difference between, from my point of view, between reading a document carefully. I would not have read it carefully in the time that was allocated to me, or that I was there to read it. It would've taken me much, much longer if I had read it carefully'*. Although he had some time pressure and engagements to go on to that evening, he conceded that he was not pressured by Mr Hove or anyone else to sign the subordination agreement there and then, and he could have asked for more time if necessary, to consider its terms.
137. Instead, he said took the steps to speak to Mr Hove and to Mr Govender, which he considered reasonable and necessary. He maintained that he relied on Mr Hove's representation as to the document's duration and purpose during their telephone conversation, when signing it.
138. During cross-examination Mr Kriel studiously avoided giving an unequivocal response to the repeated questions as to whether he had in fact read the entire document. He did not deny though that he had read the document.
139. Extracts from the cross-examination include the following:

"But the difficulty I have with what you are saying is you have an explanation as to the purpose -- Correct.

But you then read a document, even if relatively superficially and you see for instance that it says nothing about listing. Why is that not an alarm bell? --- Well, it was not an alarm bell because I had explanations. I had an explanation from Mr Hove and that was the explanation and the explanation was very clear to me and why would I be alarmed if he explains that to me when I purposely called him to ask

for clarification about the purpose of the document? It was not I think for me at the time, based on the context in which those discussions took place, to carefully scrutinise and to see that every word is crossed, given all the commercial terms. What was important for me was to understand what its purpose was and I understood it in the manner in which it was explained to me.”

140. Mr Kriel confirmed that he had read the Grant Thornton guidelines which he had initialled: *“Well, I read it and again of course, not as in detail as I’ve, you know, I, in other words, not a scrutiny of every single word and analysing the meaning of every single term thereof.”*

141. When pressed on why he hadn’t been struck that the subordination agreement could be indefinite or for a limited period, he again responded *“Well, as I said, I would’ve read it, I would not have analysed every single word of it. What I place more emphasis on is, was the context in which all of this had been explained to me, which was in this instance, the purpose of the — of a subordination agreement that was presented to me was of a limited duration and for a specific purpose.”*

142. The following extracts are from the last part of his cross-examination:

“Were you careful about the wording of this agreement when you signed it?---Well, as I’ve said earlier that I placed more emphasis on seeking the clarification about what it was, what its intent was.

So, were you not particularly concerned about the wording? --- I had as I’ve said earlier, not intended to scrutinise every single word of it as I’ve said, these are not matters that I — that particularly fall within my area of experience.

What is particularly striking to me here is that you spoke to Mr Govender, but you spoke to him only briefly. You didn’t read the whole agreement to him. You didn’t send it to him. He said in response to a question from my learned friend, Mr Kuschke, that if he’d known what this agreement said he would have told you not to sign it. You didn’t take those steps, you just signed. You were careless with respect Mr Kriel, in signing an agreement where the wording is so at variance with what you now say you intended this contract to be about or to be for? --- Well,..., I

can only explain to you what steps I had taken which I have explained and re-explained and those are the steps that I've taken and I got clarification what the intention was, I accepted that from Mr Hove. I had called Mr Govender and I'd explained to him and in that context, I think I'd acted reasonably.

You see, you have the Grant Thornton document saying it can be indefinite or for a limited period. What were you relying on in the wording of the agreement you signed for this to be for a limited period rather than indefinite? --- Well, I explained that that was what was explained to me by Mr Hove, that's what I ...[intervenes]

So, there is nothing in the wording that you can point to? --- And that's what I relied on.

Because the wording is contrary to that not so? --- Well, I think in the manner it is written, yes, it is, but remember, I've always looked at it in a context of what was explained to me.

Have a look just at clause 4... It says for how long this subordination agreement will remain in force and effect. It says:

"For so long as the liabilities of the Company as fairly valued, exceed its assets as fairly valued."

That's the duration. It is expressed and it's clear and it's unmistakable, not so? --- ... I don't know how many times I can repeat ...[intervenes]

Yes, that's fair. You don't have to repeat it, you were relying on what you were told by Mr Hove. --- Exactly.

You accept that the wording is not in accordance with what Mr Hove said to you? --- Well, it is not, but it is in the context in which was explained to me and that is what I have understood at the time and that is what I understood I had signed. It would be for that purpose and it would be for a limited duration. I had no other understanding and no other persons — had it been conveyed to me and explained to me by Mr Hove, that no this is actually intended to be the manner in which it's explained now, I would never have signed it. I have no authority to sign something like that without reverting to my structures to get a mandate to do so (underlining added)."

143. He also said the following:

"You didn't ensure that the document didn't contain terms that were, in fact, directly in conflict with what you say was represented to you? --- No, because I did not understand it to be in conflict with what was told to me. I have explained that when you read a document like that, it gives – it gets to you that moment. There is no prior circulation of a document like that. There's no prior negotiations or anything like that. And in that moment, it gets presented to you, you clarify it and it is

explained to you that that is actually what it means. And rightly or wrongly, I believed them and that is why I signed the document.”

144. On a conspectus of the evidence, a fair summation of Mr Kriel’s evidence is that he did read the subordination agreement and the Grant Thornton guidelines, albeit that he read them cursorily. He did not scrutinize them for legal or technical terms - he claims he did not understand all the terms.
145. However, he accepted the explanation of Mr Hove as to its meaning and duration, to the extent that the written terms of the subordination agreement differed from that explanation, given what he described as the context of the trust relationship between the parties.
146. Mr Kriel didn’t ensure that the representations by Mr Hove, on which he now seeks to rely in order to undo the contract, were incorporated in the written document.
147. He also didn’t ensure that the subordination agreement did not contain terms that were, in fact, directly in conflict with what he says was represented to him by Mr Hove.

Actual authority

The import of the November 2017 resolution

148. Neither the November 2017 resolution nor the sale agreement makes any reference to a subordination agreement. It is common cause that there was no mention of the subordination agreement and it was not discussed with nor

presented to SIG's directors, until its presentation to Mr Kriel on 1 December 2017, some 9 days after the resolution.

149. The anticipated listing of Sagarmatha is central to both the sale agreement and the November 2017 resolution. Clause 1.3 of the November 2017 resolution contemplates that the purchase price shall be discharged by the allotting and issuing of Sagarmatha shares to SIG on the effective date.
150. Although the import and wording of the November 2017 resolution did not really feature in the cross examination of SIG's witnesses, during argument, it was common cause that it could only be the November 2017 resolution from which Mr Kriel derived authority to sign a subordination agreement.
151. In its replication, SIG pleaded that Mr Kriel had authority to conclude a subordination agreement on behalf of SIG, for the limited purposes and duration put forward by Mr Hove in terms of the three misrepresentations which were allegedly made by Mr Hove to Mr Kriel, as set out in the introductory portion of this judgment.
152. The replication was consistent with the evidence of Mr Govender:

“And there's no suggestion in any of this evidence that board approval was required? --- No, Mr Kriel was authorised to sign certain documents regarding the exit of SACTWU's investment in SIM and those were the sale of shares agreement, because it offered an exit on a listing. It – so any document regarding the exit, because the NEC had resolved that we exit this investment. So whatever documents that were necessary for us to exit the investment, he was authorised to sign that document.”

“...he didn't need board approval to sign a subordination agreement that was a limited period subordination agreement for us to exit our investment on the listing. Because it facilitated the listing of the shares and it facilitated our exist

because that was the only way in which we could realise our shares on the listing.”

153. SIG claims that whilst Mr Kriel had authority to sign a subordination agreement (of limited duration and purpose) he was not authorised to sign the subordination agreement.

154. In *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others* 2012 (5) SA 323 (SCA) the court stated as follows (per Mpati P):

“[24] Actual authority may be express or implied. In *Hely-Hutchinson v Brayhead Ltd and Another* (referred to with approval in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others*) Lord Denning MR expressed himself thus:

[Actual authority] is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.”

155. As a general proposition, actual authority refers to specific powers, expressly or impliedly conferred by a principal (in this case the SIG Board) to an agent (in this case Mr Kriel) to act on the principal's behalf.

156. The November 2017 resolution gave authority to each director to do or cause “*all such things to be done, to sign and file all documents as may be reasonable and necessary, to give effect to and implement each and/or every resolution set out herein*”.

157. SIM contends that Mr Kriel had actual authority to subordinate the loan claim, as a general proposition. They rely on the fact that Mr Kriel and Mr Govender both accepted that a subordination agreement was incidental to the implementation of the sale agreement, and also that a subordination agreement was reasonable and necessary to give effect to the transactions contemplated by the sale agreement and so was indeed authorised by the November 2017 resolution:

157.1. Mr Govender, who vetted the SIG transaction documents, had advised Mr Kriel that he could sign the subordination agreement. He confirmed that there was no specific authority given to Mr Kriel to enter into a subordination agreement. He confirmed that his authority was the general authority granted to the directors of SIG in the November 2017, and that he did not need further board approval, in the extract from his evidence quoted above.

157.2. Mr Kriel also confirmed that he had a mandate to sign the subordination agreement by virtue of the November 2017 resolution, which empowered a director to take such steps and to sign such document to give expression to what SIG had intended to do, based on the clarification that he'd received from Mr Hove, and the further discussion with Mr Govender where he gave him the go-ahead. In his view, he was thereby authorised to sign a subordination agreement of limited duration that would be short-term, that would aid the Sagarmatha listing.

158. Thus, on Mr Kriel's understanding he was authorised to sign documents necessary for the listing of Sagarmatha, and a subordination of the loan claim fell within that category of documentation, and he required only Mr Govender's vetting or confirmation to sign the subordination agreement. He did not consult with other board members.
159. In my view, it must be so that a subordination of the loan, which is necessary to give effect to the transactions contemplated for the Sagarmatha listing, is in principle authorised by the November 2017 resolution.
160. This is also consistent, in principle, with SIG's replication, which expressly confirmed Mr Kriel's authority to enter into a subordination agreement, albeit that SIG claimed such authority to be limited to an agreement consistent with *"the purposes and the duration put forward by Mr Hove in terms of the representations"* and furthermore that *"in the event of it being found that Mr Hove did not make the representations, the subordination was executed by Mr Kriel without the authority of the Plaintiff to do so"*.
161. Thus, it is the precise terms of the authority to subordinate which are in issue, and not whether Mr Kriel had the authority to subordinate the loan claim *per se*.
162. And that in my view is where SIG's difficulty lies, as having pleaded that a subordination agreement is in principle authorised by the November 2017 resolution, can SIG then claim the limitations on Mr Kriel's authority, as are

pleaded? Can Mr Kriel's authority to subordinate be limited to the representations allegedly made by Mr Hove?

163. I agree with SIM that it is not possible to interpret the authorisation given to Mr Kriel by the board of SIG in the November 2017 resolution in the way SIG has replicated: that Mr Kriel was authorised to sign a subordination agreement only in so far as the subordination would lapse one week after the date on which Sagarmatha was scheduled to be listed.
164. Mr Kriel did not contact any members of the board of SIG in the time between speaking to Mr Hove and signing the agreement, so the pleading cannot be read as meaning that Mr Kriel obtained specific authority to sign on the basis of what he had been told by Mr Hove.
165. In addition, it is not possible that Mr Kriel had been given specific authority to sign a subordination agreement that would "*lapse and be of no further force or effect, one week after the date on which Sagarmatha was scheduled to be listed on the JSE exchange*". It was Mr Kriel's evidence that it was during the telephone conversation on 1 December 2017 that Mr Hove had referred to a lapsing date one week from the date of scheduled listing. No such date was previously mentioned, and the subordination agreement had not been raised before 1 December 2017.
166. That representation was not known to the SIG board members on 22 November 2017. No-one on the board would have considered a seven-day period from the scheduled listing to be meaningful at the time, as the

November 2017 resolution preceded the telephone conversation during which, according to Mr Kriel, such a duration was for the first time mentioned. In my view this cannot sensibly be read as a limit to Mr Kriel's authority.

167. It is also relevant that the agreement that was signed by Mr Kriel was a standard subordination agreement. It was not drafted at the behest of SIM. It was a template prepared by Grant Thornton, the auditors for the purposes of the listing of Sagarmatha. Grant Thornton required the subordination agreement because SIM was a target company in the listing of Sagarmatha, in order to be able to certify SIM as a going concern. Thus, the purpose of the subordination agreement was to subordinate SIG's loan claim, in order that Sagarmatha could list.
168. Signing a subordination agreement that enabled SIM's financial statements to be prepared on a going-concern basis, which would facilitate the listing of Sagarmatha, plainly fell within Mr Kriel's authority.
169. In my view, Mr Kriel had actual authority to sign a subordination agreement which was regarded as necessary by the auditors for the listing of Sagarmatha. Mr Kriel testified as much, his understanding was that he was authorised to sign documents necessary for the listing of Sagarmatha, and that a subordination of the loan claim fell within that category of documentation.
170. SIM contends further that the subordination agreement which was concluded retained that purpose, when it was concluded.

171. It was clear, at that stage that all parties believed the listing would happen, as confirmed by Mr Kriel's testimony:

"Well, you signed it on the understanding that Sagarmatha was going to be listing in not too long a time. Therefore, as Mr Hove said to you, once the listing took place the subordination would fall away. What you didn't take care to ensure ...[indistinct] contemplated was what happens in the event that Sagarmatha does not list. That's the extent of it. --- Well, it's true that we never discussed that, because the clear expectation from everybody was that it would list December 2017, February 2018, late in April 2018. There was never even a suggestion that it would not list."

172. Had Sagarmatha listed in March or April 2018, or even later in 2018, no one would have said Mr Kriel lacked the requisite authority to conclude the subordination agreement.

173. However, the problem is that Sagarmatha didn't list, and so there are unintended consequences which arise from the subordination agreement – at the time, what both parties thought would be a relatively short-lived subordination, has now continued for a period of years, as a result of the failed listing.

174. I agree with SIM that SIG's claim of lack of authority point is based on hindsight. Because the failed listing of Sagarmatha was not expressly contemplated, neither party at that stage contemplated the present outcome, nor was it catered for in the subordination agreement. In my view, the subsequent events, in particular the failed listing, do not detract from the fact that the subordination agreement, when it was concluded, retained the purpose of aiding the listing. The fact that the parties (and SIG in particular) did not consider or address the implications of the listing failing in the

subordination agreement, nor contemplate that the subordination may endure indefinitely, cannot divest Mr Kriel of his actual authority.

175. Mr Kriel also did not insist on obtaining a copy of the subordination agreement – he left the subordination agreement at Dr Survé's offices after signing it. That suggests that he was unperturbed at the time about any issues of authority, and was not going to seek ratification from the board of SIG for the subordination agreement, as the agreement fell within his mandate and there was no need for ratification. His evidence that he had in fact asked for copies of the agreement, but there was a reluctance to provide a copy (presumably from Ms Nyandoro) was unconvincing. The evidence to that effect also ran counter to his reason given for his then not insisting on a copy, when pressed, namely the trust relationship with his SIM counterparts.

176. Moreover, no-one from SIG told Dr Survé or Mr Hove or anyone else at SIM that Mr Kriel had authority to sign a subordination agreement but only with certain wording or only on a limited basis. Mr Kriel confirmed that SIM's representatives did not check whether he had the necessary authority - in any event he thought it was unnecessary for them to do so, because of the way it was explained to him and understood - it would be short-term, it would be only for the purposes of aiding the listing of Sagarmatha and to prevent creditors in the run-up to the listing to put SIM into liquidation.

177. SIG seeks an interpretation of the authority that it was limited to a subordination which terminates if the Sagarmatha listing fails. There is no such limitation to the authority of Mr Kriel in the November 2017 resolution. It

does not say he can sign any documents that are necessary for the sale agreement relating to the listing of Sagarmatha, but if it's a subordination agreement, then the subordination agreement would have to terminate on a specific date or if the listing doesn't take place within a specific period, then the subordination agreement terminates.

178. SIG maintained that Mr Kriel had authority to sign a subordination agreement with different terms. But what are those terms? There is no resolution which permits Mr Kriel to sign a subordination agreement that advances the listing of Sagarmatha, but only, for instance, if it lapses after a specific time period (whether three months, six months or a year, or indeed seven days after listing, as Mr Govender understood, or seven days after the scheduled listing, as Mr Kriel testified).
179. Mr Govender knew this was a subordination agreement and Mr Govender was happy for Mr Kriel to sign, provided that the agreement would fall away on the listing of Sagarmatha. This was not linked to any particular date in Mr Govender's mind – as the scheduled listing date was not yet known - and he didn't think then that Mr Kriel lacked the authority to sign.
180. Furthermore, Mr Govender appreciated that if the subordination agreement had contained a clause saying the subordination will remain in place until one week after Sagarmatha has listed, as he understood to have been conveyed by Mr Hove to Mr Kriel, then the subordination agreement would still be in place.

181. This testimony from Mr Govender was elicited in the context where he had accepted that no further board approval was required for whatever documents were necessary for SIG to exit the SIM investment, that Mr Kriel was authorised to sign the subordination document (on those very terms which had been conveyed to Mr Govender).
182. The question arises, what terms could the subordination agreement include in order for Mr Kriel's authority to be sufficient? As far as everyone was concerned at the time, the non-listing of Sagarmatha wasn't even a consideration. The parties now know that it should have been, but the reality at the time was that it was not. Sagarmatha was going to list, and therefore Mr Kriel could subordinate as per the agreement he signed.

SIG's arguments

183. In countering these arguments, SIG sought to rely on the fact that it did not plead that Mr Kriel had any authority to conclude *the* open-ended subordination agreement contended for by SIM, nor is there any evidence to this effect. SIG's pleadings refer to a limited authority (based on the alleged misrepresentations), and both Mr Kriel and Mr Govender maintained in evidence that Mr Kriel's authority was limited to whatever documents that were necessary for SIG to exit the investment, namely a limited period subordination agreement.
184. SIG claims that SIM's approach to the issue of actual authority starts from a flawed premise: the question is not whether the assertion by SIG that Mr Kriel

had authority to enter into a subordination agreement with a specified purpose and limited duration provides a basis to find that Mr Kriel had authority to enter into a totally different subordination agreement as far as its purpose and duration is concerned. SIG says the correct question simply is whether Mr Kriel was actually authorised by the resolution to enter into *the* subordination agreement, as pleaded in SIG's replication.

185. Although much of the evidence was devoted to the subsequent events, relating to the circumstances under which the subordination agreement was concluded, and the alleged misrepresentations by Mr Hove, which were said to lead to its conclusion, SIG contended that ultimately the question of authority does not turn on such evidence, because its board members could not have been aware of any future representations at the time of authorising the sale agreement in the November 2017 resolution.

186. In summary, SIG says that the construction which SIM affords to the resolution to the contrary – that it indeed granted such authority to Mr Kriel – achieves precisely the opposite of what was intended by SIG's board. Instead of concluding an enforceable sale agreement in order to exit the loan agreement, and to walk away with the proceeds of the sale of Sagarmatha shares three months after the transaction, the November 2017 resolution has the effect that SIG's loan claim is sterilised indefinitely, given SIM's insolvent position.

187. SIG says that the real question to be determined has everything to do with how the resolution should properly be interpreted having regard to the

circumstances that prevailed when the November 2017 resolution was signed by the SIG board of directors.

188. Thus, SIG maintains that in essence the question of Mr Kriel's actual authority boils down to an application of what is now the trite approach to interpretation, namely a resort to text, context and purpose as a unitary exercise.

189. The proper approach to the interpretation of documents is well established. It is the process of attributing meaning to the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. The interpretation of a document is to be approached holistically, simultaneously considering the text, context and purpose.¹⁰ Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹¹

190. SIG maintains that because the proper interpretation of the resolution is a question of law which is exclusively for the court to decide,¹² Mr Kriel and/or Mr Govender's opinions about the interpretation of the resolution, i.e. their interpretation of what authority the resolution gave Mr Kriel, is irrelevant.

191. In my view, the authority issue cannot be determined simply on the basis of a textual interpretation of the November 2017 resolution, divorced from the context in which the subordination agreement was concluded, and the state of mind of

¹⁰ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para [63] – [66]; *KPMG Chartered Accountants v Securefin Ltd and another* 2009 (4) SA 399 (SCA) at [39]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18] – [26]; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para [12]; *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) para [61] to [69]; [76] and [77]

¹¹ *Endumeni supra* para [18]

¹² *KPMG supra* 409G

the signatories who were party to the Subordination Agreement, and from SIG's pleaded case, in relation to the extent to which Mr Kriel was indeed authorised to conclude a subordination agreement.¹³

192. The issue here is not simply what SIG's board intended the resolution to mean, but whether Mr Kriel was authorised to bind them contractually. That inevitably requires an examination of the factual matrix – all the facts proven that show what their intention was in respect of entering into a contract: Mr Kriel and Govender's evidence undoubtedly remains relevant, insofar as it relates to the purpose of the sale agreement and the subordination agreement and the context in which they were both concluded. The interpretive exercise requires the context or an understanding of the purpose of both the November 2017 resolution and the subordination agreement.

The text of the resolution:

193. SIG claims that because neither the written resolution nor the sale agreement makes any explicit reference to a subordination agreement, only to the anticipated listing of Sagarmatha, having regard to the text of the resolution alone, *the* subordination agreement was not related or incidental to the sale agreement and/or its implementation, nor was it reasonable and necessary to give effect to any of the resolutions contained in the written resolution itself.

194. But that is not so. For the reasons already explained, it is plain that the Sagarmatha listing could not proceed in the absence of SIM being audited as

¹³ See comments of Lewis JA in *Novartis v Maphil* 2016 (1) SA 518 (SCA), para's 27 and 28, albeit that the issue there was not what the parties intended their contract to mean, but whether they intended to bind themselves contractually at all.

a going concern, for which purpose the subordination agreement was required. The subordination agreement was thus incidental to the sale agreement and its implementation and both reasonable and necessary to give effect to the agreement.

195. In my view, the November 2017 resolution does not need to expressly mention a 'subordination agreement' in order for it to be included amongst the various types of agreements which could be concluded by SIG's directors. The resolution is not limited to particular agreements – but includes all those which are reasonable and necessary to give effect to the sale agreement, and the listing of Sagarmatha. A subordination agreement falls within that class of agreements.

The context and purpose:

196. SIG claimed that it was undisputed that SIG agreed to participate in the listing and enter into the proposed sale transaction, *the sole purpose* of which was to use it as a mechanism to exit the loan agreement and recover the monies advanced to SIM under the loan agreement. SIG's objective was to sell the shares as soon as possible after listing. The listing was accordingly merely a means towards the plaintiff getting repaid its loan in cash within a short term.
197. SIG argues that a subordination agreement which endures indefinitely and effectively sterilises SIG's loan claim is clearly and directly the antithesis of that objective.

198. In the circumstances, they maintain that the resolution properly interpreted cannot have given Mr Kriel the authority to bind the plaintiff to a subordination agreement that would defer the repayment of the plaintiff's loan claim indefinitely, and on the facts of this case likely into perpetuity.
199. SIG also maintains that an application of these trite principles unequivocally shows that the interpretation for which SIM contends is unbusinesslike and absurd. It says that SIM's argument amounts to saying that a resolution designed to result in an exit by SIG from a non-performing loan into a valuable package of tradeable shares actually includes an authority to destroy the value of the loan in its totality, should the listing fail. SIG claims that no reasonable approach to construction can arrive at this result.
200. I disagree. As was acknowledged in *Endumeni*, views may differ as to the proper construction of an agreement:

“[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.”

201. In my view, it cannot be said that in the present circumstances it is unbusinesslike for SIG to subordinate its loan claim until the company achieves solvency, in circumstances where its best chance for recovering the loan was to convert it into something else namely, shares in the listed entity, Sagarmatha, and in circumstances where there were already contractual

limitations to the timing of recoverability of the debt, and more generally an inability of SIM to repay the loan.

202. It also cannot be said that it is unbusinesslike for a company (which is also a shareholder) to give a director the authority to sign a standard auditor's subordination agreement, which is required by the auditors for it to be able to show that SIM is solvent, SIM being a target company in Sagarmatha's listing.

203. SIG maintains that whereas the sale agreement was for its commercial benefit, the subordination agreement is exactly the opposite – to its commercial detriment. But that was not the case at the time. The subordination agreement was to the perceived commercial benefit of SIG at the time because it would be exiting the loan claim which it had against an insolvent company, in favour of tradeable shares in a listed entity. So, there was a clear benefit to SIG in subordinating its loan, where the purpose is to further the listing of Sagarmatha.

204. Although the usual effects of a subordination agreement are detrimental to recovery,¹⁴ the subordination agreement was signed in a context where everybody expected the listing of Sagarmatha to be imminent, and the subordination agreement had to be concluded because, as a target company of Sagarmatha, SIM needed to be factually solvent.

¹⁴ The subordination agreement contained terms which would bring about all the usual effects of a subordination agreement as described by Goldstone JA in *Ex parte De Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation)* 1993 (1) SA 493 (A) at 504l – 506F.

205. In my view it cannot be said that it is generally to the detriment of SIG to have done whatever is necessary for Sagarmatha to list. There was undoubtedly a big potential upside for SIG, if Sagarmatha had listed.
206. In conclusion, in my view the lack of authority point pleaded by SIG is seeking to retrospectively circumscribe Mr Kriel's authority. At the time when the authority was given, and when Mr Kriel signed the subordination agreement, the Sagarmatha listing was still anticipated. Had it happened, SIG would have swapped the loan for Sagarmatha shares. Retrospectively, and by virtue of the fact that the Sagarmatha listing has collapsed, one cannot wish Mr Kriel's authority away, nor suggest that it subsequently fell away. The question is, at the time that he signed, did he have the authority? I agree that SIG's claim that Mr Kriel had authority to sign a subordination agreement, but not this particular subordination agreement seeks to pass the subordination agreement through the proverbial "eye of a needle".¹⁵
207. I agree with SIM that it is possible to interpret the November 2017 resolution as being limited to signing documents relevant to Sagarmatha's listing and that the subordination agreement is such a document.
208. Consequently, I accept that Mr Kriel had the requisite authority to sign the subordination agreement on SIG's behalf.

¹⁵ *C. I. R. v Strathmore Consolidated Investments Ltd.*, 1959 (1) S. A. at p. 476; *C. I. R. v Richmond Estates (Pty.) Ltd.*, 1956 (1) S. A. at p. 607: To show that this particular transaction nevertheless fell outside its trading activities is consequently "*as difficult... as it is for a rope to pass through the eye of a needle.*"

209. Given this finding, I do not consider the alternative claim relating to ostensible authority in any detail, save to say that if I am wrong that Mr Kriel had actual authority, in my view he would nevertheless have had ostensible authority in view of the following.

209.1. SIM was in possession of the resolution.

209.2. It is not in dispute that Mr Kriel had the authority to conclude a subordination agreement. His authority to sign agreements on behalf of SIG is commensurate with his position as a director of that company and the General Secretary of SACTWU, a position he had held since 2009. It was acknowledged by Mr Govender that Mr Kriel's position is an important one and that he has the requisite skills to hold such an important position. Mr Kriel himself testified that he had over thirty years' experience of negotiating contracts. He could be relied on to know what he was doing. In a case of uncertainty, he had Mr Govender to assist him.

209.3. No-one from SIG advised SIM that Mr Kriel's authority to conclude a subordination agreement was limited.

209.4. No-one told SIM that Mr Kriel could only sign such an agreement if it was going to lapse one week after the date on which Sagarmatha was scheduled to be listed on the JSE.

209.5. In the premises, Mr Kriel had at least ostensible authority to conclude the agreement.

209.6. In so far as prejudice needs to be shown, this was established by the evidence of Mr Hove, who testified that if he had been told that Mr Kriel lacked the requisite authority, he would have requested a board resolution appointing someone to sign the agreement.

210. Prior to considering the defences relating to mistake and misrepresentation, I briefly deal with the issue of credibility findings.

Credibility findings

211. Factual disputes ordinarily fall to be resolved by applying the principles set out in *Stellenbosch Farmers' Wineries Group Ltd and Another v Martell et CIE SA and Others* 2003 (1) SA 11 (SCA).¹⁶ However, both parties emphasised during argument that despite the differences between their versions - credibility findings are unnecessary in order for the Court to reach its judgment, and that the matter could be resolved simply by assessing the balance of probabilities of what was said in evidence.

212. I agree that that is the case - the differences between their evidence as to what was said are matters of nuance and detail. They relate to a conversation which occurred almost five years previously. I accept, that both Mr Kriel and Mr Hove were testifying to the best of their recollection. I accept

¹⁶ At para 5.

too that those recollections, inevitably, are coloured by a degree of personal bias: Mr Kriel would like there to have been material misrepresentations made by Mr Hove, and Mr Hove would like these not to have been made, because that would absolve him of the suggestion of having set out to mislead Mr Kriel.

MISTAKE

213. SIG maintained in respect of its reliance on the doctrine of reasonable mistake, that the evidence unequivocally demonstrates that the subordination agreement is unenforceable because of material mistake regarding its purpose and duration. SIG says SIM induced the plaintiff to enter into the subordination agreement based on misrepresentations regarding the purpose and/or the duration for which the subordination agreement would apply and be extant, the first defendant having represented that the subordination agreement would be used to facilitate the listing of Sagarmatha (and by inference for no other purpose) and/or that it would be for a limited duration which would not extend beyond the expected date of Sagarmatha's listing. Alternatively, and in any event, when the subordination agreement was concluded, SIM knew, alternatively reasonably ought to have known that when the plaintiff signed the subordination agreement it had no intention to subordinate its loan for any purpose other than to facilitate the contemplated listing of Sagarmatha, or for any duration that would extend beyond its listing or the listing failing.
214. In the alternative, SIG maintains that in any event the subordination agreement is voidable based on the first defendant's aforesaid material

misrepresentations regarding the purpose for, and the duration of the subordination agreement, which representations caused the plaintiff to enter into the subordination agreement.

Onus

215. The onus in the parol evidence rule is not readily discharged: “*Unless the mistaken party can prove that the other party knew of the mistake, or, as a reasonable person, ought to have known of it, or caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge.*”¹⁷
216. In particular a party cannot rely on its own mistake to avoid a contract which was solely its fault. In this regard, in *Botha v RAF*, the Supreme Court of Appeal said the following:¹⁸

“However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, that is, failing to do his homework; in not bothering to read the contract before signing; in carelessly misreading one of the terms; in not bothering to have the contract explained to him in a language he can understand; in misinterpreting a clear and unambiguous term, and in fact in any circumstances in which the mistake is due to his own carelessness or inattention....”

¹⁷ Bradfield *Christie's The Law of Contract in South Africa* 8th ed p 385 ('Christie').

¹⁸ *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA) para 11, citing a passage from the 6th edition of *Christie*. See also *Absa Bank v Jansen van Rensburg* 2015 (5) SA 521 (GSJ) at para 18 – 19.

The sole purpose misrepresentation

217. The first alleged misrepresentation (and the only one in issue given the conclusions which I have reached above in relation to the second and third misrepresentation) is the 'sole purpose' representation.
218. SIG maintains that the "sole purpose" was implied where the context of the discussion was the imminent listing of Sagarmatha, and the subordination agreement was to be put in place to achieve that.
219. As described above, the context in 2017, was that SIM was one of the acquisition targets of Sagarmatha as part of the listing. One of the requirements from the JSE in respect of the listing requirements is for the audited financial statements of any target companies to be included in the prelisting statement. For the SIM financials to be included they need to be audited and given that SIM was insolvent there was a need for a subordination agreement to be put in place. The essence of the subordination agreement was to set aside or put aside the claims of the creditor in favour of other creditors. SIM needed the subordination agreement so that the auditors would then be able to sign off SIM's financials as a going concern.
220. Mr Kriel did not testify expressly that Mr Hove had represented to Mr Kriel that the subordination agreement would only be used by SIM in the context, and for the purpose, of the listing of Sagarmatha, if and when the auditors of Sagarmatha or the JSE required SIG's claim to be subordinated for purposes of the listing of Sagarmatha.

221. SIG however submitted that this was the tenor of Mr Kriel's evidence, that a 'sole purpose representation' was made in circumstances where they maintain that:

221.1. the first misrepresentation arose as a result of Mr Hove's silence, when he limited his response to say that the duration of the subordination agreement is of no consequence because it will fall away on listing of Sagarmatha, without proceeding further to also mention that if there is no listing, it will be used for audit purposes thereafter; and

221.2. objectively speaking, Mr Hove had a duty to draw Clause 4 and 5 of the subordination agreement to Mr Kriel's attention, and the Grant Thornton Guidelines.

222. SIG also maintains that the fact that the subordination agreement refers to the SIM debt which was owed as at the 2016 financial year end, is indicative of the fact that it was not intended to be indefinite, but tailor made for the year end. In my view, no inference either way can be drawn from that reference as the subordination agreement was prepared by Grant Thornton, not SIG and despite the reference as to the amount then owed – it is on the face of it of an indefinite duration.

223. SIG submitted that because Mr Hove did not expect the listing to fail, he too never thought he would have to use this agreement to stave off SIG. So, its only purpose viewed as between SIG and SIM in that context was the

imminent listing and therefore it was of limited duration. However, SIG's claim was not based on a common intention or rectification, but rather on unilateral mistake.¹⁹

224. SIG claims that the Court can find on a balance of probabilities that in the context, the representation amounted to a sole purpose representation because of what Mr Hove did not say.

228. In its heads, SIG maintained that the nub of Mr Kriel's evidence comes to this: it was represented to him that the subordination agreement would be for a limited purpose, namely to assist with the listing of Sagarmatha, and that it would be for a limited duration connected with the anticipated listing of Sagarmatha which was expected to take place in the next month or shortly thereafter. Based on Mr Hove's representations Mr Kriel did not understand that the subordination agreement he was asked to sign in fact provided that the plaintiff would subordinate its loan claim indefinitely and for an open-ended period.

229. Ultimately, Mr Kriel's evidence in respect of the subordination agreement lapsing after 'seven days from the date of scheduled listing' is not sought to be relied upon – instead SIG now maintains that whether or not Mr Hove said precisely that the subordination agreement would lapse seven days after the scheduled listing date, is on the evidence before the court of little importance.

¹⁹ See observation of Harms JA in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* [1992] ZASCA 56; 1992 3 SA 234 (A) at 238D-E, that "*Rectification and unilateral mistake are mutually exclusive concepts. Rectification presupposes a common intention and unilateral mistake the absence thereof. Logically speaking, the claim for rectification must first be considered.*"

230. It was certainly anticipated by Mr Govender, Mr Kriel and Mr Hove that the listing of Sagarmatha would take place in the relatively near future. It was not contentious that the subordination would come to an end once Sagarmatha listed. As everyone understood, SIG's loan claim would come to an end then, and there would be nothing for it to subordinate.
231. When they discussed the proposed subordination agreement, neither Mr Kriel or Mr Govender considered the possibility that the listing might fail and what the consequences, insofar as the subordination agreement that Mr Kriel was asked to sign, would be.
232. In my view, in the absence of a statement from Mr Hove to the effect that the subordination agreement would lapse in a period of seven days from the date of the scheduled listing (as was initially pleaded by SIG), Mr Hove's expressed belief that Sagarmatha would list fairly soon, and as a result the subordination agreement would be of a limited duration, is not an issue on which a claim of misrepresentation can be founded.
233. As aptly summarised by *Christie*, in the realm of the law of contract "*(a)n expression of opinion that turns out to be mistaken is not a misrepresentation, nor is a speculation, or a prophecy, concerning the future, which is simply one form of expression of opinion, so if the future does not unfold as forecast, the other party normally has no remedy*".²⁰ The exception is where "*the facts are not known equally to both sides, in which case a statement of opinion by the one who knows the facts best may involve a statement of a material fact, for*

²⁰ See *Christie* p. 335, cases cited in footnote 42 to 45.

that party is impliedly stating that he or she knows facts that justify his or her opinion."²¹ The caveat is of course that the opinion is honestly held.²²

234. The legal position is also helpfully summarised as follows:

"Since a representation is a statement of past or present fact, mere expressions of **opinion, forecasts** or statements of intention that prove to be incorrect or are unfulfilled will not usually amount to misrepresentations. However, since 'the state of a man's mind is as much a fact as the state of his digestion', if the speaker does not in fact hold the belief or opinion which he or she expresses, or lacks the will to give effect to his or her statement of intention when he or she makes it, he or she misrepresents his or her own state of mind; and for this he or she may be held liable."²³

235. There is no suggestion that the opinion held by Mr Hove that the subordination would endure for a short period (until the listing of Sagarmatha) was not honestly held. Although SIG had pleaded that *"To the knowledge of Mr Hove the representations were false. Mr Hove was aware when representations were made that the intention of first defendant was to use the subordination agreement for purposes other than the proposed listing of Sagarmatha,"* no evidence was ultimately adduced in support of this allegation by SIG. When pressed in cross-examination, Mr Kriel conceded that this allegation was made simply because SIM was now trying to rely on the subordination agreement, but when the conversation took place on 1 December, *"it was all very clear that we all expected it to list."*

²¹ See *Christie* pp. 335 -6, *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 695C.

²² See *Christie* p. 336, cases cited in footnote 48 to 49 including *Adam, N.O v The Curlews Citrus Farms Ltd.* 1930 TPD 68 at 82-83.

²³ *Hutchison et al The Law of Contract in South Africa* 3rd ed p 122. See also *Feinstein v Niggli and another* 1981 (2) SA 684 (A) at 695C.

236. Thus, there is no evidence that the belief was not in fact held by both parties that Sagarmatha would list and that the subordination agreement would endure for a brief period until its listing.
237. It was clear that Mr Hove was genuinely of the view that Sagarmatha was likely to list soon.
238. Moreover, no evidence was elicited from him to the effect that he (or anyone else at SIM) had special knowledge to the contrary.
239. Thus, I agree with SIM that whilst Mr Hove made certain representations to Mr Kriel, he made no misrepresentations. And Mr Govender was content that Mr Kriel sign the subordination agreement on an assumption that it would endure until the listing of Sagarmatha, and had that term been incorporated, it would still be in force.
240. Moreover, as is evident from the synopsis above, Mr Kriel's testimony boils down to the fact that he read the subordination agreement before signing it, albeit cursorily.
241. The subordination agreement is not lengthy, it is just two pages, and comprises of nine numbered clauses. Clauses 4 and 5 make it absolutely clear that SIG is subordinating its claim until such time as SIM's assets exceed its liabilities.
242. Mr Kriel said that he did not read the document carefully, but he read it. He knew it was *out of sync* with the vendor finance agreements. He recognised

that it was a subordination agreement, and he knew that the effect of the agreement was to subordinate SIG's loan claim against SIM. He confirmed that when he read the document he had seen that there is nothing in its wording that links it to a Sagarmatha listing.

243. The law of contract would not ordinarily permit someone who read a contract, and understood what terms it contains and does not contain, to sign it, and then escape the consequences of that signature on the basis of *iustus error*.
244. Neither of the parties pointed me to a case where a party who has actually read the contract was able to rely on *iustus error* in order to avoid the contract.
245. I agree with SIM that what is meant by *iustus error* is a reasonable or pardonable error. *Error* cannot be said to be *iustus* where a party has read a contract, the terms of which are either at variance with what that party alleges her understanding of the contract to have been or do not include a key provision that the party believes should be in the contract.
246. By virtue of the doctrine of quasi-mutual assent, contractual liability may ensue even when there is no consensus. When a person signs a contract they are bound by the ordinary meaning and effect of the words which appear over their signature. The starting point with a written contract is the principle of *caveat subscriptor* which 'is a sound principle of law that a man when he signs a contract, is taken to be bound by the ordinary meaning in respect of the words which appear over his signature'.²⁴

²⁴ *Burger v Central South African Railways* 1903 TS 571 at 578 (per Innes CJ), *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 1 (per Cloete JA).

247. The circumstances in which a party can set up their unilateral error as a defence to a claim based on contract are limited. They were set out as follows by Schreiner JA in the *Potato Board* case:²⁵

‘Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (*error*) would have to be reasonable (*justus*) and it would have to be pleaded.’

248. The following passage from the judgment of Fagan CJ in *George v Fairmead* is to similar effect:²⁶

‘When can an *error* be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? ... If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound.’(Citations omitted)

249. According to Harms JA, in the *Sonap Petroleum* case, the decisive question to be asked and answered in cases where reliance is placed on *iustus error* is:²⁷

‘... did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? ... To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party’s intention; secondly, who made that representation; and thirdly, was the other party misled thereby? ... The last

²⁵ National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) at 479G-H.

²⁶ George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 471A-D.

²⁷ Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis 1992 (3) SA 234 (A) at 239I-240B. See also: *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) at para 9.

question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?’

250. Foundational to this is a much-quoted *dictum* of Blackburn J:

“If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”²⁸

251. To this can be added the following passage from the judgment of the Supreme Court of Appeal in *Hartley*:

“She presented the appellant and his wife with a document which the appellant appreciated would constitute his contract with the respondent and which he realised would contain terms and conditions, and could well contain exclusions, which it did. The fact that the appellant’s wife did not appreciate this and (at best for the appellant) did not understand the meaning, contents or import of the document, is irrelevant. The appellant himself was indifferent to the provisions of the conditions of carriage which he knew would be contained in that document. He did not bother to read them. There was no obligation on Mrs Barnard to point out the possible consequences. To hold otherwise would be to introduce a degree of paternalism in our law of contract at odds with the caveat subscriptor rule.”²⁹

252. Consequently, there is only a duty to inform the other contracting party where there are terms that could not reasonably have been expected in the contract.

253. In this case Mr Kriel claimed that he was misled by the failure of Mr Hove to inform him that the subordination agreement would be used beyond the Sagarmatha listing, in the event that it failed. If the approach in *George v Fairmead* is adopted and the question is asked whether he, as the party seeking to resile from the agreement, is to blame for the situation in which he

²⁸ *Smith v Hughes* [1861-73] All ER Rep 632 (QB) at 637H. The passage is quoted at 239H-I of *Sonap Petroleum*.

²⁹ *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA) para 9 (*per* Cloete JA).

found himself, the answer is clear. It was his own failure to check the documents that he was signing – a not particularly onerous task for an experienced trade unionist – that led to the situation in which he found himself.

254. If one asks the question postulated in *Sonap*, where Harms JA cautioned against a notion of blame – and one considers on the facts whether Mr Kriel led SIM to believe that his declared intention to be bound by the subordination agreement represented his actual intention, in my view the answer must also be in the affirmative, as elaborated below.

255. On either basis it is not open to Mr Kriel to rely upon the defence of *iustus error*.

256. In *George v Fairmead* the Appellate Division said: “*When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature.*”³⁰

257. What the person who signs an agreement without reading it does is to assume a risk: the risk of being bound to the terms contained in the agreement as though they were aware of those terms and expressly agreed to them.³¹ Thus in *George v Fairmead*:

“But he knew that he was assenting to something, and indeed to something in addition to the terms he had himself filled in. If he chose not to read what that

³⁰ *George v Fairmead supra* at 472A (per Fagan CJ).

³¹ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 34.

additional something was, he was, with his open eyes, taking the risk of being bound by it. He cannot then be heard to say that his ignorance of what was in it was a *justus error*.”³²

258. The basis of the caveat subscriber principle is the doctrine of quasi mutual assent, i.e. was the other party reasonably entitled to assume that the signatory, in signing the document, signified his/her intention to be bound by it?³³

259. Thus the *caveat subscriber* rule has been aptly called “the ‘duty to read’ rule”.³⁴ Only in exceptional circumstances have our courts recognised that a party who has signed a contract may escape its consequences. There is a useful summary of such circumstances in the judgment of the High Court in *Dlamini*:

“The cases show that mutual consent is absent when a party is unaware of the terms of the agreement. A party may be unaware because the agreement contains terms that were not expected or were not disclosed. Or a party may be misled, misinformed or not informed; or the form and get-up of the agreement are inaccessible.”³⁵

260. What is not said there is that a party may avoid a contract despite having read it. This makes sense, for two reasons.

260.1. First, a contracting party enjoys protection from the enforcement of the contract on its terms only “if he/she is under a justifiable misapprehension ... as to the effect of the document”.³⁶ It may be notionally possible for a misapprehension to be justifiable despite the

³² *George v Fairmead* at pp. 472-473.

³³ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 A at 471B.

³⁴ *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C) at 524J.

³⁵ *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) para 54 (per D Pillay J).

³⁶ *Brink supra* at 421H-422A.

contract having been read. I agree with SIM, that in the nature of things it is well-nigh impossible for a party to discharge the onus of proving a justifiable misapprehension where that party had actually read the contract.

260.2. Second, a signatory's mistake is not justifiable simply because of a misrepresentation by the other party. The further question to be asked is whether a reasonable person would have been misled.³⁷ I also agree with SIM that it is well-nigh impossible, in the nature of things, to show that a reasonable person *who had read the contract* would have been misled as to its terms.

261. In support of this proposition, SIM pointed to the facts of the multiple cases on *iustus error*, all of which pertained to cases where the contract had been signed without reading it.³⁸

262. SIG by contrast sought to rely on the English case of *Curtis v Chemical Cleaning and Dyeing Company Limited* 1951 (1) A.E.R. 631 (C.A.), cited with approval in *George v Fairmead*,³⁹ in which the facts were summarised as follows:

³⁷ *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 240B; *Brink supra* para 8; *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) para 9.

³⁸ Including *inter alia*: *Shepherd v Farrell's Estate Agency* 1921 TPD 62 at 68, *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A) at 901D-E; *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (EDLD) at 109 -110; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 A at 469C, and at 472-473; *Fourie NO v Hansen and another* 2001 (2) 823 (W) at 829F; *Standard Credit Corporation Ltd v Naicker* 1987 (2) SA 49 (N) at 50 I-J (*per* Milne JP); *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 237G; *Goldberg and another v Carstens* 1997 (2) SA 854 (C) at 861A-I; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 74 I-J; At 77 I (*per* Malan JA); *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC); *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 1 (*per* Cloete JA); *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD).

³⁹ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 A at 471E-H.

“the plaintiff, when delivering a dress to the defendant company for cleaning, was asked to sign a document which contained a clause that the dress “*is accepted on condition that the company is not liable for any damage howsoever arising.*” She asked why she had to sign it, and was told that the defendants would not accept liability for damage done to beads and sequins on the dress : whereupon she signed it without reading the whole document.”

263. Denning LJ, in holding that although the firm’s assistant had made the representation innocently, as the plaintiff had relied on it, she was not bound by the wider indemnity contained in the document, stated as follows.

“In my opinion any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression that is enough if the false impression is created knowingly, it is a fraudulent misrepresentation. If it is created unwittingly, it is an innocent representation but either is sufficient to disentitle the creator of it to the benefit of the exemption. It was held in *R v Kylsant (Lord)* (3) that a representation might be literally true but practically false not because of what it said but because of what it left unsaid. In short because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation.”

264. *Curtis* is distinguishable from the present scenario, where Mr Kriel read the document.

265. SIM also emphasised that the application of the principle of *caveat subscriptor* is an important matter of policy, as the Supreme Court of Appeal has made clear:

“Human experience has shown that contracting parties often attempt to evade their contractual obligations by denying that they were aware or assented to the terms of an agreement. This is why our courts adopted the caveat subscriptor rule years ago. This entails that a person who claims not to have read or appreciated the terms to which he has bound himself cannot generally escape the consequences of not having read the document before signing it. In other words, he has assented to what appears in the document above his signature.”⁴⁰

⁴⁰ *Edwards v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 316 (SCA) para 47.

266. That passage refers to a person who “*claims not to have read or appreciated*” the relevant terms. Although neither of the parties pointed to a case in which *iustus error* was successfully raised by a person who had read the document before signing it, this extract does suggest that such a signatory *may* be able to escape the consequences of the contract on the grounds of not having understood its terms.
267. However, I agree with SIM that this would apply only in the most unusual circumstances. The defence of *iustus error* would not be available to the person who *realised* that she did not understand the terms. As the Appellate Division said in *Wallach*, “*if she did not know what she was signing, she should not have signed it*”.⁴¹
268. Even a person who read the contract and *misunderstood* its terms would have only the very narrowest of gaps open to them to escape the consequences of signing. A mistaken party is ordinarily unable to escape from the contract if the mistake was their own fault, which includes failing to do their homework, carelessly misreading the terms, not bothering to have the contract explained to them in language they can understand, and misinterpreting a clear and unambiguous term.⁴²
269. I agree that in the present circumstances SIG is unable to squeeze through that narrow gap. The mistake – if mistake it was – was due to SIG’s “*own carelessness or inattention*”.⁴³ Mr Kriel, with all his experience of contracts,

⁴¹ *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 261D.

⁴² Bradfield *op cit* p 386. The text from the 6th Edition is cited with approval in *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA) para 11.

⁴³ *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA) para 11.

his obvious abilities as longstanding General Secretary of an important trade union and director of SIG, should have considered the subordination agreement more carefully before signing it, if he intended to have the subordination endure for only a short period. On the face of it, the agreement provides for the subordination to continue until SIM is factually solvent. These provisions are not tucked away but assume centre stage in the agreement. Nor is any special expertise required to see that the agreement does *not* provide for lapsing of the subordination on any particular date, whether stipulated specifically or linked to a named event.

270. The manner in which Mr Kriel approached the signing of the agreement is demonstrated also by the fact that he called Mr Govender, started reading the agreement to him, but didn't read the entire agreement. Mr Kriel did not discuss with Mr Govender the difference between what he had understood from his discussion with Mr Hove and what the written document contains. Mr Govender too was unconcerned as to its contents when advising Mr Kriel, did not insist on it being read to him, and accepted that had the subordination agreement incorporated the express terms which he had understood it to include, it would still be extant.

271. It is apparent that no-one, in early December 2017, gave serious consideration to the question of what would happen to the subordination if Sagarmatha were not to list in the near future, or at all. There was always and inevitably a risk that Sagarmatha would not list – yet the subordination agreement does not address that risk. By not insisting that the agreement

stipulate that the subordination lapse at a certain specified date – by instead concluding a contract in terms of which its loan claim would remain subordinated pending solvency of SIM – SIG assumed the risk of Sagarmatha's not listing.

272. I agree with SIM that SIG's case is dependent on the kind of paternalism which the Supreme Court of Appeal has said falls outside our law of contract and is at odds with the *caveat subscriptor* rule.⁴⁴ Mr Kriel is able and senior and experienced, including in the conclusion of contracts, as was evident from his correspondence preceding the sale agreement, and certain of the other communications referred to. He could certainly read and understand a two-page contract. He had Mr Govender available to him for any assistance he might need. He could also have taken the document away with him to consult with SIG's lawyers about it.

273. Turning to the reasonableness of SIM's reliance on Mr Kriel's signature, what underlies this is the fact that "*a contracting party does not rely on the other party's signature as manifesting assent, when the first party has reason to believe that the other party would not sign if he were aware that the writing contained a particular term*".⁴⁵

274. In *George v Fairmead* the word "*blame*" was used: "*Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he*

⁴⁴ *Hartley supra* para 9.

⁴⁵ *Dlovo supra* at 524J.

has led the other party, as a reasonable man, to believe that he was binding himself?”⁴⁶

275. To the same effect is the Supreme Court of Appeal’s judgment in *Slip Knot Investments 777*: “There is every reason to infer that Slip Knot, as a reasonable person, believed that the respondent’s declared intention to be bound as surety, as evidenced by his signature to the suretyship, also represented his real intention.”⁴⁷ This is sufficient, even in the absence of actual consensus, to found contractual liability.⁴⁸

276. As emphasised by SIM, there are important reasons of legal policy and practicality for adopting this approach, still best explained as follows:

“The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which the Court of law can determine the terms of a contract.”⁴⁹

277. Mr Hove was not even present when Mr Kriel read and signed the subordination agreement. No-one in any position of authority at SIM was present. There was nothing preventing Mr Kriel from calling Mr Govender (as he did) or anyone else whose advice might have been required (as he elected

⁴⁶ *Supra* at 471B-C.

⁴⁷ *Supra* para 11. At para 9 the above-quoted passage from *Potato Board* was also approved. See further *Botha supra* para 10.

⁴⁸ *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) para 18; *Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA) at 332E.

⁴⁹ *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715-716 (*per* Wessels JA).

not to do) to clarify any uncertainty in the document, or to negotiate its terms with SIM before signing.

278. Given the brevity of the document and the clarity of its language, whatever Mr Hove might have said to Mr Kriel, he expected that Mr Kriel would read the document before signing it. He would not have imagined that Mr Kriel would misunderstand the import of the agreement – that he would think, for instance, that the subordination was until a certain date, given the absence of any such date in the agreement.
279. I agree that there is every reason to infer that Mr Hove, as a reasonable person, believed that Mr Kriel's declared intention that SIG's loan claim should be subordinated on the terms set out in the agreement, as evidenced by his signature, also represented his real intention.
280. Mr Hove's subsequent request for a letter of support for SIM's auditors in May 2018 is indicative of the fact that he accepted this to be the case.
281. For these reasons I find that there is no merit in SIG's contention that Mr Hove knew or ought reasonably to have known that SIG was contracting under the mistaken belief that the subordination agreement would fall away if the listing failed.
282. Insofar as the negotiations after the failed listing and the subsequent conduct of SIM and Dr Survé is concerned - in my view the various attempts made to resolve the matter commercially and for SIG to repay the loan, whilst SIM still

had the support of the PIC, do not serve to undo the terms of the subordination agreement.

Material misrepresentation

283. The party seeking to avoid a contract on the ground of misrepresentation must prove the following elements of his case, as summarised by Colman J in *Novick v Comair Holdings*:⁵⁰

- “(a) That the representation relied upon was made;
- (b) That it was a representation as to a fact. A promise, prediction, opinion or estimate or exercise of discretion is not a representation as to the truth or accuracy of its content; it can, however, often be construed as a representation that the person making it is of a particular state of mind.
- (c) That the representation was false. In relation to an ordinary representation of fact, what must be shown is that the fact was not as represented. When a prediction, opinion or estimate is relied upon, what must be shown is not merely that it was, or turned out to be, erroneous, but that it did not represent the bona fide view, at the time when it was expressed, of the person who expressed it.
- (d) That it was material, in the sense that it was such as would have influenced a reasonable man to enter into the contract in issue.
- (e) That it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided.
- (f) That the representation did induce the contract. (See eg *Pathescope (Union) of South Africa Ltd v Mallinick* 1927 AD 292 at 307 - 8.) That, as I understand it, does not mean that the misrepresentation must have been the only inducing cause of the contract. It suffices if it was one of the operative causes which induced the representee to contract as he did.”

284. Where the victim of a misrepresentation is a company, it must show the effect of the misrepresentation on the mind or understanding of the individual who decided or advised that the company should enter into the contract.⁵¹

⁵⁰ *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W) at 149 -150, *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) para [14].

⁵¹ *Alliance Assurance Company Limited v Lewis* 1958 (4) SA 69 (SR) 76F – 77B.

285. I have already dealt with why in my view, the statements of Mr Hove did not constitute a misrepresentation.
286. Although misrepresentation has been raised as a separate ground for vitiating the subordination agreement, it does not in fact raise any separate questions for determination. What misrepresentation during the negotiations preceding the conclusion of a contract does is to induce mistake in the mind of the other contracting party.
287. Also relevant, and as explained by Brand JA in *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 at 353E – the present matter is not one where the defence was one of misrepresentation by Mr Kriel in the form of an omission: of the non-disclosure of the indefinite subordination or the use of the agreement if the Sagarmatha listing failed. The true issue in this case is not one of misrepresentation by omission. It is one of dissensus. Accordingly, an investigation, along the lines established in cases concerning delictual liability for negligent misrepresentation by omission, such as *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) and *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA), as to whether Mr Hove was under a legal duty to refer Mr Kriel to the actual duration in the event of a failed listing, is not called for.
288. SIG sought to rely on *Curtis* and on *Sampson v Union and Rhodesia Wholesale Ltd (In Liquidation)*⁵² in support of the contention that a

⁵² 1929 AD 468

misrepresentation innocently made during contractual negotiations allows the representee to claim rescission and restitution:

‘For a party to a contract to say: "I put this meaning on that clause" is a statement of fact, and as far as he is concerned it will bear that construction even if A would have borne a different construction in law, had he said nothing about it. It would be most inequitable to allow the party who induces the other party to sign by telling him what he means by a clause in the contract to turn round after the contract has been signed and say: "you ought not to have been misled by my assurance that I would always give the same meaning to the contract which I gave to it when I induced you to contract; you ought to have been more vigilant and ascertained the true legal meaning of the clause."

...

if, in order to induce you to contract, a party states as a fact that a clause means such and such and that you can rely upon it that this is the meaning he will abide by. If in such a case you accept his assurance and sign the contract, you can resist his claim if he insists on giving the clause a different meaning even if such meaning is the true legal construction. To extract money from the other party under such circumstances is an unconscionable act...’

289. I agree with SIM that *Sampson* is distinguishable from the present matter, given that the innocent party entered into the contract in the mistaken belief, induced by the other party’s representation, that the parties were *ad idem* as to the meaning of the particular clause in question, which is not the case here.
290. SIG also sought to rely on the part of the judgment in *Brink*⁵³, where Cloete JA quoted from *George v Fairmead* and then said that “*it would be unconscionable for a person to enforce the terms of a document where he misled the signatory*”; and that if the misrepresentation is material, “*the signatory can rescind the contract because of the misrepresentation, provided he can show he would not have entered into the contract if he had known the truth*”. In other words, the signatory who seeks to resile was under a mistaken

⁵³ *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) at 426 C-D.

belief as to the meaning of the contract, based on the other party's misrepresentation.

291. As mentioned above, although SIG submitted that a scenario where the subordination agreement could be used by SIM to support SIM's going concern status on an open-ended basis, unrelated to the facilitation of the listing, in the event that the listing should fail, was present in Mr Hove's mind at the time when the subordination agreement was presented to Mr Kriel for signature, in my view that submission was not supported by the evidence.
292. There was no concrete evidence in support of the allegation that Mr Hove knew Sagarmatha wouldn't list on 1 December 2018, and yet he kept the subordination agreement in his back pocket to prevent any claim for repayment.
293. Mr Hove also didn't have exclusive knowledge of facts nor evidence to the contrary, which was not within Mr Kriel or Mr Hove's knowledge.
294. Neither party's witnesses testified that the subordination agreement was 'only' to be used for the listing of Sagarmatha. SIG ultimately argued that this representation was implicit - and could be assumed given the context in which the representation was made namely the imminent listing of Sagarmatha.
295. Both parties were extremely confident that the listing would proceed, and that it would occur within a relatively short time frame. As a result, nobody considered the alternative scenario - where Sagarmatha did not list, including Mr Hove. In those circumstances it cannot be said that Mr Hove's views on

the duration of the subordination – that it would be of short duration until the listing – was a misrepresentation. How could it be? His view was shared by Mr Kriel and Mr Govender.

296. Given these findings, SIG's defences based on the allegations of misrepresentation must fail. That is because of onus: if the probabilities are evenly balanced (or balanced in favour of SIM) SIG would not have established its special reasons for avoiding the subordination agreement, and its replication cannot succeed.

Does the *in duplum* rule apply to the capitalised interest which accrued prior to the maturity date of the loan?

296. SIG claimed that the interest on the loan agreement which had been capitalised prior to the maturity date of 14 August 2020 does not fall foul of the *in duplum* rule, as it did not comprise 'arrear' interest.
297. Clause 3.3.1 read with clauses 1.2.22, 1.2.23, 1.2.33, 1.2.43, 1.2.52 and 1.2.58 of the loan agreement provides that interest shall be payable from signature date until maturity date at the rate of 500 basis points above JIBAR, such interest to be calculated daily on the outstanding amount – which includes both capital and (capitalised) interest – and compounded every three months (the interest date).
298. In terms of clause 3.3.2, all interest accrued during the intervening three-month period shall be paid on the interest date (i.e. every three months from

date of advancement of the loan). This is however subject to a proviso: to the extent that SIM has insufficient funds to pay the accrued interest, the interest will be capitalised on the interest date.

299. In terms of clause 14.5, interest shall accrue on the capital amount at the applicable default rate from the due date for payment of any amount not paid on such due date to the date of actual payment in full. The default rate is, in terms of clause 1.2.16, a rate which is 200 basis points above the relevant rate, which means a rate of 700 basis points above JIBAR.
300. Clause 3.4 which is headed "*Repayment of Facility*" provides that the borrower shall irrevocably repay the "*Outstanding Amount*" to the lender in full on the Maturity Date. Clause 1.2.43 defines "*Outstanding Amount*" to be "*the aggregate amount outstanding under the Facility, including the Capital Advanced and not repaid, Interest (including arrear, default and capitalised interest)*" (my underlining).
301. The loan agreement thus seeks to distinguish between capitalised, arrear and default interest.
302. The transaction is not a pure loan agreement because SIG also acquired a percentage of the shares in SIM, the borrower in terms of clause 2.1.2. In addition, in terms of clause 7.4 SIG would have one board position in SIM and in terms of clause 7.5: "*In addition, SIM would use all reasonable commercial*

endeavours to procure that SIG would be entitled to nominate one director to the board of each of INMSA and Independent Newspapers."⁵⁴

303. The terms of the loan agreement expressly contemplated that in a worst-case scenario, the interest could accrue (and be capitalised) for a period of some seven years for the period up to the maturity date of 13 August 2020, and thus could exceed the capital amount.

304. The quantification of SIG's claim on 28 August 2023 in the amount of R458 606 995.07, indicates that the total amount of interest considerably exceeds the capital amount.

305. In *Oeanate*,⁵⁵ Zulman JA described the *in duplum* rule as follows:

"It provides that interest stops running when the unpaid interest equals the outstanding capital. When due to payment, interest drops below the outstanding capital, interest again begins to run until it once again equals that amount."

306. The *in duplum* rule applies to arrears interest. This was made clear by the Constitutional Court in the case of *Paulsen*⁵⁶ where Madlanga J said that the rule "*provides that arrears interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital*".⁵⁷ Moseneke DCJ in his concurring judgment held the rule to be "*that arrears interest stops accruing when the sum of the unpaid interest equals the extent of the outstanding capital*".⁵⁸

⁵⁴ Being Independent News and Media South Africa (Pty) Ltd and Independent Newspapers Proprietary Limited.

⁵⁵ *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 827H-829H.

⁵⁶ *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC).

⁵⁷ At para [42].

⁵⁸ At para [110].

307. In *Margo v Gardner Shongwe* JA explained as follows⁵⁹:

“[12] It is trite that the in duplum rule forms part of South African law. It is also axiomatic that the in duplum rule prevents unpaid interest from accruing further, once it reaches the unpaid capital amount. However, it must be borne in mind that a creditor is not prevented by the rule from collecting more interest than double the unpaid capital amount provided that he at no time allows the unpaid arrear interest to reach the unpaid capital amount.”

308. An extensive discussion of the historical development of the *in duplum* rule is also to be found in *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A). The judgment refers to: ‘*renteverbod in duplum dat agterstallige rente bo die kapitaalsom nie verhaalbaar is nie*’, ie. an interest ban that arrear interest *in duplum* above the capital sum is not recoverable. The judgment makes it clear that the rule applies to all contracts where a capital sum is owed which is subject to a fixed interest rate.

309. SIG contends that the interest which accrued upon maturity is excluded from the *in duplum* rule, as it is not ‘arrear’ interest, because the loan agreement expressly contemplates that any unpaid interest is capitalised, and is not payable until maturity of the loan in August 2020. They claim that for purposes of *in duplum*, the exercise starts afresh upon maturity of the loan - with R 150 million as the capital portion, and it is the interest from that date which is capped at R 150 million and if it reaches *in duplum*, as that is the ‘arrear’ interest. That point has not yet been reached.

310. The question to be answered is therefore whether interest that is by agreement capitalised every three months during the term of a so-called ‘soft’

⁵⁹ *Margo v Gardner* 2010 (6) SA 385 (SCA). This judgment was handed down whilst *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) was of application, prior to *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC).

loan is to be regarded as 'arrear' interest, given that it is not yet due and payable.

311. The case law suggests that such interest does fall within the term.

312. Wallis JA in the SCA judgment in *Paulsen* confirmed the meaning of 'arrear'⁶⁰:

"Once interest is payable on a debt the in duplum rule potentially comes into play. The effect of that rule is clear. Where a debt is owed and bears interest, the amount of such interest may not exceed the capital amount. It was argued that this restriction only applied to arrear interest but, as the cases show, that expression merely means the accumulated interest on the amount in arrears. It excludes amounts already paid by way of interest and relates only to interest that has accrued but is unpaid."

313. The answer is also provided by the description given by Zulman JA to the capitalisation of arrear interest in *Oeanate*,⁶¹ the leading judgment on the *in duplum* rule prior to *Paulsen*. There the interest is clearly in arrears, and capitalisation of it does not change its character from arrear interest to something different. The SCA quoted with approval from the judgment of Selikowitz J in the Court *a quo*:⁶²

"Words like 'capitalisation' are used to describe the method of accounting used in banking practice. However, neither the description nor the practice itself affects the nature of the debit. Interest remains interest and no methods of accounting can change that."

314. In this regard I agree with SIM that regard must be had to the "*origin*" or the "*nature*" of what has been capitalised in order to determine whether it is in fact

⁶⁰ *Paulsen and Ano v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) at para 17.

⁶¹ *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 827H-829H.

⁶² At 828G.

capital, or whether it is in fact rather arrear interest under a different guise.⁶³

In the present case, the interest remains interest, regardless of 'capitalisation'.

315. SIG sought to rely on the case of *Bellingan*, where Tuchten AJ expressly held that the *in duplum* rule applies only to unpaid arrear interest, and not to "every case in which interest exceeds the capital and remains unpaid", and had added: "There is no reported instance that I have found or to which counsel have referred me where the recipient of a long-term loan was excused payment of part of the interest which had accrued on the ground that ultimately such interest exceeded the capital sum"⁶⁴.

316. SIG also contended that the present matter is aligned the sentiments of Blieden J in *Sanlam Life Assurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W):

"[The] in duplum rule is confined to arrear interest and to arrear interest alone. In my judgment the reason for this is plain: it is to protect debtors from having to pay more than double the capital owed by them at the date on which the debt is claimed. It is not to punish investors who are entitled to more than double their investment because the addition of interest to their capital investment would produce such a result.

Indeed, most owners of single capital annuities and similar investments rely on the situation where the party with whom they have invested their funds, who in this case would be their debtor, is liable to pay to them sums of money frequently in excess of double the initial investment. Such debtors do not require the protection which is afforded the debtor who has the burden of paying arrear interest on money he owes to his creditor.

It could never be public policy to prevent an investor of an amount of money from getting more than double his money because he has invested such money over a period of time and has by agreement delayed receiving the fruits of such money in order to achieve the receipt of an increased amount of interest.

Counsel's reliance on the LTA Construction case and that of *Niekerk v Niekerk* 1 Menzies 452 for the submission that interest does not have to be in arrear for the *in duplum* rule to apply is, in my view, unfounded. The fact that the capital amount in each of these cases had either not been ascertained or agreed to at the date interest started to run does not detract from the fact that the interest

⁶³ *Oeanate*, at 829C-D, again quoting with approval from the judgment of the Court *a quo*.

⁶⁴ *Bellingan v Clive Ferreira & Associates CC and others* 1998 (4) SA 382 (W) at 399B-401G.

claimed was in fact arrear interest. This is wholly different from the present case, where interest was at no time in arrear, but was to be calculated as future interest in the relevant time period involved.”

317. An extract from this passage of the High Court judgment in *Sanlam Life Assurance* was quoted with approval by the Supreme Court of Appeal in *Ethekwini* per Maya AJA (as she then was).⁶⁵ In *Ethekwini* in the context of a sale of immovable property the SCA found that the *in duplum* rule is not applicable unless interest is payable on a debt in arrears. The sale was contingent upon the seller obtaining a rezoning, and if the rezoning was refused, the agreement permitted the purchaser to cancel the agreement and reclaim “*all amounts of money retained by or paid to the Seller together with interest thereon calculated from the date of payment by the Purchaser to the date of repayment by the Seller to the Purchaser at the rate of 15,5% per annum compounded monthly in arrears...*”. The purchaser opted to cancel the agreement, and claimed the sum of R4 049 369,96 from the appellant, which significantly exceeded the original capital payments of R1 141 153, 48. The balance was accumulated interest calculated at the rate of 15,5 per cent, compounded monthly in arrears, from the various dates of payment to the appellant. The seller claimed that the purchaser’s claim was subject to the *in duplum* rule and that the respondent was, therefore, only entitled to the capital sum and interest not exceeding such capital sum. In that context, the SCA found that the facts showed that the parties did not intend the interest clause to be ‘interest’ in the ordinary or conventional sense. As interest ran only if the sale transaction did not come to pass, “*it was meant to serve as compensation, only in that event*”, and concluded that “*the parties*

⁶⁵ *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 All SA 325 (SCA) para 10.

unambiguously meant it as a means of formulating a fair and proper restitution for what had been paid and received."⁶⁶ That approach is consistent with Blieden J's approach in *Sanlam Life Assurance* where he too confined the application of the *in duplum* rule, and distinguished 'interest' taken into account in the price payable for acquiring an immoveable property (in that case after the exercise of a put option by the seller), from arrear interest.

318. In my view, SIG's reliance on the distinction drawn by Blieden J for the proposition that the *in duplum* rule does not apply to interest which is not payable, although it has accrued, as this is not 'arrear' interest, is misplaced.
319. The loan agreement is distinguishable from the type of agreements relating to the sale of immoveable property at issue in *Ethikwini* and in *Sanlam Life Assurance*.
320. Although it is superficially attractive to carve out the loan agreement in the manner described by Blieden J and treat it akin to an investor where the party with whom they have invested their funds is liable to pay to them sums of money frequently in excess of double the initial investment, I cannot find any legal basis upon which to exclude SIM from the ordinary category of debtors who require the protection which is afforded the debtor who has the burden of paying arrear interest on money he owes to his creditor.
321. The fact that the present context is that of a 'soft-loan', containing express terms which had the effect that (a) no interest would be required to be paid

⁶⁶ At para [15]. See also

until the maturity date in August 2020; and (b) if that was the case, the interest which was payable on maturity of the loan would, by some margin, exceed the capital amount, does not detract from this.

322. In the present instance, the unpaid arrear interest has reached, and exceeded, the capital amount. Capitalising it, whether by agreement or by practice,⁶⁷ does not change the character of the debt: it remains arrear interest.⁶⁸

323. Moreover, a finding that the parties expressly contracted out of the *in duplum* rule, by permitting the payment of interest only upon the maturity date of the loan in August 2020, and relying upon the provisions of the loan agreement which distinguish between capitalised interest and arrear interest⁶⁹, would detract from the well-established legal principle that parties cannot by agreement override or waive the *in duplum* rule.⁷⁰

324. I accordingly find that interest accumulates only to the point of *duplum*.

Conclusion

325. The unfortunate cumulative effect of the agreed terms of the loan agreement, the *in duplum* rule and the subordination agreement for SIG is that in all

⁶⁷ Which is what the appellant in *Oeanate* sought to place reliance on: see at 828B.

⁶⁸ Thus in *Paulsen* para 17 Wallis JA said that the expression “*arrear interest ... merely means accumulated interest on the amount in arrears*”.

⁶⁹ Clause 1.2.43 defines “Outstanding Amount” as meaning the aggregate amount outstanding, including the capital amount and “arrear, default and capitalised interest”.

⁷⁰ *Oeanate supra* at 828C-E, *Paulsen* para [122]. *Oeanate* has been overruled by *Paulsen*, but only in regard to the application of the *in duplum* rule pendente lite, i.e. on the question of whether the rule continues to operate once litigation to recover the debt has commenced. The later judgment does not come to any different conclusion regarding any other part of the earlier judgment.

likelihood its loan will not be recoverable from SIM, unless and until it becomes solvent. As the subordination agreement cannot be avoided on any of the grounds raised by SIG, the terms are binding and have unfortunate consequences.

326. Both parties submitted that there is no reason why the usual rule relating to costs should not apply in the circumstances of this case, that the successful party should be entitled to its costs, and it is just and fair that all reserved costs should follow the result.

327. Both parties employed the services of three counsel in this matter and both parties submitted that any cost order should include the costs of three counsel. In my view, the complexity of the matter warranted three counsel, albeit that ultimately many of SIM's defences and SIG's challenges were not ultimately persisted with.

328. In the circumstances I make the following order:

328.1. The plaintiff's claim is dismissed with costs, including the costs of three counsel.

O'SULLIVAN AJ

Acting Judge of the
High Court

APPEARANCES:

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