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

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1451/2010

Heard on: 19/03/2014

Delivered on: 30/07/2014

In the matter between

GEMCORE SAMPLING (PTY) LTD **Plaintiff**

And

SUPERKOLONG (PTY) LTD **1st Defendant**

GEMROCK RESOURCES SA LTD **2nd Defendant**

(in liquidation)

JUDGMENT

PAKATI J

[1] The plaintiff, Gemcore Sampling (Pty) Ltd, is a registered company with its main place of business situated at 7 Monridge Office Park, No 2 Kekewich drive, Kimberley, Northern Cape. The First Defendant, Superkolong (Pty) Ltd, is a registered company with its registered address

in Bloemfontein but has alternative business premises in Kimberley. The plaintiff is claiming from Superkolong an amount of R4m allegedly paid to the Second Defendant, Gemrock Resources (a company in liquidation), and on-lent to Superkolong in terms of a tripartite agreement called a "Memorandum of Understanding" ("MOU") dated 03 October 2008. The signatories to the MOU were the representatives of the plaintiff, as well as Superkolong and Gemrock Resources. Superkolong is one of the many subsidiaries of Kimcor Diamonds PLC, a company listed on the London Stock Exchange. The dispute between the parties is whether the amount of R4m was advanced as a loan or an investment.

BACKGROUND

[2] It is clear from the evidence that the whole Kimcor Group was in dire financial straits. It concluded an agreement, a Memorandum of Understanding, with Gemrock Resources on 11 August 2008 ("the 11 August 2008 MOU"). Gemrock Resources was to advance an amount of R5m to Kimcor (the South African operating subsidiaries including Superkolong) as bridging finance in the form of a non-interest bearing secured loan. This loan would be repayable when Kimcor's financial position was sound. Gemcore Sampling and Superkolong were not part of the 11 August 2008 MOU.

[3] On 02 September 2008 Kimcor Diamonds PLC, Superkolong and Gemcore Sampling entered into another agreement, the Memorandum of Understanding ("the 02 September 2008 MOU"). In terms of the 02 September 2008 MOU Gemcore Sampling had to manage the SMI4

dumps which were treated by Superkolong on a joint venture basis. Gemcore Sampling had to make a capital investment of R4m by no later than 30 September 2008. At that stage, up to 29 August 2008, the parties accepted that Gemcore Sampling had already advanced an amount of R1 250 140-03 as part payment of the R4m. Mr Bredenkamp, a representative of Superkolong, did not sign this MOU. He was not satisfied with its terms amongst others that there was a pre-emptive right to Superkolong's shares which made it impossible to transfer them to Gemcore Sampling in terms of the MOU.

[4] On 03 October 2008 another Memorandum of Understanding ("the 03 October 2008 MOU") was entered into by the parties (Superkolong (Pty) Ltd, Gemrock Resources and Gemcore Sampling). The salient features of this MOU are that Gemcore Sampling loaned R4m to Gemrock Resources who on-lent it to Superkolong to distribute amongst its subsidiaries to continue its operations. This loan would be in the form of a secured convertible loan in the amount of R4m which would be increased to R8m, if necessary, to achieve a production output of 120 000 tons per month at SM14 mine dumps: Provided that the loan would be converted into Kimcor shares once reverse listing was completed. If reverse listing did not take place within eight months the amount would be repayable on demand on notice of 30 days.

[5] The on-lending by Gemrock Resources to Superkolong was to be effected on a back to back basis which would be handled on a shareholders' loan account. The parties agreed in para 1.4.9 of this MOU (the 03 October 2008) that *"all parties accept that Gemcore has paid up to 03 October*

2008 an amount of R3, 274, 571-19 as part payment of the R4m to Gemrock [Second Defendant] who on-lent this amount to Superkolong [First Defendant].” The agreement included an operational management agreement of Superkolong’s SM14 mine dumps by Gemcore Sampling from 01 September 2008.

[6] Gemcore Sampling’s case is that it advanced monies directly to or on behalf of Superkolong on 19 August 2008. The negotiations between Mr Lombaard, Gemcore Sampling’s representative, and Mr Buys, Gemrock Resources’ representative, were already under way. Mr Buys intimated to Mr Lombaard that the deal had been communicated to the Board of Directors of Kimcor. These negotiations gave rise to the draft MOU dated 02 September 2008 from which Gemcore Sampling would receive 40% shares in return for the advances made in favour of Superkolong. The payments were made immediately to prevent the liquidation of Superkolong. However, this MOU never came into existence and was not signed. The 03 October 2008 MOU was subsequently signed.

[7] Gemcore Sampling’s first Claim is based on rectification of the 03 October 2008 MOU on the following grounds:

7.1 Firstly, that the sentence in the last paragraph of Clause 3 which reads: *“…and neither party will have any claim against the other party for any matter arising from the transactions contemplated by this MOU”* was erroneously recorded as a result of a *bona fide* common error between the parties.

7.2 Secondly, that the heading of Clause 3 which reads: "Conditions Precedent" should actually read "Resolutive Conditions".

7.3 Alternatively, Gemcore Sampling requests that a further sentence be inserted in Clause 3 to read thus:

"…[A]nd each party shall pay to the other relevant party such amount(s) as it might have received from such party in pursuance of or in compliance with the terms and conditions of the agreement. The aforesaid term shall survive a nullification of this agreement by or as a consequence of the non-fulfilment of the 'condition precedent'."

[8] The second claim is based on the MOU concluded by the parties as purportedly rectified and concluded between the parties and as pleaded in the first claim as follows:

8.1 That an amount of R2, 942, 677-48 as amended was advanced by Gemcore Sampling to Gemrock Resources to on-lend to Superkolong before 15 October 2008;

8.2 That the resolutive condition that the R4m should have been advanced by 15 October 2008 was not fulfilled and therefore the MOU terminated on 15 October 2008; and,

8.3 In terms of the rectified MOU the aforesaid amount of R2, 942, 677-48 should be refunded to Gemrock Resources alternatively directly to Gemcore Sampling.

[9] The third claim is based on a *condictio indebiti* or *condictio sine causa*. Gemcore Sampling contends that it advanced a further amount of R1,

485,164-79 as adjusted after 15 October 2008 in the *bona fide* but mistaken belief that the MOU is still in place whereas in actual fact it lapsed on 15 October 2008. The MOU lapsed due to the non-compliance with the postulated suspensive conditions contained in it. This includes Clause 8.5 which states that *'neither party shall be entitled to cede any of its rights or obligations in terms of this MOU to any other person.'*

[10] Should rectification not be granted as claimed and should it be found that Gemcore Sampling is not entitled to Claim 2, based on the MOU, in that event, Gemcore Sampling in the alternative to Claim 1 and 2 plead that the "conditions precedent" have not been fulfilled and therefore no valid agreement came into existence between the parties. Gemcore Sampling states that in the *bona fide* and mistaken belief that the MOU was still valid it advanced an amount of R2, 942, 677-48 as adjusted to Superkolong. The amounts (R2 942 677-48 and R1 485 164-79) were paid directly to Superkolong alternatively this was done in its interest and to its credit by paying its employees, creditors and/or suppliers. Superkolong was therefore unjustifiably enriched which resulted in Gemcore Sampling being impoverished, the contention by Gemcore Sampling went.

[11] Gemcore Sampling claims in its own name, alternatively in terms of a cession by Gemrock Resources in favour of Gemcore Sampling, the obligations of Superkolong to Gemrock Resources in the event of the transaction being regarded as an on-lending transaction. The liquidators of Gemrock Resources signed the aforementioned cession on 23 July 2010.

[12] In its plea Superkolong denies that the conditions were resolutive and maintains that they were suspensive. It is its case further that no cession was possible between Gemcore Sampling and Gemrock Resources having regard to Clause 8.5 of the MOU which prohibits a cession (see para 9 supra). Therefore it was contended that the 03 October 2008 MOU never came into existence.

[13] *The author* ***RH CHRISTIE, THE LAW OF CONTRACT IN SOUTH AFRICA, 5th Ed, at p139,*** *comments as follows on "Conditions precedent and resolutive conditions:*

> *"The difference between a condition precedent (also known as a suspensive condition) and a resolutive condition (also known as a condition subsequent) is easy to state. A condition precedent suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event, whereas a resolutive condition terminates all or some of the obligations flowing from the contract upon the occurrence of a future uncertain event. When the condition governs the whole contract there is usually little difficulty in deciding whether it is a condition precedent or a resolutive condition, but when it governs only part of the contract there may be considerable difficulty in classifying it, and correct classification may be important in order to decide the rights and duties of the parties. Thus in a sale with a lex commissoria attached, the proper classification of the condition will decide whether risk and advantage, ownership and the right to fruits lie with the buyer or seller.*

Whether a condition is precedent or resolutive is a matter of construction, the words "subject to" being the normal way of indicating a suspensive condition, and the mere fact that some terms of the contract are to be performed immediately upon conclusion of the contract does not necessarily make a condition governing other parts of the contract resolutive rather than precedent. In such a case it is obviously arguable that the condition is resolutive in respect of those terms which were performed before it was fulfilled, and this fruitful source of disputes is the inevitable result of our ingrained habit of describing a contract as conditional when it is only partly subject to a future uncertain event." See ***Design and Planning Service v Kruger 1974 (1) SA 689 (T) 695C-F;R v Katz 1959 (3) SA 408 (C) 417G Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) SA 872 (A) 884A-885C and Badenhorst v Van Rensburg 1986 (3) SA 769 (A).***

See also **DE VILLIERS v VAN ZYL [2002] 4 ALL SA 262 (NC) 279**.

[14] Mr Lourens Cornelison, a businessman of Cape Town and Lesotho was involved in the business of a company called Elnino Mining, a subsidiary of Batla Minerals, in 2007. He later sold his mining shares in that company in the same year and informally assisted Batla Minerals with the assessment of their projects from time to time.

[15] Mr Cornelison testified that around April 2008 there were negotiations between the Batla Group and Superkolong with a view to mining together at Rooipoort Mine. Kimcor Diamonds PLC, holding the Superkolong

South Africa Operations, also got involved in these negotiations. Mr Bredenkamp approached the Batla Group advising them that Kimcor Diamonds PLC and its subsidiaries needed financial assistance for their various operations. Mr Bredenkamp pointed out that it was an investment opportunity for Batla Minerals either as a shareholder or a contractor. A meeting was held in Stellenbosch where Mr Churchouse, a director of Kimcor from London, was present. The purpose of the meeting was to explain in detail the investment opportunities created in funding their operations. A further meeting was held in London on 28 May 2008. The possibility of amalgamating Batla Minerals, a French listed company, and Kimcor was explored. Thereafter several meetings were held in Kimberley around October 2008 with the Kimcor Group.

[16] Batla Minerals which is operative in South Africa was also willing to award Gemcore Sampling the management agreement with 25% management fee just to repay the loan. Mr Cornelison confirmed that Gemrock Resources had an obligation towards Kimcor to supply the money. On 19 August 2008 Gemcore Sampling honoured the said obligation on behalf of Gemrock Resources to avoid the liquidation of Superkolong by Ekapa Mining**.** He further conceded that the R4m advanced by Gemcore Sampling was initially intended to be an investment. With the signing of the 03 October 2008 MOU they decided to change it into a convertible loan account after Mr Bredenkamp refused to sign the September 2008 MOU. This was done to ensure that Gemcore Sampling recovered the amount they had already paid to Superkolong.

[17] Mr Johan Francis Buys, a chartered accountant and financial director of Gemrock Resources, was at the time acting managing director of Kimcor Diamonds PLC and Gemrock Resources. According to him Gemrock Resources was involved in alluvial diamond mining and was in the process of attaining a dual listing in South Africa for the South African shareholders and in London for the UK shareholders. Things were going well for their company at the time. Round about the end of July and the beginning of August 2008 Gemrock Resources was approached by Mr Bredenkamp, the then managing director of Kimcor's Africa Operations which was into Kimberlite mining. The approach had to do with the serious financial constraints the Kimcor Group experienced at the time. The Kimcor Group could not sustain their production and profitable levels. They needed capital to sustain their operations. According to Mr Buys *'they were bleeding money.'* Mr Bredenkamp further told them that a company called Ekapa Mining which was involved in the haulage of the mining dumps to the plants across Kimberley threatened to urgently apply for the liquidation of Superkolong. Eskom also threatened to switch off their electricity. Mr Buys confirmed the position with Messrs John and Peter Hohne, owners of Superkolong. This transaction was a very lucrative operation if run properly. Gemrock Resources had to raise funds in the region of about R1million to prevent Superkolong's liquidation. Gemrock Resources was not financially viable or capable to raise such funds.

[18] The 11 August 2008 MOU was signed by Mr Buys in his capacity as financial director of Gemrock Resources and was so mandated by the Gemrock Resources Board. It was also signed by Mr Churchouse in his capacity as chief executive officer of Kimcor Diamonds PLC. This MOU

made provision for bridging finance that was to be given to Kimcor Africa Operations in support of their on-going operations. Mr Buys approached Gemcore Sampling for financial assistance. Gemcore Sampling was offered a 40% equity stake in Superkolong and Gemrock Resources would have 60 % ownership in Superkolong. Gemcore Sampling accepted the offer and pledged an amount of R4m and its expertise. This would enable the business to operate on its own and raise its own capital to acquire the remaining portion of the Kimcor Africa Operation. That led to the MOU signed on 02 September 2008 by Mr Buys, as the managing director of Kimcor's Africa Operation, and Mr Lombaard. Mr Bredenkamp was not present when this MOU was signed but was aware of the negotiations.

[19] Mr Bredenkamp approached Mr Lombaard and Mr Buys and advised them that a 40% shareholding in Superkolong by Gemcore Sampling was impossible because other shareholders had a pre-emptive right to buy the shares. This put Gemcore Sampling at risk in terms of monies already advanced as its reversal was problematic. Mr Churchouse and Mr Bredenkamp requested Gemcore Sampling to continue making payments to Superkolong notwithstanding this spanner in the works, which Gemcore Sampling did. A meeting was held which led to the signing of the 03 October 2008 MOU. Mr Buys at p161 from line 15 of the record dated 06 August 2013 testified:

> *"So we had to entrench ourselves as Gemrock Resources into this transaction and this was a means of achieving that. But secondly, in order to give Gemcore a tradable security and proper security*

for the investment and the monies that they have already paid over, we had to give them tradable shares."

[20] Mr Buys further testified that they used templates compiled by Rand Merchant Bank when drawing up the 03 October 2008 MOU. A proper legal agreement was prepared by Engelsman Magabane Attorneys but was never signed despite several attempts to get it signed. Mr Buys resigned in the middle of October, just after the 03 October 2008 MOU was concluded.

[21] Mr Lourens Cornelison went on to explain that he first knew about Gemcore Sampling during late September or early October 2008. Mr Bredenkamp reported to him that Superkolong had a loan account of R4m in favour of Gemcore Sampling. He and Mr Bredenkamp negotiated the terms upon which the loan had to be refunded. Around mid-October 2008 Mr Bredenkamp took them to the offices of Gemcore Sampling to meet Mr Lombaard to discuss the 03 October 2008 MOU and the repayment of the loan account. The agreement reached was that it was a prerequisite that whichever company took over Superkolong must repay the R4m. In all these meetings Mr Bredenkamp was present and never hinted that the R4m was not a loan but an investment. In fact the issue involving the R4m was never in dispute. The terms of repayment were not stipulated. The Batla Group was also informed of the management deal between Gemcore Sampling and Superkolong. During the negotiations Gemrock Resources was not in the picture anymore. In November 2008 the Batla Group became aware that Mr Chris Kimber bought Kimcor Diamonds PLC which meant that the deal between Batla and Kimcor fell through.

Before the deal fell through the Batla Group had lent Superkolong large sums of money. Mr Cornelison advised his company to perfect the notarial bonds they had against some of Superkolong's assets namely: Deeds to certain mines and some diamonds.

[22] Mr Jan Hendrik Lombaard**,** a chartered accountant and financial director of Gemcore Sampling, testified that Superkolong, represented by Mr Cedric Bredenkamp, approached Gemcore Sampling to take over and manage SMI4 mine dumps which were treated by Superkolong on a management contract basis, which Gemcore Sampling accepted. The terms of the management agreement are set out in para 1.3 of the 03 October 2008 MOU. According to Mr Lombaard the agreement with Mr Bredenkamp was that Gemcore Sampling would incur expenses of up to R4m in the running of the mine dumps. They had to prioritise SMI4 Capex with the loan but Gemcore Sampling had to foot the huge bill for Superkolong's creditors and or employees that were outstanding. The money was also used for the benefit of Superkolong's subsidiaries. Mr Lombaard dealt with the individual payments made as shown in (Bundle "B") and how they were reflected in Superkolong's books of account. Upon the requisition of Mr Bredenkamp some equipment were also installed on site to increase the mine production. Invoices for the account of Superkolong were issued for all these expenses.

[23] Mr Lombaard received an email (item number 17 of Exhibit "B") from Ms Ronel Meyer, Superkolong's accountant/financial manager, requesting payment for the security personnel in different subsidiaries of Superkolong as retrenchment packages as arranged with Mr Bredenkamp.

The amount was paid into Supermix's bank account (one of the many Kimcor's subsidiaries). After 15 October 2008 further payments were made by Gemcore Sampling totalling R1, 485, 164-79m, as adjusted. According to Mr Lombaard the 03 October 2008 MOU was still binding on the parties after 15 October 2008 even though the "conditions precedent" were not fulfilled. An amount of R850, 000-00 over and above the R4m paid by Gemcore Sampling in favour of Superkolong's subsidiaries was dealt with as a loan in Superkolong's books of account.

[24] According to Mr Lombaard when they drafted the 03 October 2008 MOU he did not know what "conditions precedent" meant. He explained that when the agreement was entered into he understood it to mean that *'the conditions were supposed to be met at some point in time.'* He corroborated the evidence of Mr Buys that they used templates when drafting the agreement. He reiterated that there was no agreement stating that Gemcore Sampling would lend money to Superkolong.

[25] The stipulation in para 3.3 of the 03 October 2008 MOU which states *"neither party will have any claim against the other party for any matter arising from the transactions contemplated by this MOU"* was never intended by the parties to the MOU to bar action against each other when it was necessary, so says Mr Lombaard. To him the said stipulation had nothing to do with the loan but the expenses in connection with the negotiations and documentation, which position Mr Buys also adopted. The loan was dealt with in para 1.4.4 of the MOU as follows:

> *"1.4.4 The capital of the loan will be convertible to shares in the reverse listed company at the same price as what the two entities who [are] merging determined. This conversion will be in the name of Gemcore. If the reverse listing does not take place within 8 months after signature of this MOU, the loan will be repayable on demand after notice of 30 days has been given."*

[26] Mr Lombaard testified that the 11 August 2008 MOU was an agreement between Kimcor Diamonds PLC and Gemrock Resources and therefore a separate agreement. Kimcor Diamonds PLC was under financial pressure at the time and sought assistance from Gemrock Resources. The latter could not provide the R5m needed by Kimcor as an investment opportunity. Gemrock Resources was in the process of raising funds but was nevertheless liquidated on 20 March 2009. Gemrock Resources borrowed money from Gemcore Sampling with the intention of on-lending it to Superkolong. Gemcore Sampling had the money, Gemrock assets and Superkolong tailings. It was not in dispute that this was a good investment opportunity for Gemcore Sampling. Mr Lombaard insisted that the central word was "loan" and not "investment". Mr Buys approached Gemcore Sampling to buy out Superkolong for R10m. However, Gemcore Sampling made a counter offer of an equity investment of 40% for the R4m. This led to the 02 September 2008 MOU which was concluded between Gemcore Sampling, Superkolong and Kimcor Diamonds PLC. Mr Bredenkamp did not sign this MOU on behalf of Superkolong and Mr Buys had replaced Mr Bredenkamp as managing director of Kimcor Diamonds PLC at that stage. In this agreement the parties agreed to convert the 40% profit share basis to a 40% shareholding in SMI4. However, if the conversion was not possible

the agreement would continue on a profit sharing basis (management agreement).

[27] Mr Lombaard further testified that subsequent to the said negotiations the 03 October 2008 MOU was concluded between the parties to this action. When it was put to him by Mr Danzfuss that the investment that Gemcore Sampling intended making was in the region of R170m at the end for only R4m, he stated:

> *"Well, at that point in time we were looking at an equity investment in Superkolong and then we would – and that didn't happen. So afterwards we were looking at a loan of R4 million and that loan, the capital of that loan we would have taken to buy shares in the reverse listed entity. So that is two separate transactions. And we had no control over the reverse listing."*

[28] Mr Guillaume Johannes Oberholster, a practising auditor in Bloemfontein, was appointed as an auditor for Superkolong after the shares of the company were taken over by Mr Corns and Mr Patrick Mason towards the end of 2009. Mr Oberholster and his team approached Superkolong's previous auditors, Price Waterhouse Coopers, to glean more information from the records. This they did to determine how up to date their financial statements were. They discovered that the financial statements for the year-end 30 June 2009 were incomplete. Superkolong requested Mr Chris Kimber, the previous owner, to complete the statements. However, due to the failed negotiations and discussions with Price Waterhouse Coopers Mr Oberholster was requested to do so instead even though this happened before Mr Mason and Mr Corns took over the

company. They prepared a compilation agreement and financial statements but did not complete the audit. Mr Oberholster used the information received from Ms Emile Barnard from Price Waterhouse Coopers and Ms Ronel Meyer in Superkolong's offices.

[29] Mr Oberholster was referred to p242 (loan account) and p243 (creditors' account) of Bundle "A", a printout of the general ledger account in the accounting system used by Superkolong called Pastel. This documentation is ordinarily furnished by the company but in this case he and his team compiled it themselves. They loaded it onto their system and finalised the financial statements from it. It covered the period 01 July 2008 to 30 June 2009 financial year. It contained Gemcore Sampling's account and transactions with Superkolong over the said period. Superkolong's books showed a loan account of R4m due in favour of Gemcore Sampling. In the normal trade creditors' account Gemcore Sampling is one of Superkolong's creditors and the total due to it is R824, 239-50. When Mr Oberholster and his team made enquiries concerning the R4m they were informed by Superkolong's directors: Messrs Corns, Mason and Kimber, the previous owners that the money was not due to Gemcore Sampling but to Gemrock Resources which was at that stage liquidated. Mr Oberholster and his team therefore entered the money in Superkolong's books as a capital gain because according to the explanation they did not regard it as a liability anymore as it was not repayable. This position was not verified by the audit. They acted on the instruction of Corns and Kimber. They later verified and confirmed that Gemrock Resources was indeed liquidated. They had in their possession the 03 October 2008 MOU.

That concluded the case for the plaintiff.

[30] At this stage Mr Danzfuss, on behalf of Superkolong, applied for absolution from the instance on the grounds that Gemcore Sampling failed to make out a proper case for rectification. He argued further, amongst others, that Gemcore Sampling had no right to act either as a cessionary or in its own name against Superkolong. The 03 October 2008 MOU relied upon by Gemcore Sampling was not a loan but an investment, the argument proceeded. Mr Zietsman, on behalf of Gemcore Sampling, opposed the application. He submitted that it is common cause that Gemcore Sampling advanced payments in favour of Superkolong to its employees, suppliers and/or its creditors.

[31] **HOFFMAN AND ZEFFERTT IN THE SOUTH AFRICAN LAW OF EVIDENCE, 4th Ed p508,** lays down the test for absolution from the instance as follows:

> *"If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution. Or, as it has been expressed on more than one occasion by the Appellate Division, "the only question" is "whether, at the close of the plaintiff's case, there was such evidence before it upon which a reasonable court might, not should, give judgment against the defendant."*

See **CLAUDE NEON LIGHTS (S.A.) LTD v DANIEL 1976 (4) SA 403 (A)** at 409G and **OOSTHUIZEN v STANDARD GENERAL VERSEKERINGSMAATSKAPPY BPK 1981 (1) SA 1032 (A)** at 1035H-36A.

With this principle in mind, I dismissed the application for absolution because in my view Gemcore Sampling had made out a *prima facie* case to find for it.

[32] Mr Danzfuss called Mr Cedric John Bredenkamp to testify. He is a non-executive director of Superkolong. During August 2008 he was a director of Kimcor Diamonds PLC in the South African Operations and its subsidiaries. He was also operations manager for all the subsidiaries of Kimcor Diamonds PLC. Mr Bredenkamp confirmed that Superkolong experienced financial problems at the time. Kimcor Diamonds PLC had a two-tier strategy in London for fundraising. The first half of the funds was raised in order to start with their projects. The market was not good and it was impossible to raise funds in London. He acted on instructions he received from the London Board and did not himself give instructions, except to his managers on operations but not on corporate matters. A Chief Financial Officer in London worked with Ms Ronel Meyer in the South African Operations. The accounting department was a different component in the structure and had its own operations. During August to October 2008 the finance department was run by Mr Buys of Gemrock Resources in terms of an agreement between Kimcor Diamonds PLC and Gemrock Resources. Mr Buys dealt with the creditors and debtors of Kimcor SA branch. Mr Bredenkamp was not certain for which period were they supposed to send all accounting information to Mr Lombaard.

[33] Mr Bredenkamp was instructed by Ms Melissa Sturgess Smith and Mr Churchouse of the London Board to find a partner in South Africa willing and able to give bridging finance or enter into a joint venture or do a joint

listing. He approached Mr Buys, amongst others, who showed an interest in listing in London. The discussions and negotiations between Mr Buys, Ms Smith and Mr Churchouse resulted in the signed 11 August 2008 MOU. The plan was that Kimcor would service its creditors in all its subsidiaries. Mr Buys informed them that a list of creditors and debtors that was prepared by Ms Meyer should be presented to Ms Anne-Marie (surname not supplied), Mr Buys' secretary, for payment. Superkolong's creditors and other subsidiaries were included in this list. Ms Meyer never gave instructions for payments. Mr Buys made such decisions.

[34] Mr Bredenkamp had nothing to do with the 02 September 2008 MOU. He did not sign it though it was presented to him. He was not comfortable with the fact that 40% of Kimcor Diamonds PLC subsidiary would be given away for R4m without passing the requisite resolution approving such measure.

[35] Mr Churchouse who was London based instructed Mr Bredenkamp to negotiate a deal with Mr Buys and Mr Lombaard. These negotiations resulted in the 03 October 2008 MOU. According to Mr Bredenkamp the R4m would have been lent to Kimcor Diamonds PLC by Gemrock Resources for the benefit of Kimcor Diamonds PLC's subsidiaries, including the benefit of Superkolong. He could not tell when Gemcore Sampling started advancing payments. He also could not remember who requested him to send the list of creditors to Superkolong and not Gemrock Resources. He testified that he requested payments from Mr Lombaard who at the time was in control of the finances of Superkolong. He intimated that the payment of an amount of R126, 832-12 by Gemcore

Sampling for security purposes had nothing to do with Superkolong because the latter did not have security personnel of their own. The amount could only have been paid for the benefit of Supermix. He could not tell why this was included in the list of payments on behalf of and/or to the benefit of Superkolong.

[36] Mr Bredenkamp stated that he never thought that the 03 October 2008 MOU had lapsed at any stage. The parties were concerned about rectifying the situation, namely the repayment of Gemcore Sampling's R4m. He did not make Mr Cornelison aware that Gemcore Sampling was of the view that there were monies due to them. He said he did not mention it because it was not his place to tell Mr Cornelison, as the new investor. He only reported to him that Mr Cornelison needed to negotiate with Gemcore Sampling what could be put in place to repay Gemcore Sampling's money. He tried to help Gemcore Sampling recover *'the money that they potentially could have lost.'* When asked why he would do that when the "conditions precedent" were not met and '*no party will have any claim against the other party for any matter arising from the transaction contemplated by this MOU'* he said this did not mean that he felt no regrets towards people or instances that put money into an investment or venture that went wrong. He insisted that Gemcore Sampling advanced monies as per 11 August 2008 MOU. He conceded that Gemcore Sampling made payments directly to creditors and/or Superkolong.

[37] Meetings were held on 01 October 2008 and 21 October 2008 but Mr Bredenkamp attended only the latter. He stated that it was clear at that stage that Gemrock Resources was completely out of the picture. When it was put to him by Mr Zietsman why he did not inform the meeting that

it was an investment and not repayable he insisted that *'it was not my money to say anything.'* He referred Mr Chris Kimber, the new owner of Kimcor Diamonds PLC, Mr Albert Michau, his bookkeeper or auditor and Mr Cornelison to the MOUs and to the fact that Gemcore Sampling had invested money which he assisted it to recover. He only advised them to make payment arrangements with Gemcore Sampling. According to Mr Bredenkamp the agreement did come into existence but did not know when it terminated.

[38] It is undisputed that Gemcore Sampling advanced amounts of R2, 949, 677.48 and R1, 486, 164.79, suitably adjusted, on behalf of Kimcor Diamonds PLC and/or its subsidiaries which include Superkolong's employees, creditors and/or suppliers. According to Superkolong's version Gemcore Sampling paid the monies to Gemrock Resources in terms of the MOU dated 11 August 2008 concluded between Gemrock Resources and Kimcor Diamonds PLC. Mr Bredenkamp disputes that the payment was made in terms of the 03 October 2008 MOU. Consequently Kimcor PLC owes Gemrock Resources who, in turn, owes Gemcore Sampling, it was argued. The monies were advanced as an investment rather than a loan in Kimcor Diamonds PLC with specific reference to Superkolong. In the premises and in an attempt to save Gemcore Sampling's investment the parties to the action tried to convert it into a loan by signing the 03 October 2008 MOU. Mr Danzfuss on behalf of Superkolong submitted that this 03 October 2008 MOU had lapsed irrespective of whether this MOU contained conditions precedent or resolutive conditions and therefore no legal consequences could flow from this purported agreement.

[39] Mr Danzfuss sought to persuade me that the 03 October 2008 MOU draws three distinctions:

39.1 Firstly, that the capital of the loan would be convertible to shares in the reverse listed company;

39.2 Secondly, that if the reverse listing does not take place within eight months after signature of this MOU the loan would be repayable on demand upon notice of 30 days having been given; and,

39.3 Thirdly, that the MOU would terminate and each party would bear its own expenses in connection with all negotiations and documentation and neither party shall have any claim against the other party for any matter arising from the transactions contemplated by the MOU.

Mr Danzfuss argued in the upshot that the fulfilment of the conditions was within Gemcore Sampling's power by advancing further amounts of money. It was the sole manager responsible for the operations of Superkolong and therefore the non-fulfilment of the conditions was its responsibility. The money was not repayable, the submission went.

[40] Mr Zietsman, on behalf of Gemcore Sampling, argued that in its further and better particulars Superkolong stated that only paragraphs 4.1, 4.2 and 4.3 of the 03 October 2008 MOU were to be "conditions precedent"; inasmuch as they were not fulfilled they would have lapsed but the balance of the MOU came into existence. He argued further that the anomaly is the balance of Clause 3 under the heading: "Conditions Precedent"; which determined that:

> *'If the date for the satisfaction of the conditions precedent is not extended in writing by the parties and the conditions are not*

> *satisfied or waived by the relevant date or the transaction does not proceed; then this MOU shall terminate, each party will bear its own expenses in connection with all negotiations and documentation, and neither Party will have any claim against the other Party for any matter arising from the transactions contemplated by this MOU.'*

[41] Gemcore Sampling acts in its capacity as a cessionary in terms of the cession signed by Gemrock Resources on 23 July 2010. Alternatively it acts in its own name.

The issue that falls for determination is whether there is an agreement in terms whereof monies were advanced to Superkolong, its creditors, employees and suppliers which was concluded on 03 October 2008 and whether it was an investment or a loan.

[42] The parties to this agreement are Gemcore Sampling (the plaintiff), Superkolong (the First Defendant) and Gemrock Resources (the Second Defendant). Kimcor Diamonds PLC was never a party. Superkolong argues that the money was paid by Gemcore Sampling on behalf of Gemrock Resources to enable the latter to honour its obligation towards Superkolong which has its genesis in the 11 August 2008 MOU. This means that the legal obligation was between the defendants (Superkolong and Gemrock Resources). The logic consequently goes that Superkolong owes Gemrock Resources and that Gemrock Resources in turn owes Gemcore Sampling. Gemcore Sampling denies that it was party to the 11 August 2008 MOU. Gemcore Sampling states that that agreement was signed by Gemrock Resources and Kimcor Diamonds PLC, who is not a

party to these proceedings. Gemcore Sampling acknowledges though that it was a party to the 03 October 2008 MOU or agreement.

[43] It is clear from the 11 August 2008 MOU that Superkolong and Gemcore Sampling were not parties to it. Mr Buys, the financial director of Gemrock Resources, testified that when his company (Gemrock Resources) could not assist the Kimcor Group he approached Mr Lombaard's company (Gemcore Sampling) for financial assistance and its expertise to manage the Kimcor Group's plant. At no stage did Mr Buys say that he informed Mr Lombaard that he would be assisting on the basis of the 11 August 2008 MOU. This also did not come out during cross-examination. Mr Buys specifically stated that Gemcore Sampling was not a party to that agreement. He did not disclose what date he approached Mr Lombaard for assistance. However, it was after their discussions that Gemcore Sampling started advancing payments directly to Superkolong's creditors. This took place before the 02 September 2008 MOU was signed.

[44] Mr Lombaard stated in no uncertain terms that Gemcore Sampling was not party to the 11 August 2008 MOU. This was not disputed. Mr Buys testified that the purpose of the 03 October 2008 agreement was:

> *"…[R]emember now the transaction has been implemented already and monies have been paid over. There is no way of getting back those monies. So it's been – the transaction has already been implemented to a large degree. So now we had to get our heads around, getting a new structure in place to facilitate this transaction."*

Mr Lombaard testified that they started paying in August 2008 already because negotiations were already in place. Mr Buys corroborated his version and added that there was a threat by Ekapa Mining to urgently liquidate Superkolong. This led to the September 2008 MOU which Mr Bredenkamp did not sign and thereafter the 03 October 2008 MOU.

[45] Superkolong is the one who discovered the 03 October 2008 MOU and not Gemcore Sampling. Mr Danzfuss put to Mr Buys the following statements:

> *"Ques: But Gemrock had the obligation towards Kimcor to supply the money, not Gemcore?---At that – My Lady at that point in time yes, that was certainly the case.*
> *Ques: And to honour that obligation Gemcore on the 19th of August, a few days after that agreement, made payments, inter alia, to Escom and in favour of Supermix, to Superstone and that was to honour the obligation of Gemrock towards Kimcor?---My Lady that's correct and it's also through that intervention that we saved Superkolong from that application for liquidation. And that's why it's so quickly, it was done so quickly after this MOU was signed.*
> *Ques: Mr Buys, the question was simple, was this – were these payments made by Gemcore on behalf of Gemrock to honour its obligation towards Kimcor? ---Yes My Lady, yes."*

[46] From the aforegoing it is clear that Gemrock Resources approached Gemcore Sampling and borrowed some money from it to on-lend it to Superkolong. **The question is whether at that stage Gemcore Sampling knew of the agreement between Gemrock Resources and**

Kimcor that was signed on 11 August 2008, since it was not party to it. In my view it cannot be said that when Gemcore Sampling started paying the monies on 19 August 2008 to Superkolong it was aware of the 11 August 2008 MOU. It can therefore not be construed that Gemcore Sampling honoured Gemrock Resources's obligation on that basis. The evidence is that those payments were followed by the 02 September 2008 MOU and subsequently the 03 October 2008 MOU. In both of these Memoranda of Understanding Gemrock Resources borrowed money from Gemcore Sampling to on-lend to Superkolong. In actual fact the August 2008 MOU has nothing to do with Gemrock Resources borrowing money from Gemcore Sampling to on-lend to Superkolong. This MOU was about Gemrock Resources assisting Kimcor with bridging finance and a reverse take-over of Kimcor by Gemrock Resources. It is far-fetched to suggest that Gemcore Sampling was aware of this as this is not supported by the evidence.

CLAIM 1 RECTIFICATION

[47] Gemcore Sampling prays for rectification. Firstly, of the sentence in Clause 3 of the 03 October 2008 MOU quoted in para 7 above and secondly, that the words in the heading of Clause 3 which reads as follows: "*Conditions Precedent"* should read *"Resolutive conditions".*

The onus is on Gemcore Sampling to show that when the parties entered into the agreement they did not intend the two clauses to form part of their agreement. Mr Danzfuss on behalf of Superkolong argued that it does not matter whether the conditions were resolutive or suspensive, the fact of the matter is that the 03 October 2008 MOU never came into existence because of the non-fulfilment of the said conditions.

[48] Mr Buys testified that he, Mr Lombaard and Mr Bredenkamp had the October 2008 MOU typed on a big screen using the September 2008 MOU as a basis for it. They discussed it whilst it was on the screen and suggested some amendments. They went through it paragraph by paragraph to make sure everyone was satisfied. They then signed it. According to Mr Buys the meaning of Clause 3 which says '*neither party will have any claim against the other for any matter arising from the transactions contemplated by this MOU'* was known to everyone and everyone was satisfied with it. However, it did not relate to the loan. He said referring to the impugned paragraph:

> *…[I]t should have been taken out. It was a template that we used and incorrectly so, but in hindsight that paragraph shouldn't have been there. There was no intention whatsoever that [that] paragraph should ever be related back to that loan account."*

[49] Mr Buys explained further that they made a mistake because that pro-forma paragraph should have been deleted. When it was put to him that he deliberately signed the agreement knowing that the stipulation was there he said in reply: *"Obviously I read that My Lady, but clearly I didn't understand the implications of what I was signing there."* He later said that he did not know why they kept it in the agreement.

[50] Mr Lombaard on the other hand stated that the said stipulation was hidden away after a comma that related to the first part of the sentence.

According to him it was taken out of context by Mr Kimber for the first time on 20 January 2009. Otherwise it was never the intention of the parties to have it there. When asked whether he agreed that all the parties present agreed that that should not have been part of the contract he said: *"I don't know whether all parties agreed at that point in time."*

[51] Mr Bredenkamp in turn testified that this stipulation was inserted in the agreement by design. He intimated that he knew what "precedent" meant and knew that even though the agreement had lapsed that some of the clauses were still in place or extant. He denied that there was an error common to all the parties who were involved in the negotiations and/or were signatories to the 03 October 2008 MOU.

[52] When Mr Buys was asked by Mr Danzfuss what he understood by "conditions precedent". He responded that his understanding was that the contract will only come into effect once all the conditions are complied with. When Mr Danzfuss asked Mr Lombaard whether or not the conditions were resolutive, his response was: *"I didn't know what the difference was at that stage."*

52.1 In **UNION GOVERNMENT v VIANINI FERRO-CONCRETE PIPES (PTY) LTD 1941 (AD) 43** at 47 WATERMEYER JA held:

"…this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as an exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the

document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

52.2 In **BARDOPOULOS & MACRIDES v MILTIADOUS 1947 (4) SA 860 (W)** at 863 -864 Clayde J held:

"A party seeking to obtain rectification must show the facts entitling him to obtain that relief "in the clearest and most satisfactory manner"...where the common intention is to be shown not by any *writing but by verbal evidence, the Courts have a great difficulty in determining whether there was a mistake in the written contract. These cases do not, I consider, require more than a balance of probability in favour of the party seeking rectification but indicate that such a claim is in fact difficult to prove."*

52.3 In **LEVIN v ZOUTENDIJK 1979 (3) SA 1145 (W)** 1147-1148 Coetzee J had this to say:

*"The purpose of an action for rectification is to reform a written document in a specific fashion and a wholesome practice has developed over the years to draft the actual wording of the term omitted and to pray that that be inserted at a suitable place in the writing. An example can be found in **MUNNIK and MUNNIK v SYDNEY CLOW & COMPANY CO LTD 1965 (4) SA 312 (T)** at 314. It is essential for any party to a written contract to know what the other party contends regarding the actual wording of the contract. ...The very cause of action for rectification postulates that the parties' agreement or common intention was clear and unmistakeable on those aspects in respect whereof the writing is to be reformed."*

52.4 In **SOIL FUMIGATION SERVICES LOWVELD CC v CHEMFIT TECHNICAL PRODUCTS 2004 (6) SA 29 (SCA)** at 38J-39C Brand JA held:

*"It is a settled principle that a party who seeks rectification must show facts entitling him to that relief 'in the clearest and most satisfactory manner' (per Bristowe J in **Bushby v Guardian Assurance Co 1915 WLD** 65 at 71; see also **Bardopoulos and Macrides v Miltiadous 1947 (4) SA 860 (W)** at 863 and **Levin v Zoutendijk 1979 (3) SA 1145 (W**) at 1147H-1148A). In essence, a claimant for rectification must prove that the written agreement does not correctly express what the parties had intended to set out therein. (See **Meyer v Merchants' Trust Ltd 1942 AD** 244 at 253.)"*

[53] Mr Lombaard testified that the conditions were supposed to be resolutive but in trying to define what this concept meant he was clearly at a loss. On the contrary Mr Bredenkamp intimated that the conditions were correctly recorded. Consequently there was no *consensus* between the parties on whether the conditions should be resolutive or suspensive ("conditions precedent"). The evidence of Mr Lombaard and Mr Buys did not support the contention that Superkolong also intended that the relevant paragraph be deleted. What is fairly apparent is that the affected parties did not know what "conditions precedent" meant and could therefore not have intended to have resolutive conditions in the agreement not knowing what they meant or involved. Mr Lombaard and Mr Buys are Chartered Accountants and very experienced businessmen. The evidence shows that they had all the opportunity to study the document before signing it. A lot of money was at stake. The probabilities are that the parties intended the last paragraph of Clause 3 in para 48 *supra* to be

part of the agreement. The evidence also did not support the insertion of a further sentence. A claim for rectification cannot succeed because in doing so in the mentioned circumstances would amount to a construction of a new contract being crafted for the parties.

The application for rectification stands to be dismissed with costs.

CLAIM 2

[54] Since the rectification application has failed the agreement will therefore be dealt with as it stands. Clause 1.2 of the contract between the parties (the 03 October 2008 MOU) firstly deals with R4m lent to Gemrock Resources who would on-lend same to Superkolong. The agreement clearly refers to it as a loan. It is then explained as a secured convertible loan to be converted into shares in the Kimcor entity once reverse listing has been done. Clause 1.3 deals with the management agreement and Clause 1.4 with the transfer of the R4m by Gemcore Sampling to Gemrock Resources by no later than 15 October 2008. Clause 1.4.4 stipulates that if the reverse listing does not take place in eight months after signature of the 03 October 2008 MOU the loan will be repayable on demand after 30 days' notice has been given. Clause 1.4.9 stipulates that all parties accept that Gemcore Sampling has paid up to 03 October 2008 an amount of R3 274, 571-19 as part payment of the R4m to Gemrock Resources who on-lent this amount to Superkolong. All these mentioned clauses refer to a loan and not an investment.

[55] Clause 3 deals with "conditions precedent". These conditions made provision for three different happenings:

55.1 Clause 3.1 deals with the approval by the boards of all the parties and the acceptance by them of the rights and obligations created by the 03 October 2008 MOU within a week;

55.2 Clause 3.2 with the payment of the R4m referred to in Clause 1.4.1.

55.3 Clause 3.3 stipulates that the parties confirm that the envisaged transaction will be re-negotiated in good faith in the event of any material adverse change in the budgeted capital outlay and forecast operational capabilities. It states further that the parties agreed to use their utmost good faith to ensure the fulfilment of the conditions alluded to in Clauses 3.1 to 3.3 (above of the MOU) as soon as is practically possible.

[56] The ultimate sentence of Clause 3.3 states:

" ...[T]he parties agree that if :

(a) the date for the satisfaction of the conditions precedent is not extended by agreement in writing by the parties; and

(b) the conditions precedent are not satisfied or waived by the relevant date, or the transaction does not proceed;

Then this MOU shall terminate, each party will bear its own expenses in connection with all negotiations and documentation, and neither party will have any claim against the other party for any matter arising from the transactions contemplated by this MOU."

Clause 8.5 prohibits any party to cede any of its rights or obligations in terms of this MOU to any other person.

[57] The contract (in the modern sense, now that all contracts are consensual) is binding immediately upon its conclusion. What may be suspended by a condition is the resultant obligation or its exigible content. See **ODENDAALSRUST MUNICIPALITY v NEW NIGEL ESTATE GOLD MINING CO. LTD 1948 (2) SA 656 (OPD) at** 666-667. It is common cause between the parties that the "conditions precedent" were never fulfilled. It is not clear what happens to Clause 1.4.4 which says the loan will be repayable taking into account Clause 3.3 referred to in *para* 56 above. In any event the fact that the "conditions precedent" were not fulfilled resulted in the obligations not coming into existence from 03 October 2008, when the MOU was signed. In fact whether the conditions were resolutive or suspensive it makes no difference because the conditions were never fulfilled by 15 October 2008, which means that the contract lapsed retrospectively to 03 October 2008. The effect thereof is that no agreement became operative as at 03 October 2008 and therefore no obligations were created. In **AMORETI v TUCKER'S LAND AND DEVELOPMENT CORPORATION (PTY) LTD 1980 (2) 330 (WLD)** at 332H Coetzee J had this to say:

> *"I think that Mr Pincus's argument ignores the legal result of a resolutive condition which is fulfilled. This is fully dealt with by Wessels (supra 1409 - 1411). The learned author states, inter alia:*
> *"If a resolutive condition is fulfilled, the law regards the whole transaction inter partes as if the absolute contract had never existed and the parties must therefore be restored to their formal*

> *position. Obligatio resolvitur nunc ex tunc. Thus, in the case of a sale subject to a resolutive condition, the Romans said that, when the condition was fulfilled, the subject-matter of the sale was to be regarded as if it had never been bought or sold. The resolutive condition has a retrospective effect."*

The ultimate result is that there was no cession because the 03 October 2008 MOU never came into existence.

CLAIM 3 BASED ON ENRICHMENT: CONDICTION INDEBITI OR CONDICTIO SINE CAUSA

[58] Mr Danzfuss, on behalf of Superkolong, argued that enrichment must be unjustified or without cause. If there is a cause or legal obligation for the payment then no reliance can be placed on the *condictio indebiti*. He argued further that in order to claim due to an invalid contract Gemcore Sampling must tender to restore all the benefits received under the contract.

[59] Mr Zietsman, for the plaintiff, submitted that it was never the case of Superkolong from the beginning that Gemcore Sampling received any benefits of whatever nature under the loan agreement which Gemcore Sampling should have tendered to restore. This also did not come out during cross-examination of Gemcore Sampling's witnesses. It was clear from the evidence tendered by Gemcore Sampling's witnesses that it did not receive any benefits in terms of the invalid loan agreement. Mr Bredenkamp also did not testify that Gemcore Sampling received any

benefits of whatsoever kind. Mr Danzfuss did not press this point any further.

[60] **AMLER'S PRECEDENTS OF PLEADINGS, 7th Ed, p101** states:

> *"If the claim arises from performance in terms of an invalid contract, the performance is not indebite because there is a cause, albeit an illegal one. The claim then lies under the condictio ob turpem vel iniustam causam.*
> ***AFRISURE v WATSON [2009] 2 ALL SA 1 (SCA) para 51***
> ***LEGATOR McKENNA INC v SHEA [2009] 2 ALL SA 45 (SCA).***
> *In such event the plaintiff must tender to restore all benefits received under that contract and must allege that the defendant is unwilling or unable to perform his or her part of the invalid bargain."*

See CARLIS v McCUSKER 1904 TS 917
BOTES v TOTI DEVELOPMENT CO. LTD [1978] 1 ALL SA 465 (A), 1978 (1) SA 205 (T).

[61] At **p100 AMLER'S PRECEDENTS OF PLEADINGS (supra)** sets out the essential elements of enrichment as follows:

> *"(a) The defendant must be enriched;*
>
> *(b) The plaintiff must be impoverished;*
> *(c) The defendant's enrichment must be at the expense of the plaintiff; and*
> *(d) The enrichment must be unjustified or sine causa.*

McCARTHY RETAIL LTD v SHORTDISTANCE CARRIERS CC [2001] 3 ALL SA 236 (A), 2001 (3) SA 482 (SCA)."

[62] Gemcore Sampling's claim and evidence that Superkolong had been enriched at its expense and that it (Gemcore Sampling) has been impoverished as a result in the amounts of R 1,485,164-79 and R 2, 942, 677-48 (as amended) was met with a bare denial. The evidence showed that this amount was paid to or on behalf of Superkolong. Superkolong's books of account exhibited that Gemcore Sampling was its creditor and that monies have been advanced by it and paid into its account for its benefit. That is common cause between the parties. **SIELBERGERG AND SCHOEMAN'S THE LAW OF PROPERTY 5th ed** at 267 para 11.2.1.6 comment as follows:

"The requirements are that the defendant must be enriched, the plaintiff must be impoverished, the defendant's enrichment must be at the expense of the plaintiff and the enrichment must be unjustified."

See McCARTHY RETAIL LTD and BESSELAAR v REGISTRAR, DURBAN AND COASTAL DIVISION 2002 (1) SA 191 (D) at 197I-J.

[63] The defence raised by Superkolong that there was a *causa* namely the 11 August MOU 2008 cannot be sustained because Gemcore Sampling and Superkolong were not party to that agreement dealt with in para 46 above.

I consequently come to the conclusion that the claim for enrichment has been established and should succeed.

In the result the following order is made:

1. **The application for rectification by the plaintiff (Gemcore Sampling (PTY) Ltd is dismissed with costs.**
2. **The First Defendant, Superkolong (Pty) Ltd, is ordered to pay to the plaintiff, Gemcore Sampling (Pty) Ltd, an amount of R2, 942, 677-48 with interest thereon *a tempora morae*, to date of payment .**
3. **The First Defendant, Superkolong (Pty) Ltd, is ordered to pay to the plaintiff, Gemcore Sampling (Pty) Ltd, an amount of R1, 486, 164-79 with interest thereon *a tempora morae*, to date of payment.**
4. **The First Defendant, Superkolong (Pty) Ltd, is ordered to pay the costs of this application.**

BM PAKATI
JUDGE

On behalf of the Plaintiff:	**ADV P. ZIETMAN (SC)**
Instructed by:	**ENGELSMAN MAGABANE ING**
On behalf of the Defendant:	**ADV A. DANZFUSS (SC)**
Instructed by:	**VAN DER WALL & VENNOTE**