



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 915/2024

In the matter between:

SACTWU INVESTMENTS GROUP (PTY) LTD

APPELLANT

and

**SEKUNJALO INDEPENDENT MEDIA
(PTY) LTD**

FIRST RESPONDENT

**SEKUNJALO INVESTMENTS HOLDINGS
(PTY) LTD**

SECOND RESPONDENT

Neutral citation: *SACTWU Investments Group (Pty) Ltd v Sekunjalo Independent Media (Pty) Ltd and Another* (915/2024) [2026] ZASCA 39 (26 March 2026)

Coram: MATOJANE, SMITH and BAARTMAN JJA and VALLY and NORMAN AJJA

Heard: 18 February 2026

Delivered: 26 March 2026

Summary: Law of Contract – loan agreement – whether the signatory to the subordination agreement had actual or ostensible authority to conclude the agreement – whether the subordination agreement is vitiated by mistake or is voidable due to misrepresentation – whether the *in duplum* rule finds application in relation to the calculation of interest on the capital amount of the loan where interest had been capitalised over time.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (O’Sullivan AJ, sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of three counsel.
- 2 The order of the high court is set aside and substituted with the following order:
 - ‘1 The plaintiff’s claim is upheld with costs, including costs of three counsel.
 - 2 Sekunjalo Independent Media (Pty) Ltd is liable to pay to SACTWU Investments Group (Pty) Ltd, the amount of R458 606 995.07, calculated as set out in Annexure A, attached to the parties’ agreement.
 - 3 Sekunjalo Independent Media (Pty) Ltd is liable to pay interest from 29 August 2023 until the date of payment, on any amount then and thereafter outstanding in respect of the amount payable to SACTWU Investments Group (Pty) Ltd at the default interest rate provided in the loan agreement.’

JUDGMENT

Norman AJA (Matojane , Smith and Baartman JJA and Vally AJA concurring)

Introduction

[1] This appeal has been brought by SACTWU Investments Group (Pty) Ltd (SIG), with the leave of the Western Cape Division of the High Court, Cape Town (the high court). On 16 April 2019, SIG brought an action for the recovery of R150 million lent to the first respondent, Sekunjalo Independent Media (Pty) Ltd (SIM), in August 2013 (the loan agreement). SIG is the investment vehicle of the Southern African Clothing and Textile Union (SACTWU). SIG has SACTWU Educational Trust as its sole shareholder. The parties agreed in the loan agreement that its maturity date would be 14 August 2020. They also agreed that interest was to accrue on the loan amount due quarterly over the seven-year term of the loan. In the event that SIM had insufficient funds to pay any accrued interest, then such interest would be capitalised. The issues of liability and interest payable are for determination in this appeal. SIM opposes the appeal.

Background

[2] During 2017, SIG faced challenges from a capital perspective and its dividend income proved insufficient to make the necessary investments in the clothing industry to preserve clothing businesses and prevent job losses. By 2017, no interest payments had been made by SIM. SIG then decided to exit the loan agreement. It had discussions with Dr Iqbal Surve of SIM about the exiting strategy. At that point, SIM was merging its electronic and technology businesses into Sagarmatha Technologies Limited (Sagarmatha), which would list on the Johannesburg Stock Exchange (JSE) and the New York Stock Exchange (NYSE). Dr Surve wrote to SIG on 23 October 2017 and made a formal proposal that the second respondent, Sekunjalo Investment Holdings (Pty) Ltd (SIH), was offering to acquire all the shares and loan claims that SIG has in and against SIM. The equity would be settled by the issue of shares in Sagarmatha before its listing on the JSE. He further informed SIG that Sagarmatha had attracted to its advisory board and as

shareholders, some technology billionaires from the USA, Holland, China, Singapore, and India.

[3] That offer was accepted, and led to the conclusion of the sale agreement on 22 November 2017. In terms of the sale agreement, the parties agreed that SIG's claim of no less than R275 644 627, and its eight ordinary shares in SIM, were sold for an aggregate purchase price of R334 164 627, plus any interest on the loan that accrued up to the effective date. The effective date meant either the date on which the Stock Exchange News Service (SENS) announcement is to be released, and if no such SENS Announcement was released, the effective date would be the second business day following the date on which the purchaser notifies the seller in writing that the listing will proceed.

[4] The sale agreement further provided that 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. A cession would take place in terms of which SIG's claim under the loan agreement passed to Sagarmatha. The parties agreed that SIG may not dispose of the shares for a period of three months from the listing (the lock-in period). The lock-in period came about because SIG intended to sell its shares in Sagarmatha as soon as possible after the listing. Dr Surve wished to avoid that by proposing a lock-in period of six months, which was, through negotiations, reduced to three months. Sagarmatha was, according to Dr Surve, going to become an African leader in e-commerce, digital media, and syndicated technology ventures.

[5] On 22 November 2017, SIG's board of directors passed a written resolution authorising the sale agreement. The details of the resolution shall be dealt with later,

as they are relevant to the primary issue of whether Mr Andre Kriel (Mr Kriel), a general secretary of SACTWU and one of the directors of SIG had authority to sign the subordination agreement.

[6] On 1 December 2017, Mr Kriel, signed the subordination agreement in respect of the loan agreement at Dr Surve's offices. Mr Takudzwa Hove (Mr Hove), a chartered accountant, signed the subordination agreement on behalf of SIM some days later. The Sagarmatha listing failed in April 2018, and consequently, SIG's loan was never transferred to Sagarmatha. The sale agreement became ineffective.

[7] Dr Surve came up with ways of repaying the loan to SIG after the listing failed. At some point, he undertook to pay R120 million and to transfer shares valued at R30 million to SIG. That promise never materialised. SIG subsequently sued for repayment of the loan, and SIM defended the action, primarily relying on the subordination agreement.

In the High Court

[8] SIG disputed the validity of the subordination agreement. It contended that Mr Kriel lacked actual authority to conclude it. If it was found that the subordination agreement was validly concluded, SIG argued that it was unenforceable or voidable based on the doctrine of reasonable mistake or misrepresentation. It also relied on three material representations that were made by Mr Hove to Mr Kriel, which, according to SIG, were made with the intention of inducing SIG to enter into the subordination agreement.

[9] Those representations were that: first, 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 Sagarmatha's listing; 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; and 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 Sagarmatha was scheduled to list on the JSE. SIG further submitted that the *in duplum* rule does not apply to capitalised interest.

[10] SIM abandoned its defence that the sale of Sagarmatha shares to SIG divested SIG of its claim under the loan agreement, as it had passed to Sagarmatha on the effective date. As stated earlier, SIM's defence turned entirely on the subordination agreement, namely, that by virtue of its terms, SIG is not entitled to demand or sue for repayment under the loan agreement until such time that SIM's auditors report in writing that its assets exceed its liabilities. SIM further contended that Mr Kriel derived actual authority from the resolution of the board of directors of SIG, passed on 22 November 2017. In the alternative, SIM contended that Mr Kriel had ostensible authority. Regarding interest, SIM contended that the *in duplum* rule applies.

The High Court findings

[11] The high court made the following findings that have a bearing on the issues before this Court: (a) that the subordination agreement, which was to give effect to the transactions contemplated for the Sagarmatha listing, was in principle authorised by the November 2017 resolution; (b) that it was not possible that Mr Kriel had been given specific authority to sign a subordination agreement that would lapse and be

of no further force and effect, one week after the date on which Sagarmatha was scheduled to be listed on the JSE exchange; (c) that signing the subordination agreement that enabled SIM's financial statements to be prepared on a going concern basis, which would facilitate the listing of Sagarmatha, clearly fell within Mr Kriel's authority. He thus had actual authority to sign it; (d) that SIG's claim of lack of authority point is impermissibly based on hindsight; (e) that the November 2017 resolution did not need to expressly mention a subordination agreement in order for it to be included in the types of agreements which could be concluded by SIG's directors; (f) that Mr Kriel, who had read the subordination agreement, could not rely on *iustus error* in avoiding it, since the error was solely his fault; (g) that SIG assumed the risk of Sagarmatha not listing; (h) that SIG's defences based on allegations of misrepresentation must fail; (i) the parties cannot by agreement override or waive the *in duplum* rule and the interest consequently accumulates only to the point of *duplum*; and (j) that the terms of the subordination agreement are binding on SIG. For these reasons, the high court dismissed the claim with costs.

Before this Court

Issues for determination

[12] The primary issue is whether Mr Kriel had authority derived from the November 2017 resolution to enter into the subordination agreement. In my view, that issue is dispositive of the matter, and it may not be necessary to address the issues such as misrepresentation or *iustus error* (justifiable mistake) should it be found that he had neither actual nor ostensible authority. The other issue is whether the interest that was payable in terms of the loan agreement was subject to the *in duplum* rule by virtue of it having been capitalised.

Legal submissions by SIG

[13] SIG submitted that Mr Kriel did not have authority to bind it to the subordination agreement because, properly interpreted, the board resolution relied upon did not authorise him to do so. SIG relied on the established principles set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹ The high court erred in finding that the resolution authorised Mr Kriel to conclude the subordination agreement on behalf of SIG.

[14] The high court further erred in finding that the subordination agreement is related or incidental to the sale agreement. The high court further erred in finding that Mr Kriel had ostensible authority to sign the subordination agreement.

[15] SIG submitted in the alternative that it is not bound by the subordination agreement because it is vitiated by mistake or *iustus error*,² in that SIM knew, or ought to have known, that SIG did not intend to contract on the terms of the subordination agreement, alternatively, the purported agreement was caused by SIM's misrepresentation. In the further alternative, the latter also renders the subordination agreement voidable, and SIG elected to avoid it. Apart from the misrepresentation, SIM knew or ought reasonably to have known that SIG's apparent expression of consensus was not in conformity with its actual intention.³ SIG also relied on SIM's subsequent conduct, after the listing failed, in that it corroborated the fact that SIM placed no reliance on the terms of the subordination agreement and made various alternative proposals to accommodate repayment of SIG's loan.

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) paras 18-26 (*Endumeni*).

² *Sonap Petroleum (SA) (PTY) LTD (formerly known as SONAREP (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239 G-H (*Sonap*).

³ *Spes Bona Bank LTD v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) 984 E-F citing *Smith v Hughes* (1871) LR 6 QB 597 at 607.

[16] SIG further asserted that the high court erred in its finding that the *in duplum* rule applies in this case. SIG submitted that the loan agreement is not a pure loan agreement but has elements of an investment agreement. It gave the debtor, SIM, an election to delay interest payments. This is not a case where the debtor, from a policy perspective, requires protection from the creditor as found in *Bellingan v Clive Ferreira & Associates CC and Others*,⁴ and should not apply in a case where the debtor has contracted for and elected to defer interest payments. In this regard, it was argued, the high court erred. SIG sought an order upholding the appeal with costs of two counsel.

Legal submissions by SIM

[17] SIM argued that Mr Kriel had actual authority to conclude the subordination agreement as it falls within the ambit of the resolution authorising him to conclude any agreement related or incidental to the sale agreement and the implementation thereof. In the alternative, Mr Kriel had ostensible authority.

[18] Furthermore, Mr Hove did not make any misrepresentations when he informed Mr Kriel that the subordination agreement would fall away on Sagarmatha's listing. At the time of making this statement, Mr Hove did not consider that Sagarmatha would not list. SIG cannot rely on a unilateral mistake. Capitalisation does not change the nature of the debt; it remains arrear interest, and the *in duplum* rule applies.

[19] SIM further submitted that Mr Kriel had, at least, ostensible authority. Ostensible authority is one instance of estoppel. It relied on *Makate v Vodacom Ltd*,⁵

⁴ *Bellingan v Clive Ferreira & Associates CC and Others* 1998 (4) SA 382 (W) at 401 B-C (*Bellingan*).

⁵ *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC), para 110.

for the contention that the majority judgment held that ostensible authority and estoppel are not synonymous.⁶ A party cannot rely on its own mistake to avoid a contract.⁷

[20] SIM relied on the principle of *caveat subscriptor*. It argued based on that principle that Mr Kriel, having read and signed the subordination agreement, is bound by it.⁸ SIM submitted that the high court correctly held that Mr Hove made no misrepresentation to Mr Kriel. On the issue of the *in duplum* rule, SIM relied on *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)*,⁹ for the contention that capitalisation of arrear interest does not change its character from arrear interest to something different. In this case the unpaid arrear interest has reached and exceeded the capital amount, it remains arrear interest, and therefore, the *in duplum* rule applies as correctly found by the high court. SIM asked for the dismissal of the appeal with costs of three counsel.

Discussion

The subordination agreement

[21] Given that the length and complexity of the subordination agreement were central to the parties' arguments concerning the reasonableness of Mr Kriel's actions and the relevance of the *caveat subscriptor* principle, I will reproduce it in its entirety.

'Memorandum of agreement

Between SACTWU Investments Proprietary Limited ("the Creditor") and Sekunjalo Independent Media Proprietary Limited ("the Company") Whereas:

- a. The Creditor is a substantial creditor of the Company.

⁶ Ibid, para 69.

⁷ *Botha v Road Accident Fund* [2016] ZASCA 97; 2017 (2) SA 50 (SCA).

⁸ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472A.

⁹ *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* [1997] ZASCA 94; 1998 (1) SA 811 (SCA); [1998] 1 All SA 413 (A) at 827 H-829 H (*Oneanate Investments*).

- b. The Creditor has agreed to assist the Company by subordinating, subject to certain terms and conditions, and together with the Government Employees Pension its claim(s) against the Company in favour of and for the benefit of the other creditors of the Company.
- c. It is desirable to record the matters agreed upon.

Now therefore it is agreed as follows:

- 1. It is recorded that as at 31 December 2016, the Creditor constituted a substantial creditor of the Company in the amount of R243 986 857 for monies lent to the Company.
- 2. In order to assist the Company, the Creditor agrees, subject to 4 below, -
 - 2.1 To subordinate for the benefit of the other creditors of the Company, both present and future, so much of its claim ("the Subordinated Claim") against the Company as would enable the claims of such other creditors to be paid in full.
 - 2.2 And hereby warrants that its claims against the Company have not been ceded to any third party and that no third party has any interest in the claims; the claim has been ceded and the cessionary has been notified and has consented to the subordination;
 - 2.3 That the claims of such other creditors of the Company, both present and future, will rank preferentially to the Subordinated Claim of the Creditor against the Company; and
 - 2.4 That in the liquidation of, or business rescue of, or compromise by the Company, it will not prove or tender to prove a claim in respect of its Subordinated Claim, which proof would reduce or diminish any dividend payable to other creditors, whether present or future, and accordingly, the Creditor hereby abandons that Subordinated Claim to the extent that it would reduce or diminish the dividend payable to those other creditors.
- 3. It is intention of the parties that this agreement shall constitute a contract for the benefit of other creditors of the Company, both present and future, and that the benefit shall therefore be capable of express or implied acceptance by any or all of such creditors who may then enforce any terms of this agreement.
- 4. The subordination referred to in 2 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. This subordination shall lapse immediately upon the date that the assets of the Company, as fairly valued, and shall not, except by further agreement in writing, be reinstated if thereafter the liabilities of the Company, as fairly valued, again exceed its assets, as fairly valued, provided that for the purposes of this paragraph 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.
5. The Creditor hereby agrees that, until such time as the assets of the Company, as fairly valued, exceed its liabilities, as fairly valued, and the auditor's report referred to in 4 has been issued, it shall not be entitled to demand or sue for or accept repayment of the whole or any part of said amount owing to it by the Company and set-off shall not operate in relation to the Subordinated Claim in respect of any debts owing by it now or in the future provided that if the auditor of the Company reports in writing that he has been furnished with evidence which reasonably satisfies him/her that the amount of the Subordinated Claim exceeds the amount by which the liabilities of the Company, as fairly valued, exceed its assets, as fairly valued, such excess portion of the subordinated claim as is specified in the said certificate shall be released from the operation of this agreement.
 6. It is agreed that from the date of signature hereto, notwithstanding that interest may accrue on the Subordinated Claim, no interest will be paid by the Company on the Subordinated Claim for so long as the subordination is in effect.
 7. Should all or part of the Subordinated Claim be repaid, inadvertently or deliberately, then the Creditor agrees that it will immediately refund to the Company the amount repaid.
 8. The Creditor and the Company undertake that in the event of cancellation or variation of this agreement in any respect, each will, as a condition precedent to the coming into force and effect of such cancellation or variation, advise the auditor of the Company in writing forthwith of the cancellation or variation.
 9. The costs of and incidental to the preparation of this agreement shall be borne and paid for by the Company.'

[22] Ordinarily, a subordination agreement relates to a subordinated debt which remains a liability of the debtor. The mere subordination of a creditor's debt does not automatically make the debtor solvent again.¹⁰

¹⁰ *Ex Parte De Villiers and Another NNO: In Re Carbon Developments (Pty) Ltd (in liquidation)* 1993 (1) SA 493 AD at 504-505.

[23] It is not in dispute that Mr Kriel went to Dr Surve's office to sign documents that related to a separate 'vendor finance deal'. Mr Govender had vetted all documentation related to the vendor deal. Mr Govender is an accountant and, at the relevant time, was an executive director of Hoskin Consolidated Investments (HCI). SIG is a major shareholder in HCI. SIG sought his advice on business and investment matters.

[24] The subordination agreement was never shown to Mr Govender or vetted by him, although he had been at Dr Surve's offices an hour before Mr Kriel's arrival to vet all documents relating to the vendor finance deal. In fact, the subordination agreement did not form part of the suite of agreements that were presented to Mr Govender, and which were subsequently signed by Mr Kriel.

[25] It is common knowledge that there were no negotiations or discussions regarding the subordination agreement between SIM and SIG prior to its presentation to Mr Kriel for signature. Mr Kriel testified that he did not read the subordination agreement carefully, he read the first parts of it, it did not fall within his area of expertise, and he did not pay attention to 'every single legal or commercial term.'

[26] Prior to signing the subordination agreement, Mr Kriel telephoned Mr Hove, SIM's chief financial officer, to enquire about its intention, purpose, and duration. According to Mr Kriel, Mr Hove told him that the subordination agreement was necessary for the listing of Sagarmatha; it was required by the auditors to facilitate the listing; it would be for a limited duration; and it would 'fall away seven days after the listing was scheduled.'

[27] Mr Hove's recollection of the telephonic discussion with Mr Kriel differed in one material respect. He testified that when he was asked about the duration, he said, '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.' He denied mentioning a seven-day period.

[28] After speaking with Mr Hove, Mr Kriel telephoned Mr Govender and read to him the first few parts of the agreement. Mr Govender testified that Mr Kriel reported that Mr Hove had told him that the subordination was necessary for the listing, was for a limited duration, and 'would fall away a week after the listing took place.' This differed from Mr Kriel's evidence, who had testified that it would 'fall away seven days after the listing was scheduled.' Based on the limited duration of the subordination, Mr Govender told Mr Kriel to sign the subordination agreement.

[29] Under cross-examination, Mr Hove testified that he was almost certain that he had seen the subordination agreement before it was sent to Mr Kriel. He stated that in his understanding Mr Kriel was going to meet with Dr Surve and '*was expecting that Dr Surve in his meeting with Andre would then ... take him through the document and get a signature.*' The evidence showed that Dr Surve was not present, and no one took Mr Kriel through the subordination agreement at Dr Surve's offices. Importantly, it is common cause that no one, including Mr Hove, explained to Mr Kriel, Grant Thornton's guidelines¹¹ relating to the subordination agreement, which directed specifically that reference to paragraph five of the subordination agreement specimen should be drawn to the creditor's attention, in this case, SIG.

¹¹ The Grant Thornton's guidelines that form part of the Record provide amongst others:

'The creditor who has subordinated his/ her/ its claim 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. (See, for example, paragraph 5 of attached specimen agreement).' The specimen agreement is the subordination agreement quoted above.

That is the clause that conveys, amongst others, the open-ended nature of the subordination agreement.

Did the November 2017 resolution authorise Mr Kriel to enter into the subordination agreement?

Actual authority

[30] As aforementioned, the primary issue for decision is whether Mr Kriel had authority to sign the subordination agreement that forms the subject matter of these proceedings. This issue is dispositive of the matter because if it is found that Mr Kriel did not have authority, that would render the subordination agreement void and of no force or effect.

[31] Before dealing with the issue of authority, a close scrutiny of the subordination agreement may provide a better context. SIG, as a juristic person, acts through its agents. It is to the resolution taken by its board of directors that this Court should look for authority, because a director has no inherent authority to bind the company as he or she wishes. A director must act on authority conferred either expressly or by implication.

[32] In *Ditsoane v ACWA Power Africa Holdings (Pty) Ltd*,¹² the Constitutional Court remarked that:

‘Implied authority is a form of actual authority. If an attorney does something that is contrary to the express instructions of the client, it is contrary to the attorney’s actual authority. The fact that the attorney’s act would, but for the client’s express contrary instruction, have been within the attorney’s implied authority does not convert the act from an unauthorised one into an authorised one. However, the fact that the act would, but for the contrary instruction, have been within the

¹² *Ditsoane v ACWA Power Africa Holdings (Pty) Ltd* [2023] ZACC 44; 2024 (3) BCLR 307 (CC); (2024) 45 ILJ 467 (CC), para 30.

attorney's implied authority may be relevant in deciding whether the client is estopped from denying the attorney's actual authority.'

[33] In considering those sentiments where a company is involved, this Court dealt with actual authority in *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others* as follows:¹³

'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:

'[A]ctual 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.'

[34] There are broadly three categories of implied actual authority. First, implied actual authority is that authority which is necessary or reasonably incidental to the effective execution of the agent's express authority. For instance, where the agent has express authority to develop property for his principal, he will have implied authority to do all such things as are reasonably incidental to the development of that property, such as appointing architects to prepare plans. Alternatively, if an agent is authorised to finalise an offer to purchase on behalf of a principal, they also have the implied authority to handle related tasks, such as obtaining necessary compliance certificates.¹⁴

¹³ *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and Others* [2012] ZASCA 66; 2012 (5) SA 323 (SCA); [2012] 3 All SA 498 (SCA), para 24 (*Northern Metropolitan Local Council*).

¹⁴ *Hopkins v T L Dallas Group Ltd & Anor* [2004] EWHC 1379 (Ch) (*Hopkins*); *Coetzer v Mosenthal Ltd* 1963 (4) SA 22 (A); *Kahn v Leslie & Sons* 1928 EDL 416.

[35] Second, implied actual authority may be implied from the nature of the office or the particular position to which the agent is appointed. This may be referred to as implied usual authority. The appointment of a person as the managing director of a company, for instance, may carry with it implied usual authority to enter into contracts on behalf of the company and to do all such things as are within the usual scope of that office.¹⁵ Where the board of directors appoint one of their members to an executive position, they impliedly authorise him to do all such things as fall within the usual scope of that office.¹⁶ Implied usual authority must be distinguished from ostensible usual authority. Third, implied actual authority may arise as a reasonable inference from the conduct of the principal, where the principal acquiesces in the activities of the agent. An example of this category arose in *Hely-Hutchinson v Brayhead Ltd*.¹⁷

[36] The November 2017 resolution must be looked at contextually, having regard to, inter alia, the text, purpose, and the surrounding circumstances that led to it being passed. It was not an ‘open sesame’ for any director of SIG to sign any agreement. The directors’ authority was limited in that they were 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’, that would give effect to the implementation of the sale agreement.

[37] That context is provided both in the introductory summary preceding the actual resolution and the resolution itself. The resolution, in the first part,

¹⁵ *SA Securities v Nicholas* 1911 TPD 450; *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 (CA).

¹⁶ *Hopkins* at 572.

¹⁷ *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 (CA).

incorporated some of the terms of the sale agreement, such as the amount of shares in SIM that SIG will sell to Sagarmatha, how the purchase price will be discharged, and also the amount of the claim. It further recorded that a copy of the agreement with the resolutions contained therein had been provided to the board for consideration. The resolutions passed were recorded as follows:

‘3. Resolutions

3.1 Resolution 1

The terms and conditions of, and the transactions contemplated by, the agreement is hereby approved, the company be and is hereby authorised to enter into and perform its obligations and shall be bound in terms of:

3.1.1 the Agreement;

3.1.2 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”) and any amendments to the Agreement and/or the Related Documents.)

3.2 Resolution 2

Any director of the Company, be and is hereby authorised, empowered and instructed, on behalf of the Company, 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. Any actions which thus far been taken in this regard by any of the aforementioned be and are hereby confirmed and ratified.’

[38] In *Endumeni*, this Court summarised the trite principles of interpretation as a process of attributing meaning to the words used either in a contract or legislation, by considering the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.’¹⁸

¹⁸ *Endumeni*, para 18.

[39] The high court, in concluding that Mr Hove, acting as a reasonable person, believed that Mr Kriel's expressed intention was for SIG's loan claim to be subordinated in accordance with the terms outlined in the agreement, relied upon Mr Kriel's signature as evidence of both his express or apparent intention. However, the high court did not give sufficient weight to the contextual factors, all of which are essential as directed in *Endumeni*.

[40] The purpose of the November 2017 resolution was to enable SIG to exit the loan agreement by authorising its directors to ensure that the sale agreement was given effect to. That was its sole purpose. The loan agreement was going to be exited by SIG in line with what was agreed to in the sale agreement, which was that on the effective date the purchase price would be discharged by Sagarmatha, after its listing on the JSE, by allotting and issuing to SIG the shares credited as fully paid up at an issue price equal to the offer price. A cession would then take place in terms of which SIG's claim under the loan agreement would pass to Sagarmatha. Nowhere in the sale agreement is there any mention of the subordination agreement.

[41] Mr Kriel understood that this resolution granted him the general mandate to sign such documents and to do such things that would realise the mandate. The mandate was that they would enter into a 'loan swap' or 'share swap agreement', that would give SIG shares in Sagarmatha for the purpose of aiding it to be listed. SIG would then sell those shares after three months to recover the loan. The resolution was consistent with the terms of the sale agreement. The sale agreement was predicated on the successful listing of Sagarmatha. The resolution did not explicitly or impliedly authorise Mr Kriel to subordinate SIG's loan to the claims of any other creditors of SIM until such time as SIM is declared to be solvent.

[42] According to Mr Kriel, he relied on the explanation from Mr Hove that the subordination was for a limited period, needed by auditors to facilitate the listing, which would fall away seven days after the listing was scheduled. He also understood that when the listing failed, the subordination agreement was null and void, 'it was dead' because it did not serve the purpose for which it was intended, as explained to him by Mr Hove and as he understood it.

[43] It is the first category as explained in *Northern Metropolitan Local Council*, that is implicated, namely, implied actual authority being that authority which is 'necessary or reasonable' to the effective execution of the agent's express authority. Whether it was necessary or reasonable to act, can only be determined by employing the objective test. That is, evaluating the parties' words and conduct from the perspective of a reasonable observer, rather than their subjective inner intentions.

[44] The resolution clearly refers to the sale of shares and claims agreement. The sale of shares is between SIG and Sagarmatha and has a direct bearing on the exit strategy. The resolution also recorded that the agreement pertaining to those issues had been submitted to the board of directors of SIG. It appears therefrom that not only was the sale agreement placed before the board, but the board applied its mind to its terms by incorporating some of them in its resolution document, as stated above.

[45] Most importantly, both the sale agreement and the resolutions were signed on the same day, 22 November 2017. A subordination agreement that was placed before Mr Kriel on 1 December 2017, some nine days after the passing of the resolution, could not have been within the contemplation of SIG's board when the resolution was passed.

[46] The reference to the listing in the resolution is part of the record of the sale agreement foreshadowed in the introductory part of the resolution that ‘the listing of its shares on the Johannesburg Stock Exchange (the JSE) equals the purchase price (fractions to be dealt with per Listings Requirements of the JSE)’, and nothing more. It does not mean that a subordination agreement that is introduced for a completely different purpose, and whose effects or consequences were not even remotely connected to the purpose for which the resolution was passed, is part of the authority given to the directors of SIG. To do so, with respect, would undermine the resolution itself.

[47] The reference to the shares in the resolution is to those that were to form part of the exit strategy. SIG was intent on selling them after the lock-in period post the listing. That, on any interpretation, could not mean what is contended for by SIM, namely that SIG agreed through the hand of Mr Kriel not to claim payment of its loan indefinitely or until SIM became solvent in terms of the subordination agreement.

[48] That contention is not supported by the objective facts because the plan that Dr Surve came up with, which was negotiated and culminated in the sale agreement, was meant to enable SIG to exit the loan agreement and recover its capital plus interest. An indefinite subordination of its claim would prevent any form of exit because it is linked to the state of solvency of SIM, the onset of which was unknown.

[49] Critically, neither the resolution nor the sale agreement made any reference to a subordination agreement. The subordination agreement was not discussed with or presented to SIG’s directors until 1 December 2017, nine days after the resolution was passed. No director of SIG knew of the subordination agreement before it was signed. Mr Govender also testified that in all his discussions with Dr Surve, the latter

never mentioned a need for a subordination agreement. Mr Govender's evidence in this regard stands uncontroverted because Dr Surve did not testify at the trial.

[50] Mr Hove, Mr Govender, and Mr Kriel may have believed that the subordination agreement was related to the sale agreement and was limited in duration. Factually, and contrary to their beliefs, the subordination agreement in these proceedings is not related to the sale agreement and is for an indefinite period.

[51] Mr Kriel testified that he would not have signed the subordination agreement if he had been aware of its open-ended nature, as it would have sterilised the loan agreement. He relied on the representations made to him by Mr Hove that the subordination agreement was for a limited period as it was going to fall away after the listing. Under cross-examination the response of Mr Kriel to Mr Fagan was put to Mr Hove:

'Mr Kriel: Had Mr Hove said to me no this is not for a limited duration which [he did], he clearly said to me this is for a limited duration, not his words but clearly it was a limit, it was to aid the listing in other words, it was for a limited period, it would fall away within a defined period. Had he taken the time to explain to me differently to say what is being presented to you for the first time now, first time that you see this document is intended to be for an indefinite period I would never have signed it, never.

Mr Kuschke: So, there is no doubt at least I would submit and it can be not little doubt at all in anybody's mind that had clause 5 which I was directing your attention in the context of this question being drawn to the attention of Mr Kriel. And had it dawned on him if I can call it that that is an unlimited and open-ended duration subordination agreement, he certainly would've said to whoever was there it was nice to meet with you today but I am sorry I'm not signing this document.

Mr Hove: Mm, yes

Mr Kuschke: Accept it

Mr Hove: Yes.'

[52] These responses evince that both Mr Kriel and Mr Hove shared the common understanding that the subordination agreement would endure for a limited period and would lapse after the listing. A subordination agreement limited in duration to the period necessary for the listing process would undoubtedly be reasonable and necessary. Such an agreement would facilitate the listing, enable the implementation of the sale agreement, and protect SIG's position if the listing were to fail.

[53] But an open-ended subordination agreement, which would continue indefinitely even if the listing failed, cannot be described as 'reasonable and necessary' to implement a transaction whose entire purpose was to enable SIG to exit the loan through the listing. On the contrary, such an agreement would ensure that if the listing failed, SIG would be left in a worse position than before, unable to recover its loan, remediless and without the Sagarmatha shares that it had bargained for.

[54] The resolution, properly interpreted, does not support the subordination agreement. The failure of the listing clearly illustrates why an indefinite subordination was not reasonable and necessary to implement a transaction designed to facilitate SIG's exit through a successful listing.

[55] According to Mr Hove, he conveyed to Mr Kriel that the subordination agreement was required by the auditors for the listing. Mr Kriel accepted that the subordination agreement was needed for the listing and so did Mr Govender. Both Mr Kriel and Mr Govender testified that SIG was intent on recovering its loan amount plus interest through the listing of Sagarmatha and the allocation of shares

to it, which it would sell three months after listing. According to Mr Kriel, he understood that if the listing failed the subordination ‘would be dead.’

[56] When questioned about the purpose for which the subordination was signed Mr Kriel stated that, *‘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.’* His testimony in this regard supports SIG’s contention that he had no authority to enter into the open-ended subordination. Mr Govender testified that if SIG signed an open-ended subordination agreement SIG *‘would not be able to exit their investment’*, if the listing failed. These responses are consistent with the exit plan as contained in the sale agreement.

[57] The high court and the parties accepted that before Mr Kriel signed the agreement, he did not contact any of the SIG board members. Mr Govender had not seen the subordination agreement, and did not have any discussions regarding it either with SIG or SIM. He gave Mr Kriel the go ahead to sign the agreement based on the brief telephonic discussion with Mr Kriel and his statement-which rested largely on what Mr Kriel was allegedly told by Mr Hove-that the subordination would fall away after the listing.

[58] Mr Govender may have been the go-to man’ in SIG on matters relating to contracts but, absent written authority from the board of directors, he possessed no power in law to authorise the signing of the subordination agreement. There is no evidence that SIG ratified the subordination agreement through its subsequent conduct or other means. Furthermore, Mr Govender’s opinion or assumptions conveyed to Mr Kriel regarding whether he required board approval to sign the subordination agreement is irrelevant because he was not a director of SIG.

[59] It is common cause that there was no specific board resolution that authorised Mr Kriel to conclude the subordination agreement. Mr Hove conceded that the sale agreement and the subordination agreement were unconnected. The transcript before the high court reveals that he was asked whether the subordination agreement was part of the transaction documents? In his response, Mr Hove indicated that ‘it came about as a separate process. [...] it was driven by the listing, and it came about as a result of a need to get the financials signed. [...] 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.*’ (My emphasis).

[60] It was properly conceded by the parties that the sale agreement and the subordination agreement were entirely separate, each serving its own independent purpose. The sale or swap agreement was intended to govern, among other things, the repayment of the loan and interest. By contrast, the subordination agreement was designed to sterilise the insolvency of the debtor on an ongoing basis, potentially without end. In light of these fundamentally different objectives, the high court was mistaken in its determination that the subordination agreement was ‘related or incidental’ to the sale agreement. The two agreements addressed distinct matters and were entered for distinctly different reasons.

[61] In sum, it follows that the finding by the high court that the subordination agreement was related or incidental to the sale agreement, constitutes a misdirection. The high court also erred in its findings that Mr Kriel had the requisite authority to sign the subordination agreement. Authority is conferred by the resolution and not by the subjective expectations of the parties. The question is not what Mr Kriel or Mr Hove anticipated but what the resolution authorised. Absent a written resolution

from the board of SIG, authorising the signing of the subordination agreement by Mr Kriel, SIG cannot be bound by it. I find that Mr Kriel lacked actual authority to bind SIG to the subordination agreement. Based on these findings, this Court is at large to interfere with the decision of the high court.

Ostensible authority

[62] On the alternative argument based on ostensible authority, Mr Hove testified that he never saw a resolution authorising Mr Kriel to sign the subordination agreement. If SIM never saw the resolution it could not have relied on it as a representation of authority. In *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd*,¹⁹ a case concerning the enforceability of obligations against a company, the court set out the four-point test for establishing apparent or ostensible authority. It listed the following: (a) a representation was made to the contractor that the agent had authority; (b) the representation was made by someone with actual authority; (c) the contractor was induced by the representation to enter the contract; and (d) the company had the capacity to enter into the contract. Having regard to the facts set out earlier, the four-point test was not satisfied.

[63] The evidence demonstrates that both parties were in agreement regarding the purpose of the subordination agreement. It was understood by all involved that the agreement was solely intended to facilitate the listing of Sagarmatha. Consequently, the subordination agreement was envisaged to last only until the listing took place. This temporary nature was central to its purpose and operation. Despite this common understanding, Mr Kriel was, instead, presented with a pro-forma agreement prepared by SIM's auditors, which provided for the open-ended subordination of the debt. SIM, as a result, failed to demonstrate that it altered its position to its own

¹⁹ *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

detriment based on reliance on the subordination agreement. Therefore, any claim of prejudice arising out of the agreement is not supported by the evidence. At most, SIM obtained an agreement it would not otherwise have obtained. That is not prejudice; it is the loss of an unconscionable advantage.²⁰ None of these requirements have been satisfied by SIM, and the defence based on ostensible authority must also fail.

[64] I do not deem it necessary to address innocent misrepresentation and mistake or *iustus error*, because the resolution of the authority issue cuts across all the other defences. However, in order to comply with the decision of the Constitutional Court in *Spilhaus Property Holdings (Pty) Ltd and Others v MTN and Another*,²¹ it is sufficient to record the following findings with regard to misrepresentation and *iustus error*. Mr Hove made specific representations to Mr Kriel regarding the nature and purpose of the subordination agreement. He indicated that the subordination agreement which he had reviewed and forwarded to Dr Surve's offices, before it was presented for signing to Mr Kriel, was effective for a limited period and was for listing purposes. As an accountant and to whom the Grant Thornton guidelines applied, he failed to bring to the attention of Mr Kriel the contents of paragraph five of the subordination agreement. In his explanation to Mr Kriel he described the subordination agreement as if it were relevant to the listing itself, despite his knowledge—later confirmed in his testimony—that it was, in fact, a separate process. His actions therefore amounted to misrepresentation. At all relevant times relating to the subordination agreement, Mr Hove was acting on behalf of SIM when he made

²⁰ In *Olex Focas Pty Ltd and Another v Skodaexport Co Ltd and Another* O.M.P No. 232 (November 5, 1999), unconscionability was held to include: (i) exploitation of vulnerability or weakness; (ii) abuse of a position of trust or confidence; (iii) insistence upon rights in circumstances which make that harsh or oppressive; and (iv) inequitable denial of legal obligations.

²¹ *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC), at paras 44-45.

these misrepresentations. Consequently, the findings of the high court that there were no misrepresentations constitute a misdirection.

[65] To avoid being bound to a signed document on the basis of *iustus error* (justifiable mistake), the party relying on this defence must show (i) that they were induced into the mistake either by the other party's misrepresentation or by a document that is itself misleading, and (ii) that a reasonable person in their position would also have been misled. The test is objective and aimed at preventing abuse of the defence.²² The question of *iustus error* is directly informed by the uncontested testimony of Mr Kriel, who stated that the subordination agreement was not explained to him when he visited Dr Surve's offices. The agreement was presented as if it belonged to the suite of documents associated with the listing, when it was known to Mr Hove that it was not, but related to a separate process. Mr Hove testified that he expected Dr Surve to take Mr Kriel through the agreement, but the evidence confirms that Dr Surve was absent when Mr Kriel arrived. When Mr Kriel telephoned Mr Hove to inquire about the subordination agreement, Mr Hove, a chartered accountant, failed to properly clarify its purpose and significance. Instead, he linked the agreement to the listing process and consequently induced Mr Kriel to sign it. Mr Kriel was thus led to believe the subordination agreement was related to the Sagarmatha listing. He mistakenly accepted this connection and signed the document under that impression. I find that a reasonable person in the position of Mr Kriel would have been misled under the circumstances. These facts clearly establish the requirements for reliance on *iustus error*.

²² *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471A–D; *Brink v Humphries & Jewell (Pty) Ltd* [2004] ZASCA 131; [2005] 2 All SA 343 (SCA); 2005 (2) SA 419 (SCA) paras 2–3, 7–8, and 11–12; See also *Sonap* where this Court found in the context of objective, reasonable-reliance framework; there is a duty to speak where the other party knows or ought reasonably to know of the mistake; See also *Tshepe and Another v Rustia Feed (Pty) Ltd* [2021] ZASCA 104 (23 July 2021) para 47, Petse DP explained the two-limb, objective test to prevent abuse of *iustus error*.

[66] I am satisfied that Mr Kriel was induced by Mr Hoves's representation that the subordination agreement was for a limited duration. A reasonable person in his position would have been misled and his mistake in signing the subordination agreement was therefore justifiable. For these reasons I find that SIG is not bound by the subordination agreement and it is of no force or effect. It follows that SIG is entitled to claim repayment of its loan, which SIM had failed to pay. SIG must accordingly succeed in its claim.

In duplum rule

[67] What remains for decision is the issue of whether the *in duplum* rule applies to interest. Clause 3.3 read with clauses 1.2.33, 1.2.33, 1.2.43, 3.3.1, and 3.3.2 of the loan agreement, regulate the payment of interest in terms of the loan agreement. I will record them for context:

‘Clause 1.2.33: “Interest date” (means the date falling 3 (three) months from the Advanced Date and each date falling 3 (three) months thereafter and each such date shall accordingly coincide with the first day of an interest period, provided that the last interest date shall be the maturity date. Clause 1.2.43. “Outstanding Amount” means, at any time, the aggregate amount outstanding under the Facility, Including the Capital Advanced and not repaid, interest (including arrear, default and capitalised Interest), costs, and all other amounts outstanding under this Agreement arising from or in connection with the Facility.’

Clause 3.3 Interest:

‘3.3.1 The Facility shall bear interest at the Relevant Rate, which Interest shall be calculated daily on the Outstanding Amount on the basis of a 365 (three hundred and sixty five) day year and calculated on the number of days elapsed. Such interest shall accrue on a day-to-day basis over the Term and be compounded on each Interest Date.

3.3.2 All Interest accrued on the Outstanding Amount during each Interest Period shall be paid, into the account specified in clause 14, to the Lender on each Interest Date provided that , to the extent that the Borrower has insufficient funds to pay any accrued Interest on any interest date, then such interest shall be capitalised on that Interest Date.”

Clause 14 contains general payment provisions.

[68] SIG contends 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. It contended that because SIM elected to delay payment of interest, the interest that accrued was not payable and thus not in arrears. The loan agreement is not a pure loan agreement but has elements of an investment agreement. The agreement was structured in such a way that SIM could, at its election, delay payment of interest. The presence of this feature in the agreement distinguishes this contract from those where the creditor (SIG) has allowed the unpaid interest to accrue and reach the unpaid capital amount. Where the interest accrued, but is not payable, it is not in arrears and thus not subject to the *in duplum* rule. SIG contended that because interest in respect of the loan agreement was contractually deferred, the *in duplum* rule does not apply as such interest does not constitute arrear interest. In this regard, it relied on *Bellingan*.²³ It also relied on *Sanlam Life Insurance Ltd v South African Breweries Ltd*.²⁴

[69] SIM, on the other hand, submitted that it is apparent from the agreement reached between the parties on the quantification of SIG’s claim that the total amount of interest considerably exceeds the capital amount, and the compound interest for the period up to August 2020 in itself exceeds the capital amount. It was argued that the fact that interest is capitalised, whether by agreement or by practice, does not change the character of the debt; it remains arrear interest. In this regard, SIM relied on *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd*.²⁵ SIM, further

²³ *Bellingan* at 401 C.

²⁴ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W).

²⁵ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2014] ZASCA 16; [2014] 2 All SA 527 (SCA); 2014 (4) SA 253 (SCA) (*Paulsen*).

submitted that the parties cannot by agreement override the *in duplum* rule as found by this Court in *Oneanate*.

[70] *Merriam–Webster*,²⁶ defines ‘arrear’ as the state of being behind in the discharge of duties, obligations or responsibilities; an unpaid and overdue debt. ‘Accrued interest’ is defined as interest earned since last settlement date but not yet due or payable. ‘To capitalize’ is defined as to compute, appraise, or estimate the present value of income extended over a period of time. ‘Compound interest’ is defined as interest paid or computed on the combined sum of the original principal of a loan and interest accrued and payable at the end of each agreed period (as monthly, quarterly, semi-annually, or annually).

[71] If one were to take the loan agreement herein, the capital amount was advanced on 12 August 2013. The repayment date of the loan was 14 August 2020. The debtor enjoyed non-payment of interest on the R150 million for seven years. It failed to pay when it was called upon to do so. Litigation commenced on 15 April 2019, and the appeal was brought and heard by this Court some six years later, on 18 February 2026. This is not an ordinary debtor that has purchased a motor vehicle or a house that is bonded with a financial institution. This is a debtor who had the benefit of a huge loan with the freedom to exercise an election not to pay interest and let it accrue.

[72] In *Margo and Another v Gardner, Gardner and Another v Margo and Another*,²⁷ this Court found that as a rule, the *in duplum* rule is suspended during litigation. It also found that a creditor is not prevented by the rule from collecting

²⁶ *Merriam–Webster*, Third International Dictionary, Unabridged, Vol 1, at 121 (arrear); at 13 (accrued interest); at 332 (to capitalize); at 467 (compound interest).

²⁷ *Margo and Another v Gardner and Another, Gardner and Another v Margo and Another* [2010] ZASCA 110; 2010 (6) SA 385 (SCA) paras 11-12.

more than double the unpaid capital amount in interest, provided that he at no time allows the unpaid arrear interest to reach the capital amount. This means that for as long as the interest amount does not exceed the capital amount, the creditor is not precluded from charging more interest. It is important to note that the fact that the parties agreed, as recorded in clause 3.3.1, that interest shall be calculated daily on the outstanding amount on the basis of a 365-day year and calculated on the number of days elapsed. Such interest shall accrue on a day-to-day basis over the term and be compounded on each interest date, does accord with the interpretation in *Paulsen* that it remains arrear interest.

[73] The fact that it is not payable does not detract from the fact that it is calculated daily and on the number of days elapsed. Even the capitalisation of interest refers to interest that has not been paid because, for example, the debtor does not have sufficient funds to pay accrued interest on the interest date (as provided in Clause 3.3.2). This means that the debtor failed to meet its obligations by not paying on the interest date. Simply put, it is in arrears with payment of interest.

[74] Having said that, one cannot overlook the policy and public interest considerations that this Court expressed in *Oneanate Investments*.²⁸ This Court emphasised the critical role of the *in duplum* rule within the legal framework, highlighting its function as a measure grounded in public policy. The primary objective of this rule is to protect borrowers from the ongoing accumulation of excessive interest, particularly in circumstances where a lender may choose not to recover the interest immediately, thereby allowing interest to continue accruing unchecked. Such a scenario would impose an undue burden on borrowers and could have adverse consequences for the broader economy. By limiting the amount of

²⁸ *Oneanate Investments* at 834 A-I.

interest that may be charged, the *in duplum* rule ensures that borrowers are not subjected to oppressive financial obligations, thereby promoting fairness in lending practices and contributing to economic stability. Although this was decided in the context of banking institutions, it applies here equally. The danger of moving away from the *in duplum* rule is that lenders or creditors could structure loans that were repayable in seven years, interest payments deferred based on the liquidity of the debtor, interest is capitalised, and it would easily escalate exponentially above the capital amount. That would result in boundless interest. In this case, the capitalised interest is interest that the debtor did not pay on the interest date, and it is accordingly arrear interest.

[75] The high court, after a thorough exposition of the law on the *in duplum* rule and the contractual terms between the parties in relation to interest, found that interest that is by agreement capitalised every three months during the term of the ‘soft loan’ is to be regarded as arrear interest. In *Paulsen*,²⁹ this Court confirmed that position and stated:

‘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.’

[76] I agree with its finding that, in accordance with established principles, the fact that interest has been capitalised, whether by agreement or by practice, does not change the character of the debt, it remains arrear interest. As found in *Oneanate*

²⁹ *Paulsen*, para 17.

Investments ‘[i]nterest remains interest and no methods of accounting can change that.’³⁰

[77] An article by Vessio,³¹ states that the prohibition on interest *in duplum* rule is not limited to money–lending transactions but applies to all contracts arising from a capital sum owed, which is subject to a specific rate of interest. I find that in line with established principles, the high court was correct in its decision that the interest accumulates only to the point of *duplum*. No case has been made for this Court to interfere with the finding of the high court in this regard. It follows that the submissions made by SIG in this regard must be rejected.

[78] Having said that, at the hearing of this appeal, the parties brought to the attention of this Court an agreement reached by them on 2 August 2023, where they agreed to, *inter alia*, limit issues. That agreement forms part of the appeal record. In their submissions, both parties relied on it. They agreed on the following order in the event the defences raised by SIM fail, that:

‘SIM shall be liable to pay to SIG:

3.1. The amount of R458 606 995.07, calculated as set out in Annexure A hereto;

3.2 Interest from 29 August 2023 until date of payment, on any amount then and thereafter outstanding in respect of the amount set out in paragraph 3.1 above, at the default interest rate as provided in the Loan Agreement., a copy of which is annexure “POC1’ to the plaintiff’s particulars of claim.’

[79] The parties agreed to be bound by what is contained in Annexure A, which consists of the calculations upon which the amount in 3.1 of its agreement is based,

³⁰ *Oneanate Investments* at 827H – 829H.

³¹ Monica L Vessio ‘A limit on the limit on interest? The in duplum rule and the public policy backdrop’ (2006) 39 *De Jure* at 26-27.

and therefore, this Court has no basis to question it. In *Eke v Parsons*,³² the Constitutional Court remarked that while courts must exercise judicial oversight to ensure that settlement agreements are lawful, they should not arbitrarily interfere with or question agreements freely reached by parties, as this violates the *pacta sunt servanda* principle and the right of the parties to settle disputes.

Costs

[80] On the issue of costs, there is no reason to depart from the usual rule that the successful party should be entitled to its costs. The parties agreed that costs of three counsel would be appropriate.

[81] For all the reasons advanced, the appeal should succeed with costs, such costs to include costs of three counsel.

Order

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

- 1 The appeal is upheld with costs, including the costs of three counsel.
- 2 The order of the high court is set aside and substituted with the following order:
 - ‘1 The plaintiff’s claim is upheld with costs, including costs of three counsel.

³² *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC).

- 2 Sekunjalo Independent Media (Pty) Ltd is liable to pay to SACTWU Investments Group (Pty) Ltd, the amount of R458 606 995.07, calculated as set out in Annexure A, attached to the parties' agreement.
- 3 Sekunjalo Independent Media (Pty) Ltd is liable to pay interest from 29 August 2023 until the date of payment, on any amount then and thereafter outstanding in respect of the amount payable to SACTWU Investments Group (Pty) Ltd at the default interest rate provided in the loan agreement.'

T V NORMAN
ACTING JUDGE OF APPEAL

Appearances

For the appellant: L Kuschke SC (with J Engelbrecht and M Tsele)

Instructed by: Edward Nathan Sonnenbergs Inc., Cape Town
C/o Lovius Block Inc., Bloemfontein

For the respondents: E Fagan SC (with N Mauritz and J Moodley)

Instructed by: Abrahams Kiewitz Inc., Cape Town
C/o Webbers Attorneys, Bloemfontein.