THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20427/2014

In the matter between:

KEITH LARRY BROUZE	**FIRST APPELLANT**
DAVID SOLOMON BROUZE	**SECOND APPELLANT**
SHAWN MAURICE LASHANSKY	**THIRD APPELLANT**
and	
WENNENI INVESTMENTS (PTY) LTD	**FIRST RESPONDENT**
SHANE JEDEIKIN	**SECOND RESPONDENT**

Neutral Citation: *Brouze v Wenneni Investments* (20427/2014) [2015] ZASCA 142 (30 September 2015)

Coram: Lewis, Leach, Pillay, Willis and Dambuza JJA

Heard: 9 September 2015

Delivered: 30 September 2015

Summary: Delict: appeal against findings that the appellants had made fraudulent misrepresentations and actionable non-disclosures that had induced a contract: held that no misrepresentations had been made and that there was no duty to make disclosure.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kollapen J sitting as court of first instance):

1 The appeal is upheld with the costs of three counsel where so employed.

2 The order of the trial court is set aside and replaced with:

'The plaintiffs' claims are dismissed with costs including the costs of two counsel.'

JUDGMENT

Lewis JA (Leach, Pillay, Willis and Dambuza JJA concurring)

[1] Behind this appeal lies a tale about a young man, the second respondent, Mr Shane Jedeikin, with high commercial aspirations but a limited grasp of reality. He and a company that he controlled, Wenneni Investments (Pty) Ltd (Wenneni), the first respondent, instituted action in the North Gauteng High Court, Pretoria against the appellants, Mr Keith Brouze, Mr David Brouze and Mr Shawn Lashansky, for damages for fraudulent misrepresentation and non-disclosure. Kollapen J held that the appellants had made the misrepresentations and been guilty of non-disclosure, and that but for these, Wenneni would not have entered into a contract with the appellants as and when it did and on the terms it did.

[2] The contract in question (called the 'exit contract') was that Wenneni would transfer its shares in a company known as Golden Pond (Pty) Ltd (Golden Pond), jointly owned by Wenneni and a company controlled by the appellants, Busby Trading (Pty) Ltd (Busby Trading) in return for the payment by Busby Trading of the total sum that Wenneni had invested in Golden Pond by way of a loan. Golden Pond was the vehicle used to acquire and exploit the licence to sell clothing imported from

Punto FA SL, the Spanish supplier of Mango fashions. I shall refer to the Spanish company, in general, as Mango.

[3] The trial court did not deal with the quantum of damages to which Wenneni was entitled since it had ordered, at the outset of the trial and by agreement between the parties, that the quantum of the claim would be determined after liability had been decided. It refused the appellants leave to appeal against the order declaring the appellants liable for damages, but that they obtained with the leave of this court.

[4] The issues on appeal are whether false and material misrepresentations were made to Jedeikin, representing Wenneni, and if they were, whether they induced the contract in question; and secondly, whether the appellants owed to the respondents a duty to disclose, at the time when the contract was concluded, that they were in talks to sell their shares in a holding company, The House of Busby Ltd (House of Busby), which was listed on the Johannesburg Stock Exchange.

[5] The facts giving rise to the claims are complex, and the appeal turns largely on matters of fact. The chronology furnished by the appellants to this court is some 21 pages. That of the respondents is even longer (although there is considerable overlap between the two), some 27 pages of listed events said to be relevant to the determination of the appeal.

[6] I shall discuss first the events that led to the formation of a joint venture between Wenneni and Busby to promote the Mango fashion products. In doing so I shall refer generally to the Busby Group and entities within the group as Busby unless reference to a specific entity is required. Secondly, I shall deal with the structure of Wenneni and the manner in which Jedeikin secured funds from the Consensus Business Group (CBG) to finance the Wenneni share in Golden Pond. Thirdly, I shall consider the events that led to the breakdown of the relationship between Busby and Jedeikin, and the withdrawal by CBG of its investment in

Wenneni. And in the fourth place, I shall narrate (in summary) the events leading to the purchase of the shareholding in the House of Busby by a private equity investment company, Ethos (Pty) Ltd. These are the strands of the story behind the claims made by Wenneni and Jedeikin against the appellants.

Wenneni, Busby and Mango

[7] Jedeikin testified that he had studied in England and had spent time in Europe before 2005 and noticed a recent trend in fashion with new clothes being sold in stores not just on a seasonal basis but on a regularly changing basis. He thought it would be a good idea to bring certain fashion brands, the makes Zara[1] and Mango[2] in particular, to South Africa. He was then about 23 years old. He had no training in business, and no experience of retailing anything, let alone fashion brands.

[8] Nonetheless, at the beginning of 2005 he requested the South African Embassy in Spain to arrange a dinner for him and the leading fashion suppliers in Spain at which they could discuss the possibility of partnering with Jedeikin in opening shops to sell fashion brands. He had some acquaintance with European royalty and asked that they be invited to the dinner. They accepted and a dinner was set up on 9 February 2005 at which Jedeikin met a number of retailers, including Mr Christian Garcia from Mango and Mr Ivan Trapuesto of Inditex, which owns the Zara brand. The next day a co-director of Wenneni met Trapuesto of Inditex.

[9] The meeting with Trapuesto yielded nothing. But by the middle of 2005 Jedeikin had received calls from the managing director of Mango who was interested in a business relationship with Wenneni. In the meantime, Jedeikin realized that he did not have the experience or ability to pursue his goals without the assistance of an experienced retailer. An uncle of his, Mr Howard Bloomberg, who had been at school with Keith Brouze, introduced Jedeikin to Brouze, and the fashion trends that

[1] Zara is a multinational (originally Spanish) clothing and accessories retailer. It is the flagship store of the Inditex group.
[2] Mango is the trading name of Punto FA SL, a clothing design and manufacturing company founded in Barcelona.

Jedeikin wished to pursue were discussed at a meeting between them on 4 May 2005. Brouze expressed interest.

[10] Brouze was the chief executive officer of the Busby group. The group was a leading wholesaler and retailer in South Africa, operating, at the time, some 100 stores selling a variety of different clothes, fashion accessories, leather goods and luggage, and supplying other major retailers with imported and local goods. The group also operated in Australia. Brouze's brother, David, was a non-executive director of the group. The chief financial officer was Mr Shawn Lashansky, who looms large in the tale.

[11] On 6 May 2005, Jedeikin sent a letter to Brouze thanking him for meeting him. He attached a draft letter to Inditex for Brouze's attention. It advised Inditex that 'my retail team and I, formerly of Wenneni Holdings' had formed a partnership with the Busby group. He suggested that the letter be sent on the letterhead of the House of Busby. He met Brouze on 13 May and made notes on his draft letter at Brouze's suggestion. He sent the letter advising of a formal relationship with the Busby group, and explaining their retail operations, to Inditex on 16 May 2015.

[12] Trapuesto responded to the letter from Jedeikin some ten days later saying Inditex was not yet ready to bring the Zara brand to South Africa. But a few days later, as I have indicated earlier, Jedeikin had better luck with Mango, and advised Busby of this on 2 June 2005. Mango, he said, wanted prime spots for stores it might be interested in, and Jedeikin asked if Brouze would consider locations. He also stated that Inditex might still be willing to negotiate, though there is no evidence of that.

[13] On the same day, Jedeikin wrote to Brouze advising that Mango wished to meet him and Brouze in Barcelona the following week. He attached an email from Ms Julia Bischof of Mango suggesting the meeting. And indeed he went to Barcelona, with Ms Dina Casperis representing Wenneni, where they met Bischof

and Garcia of Mango on 9 June 2005, and were introduced to the Mango operations and in turn presented the proposed joint venture between Wenneni and Busby.

[14] Jedeikin followed up the meeting with a letter to Garcia, dated 15 June 2005, thanking Mango for the visit. He said: 'As outlined before, Wenneni . . ., a group of private international investors with know-how and experience in the retail industry, is part of a joint venture operation with the Busby Group Limited, a leading wholesale and retail fashion Group in South Africa, employing a highly trained and retail experienced staff of more than 800 people'. At that stage there was no formal agreement with Busby, and the statement about private international investors with retail experience was also not true. The only 'international' investor was a Mr Victor Tchenguiz, who played a crucial role in the matter, to which I shall return.

[15] Jedeikin elaborated on the plans of the 'joint venture' to open flagship stores in Sandton City and in Cape Town and on their 'trading philosophy'. The letter was copied to Bloomberg, amongst several others, as 'Wenneni-Busby JV Relations director' (whether Bloomberg ever had anything to do with Wenneni is not clear), the South African Ambassador to Spain, Mr Hans Dieter Fuchs, 'Chairman, Wenneni Investments (Pty) Ltd' (again a statement of doubtful veracity) and Brouze.

[16] On 27 June 2005, Jedeikin, having been advised telephonically by Garcia and Bischof that the Mango label had been awarded to Wenneni, wrote to Bischof, on a Wenneni letterhead, asking for written confirmation. That he received on 22 July 2005, but the award was subject to finding of suitable locations for stores. The letter attached a 'non-binding' example of a contract with Punto FA SL in respect of the distribution rights of Mango products. The draft contract was sent by Jedeikin to Brouze's secretary, and a draft memorandum of understanding between Busby and Wenneni was sent to Jedeikin by her.

[17] The draft, in tabular form, indicated that Busby would have a shareholding of 51 per cent, and Wenneni 49 per cent. Busby would have the management of the business, management control, would appoint a brand manager, help negotiate the terms of the agreement with Mango, as well as leases, would control the board of directors and would finance the project in accordance with its shareholding. Wenneni would 'help deliver the licence' and negotiate. All parties would stand surety. A number of points to be considered were listed.

[18] On 18 October 2005, Garcia of Mango met Wenneni and Busby representatives at the Busby offices in Cape Town. Brouze and the managing director of Busby Retail (Pty) Ltd (Busby Retail), Mr Martin Duarte, were present. Jedeikin represented Wenneni, and he was accompanied by Mr Alfred Muench, said to be the non-executive chairman of Wenneni and Ms Dina Casperis, in her capacity as 'Legal Director Wenneni'.

[19] Various business models were discussed, and Garcia indicated that Mango required a 'franchise fee' of €100 000 for the first store to open, and €55 000 for the second store. The fee included the right to use the Mango trademark, costs to set up a store, travel expenses, the costs of a supervisor and a team of staff trainers.

[20] The Cape Town meeting was followed by another in Johannesburg on 19 October 2005 at which Lashansky was present. And on 26 October, Brouze wrote to Bloomberg stating:

'This letter serves to confirm that provided Howard Bloomberg and Shane Jedeikin of Wenneni Investments can come up with the necessary finance to launch the Mango brand, they will be included in a consortium for the Mango licence.

This is subject to the fact that Busby will have full management control of the Mango licence and operation of the business.

We look forward to doing a proper agreement once the licence has been awarded to the consortium.'

[21] At the beginning of 2006 Mango sent a fax to Jedeikin enclosing a ‘precontractual letter’ from Mr Isak Halfon Cakim of Punto FA SL, which Jedeikin signed for Wenneni. A trip to Barcelona was arranged so that the Wenneni and Busby representatives could meet with the Mango representatives. They met on 31 January 2006 at the Mango offices in Barcelona. And finally, on 15 February 2006, Cakim of Mango, and Jedeikin representing Golden Pond Trading 291 (Pty) Ltd, in which Busby held 51 per cent of the shares, and Wenneni 49 per cent, signed an agreement in terms of which Mango granted to Golden Pond the distribution rights of the Mango products and set out the terms on which the parties were to operate.

[22] In March 2006 Wenneni undertook to transfer €49 000 to Busby’s attorneys’ trust account for its share of the franchise fee. And on 25 April 2006 a shareholders’ agreement between Busby Trading, Wenneni and Golden Pond was concluded. Busby and Golden Pond were represented by Lashansky, and Wenneni was represented by Jedeikin.

[23] The salient terms of the shareholders’ agreement were, first, that Busby would lend R5.1 million to Golden Pond, and Wenneni R4.9 million. Second, Golden Pond was to employ Jedeikin as ‘brand ambassador’ and company secretary. It was agreed that Golden Pond could sell its business, or a substantial part of it, only with the approval of 70 per cent of its members. Monthly management accounts had to be prepared and circulated to shareholders within 25 days of the end of each month. The books and records of Golden Pond were to be made available at all reasonable times to all shareholders. Wenneni undertook, if other business opportunities were presented to it, to offer these to Golden Pond. Busby did not give a reciprocal undertaking because it already traded in many other businesses.

[24] Annexure A to the agreement, termed a management agreement, provided that Busby Retail would operate all the stores of Golden Pond and would charge a fee for its services to Golden Pond. The fee would include an allocation of Busby’s fixed overhead expenses and actual disbursements.

[25] A formal management agreement was concluded between Busby Retail and Golden Pond on 19 July 2006. Busby Retail was appointed as the sole and exclusive manager and operator of all the retail outlets and all the operations of Golden Pond. Busby's powers of exclusive management were detailed, as were the management fees, on the lines set out in Annexure A to the shareholders' agreement.

Wenneni and Consensus Business Group

[26] How did Wenneni raise its share for the financing of Golden Pond? On 4 May 2006 a bank paid some R4.5 million into the account of Golden Pond on behalf of Wenneni. £250 000 (approximately R2.7 million at the time) was lent to Wenneni by the Consensus Business Group (CBG). The balance was advanced by Jedeikin's mother, Mrs Denese Schneider.

[27] The head of CBG was Mr Vincent Tchenguiz, a London-based businessman, whose investments centered on immovable property. Jedeikin had heard of him, and in early 2006 engineered a meeting with him in Cape Town, where Tchenguiz owns a home. Jedeikin paid a fee to an associate of Tchenguiz to arrange the meeting. He explained to Tchenguiz his plans for bringing high-end fashion from Europe to South Africa. Tchenguiz agreed to invest in the enterprise and, on Jedeikin's evidence, to acquire a 20 per cent share in the equity. He advanced payment before any formal agreement was entered into between CBG and Wenneni. Ultimately, the advance came to be treated as a loan.

[28] CBG was represented in South Africa by Mr Brian Gamsu and Mr Guy Baxter. On 8 March 2006 CBG wrote to Jedeikin stating that it would invest £250 000 into Wenneni 'as a long-term loan, with the express purpose of establishing four new retail stores, operating under licence to the Mango brand, in South Africa . . . In return for the investment, CBG will receive 20% of the equity in [Wenneni].' It named the other investors – whether that was ever confirmed is not clear but they would

have a minor share, save for Schneider (or a Mr Eric Ellerine) who would also hold a 20 per cent share. The letter stipulated that the stores would be operated in a joint venture with Busby. The letter was countersigned by Jedeikin.

[29] A formal loan agreement between an entity known as Bantry Point Investments (Pty) Ltd (Bantry Point), a South African company through which Tchenguiz's Cape Town property was held, and Wenneni was sent to Jedeikin by Gamsu on 2 May 2006. It was signed for Bantry Point by Gamsu, and Jedeikin signed it as well as a suretyship given by him to Bantry Point for performance of Wenneni's obligations. At some stage Baxter and Gamsu were appointed as directors on the board of Golden Pond.

The implementation of the agreements with Golden Pond

[30] The Busby employees tasked with managing the Golden Pond business, principally the opening of the first Mango store in Sandton City, Johannesburg, were Lashansky, as chief financial officer, and, reporting to him, Mr Francois du Rand, the financial director of Busby Retail. Du Rand was directly in charge of the accounts for Golden Pond.

[31] On 20 June 2006 Jedeikin wrote to Lashansky, even before the management agreement had been concluded, suggesting what his role as brand ambassador should be. He saw it as being akin to that of a 'commercial director'. He proposed ways to promote Mango clothing to banks and cabinet ministers (saying that he had political associations) and suggested that he would attempt to get government contracts. He also had plans for meeting with television networks and celebrities. In addition he undertook to fulfill the duties of a company secretary.

[32] It was subsequently agreed that he would work for three days a week for Golden Pond, and would be paid R16 000 a month, as from 1 July 2006. A formal

letter setting out his duties was sent to him only after the opening of the first Mango store. Lashansky sent Jedeikin a business plan, drawn up by Du Rand, on 22 June 2006. The official launch of the first Mango store in Sandton City was arranged for 24 October 2006.

The souring of the Wenneni Busby relationship

[33] Before the store was opened Jedeikin was dissatisfied with the way in which Busby treated Wenneni, not furnishing management accounts timeously (or at all). As pointed out by the appellants, however, after the store was opened, on 14 October 2006, Jedeikin was given daily sales figures and all bank statements of Golden Pond. And while admitting that management accounts were not provided timeously, Lashansky advised that Wenneni was furnished with the management accounts at the same time as Busby was. And all the books of Golden Pond were available for inspection at all reasonable times in terms of the shareholders' agreement. Admittedly, these were kept in the Busby Cape Town office, making regular inspection by Jedeikin difficult.

[34] Jedeikin complained also that he was sidelined in so far as the opening launch of the store was concerned. On 29 September 2006 he wrote an indignant letter to various people at Busby, in response to a letter from a marketing person at Busby, asking for an urgent meeting. He said that he was a partner in the business and a major shareholder, and that he would not accept being sidelined. Mango, he said, would frown on Busby's behaviour. The Busby marketing team, it would appear, had arranged the opening event without his input, save for asking him for a list of guests. He appeared to overlook the fact that he was not involved in the management of Golden Pond.

[35] Despite the admonitions of the marketing team, he kept CBG advised of his involvement in the opening of the store, and wrote to Guy Baxter on 11 October 2006 that he was expecting 'a host of Spanish and South African dignitaries including SA's

top celebrities, businessmen and business women, the financial media, the fashion media, landlords and others' to attend the 'Official Launch party'.

The Zara saga

[36] Jedeikin continued, however, to try to persuade Inditex (the Zara brand owner) to open stores in South Africa. And he continued to press Busby to find retail space for Zara stores. He wrote to Duarte of Busby on 24 November 2006 saying he was confident that Inditex would appoint Wenneni and Busby as their South African agent. Inditex was aware, he said, of their joint involvement in Mango through Golden Pond.

[37] But the day before that, Brouze had written to Trapuesto of Inditex to say that Busby was happy to welcome him to South Africa and to partner with Inditex to launch the Zara brand, but that he would like to stress that 'should Busby be selected as the partners through which to launch the Zara brand in South Africa, the partnership would consist of Zara and Busby and no joint venture or third parties will be involved'. He attached a letter explaining Busby's position as a major retailer and holder of other brands in the country.

[38] On 9 February 2007 the first, and only, board meeting of Golden Pond was convened. The people present were Baxter, Brouze, Gamsu, Jedeikin, Lashansky, and Schneider. It was recorded in the minutes that the opening of Mango in Johannesburg was a great success. After that sales levelled off but were expected to improve in the middle of 2007. A lease for the Cape Town store had already been concluded at the Victoria and Alfred Waterfront. Lashansky would provide a cashflow forecast and shareholders would be required to raise funding to the extent of R8 million.

[39] The minutes reflect that Busby was not interested in Zara and Wenneni could pursue that on its own account. A transcript of a recording of the meeting reflects that there was a tense discussion about Zara during the meeting. After discussing Jedeikin's role at Mango, Brouze expressed the view that Mango did not really need a brand ambassador but could use the in-house Busby marketing team. Jedeikin, in the course of that discussion said that Golden Pond was sitting with a new brand. Brouze indicated that he was interested only in Mango at that stage. Jedeikin said: 'The point is that Zara is going to happen. Do you want it to happen with us or how do you want it? Because it's going to happen. . .'. Brouze responded that he would be happy with Zara later, and said 'At this stage we're not interested. If somebody brings us a separate proposal we'll look at it independently. You want to go somewhere else you're more than welcome.'

[40] On the same day as the board meeting, after the exchange between Jedeikin and himself, Brouze telephoned Trapuesto of Inditex to establish the truth of Jedeikin's assertions. He explained when testifying that he was surprised to hear that Jedeikin was confident that Inditex would partner with Wenneni. And that he was certainly not willing to have Jedeikin working on any other brand with Busby. He also said that he was willing to partner with Inditex but not with Wenneni.

[41] He had already said as much to Trapuesto previously and confirmed that in an email exchange with Trapuesto the same day – 9 February 2007. In that exchange Brouze and Trapuesto agreed to pursue the possibility of Busby partnering with Inditex. I shall revert to the exchange because the respondents argue that Brouze behaved dishonourably in going behind Jedeikin's back after saying that Busby was not interested in Zara at that stage. They argue also that Brouze's credibility was compromised.

[42] Trapuesto, on 14 February 2007, advised Jedeikin of Brouze's interaction with him. He asked Jedeikin whether he was comfortable that Brouze negotiate directly with him. They arranged a meeting in Spain for 13 March 2007.

[43] Baxter, after hearing about Brouze's call to Trapuesto, expressed surprise about any negotiation between Busby and Inditex. In an email to Jedeikin sent on 16 February, Baxter nonetheless cautioned against litigation against Busby. Jedeikin must have told him that he was considering action against Busby. He pointed out that in terms of the shareholders' agreement, while Wenneni was obliged to offer any new business opportunity to Busby, Busby was not similarly bound.

[44] Baxter said that CBG's investment had been for four Mango stores and it would not necessarily be interested in Zara in any event. And he reminded Jedeikin that the costs of visiting Inditex in Spain would be for Jedeikin's account, and should not be borne by Wenneni. On 16 February 2006 Baxter wrote to Jedeikin again and advised him to reconcile with Brouze and resolve differences over Zara. He wrote that 'the fact that Busby was in on the Mango deal gave [Vincent Tchenguiz] the necessary comfort in agreeing to go in with you.' He suggested that Jedeikin ask Lashansky or Bloomberg to 'assist in brokering a peace-pipe meeting' with Brouze. He cautioned Jedeikin not to jeopardize Tchenguiz's investment by litigating with Busby. Jedeikin did not heed the advice to make peace with Brouze.

The end of the Brouze Jedeikin relationship

[45] There followed numerous exchanges between Jedeikin and Du Rand in respect of management accounts which were late. He received the February 2007 accounts on 28 March 2007. The next day he wrote to Baxter telling him about the state of Golden Pond's finances. His report displayed a detailed knowledge of the state of Golden Pond's finances. He complained about the management fees paid to Busby, and took up his concerns with Lashansky and Du Rand the next day.

[46] The hostitility between Brouze and Jedeikin remained but nothing happened until, on 30 April 2007, Business Day featured a short report after an interview with Jedeikin. It was reported that he said that Wenneni was considering a listing on the

JSE and ‘hoped to have Mango in all major cities by the end of next year’, and that they would compete ‘in the same space as Truworths and Foschini’. Jedeikin was reported as having said that Wenneni was in talks with two other major European brands. The report stated further that ‘property tycoon’ Vincent Tchenguiz had a 50 per cent stake in Wenneni.

[47] The article was taken up by other newspapers. Jedeikin thought the media coverage was good – he sent an email to Baxter saying as much, and copied it to Tchenguiz. The latter responded: ‘Excellent’. When cross-examined and asked about the source of the information Jedeikin eventually conceded that it was inaccurate. But Brouze was incensed about what Jedeikin had said to the reporter from Business Day. First, much of it was untrue. And, secondly, it angered Truworths and Foschini which were customers of Busby, and that upset Brouze even more. The claim to be competing with Busby’s biggest customers was like a shot at them, he said, when testifying.

[48] Jedeikin claimed to be ignorant of Brouze’s angry reaction to the press report. That was far from true. He had been advised that Brouze wanted nothing more to do with him by Baxter and Gamsu, through his mother, Schneider. To understand the relationship between CBG and Jedeikin it is necessary to go back to 2006.

The Wenneni CBG relationship

[49] It will be recalled that Jedeikin and Tchenguiz had met at the former’s instance. Tchenguiz had agreed to assist Jedeikin financially even though retail fashion had not been part of his business investments previously. On Jedeikin’s version, Tchenguiz had taken a liking to him and wanted to help a young entrepreneur. But Tchenguiz was based in London and so decided that his interests would be handled by Gamsu and Baxter who were based in South Africa.

[50] As early as July 2006, Jedeikin and Baxter had corresponded on fairly acrimonious terms by email in respect of the shareholders' agreement to be concluded between Wenneni and CBG. Baxter wrote to Jedeikin on 11 July and said that there was not much time left before the opening of the Mango store, and that an inordinate amount of time had been spent on corresponding over administrative issues. He asked Jedeikin to conclude the various agreements required between CBG and Wenneni, and to ensure that the Mango store was brought to fruition.

[51] Jedeikin responded on 12 July stating that: 'It is becoming gradually more evident to me that relations between Wenneni on the one hand and you (and Brian Gamsu) on the other are taking enormous strain and that the situation in respect of finalizing the Wenneni /CBG Shareholders' Agreement is very near to reaching an untenable position.' He complained that his legal fees had increased dramatically as a result of the amendments required by Baxter and Gamsu to various drafts prepared by his attorneys.

[52] On 14 July Baxter wrote to Gamsu and said that Tchenguiz was treating the investment as a loss-leader. He said: 'I think he knows it's not a good deal for him' but was proceeding anyway. On the same day Gamsu recorded discussions between them at a meeting in respect of a number of CBG matters and said in respect of Wenneni: 'It was jointly agreed that it is a time-consuming exercise. There are consistent non-deliverables from [Jedeikin] expenditure of over R500 000 on company funds remains unexplained.' He went on to say that he had spoken to Wenneni's attorney and they had agreed that unless the terms of the contracts had been agreed by that Friday, 'we should recall the loan and kick this investment to touch.'

[53] A week later Gamsu sent an email to Tchenguiz asking him to call. He said the deal with Wenneni was bad from start to finish. And subsequently he advised

Tchenguiz that he and Baxter had tried to speak to Jedeikin but he had told them that they must do as Tchenguiz said: '[I]f your instructions are to throw client's money down the toilet then that is what you do'. The basics of the shareholders' agreement between Wenneni and CBG had been agreed only on 3 January 2007.

[54] After the board meeting on 9 February 2007, when the Zara issue arose, Baxter wrote to Gamsu confirming that CBG was not interested in Zara and that Jedeikin would have to realize that his was not the only interest in Wenneni and that he could not do as he pleased. He added: 'We can't have a loose cannon rolling around the decks . . . particularly given that we will need a healthy relationship with Keith and Busby in order to achieve the original objective of four Mango stores.'

[55] On 29 March 2007 Baxter wrote to Gamsu advising about a meeting that he had had in London with Tchenguiz, Jedeikin and Schneider. The purpose of the meeting was to discuss a venture between Schneider and CBG. But the meeting was largely taken up with Jedeikin's reporting to Tchenguiz on his discussions with Inditex about the Zara brand. Apparently Jedeikin had indicated to Inditex that he would partner with Tchenguiz in the Zara venture – for which, of course, he had no authority. Baxter advised further that he had attempted to obtain financial information about the Mango store from Jedeikin with no success.

[56] On 19 May 2007 Baxter wrote to Tchenguiz saying that Jedeikin had 'severely aggravated' Brouze, who wanted nothing more to do with Wenneni. He reported that he and Gamsu had a conversation with Brouze who wanted to find a way to continue with the business but without Jedeikin being directly involved. Busby, said Baxter, was going to be asking CBG, within the next two weeks, for a bank guarantee in respect of R10 million for Golden Pond's business. He suggested to Tchenguiz that he should make no decision to proceed unless CBG received a suitable business plan and the relationship with Busby was restored. He said that Jedeikin was not willing to fix the relationship with Brouze as he saw him as 'a threat, not a partner'.

[57] Before writing the letter to Tchenguiz, Baxter and Gamsu had a telephone conversation with Schneider, which she recorded. The transcript of the recording forms part of the record. They explained that Brouze was no longer willing to work with her son. They asked her to speak to Jedeikin and to persuade him that he should repay CBG's loan, or buy out the Busby interest in Golden Pond or sell Wenneni's shares in Golden Pond to Busby. They also said that they would remain on the Wenneni board only if Jedeikin was removed from it. They told Schneider that they believed CBG should withdraw from Wenneni altogether. When testifying for the appellants, Baxter said that he and Gamsu had made the recommendation to withdraw because of Jedeikin's conduct and not because Brouze had told them he would have nothing further to do with Wenneni. The environment in which CBG and Busby had to operate with Jedeikin was not pleasant.

[58] On 24 May 2007 Baxter wrote to Gamsu and a member of the board of CBG in London, Mr Ohad Yaron, advising that he had spoken to Lashansky who was finalizing financial statements and a business plan for Mango. Lashansky, he said, was very willing to assist CBG notwithstanding Jedeikin. On the same day Baxter wrote a lengthy report to Yaron explaining the background to the CBG investment in Wenneni. He said:

'The key problem/issues here are that (a) Shane [Jedeikin] is young, inexperienced and is also a very difficult personality; during the formation stages last year his communications with Brian [Gamsu] and me were volatile, repetitive (multiple phone calls and emails) and were very often abusive and threatening and when he did not get satisfaction from us he'd go straight to Vincent [Tchenguiz] who he now regards as a close personal friend (!); (b) Shane has no capital of his own and so he needs Vincent, Denese [Schneider] and Busby to take the business to the next level(s) . . . (c) without Busby we have no business . . . (d) there is no executive position in the business for Shane and Wenneni has no income; . . . (e) this entire venture has been hugely time consumptive on Brian's part and on mine and we could very well do without the aggravation of the interpersonal disputes, the abusive behaviour, the shouting and threats of legal action etc that have characterized this transaction.'

Baxter concluded by saying that, having experienced Jedeikin's 'unlikeable attitude and communications style' neither he nor Gamsu 'could in good faith recommend that Vincent pursues further investments with Shane'.

The call on Wenneni for funding for the second Mango store

[59] At the board meeting on 9 February, as I have said, Lashansky indicated that an injection of funding was needed in order to open the Mango store in Cape Town. He had estimated that some R8 million was required. On 16 May 2007, in response to a lengthy email from Jedeikin requesting information and explanations of various matters, Lashansky reminded Jedeikin that additional funding was required. He said 'the situation will become dire by the end of the month!!!!'

[60] Jedeikin's response was that Wenneni had not received any request in writing from Busby for further funding, and that none would be provided until he received a breakdown of capital and operating expenses for the new store. Lashansky responded, on 17 May 2007, asking whether the full board meeting, where it was agreed that a further R8 million was required, was to be ignored. He said 'I am very confused . . .' . He received a sarcastic response telling him to read the correspondence again.

[61] The correspondence was preceded by a letter from Nedbank, which had been asked for a loan of R10 million, stating that it was prepared to consider the request provided that Wenneni and Busby provided suretyships and ceded loan accounts. Neither was willing to agree to that.

[62] On 23 May 2007, Lashansky sent Jedeikin an estimate of funds needed for the Cape Town store and said that the response to his request for information was being prepared. The estimate indicated that Wenneni would have to provide some R3 million for the store, and Busby slightly more. Jedeikin, on 28 May 2007, sent a

‘formal request and notice’ to Lashansky stating that in terms of clause 7 of the management agreement Busby had failed to maintain full, accurate and up to date books of account. He required the information he had previously requested to be provided within seven days, failing which he would resort to obtaining an external audit of Golden Pond’s books. The clause said no more, however, than that shareholders were entitled to inspect the books at all reasonable times. Lashansky had said that the books were available for inspection but Jedeikin had never gone to Cape Town to inspect the documents.

[63] After meeting with Jedeikin and a further exchange of correspondence, Lashansky, on 13 June 2007, sent Jedeikin a full response to his requests for information. He said that because the Mango store was not yet making a profit, the existing Busby accounting staff were attending to the Golden Pond financial affairs: no additional resources had been put in to the accounting operation of Busby, hence delays in providing information. He explained that the Golden Pond accounts were part of a much bigger accounting system and that it was not financially viable to have a separate accounting system for Golden Pond. He confirmed this when testifying. Lashansky proposed that R6.3 million be injected by 18 June 2007, and that if additional funds were required they should be provided on seven days’ notice.

[64] Instead of providing the funds required on 18 June, Jedeikin sent Lashansky his version of Golden Pond’s balance sheet as at 30 April 2007. And on 3 July 2007, still attempting to get an overdraft facility from Nedbank, Jedeikin gave it a complete set of financial statements including a cash flow projection for Golden Pond. He was thus fully informed of the financial position of the company on that date.

[65] On 4 July 2007 Du Rand sent a retrenchment letter to Jedeikin. It had Lashansky’s approval. It was headed ‘Possible Redundancy’. Du Rand said that ‘the brand is unfortunately not doing as well as expected’ and that Golden Pond was compelled to consider cost cutting measures. One such measure was to retrench Jedeikin as brand ambassador. He called on Jedeikin to meet urgently to respond to

the possibility. Wenneni argued that the retrenchment proposal was a sham. It was a disguised unfair dismissal. That may be so. The fact that emerges from it, however, is that Jedeikin now knew that he was not wanted by the Busby shareholders in Golden Pond.

[66] On 13 July 2007 Jedeikin went to the Doornfontein offices of Busby with his grandfather. He demanded to see Lashansky. The receptionist said it was not possible as he was in a meeting. He said he would wait. The receptionist, who testified, said that he then created a disturbance, that she felt intimidated, and that he and his grandfather had to be ushered out of the building by security guards. She did not know who had called the guards. Jedeikin and his grandfather then went to a police station and deposed to affidavits saying that they had tried to see Lashansky but was warned and threatened to leave. Interestingly, Jedeikin said that this occurred within five minutes after deciding to wait. His grandfather estimated the time as 30 minutes. Nothing turns on this of course. But the visit shows, in my view, the desperate state of mind that Jedeikin was in: not only had he received the retrenchment letter, but he had by that time learned that Tchenguiz was withdrawing his funding.

The CBG withdrawal of funding

[67] On 20 June 2007 Tchenguiz wrote a memorandum to Yaron, Baxter and Gamsu to record that CBG had decided that it was no longer interested in co-funding or co-investing in the establishment of any more Mango stores in South Africa. He said that CBG should secure an appropriate exit from Wenneni before there was a call for further funding. He suggested that Bantry Point call in the loan, or that CBG sell its interest to the shareholders in Wenneni. Tchenguiz communicated the decision to Jedeikin and Schneider, as directors of Wenneni, on 5 July 2007 and said that finality should be reached by the end of August. He notified the directors of Golden Pond on the same day.

[68] Baxter met Jedeikin and Schneider on 16 July 2007 to discuss the options open to them. He recorded what they had discussed two days later. He confirmed that CBG wished to sell its interest to Wenneni shareholders. He mentioned also that they had considered finding another buyer for it.

The exit contract

[69] On 25 July 2007 Jedeikin and Brouze had a telephone conversation. There is a dispute as to who initiated it. It was followed by an email from Jedeikin to Brouze said to be 'without prejudice' and the subject was 'Possible exit from Golden Pond . . .'. He wrote:

'Dear Keith

Further to our good conversation this afternoon the following was discussed: Wenneni . . . is prepared to consider exiting Golden Pond . . . in entirety with immediate effect subject to the following terms:

a) The full repayment of Wenneni's loan to Golden Pond . . .
b) The repayment of interest on Wenneni's loan account to date.
c) Consideration of a mutually favourable and fair value price for the shares in question particularly in respect of the goodwill of the Brand.
d) Wenneni and/or any of its related or affiliated entities to be released from all its obligations in respect of guarantees, warranties, suretyships and indemnities for and on behalf of Golden Pond . . . .

Please could I kindly request that you advise me of your considered response at the earliest opportunity? I would like to ask you to please kindly respond to me by the end of this month at the latest.

I look forward to hearing from you.

Kind regards,

Shane.'

[70] Jedeikin said, when testifying, that Brouze advised him that the business was 'in a perilous financial position, that all the investors stood to lose their money, and

that the best way for me to get out of this, would be to get repayment of my loan account and interest . . .'. That was what had made him decide to exit, but he still expected to be paid for his goodwill.

[71] The following day, 26 July 2007, Brouze and Jedeikin had another phone conversation. It was not a good one. On Jedeikin's version he was told that no goodwill would be paid to him, and that if he did not exit the investment Golden Pond would be liquidated and wound-up. Brouze had said that 'this business is going to be liquidated. I am going to wind this business up. . . and you stand to lose your entire investment . . .'.

[72] The email that followed after the conversation had a different tone from the one sent the day before:

'Keith,

I refer to my email sent to you yesterday which you have communicated to me that you are not willing to consider in entirety.

In furtherance to our conversation of this afternoon, I am hereby prepared to exit Golden Pond . . . subject to the full repayment of Wenneni's loan to Golden Pond . . . including the interest within 24 hours, in full and final settlement.

I await your urgent response.

Yours sincerely . . .' .

[73] The exit agreement was thus induced, said Jedeikin, by the threat of liquidation which would entail Wenneni losing its investment. I shall return to the misrepresentations pleaded in due course. Brouze denied Jedeikin's version. When testifying he said that in the conversation on 26 July they had discussed whether there was any goodwill attaching to Wenneni's share in Golden Pond. He made the point that it was factually and commercially insolvent as its liabilities exceeded its assets. Without the additional funding that Busby contributed it was unable to pay its

debts. It was trading at a loss. If the shareholders in Golden Pond did not invest additional capital for the operational costs and for the opening of the second store the investors would lose their capital. The conversation, said Brouze, was heated.

[74] He denied having threatened to liquidate Golden Pond. It would have made no sense and would have jeopardized Busby: it would have seriously affected its reputation, and the landlords of their many stores would have had concerns. The respondents argue that Brouze was not a credible witness. I shall consider the credibility of Brouze and Jedeikin, and the probabilities as to what was said, in due course. I shall also consider whether, even if the threat were made, it amounted to a fraudulent misrepresentation of a fact, and whether it induced Wenneni's exit from Golden Pond.

[75] The offer that was made by Jedeikin on 26 July 2007 was accepted by Busby the following day. Lashansky wrote to him asking him to sign share transfer certificates and to resign as a brand ambassador, which was done, and Jedeikin signed a settlement letter on 6 August 2007. Busby paid Wenneni the sum it had invested in the first place, together with interest.

The non-disclosure of a proposed equity buy-out by Ethos

[76] I shall deal with this issue only briefly, for it was not disputed that no one at Busby disclosed to Jedeikin that the private equity company, Ethos, had started discussions with Brouze about a takeover of the controlling share in the House of Busby, the holding company. The only questions that arise are whether there was a duty to disclose and what there was in fact to disclose when the exit contract was concluded.

[77] In February 2007 Mr Jos van Zyl, a principal in Ethos, a company that invests on behalf of other entities, identified the House of Busby as a company in which it

might be interested. Mr Michael Jensen, who testified for the appellants, explained that Van Zyl had phoned Brouze in February and set up an exploratory meeting on 3 March 2007. Jensen was at that time an associate in Ethos. Van Zyl, Mr Danie Jordaan and Jensen, all of Ethos, met Keith and David Brouze again on 31 May 2007. By that stage Ethos staff had done research on the House of Busby and the retail market, all of it based on what was in the public domain, and had code-named the possible transaction 'Project Bugsy'.

[78] At the meeting Ethos showed a pre-screening report which was an overview of the Busby group. Only the Brouze brothers from Busby were present. No one else in the Busby group was at that stage aware of the proposed transaction. The Brouzes indicated that they were interested in taking the matter further. Brouze called Van Zyl on 9 July 2007 and undertook to furnish information on the Busby group to him. On 12 July Ethos sent Busby a letter undertaking to keep the information provided confidential. Busby asked its corporate adviser, Java Capital, to provide to Ethos a report on the Busby group, which they did on 16 July 2007. The report made no mention of Golden Pond or the Mango brand and indicated that there was potential for growth.

[79] Ethos then prepared a report on the benefits and concerns associated with a takeover of the House of Busby, dated 24 July. At a meeting of people at Ethos on that day Ethos decided to continue the process of considering a purchase of shares in the holding company of Busby. The third meeting with the Brouzes occurred on 25 July 2007. The appellants say that it was fortuitous that the meeting took place on the same day as Brouze and Jedeikin talked about Busby taking over Wenneni's shareholding in Golden Pond. The respondents argue that it was the possibility of the Ethos transaction that led to Brouze forcing it out. But since the transaction had not been concluded (indeed the Ethos proposals were all rejected on 25 July) the argument is at best tenuous.

[80] As at 25 and 26 July, when the exit agreement with Wenneni was concluded, the Ethos transaction was very much in the air. Jensen testified that a very small percentage of projects that Ethos initiated ever found their way into concluded transactions. The Brouzes had not at that stage advised even members of the board of the House of Busby about a proposed transaction with Ethos, because there was nothing to tell. Only Lashansky was aware of it because he had had to provide information to Java. And he knew that all the discussions were confidential.

[81] Thus when Jedeikin, in June 2007, asked Lashansky whether Busby had been approached by a private equity firm Lashansky did not respond – he was taken by surprise as he thought the information was confidential and 'price-sensitive': that is, that if it got out it would affect the price of Busby shares. Moreover, said Lashansky, Jedeikin had previously divulged confidential information, and he would have been reluctant to tell him anything which might result in a contravention of the regulatory rules governing listed companies.

[82] In August 2007 Busby and Ethos continued negotiations, with Busby making a counter proposal as to the form of a possible transaction. On 15 August, Java provided an organogram of the Busby group to Ethos. That reflected the companies in the group, and showed that Busby Retail held 100 per cent of Golden Pond. Jensen obtained a mass of detail from Lashansky between then and 18 September 2007 when Ethos held an investment committee meeting and the 'deal team' (including Jensen) was authorized to submit a non-binding expression of interest to the House of Busby, which it did on the 28 September 2007.

[83] The letter conveying the non-binding expression of interest informed the board of the House of Busby that Ethos was interested in buying a controlling share in the company. Busby then published (as it was required to do), on 1 October 2007,

a SENS[3] announcement that Ethos had made a proposal that might result in an offer to purchase a significant share in the listed company for some R1.33 billion.

[84] The Ethos investment committee approved the takeover on 23 November 2007 and a company in the Ethos group, Main Street 251 (Pty) Ltd (Main Street), made a firm offer for the controlling share in the House of Busby at the end of November. The takeover was effected by a scheme of arrangement in terms of s 311 of the Companies Act 61 of 1973, sanctioned by the South Gauteng High Court on 12 December 2007.

[85] It is significant that when financial information about the subsidiaries of the House of Busby was obtained for tax purposes, both by Busby and by Ethos before the takeover, Golden Pond was valued at zero. It was not trading profitably at the time of the takeover and had not done so before then.

[86] After the takeover, all the trading activities of the Busby group in South Africa were moved to Main Street. Several subsidiary companies, including Golden Pond and Busby Retail, were liquidated. Some of them had had minority shares held by other persons.

The position of Wenneni and Jedeikin after the exit contract was concluded

[87] It will be recalled that Jedeikin signed the settlement letter recording the terms of Wenneni's exit from Golden Pond on 6 August 2007. On 15 August he wrote to Tchenguiz stating that he was 'extremely surprised and disappointed' that Tchenguiz had withdrawn his investment in Wenneni. He was 'shattered, both from a professional and personal point-of-view, to read of your unexpected withdrawal'. He continued: 'Your unforeseen intention to exit from Wenneni and Mango has resulted in me having to abruptly withdraw from Mango altogether.' Jedeikin then made various proposals as to the way in which Wenneni would repay Tchenguiz. CBG had

[3] SENS is the acronym for the Stock Exchange News Service: it is an instant information dissemination service administered by the Johannesburg Stock Exchange.

already agreed that Wenneni was not required to pay interest on the £250 000 that had been advanced to it.'

[88] A cause of the exit contract was clearly the withdrawal of funding by Tchenguiz: that was what induced the contract, and Jedeikin not only thought that it was all CBG's 'fault', he said as much. A combination of the need to invest further capital in Golden Pond (R3 million, as estimated by Lashansky, and requested several times in June 2007), which Wenneni simply did not have, and the withdrawal of the CBG investment, both of which occurred shortly before the exit contract was concluded, entailed an inevitable need to sell the share in Golden Pond. Wenneni had no choice.

[89] But when Jedeikin saw the SENS announcement of the expression of interest by Ethos in Busby he came to a different conclusion. The announcement of September 2007, which presented the results of the House of Busby as at the end of June 2007, stated that the South African retail division had 'successfully launched the Mango brand into the South African market during the recent financial year; this concept is meeting expectations'. And a later SENS announcement, in February 2008, stated that as at the end of December 2007, all divisions within the Busby group had 'performed well' and that 'the group delivered meaningful growth across its portfolio of brands'. Subsequently, Jedeikin also obtained the Ethos report of 24 July 2007, presented to the Brouzes on 25 July, which stated that 'A world leading brand such as Mango has only been rolled out in Sandton, with great success. The potential is to open at least another ten stores around the country.'

[90] Jedeikin accordingly concluded that statements made to him about Mango not doing as well as expected (at the board meeting of Golden Pond on 9 February 2007) and that it was insolvent and the situation was dire (when Lashansky asked for the capital injection of R3 million) were false. That is when, to Jedeikin's mind, the alleged threat of liquidation of Golden Pond by Brouze became a false

misrepresentation made to get rid of Wenneni, and the non-disclosure of the potential Ethos deal became actionable.

The claims as pleaded

[91] The misrepresentations pleaded were that Brouze, at the board meeting of 9 February 2007, had advised that Busby was not interested in the Zara brand; Busby Retail failed timeously or at all to provide Wenneni with management accounts, and that these included inaccurate or misleading entries; Du Rand had said in the retrenchment letter that the Mango brand was not doing as well as expected; Brouze told Jedeikin on 25 July 2007 that Golden Pond was in a perilous financial position, that the business prospects were looking very bleak, and that all the shareholders stood to lose their investments, and that in the circumstances Wenneni should relinquish its investment; that Brouze told Jedeikin on 26 July 2007 that if Wenneni did not sell its 49 per cent equity interest in Golden Pond in return for the repayment of its loan, Busby intended to apply for Golden Pond to be liquidated on the basis of its inability to pay its debts, and that Busby would then approach Mango to renegotiate the rights to the franchise; and that Brouze and Lashansky failed to give Jedeikin financial information so that he could himself assess the financial status of Golden Pond.

[92] The non-disclosures alleged were that Brouze had not told Jedeikin that after the board meeting he had phoned Trapuesto of Indictex and said that Busby, not Wenneni, should acquire the Zara brand; and that the Brouzes had failed to disclose to Wenneni and Jedeikin, before the exit contract was concluded, that Busby was in discussions with Ethos to buy the controlling share in House of Busby for over R1 billion.

[93] Both misrepresentations and non-disclosures were alleged to be deliberate, made to induce Wenneni to sell its shares in Golden Pond. The crucial allegation about the alleged misrepresentations and non-disclosures was inserted by an

amendment to the particulars of claim: had they not been made, or had the disclosures been made, ‘Wenneni (represented by Jedeikin) would not have concluded the exit agreement, and would not have exited from Golden Pond, as and when it did, and on the terms it did’.

[94] The respondents alleged that because Golden Pond had been liquidated, it was not able to claim rescission of the exit agreement. And that the scheme of arrangement had been conditional on the consent of the owners of all the brands in the Busby group to the assignment of the brands, including, of course, Mango. Thus, they claimed, the value of each brand had to be calculated by having regard to the price paid by Main Street (alleged to be R1.28 million, although Jensen had said it was actually R1.33 million) and the number of brands in the group – 16. On that basis they claimed they were entitled to damages in the sum of R39.2 million, plus interest. (As I have said, the determination of the quantum of damages was postponed.)

[95] The allegations were for the most part denied, but the appellants pleaded that they had not disclosed the Ethos-Busby deal because they had no duty to do so. They said also that by the end of July 2007 Golden Pond had not yet traded at a profit and that it was not foreseen that it would do so in the near future. At that time, its liabilities exceeded its assets.

The findings of the trial court

[96] Kollapen J found for Wenneni and Jedeikin. He issued an order that: ‘Had it not been for the misrepresentations and non-disclosure, the first plaintiff [Wenneni] would not have concluded the exit agreement, and would not have exited from Golden Pond, as and when it did, on the terms that it did.’ The court characterized the issues to be determined as: whether there were misrepresentations; whether there was non-disclosure; whether the misrepresentations and non-disclosure induced the exit agreement; and whether, but for the misrepresentation and non-

disclosure, Wenneni would have exited on the terms that it did. It did not have regard to the requirement of fraud or negligence that would warrant a claim for damages in delict and did not apparently examine whether the alleged misrepresentations were false.

[97] The trial court failed also to consider in any detail the role that CBG played, and the immediate reasons why Wenneni was not able to provide the capital funding for the second Mango store, and why he had to repay CBG the loan that Bantry Point had made to Wenneni. Kollapen J did take into account, however, that a friend of Jedeikin, Mr Hans Fuchs, who has apparently funded this litigation, would have stepped in and provided funding had Brouze and Lashansky not painted such a bleak picture of Golden Pond and its future. Fuchs did not give evidence and there is no proof at all that he would have been able and willing to invest in Golden Pond. The trial court regarded the CBG withdrawal as part of the larger picture – it could not have been looked at in isolation. It did not, however, have regard to the demand for payment by Wenneni of some R3 million made by Busby at much the same time.

[98] In so far as the non-disclosure of the Ethos-Busby transaction was concerned, the trial court found that there was a duty to disclose it to Wenneni and Jedeikin before the 25 July 2007 even though there was no transaction concluded at that stage, and negotiations were at an early stage. It considered that because of previous dealings between the parties, and the constitutional imperative to achieve a balance between the 'unacceptable excesses of contractual freedom and securing a framework in which the ability to contract enhances rather than diminishes self-respect and dignity', Busby owed a duty to disclose the negotiations without considering whether they would have any impact on Golden Pond. The intention of Ethos to acquire the controlling shareholding of the House of Busby would have had a 'cascading effect on other entities including subsidiaries and licensors'.

[99] The failure to disclose was deliberate, said the trial court. That was an inference to be drawn from the fact that when Jedeikin learned of the proposed

transaction, his then attorneys applied in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), for the documents and information relating to Golden Pond, Busby and Ethos, the former attorneys for Busby adopted a deliberate delaying strategy. This was revealed by documents that were subsequently made available, where a letter confirming instructions from Busby said that they were to delay the furnishing of the information.

[100] Accordingly, the trial court held that the Brouze brothers and Lashansky misrepresented the performance of the Mango brand when the letter of possible retrenchment was sent by Du Rand on 4 July, and on 25 and 26 July 2007 when Brouze spoke to Jedeikin; the misrepresentations were material; they had a duty to disclose to Wenneni, at least on 26 July 2007, the status of the discussions between Ethos and Busby; they had a duty to disclose these discussions even though nothing might have come of them; the misrepresentations were made knowingly; the non-disclosure was deliberate, and was intended to induce Wenneni to abandon its share in Golden Pond; and Wenneni would not have concluded the exit contract but for the misrepresentations and the non-disclosure.

Were misrepresentations in fact made?

[101] On appeal the appellants contend that the findings of fact by the trial court were wrong. I have already traversed the circumstance in which the statements about the poor performance of the Mango brand and the financial status of Golden Pond were made. Jedeikin was, despite his allegations of being kept in the dark, fully aware of the daily sales figures of Mango products and of the financial position of Golden Pond. His own testimony was that Du Rand's statements in the retrenchment letter were honest, and he too was concerned about the disappointing sales of the Mango brand. Jedeikin was not misled at all. He knew that if a second store was to be opened in Cape Town, Wenneni would have to find additional funding. And he knew that unless other stores were opened the Mango brand would never be successful. He did not prove that the statements in the retrenchment letter were false, let alone that he relied on them in entering into the exit contract. So the trial

court did indeed err in concluding that Du Rand's letter contained a false statement that was a cause of the exit contract.

[102] As to the conversations on 25 and 26 July with Brouze, it is clear that Jedeikin was in a financial predicament. That is why he had to sell Wenneni's interest to Busby. The CBG loan had to be repaid by 31 August 2007 and Jedeikin could not raise the additional funding of R3 million to fund Wenneni's contribution to Golden Pond. The only question to be resolved was whether he was entitled to payment for goodwill in that he had introduced the Mango brand to Busby. Brouze was not willing to pay anything but the token sum of R50. Golden Pond was trading at a loss.

[103] If the threat of liquidation was made by Brouze – and it is unlikely that it was – then it was no more than that, a threat and not a false misrepresentation of fact. Brouze said he would never have made such a threat: it would have been damaging to Busby to even contemplate liquidating a company in the group. And Jedeikin knew that too. The allegation about the threat only surfaced after the SENS announcement at the end of September.

[104] The statements in the Ethos report on the benefits and concerns in respect of a transaction with Busby, that the Mango brand had been rolled out with great success and the statements in the SENS announcements dealing with Mango related to the brand's potential. They had nothing to do with the financial status of Golden Pond in July 2007. By the time the statements were made the Cape Town Mango store was ready to open: Busby had raised the finance for it, and had signed a lease as early as February 2007. The prospects for Mango were thus appreciably better in the latter part of 2007 than they were in July of that year. Thus the statements relied on by the trial court in concluding that what was allegedly said to Jedeikin was false actually show no such thing.

[105] It is true that Brouze was a poor witness: he was obstructive and evasive and claimed far too often that he could not remember what was said. And it is also no doubt true that he handled Jedeikin roughly. I do not understand his discussions with Trapuesto of Inditex after the board meeting to have been dishonest – going behind Jedeikin's back. The previous year (in November 2006) he had written to Inditex saying Busby was interested in the Zara brand – but not with any other company. Inditex was not interested at that stage. Hence his call to Trapuesto to find out if Inditex's plans had changed when Jedeikin made his statement that 'Zara was coming' at the board meeting. Brouze followed the call up with the email to say, again, that Busby would not be involved with a joint venture. So his behaviour was consistent.

[106] Jedeikin was an equally poor witness. He was, as counsel for the appellants said during the course of the trial, arrogant, unmannered, ill-disciplined and evasive. Jedeikin misled Busby at the outset, when first meeting Brouze, by claiming to have landed the Zara brand. And he said when testifying that had he known the truth he would have exited from Golden Pond with an excellent price because he would have had the right to assign the Mango licence and would have used that as a bargaining chip. But he did not have the licence. Golden Pond did. As I said at the start of the judgment, Jedeikin had a limited grasp of reality.

[107] Given that both Jedeikin and Brouze were not good witnesses, this court must have regard to the probabilities. These are that no threat to liquidate was made. Such a course of action would have made no sense. And even if the threat was made, and Brouze told Jedeikin, as claimed, that they would all lose their investments, Jedeikin would not have believed it. The fact is that Busby was able immediately to repay the R4.9 million Wenneni loan account, plus interest. Moreover, Jedeikin, when testifying as to why he would have acted differently had he known the truth, said that 'we were on the brink of something very lucrative, had I known and the prospects of sale to a major private equity house meant that there was a large sum of money, would have placed a value on Golden Pond, given that it had a major

international brand, Mango, in its stable'. Thus the reason he sold Wenneni's share to Busby was not the threat of liquidation.

[108] The trial court erred also in finding that David Brouze and Lashansky were guilty of making misrepresentations. David Brouze did no more than react rudely to Jedeikin when he called him to complain that nothing was being paid to him for goodwill. He cannot be held responsible for the statements of his brother. And equally, there is simply no basis on which to find Lashansky liable for misrepresentations. There was no evidence at all that the financial statements were misleading.

[109] I conclude accordingly that no actionable misrepresentations were made by any of the appellants to Jedeikin, acting for Wenneni.

Was the non-disclosure actionable?

[110] The claim for damages is one in delict. Where it is based on an omission – a non-disclosure – it must be shown that it is wrongful: that the appellants had a duty to tell Jedeikin about the Busby negotiations with Ethos. In *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) Conradie JA pointed out that the test for determining wrongfulness in a pre-contractual setting is the same as the general test in delict for omissions: in each case the court looks to the legal convictions of the community. He continued (para 5):

'The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context – a non-disclosure – have been synthesized into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (*Speight v Glass & another* 1961 (1) SA 778 (D) at 781H-783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie lawful . . . . A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the

information, moreover, is such that the right to have it communicated to him 'would be mutually recognized by honest men in the circumstances'. . . .

[111] In *Speight* Fannin J said (at 781H-782G):

'There is in our law no general duty upon contracting parties to disclose to each other any facts and circumstances known to them which may influence the mind of the other party in deciding whether to conclude the contract (see *Hoffman v Moni's Wineries Ltd* 1948 (2) SA 163 (C); cf Wessels *South African Law of Contract* 2nd ed vol I s 1073 pp 329 et seq). There is authority for the proposition that in Roman and Roman-Dutch law, and therefore in South African law, a seller who knows of the existence of defects in the thing sold, but deliberately refrains from disclosing them to the buyer, is guilty of fraud, justifying the cancellation of the contract by a buyer who is not aware of them. . . . There is still some controversy as to whether mere silence is enough, or whether the silence must itself amount to a representation or be accompanied by some deliberate act of concealment. See, for example, *Dibley v Furter* 1951 (4) SA 73 (C); *Cloete v Smithfield Hotel (Pty) Ltd* 1955 (2) SA 622 (O); Norman *Purchase and Sale in South Africa,* 2nd ed p 84; and the discussions on the two above cases in the *Annual Survey of South African Law* for 1951 (at pp 230-232) and 1955 (at pp 264-266). . . .

I have examined all the authorities which are cited or referred to in the foregoing cases. They all, without exception I think, deal with the cases of deliberate suppression or the calculated withholding of information regarding the subject matter of the sale, which is known to the seller and unknown to the buyer, and which might affect, the buyer's mind. . . . In none of them, save one, can I find any suggestion that, where the seller has not made any misrepresentation, express or otherwise, on the matter in question, the mere failure to disclose the relevant facts can found an action, or any statement that, in the case of a sale, there is a duty of disclosure such as is set out in the passages from *Spencer Bower* [Actionable Non-Disclosure]. The exception is the passage in *Norman* [Purchase and Sale in South Africa 2 ed 84] op cit at p 84, where, dealing with fraud, the learned author says: -

"Non-disclosure will always amount to fraud where there exists a duty to disclose the full facts, eg:

(i) In contracts where a *fiduciary relationship* arises between the parties – contracts *uberrimae fidei,* such as insurance contracts, partnership and agency contracts,

(ii) where the facts concealed are accessible only to the party concealing them."'

[112] Wenneni and Jedeikin argue that the relationship between Wenneni and Busby was a fiduciary relationship: they were in a way partners. Jedeikin referred to Busby as a partner from time to time, as indicated in correspondence described earlier, and Brouze raised no objection. However, the incorrect designation of the legal relationship cannot change the legal position. Apart from that, the loose use of terminology by non-lawyers is common.

[113] It is true that 'there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure': *Ebrahimi v Westbourne Galleries Ltd & another* [1973] AC 360 (HL) at 379*b-c* quoted with approval by Hoexter JA in *Hulett & others v Hulett* 1992 (4) SA 291 (A) at 307G-I. In that case the court held that the pre-existing bonds of a lengthy friendship and of mutual trust and confidence between three men had resulted in a quasi-partnership. That was hardly the case in this matter. The relationship between Wenneni and Busby was shortlived and acrimonious. There was certainly no basis for finding that there was a quasi-partnership. And in the shareholders agreement clause 25, headed 'Quasi Partnership', expressly stated that 'The relationship between the shareholders as such shall not be construed as that of quasi partners'.

[114] Nonetheless the respondents argued that as a shareholder in Golden Pond, where a transaction involving the sale of shares by one shareholder would impact on another, there was a fiduciary duty in the circumstances to disclose the fact of the sale. This was a principle recognized by the Supreme Court of New South Wales, Australia in *Brunninghausen & another v Galvanics* (1999) 32 ACSR 294. And Professor Michael Blackman, in *Lawsa* First reissue vol 4 Part 2, para 119, suggested that directors wishing to purchase shares in their own company would have a duty to make full disclosure to other shareholders of all relevant facts concerning the company's affairs when negotiating the purchase. But as a general

principle, Blackman stated, directors of a company owe a fiduciary duty to it, and not to shareholders individually.

[115] In *Cape Empowerment Trust v Fisher Hoffman Sithole* [2013] ZASCA 16; 2013 (5) SA 183 (SCA) Brand JA, dealing with the wrongfulness of a failure to protect a plaintiff from economic risk caused by a negligent misrepresentation, said (para 28):

'But the consideration which, in my view, weighs most heavily against the imposition of legal liability on [an auditing firm] is the one that has become known, in the context of wrongfulness, as the plaintiff's "vulnerability to risk". As developed in our law, under the influence of Australian jurisprudence, vulnerability to risk signifies that the plaintiff could not reasonably have avoided the risk of harm by other means. What is now well established in our law is that a finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant. . . . The role of this consideration is best illustrated, I think, by McHugh J in *Perre v Apand (Pty) Ltd* (1999) 198 CLR 180 (HC of A) . . .para 118:

"Cases where a plaintiff will fail to establish a duty of care [or wrongfulness in the parlance of our law] in cases of pure economic loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interfere with legitimate acts of trade. In many cases there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from pure economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss."'

[116] It is not necessary to discuss the principles any further. At the time when the exit contract was entered into, there was no transaction to disclose. At the meeting between Busby and Ethos on 25 July 2007, Busby rejected the proposals made by Ethos. It made a counter-proposal only subsequently. At that stage not even the directors of the House of Busby had been advised of the approach. There was nothing to tell them.

[117] The proposed takeover was, in any event, of the shares in the House of Busby. Golden Pond would not have been affected. Wenneni did not show how, if at all, the value of its shares in Golden Pond would have been affected by the takeover of the holding company (this is not a question of the calculation of the claim – quantum – but a question of causation). There were numerous subsidiaries in the group, and there was certainly no idea in July 2007 how any of these would be affected, if at all. As the appellants argue, the buyer of shares is perfectly entitled to deal with different sellers without disclosing the fact of competing buyers to them.

[118] And the fact is that Busby had started talks not to sell the shares in Golden Pond, but to sell shares in the holding company of Golden's Pond's holding company. Golden Pond was a subsidiary of Busby SA, which was itself a subsidiary of the House of Busby. Preliminary talks about a sale of shares in the House of Busby were not such as to require any disclosure to a shareholder in a subsidiary. I consider that there was no duty to disclose the talks that occurred before the exit agreement was concluded. Jedeikin, acting for Wenneni, had all the facts on which to base the decision to exit from Golden Pond at his disposal.

[119] Even on the assumption that there was a duty on the appellants to disclose anything to Jedeikin and Wenneni, they did not discharge the burden of proving that they would not have sold the shares in Golden Pond, or would have sold them on different terms. Every question that related to causation in this regard was considered during the course of the trial to be a question of quantum, and not to relate to liability. In my view, the respondents bore the onus of proving that Wenneni would not have exited from Golden Pond had it known there were negotiations about selling the controlling share in the House of Busby. Jedeikin could not say what he would have done about repaying the loan to CBG or injecting a further R3 million to fund the Mango store in Cape Town. He mentioned Fuchs. But as I have said, there was no evidence that Fuchs was willing or able to lend Wenneni R3 million and repay £250 000 to CBG. And likewise, he adduced no evidence that the takeover the

following year would have raised the value of the Golden Pond shares. In fact, those shares were valued at nil when valuations were obtained by Ethos for tax purposes. Had Jedeikin not exited from Golden Pond, the Wenneni shares would have had no greater value than they did when its shares were sold to Busby.

[120] When Jedeikin wrote to Tchenguiz, Gamsu and Baxter on 2 October 2007 saying that they would have noted that Busby had received a private equity offer from Ethos of R1.3 billion, and that Golden Pond would be acquired for a 'high multiple', he was being fanciful. The test to determine whether wrongful conduct has caused economic loss is to ask, hypothetically, what would have happened but for the wrongful conduct of the defendant: *Cape Empowerment Trust* para 20. Wenneni and Jedeikin failed to show what they would have done but for the misrepresentations and non-disclosures alleged. As I have said, Wenneni had no choice but to sell its shares to Busby given CBG's withdrawal of funding and its inability to raise other finance for the second Mango store.

[121] The argument that Wenneni's exit from Golden Pond was the result of a deliberate strategy on the part of the Brouzes and Lashansky must also be rejected. The only reason Keith Brouze wanted to get rid of Jedeikin was because of his nuisance value. He interfered in the management of the Mango store despite Busby having sole management rights and made constant demands for information despite having all that was necessary at his disposal. And the inference that the non-disclosure of the Ethos deal by Lashansky was deliberate because he had wanted to delay the response to the PAIA request is unfounded. The concern was that Jedeikin would in some way jeopardize the s 311 application. Perhaps the concern was unfounded and the delay was unjustified (as was the failure to make discovery of all the Ethos and Busby documentation) but the question as to Wenneni's right to the information requested was well-founded. I conclude, therefore, that there was no duty to disclose the Ethos transaction, and no proof that it had any causal effect on the exit agreement. Wenneni had to exit when it did.

[122] It is not clear why Jedeikin sued personally or why the trial court ruled in his favour. At all material times he was acting for Wenneni and it was Wenneni which would have suffered damages if the claims had succeeded. But given the conclusions to which I have come it is not necessary to deal with this question.

[123] On appeal, the Brouzes and Lashansky ask for the costs of three counsel. The reputations of three people have been damaged without justification by the findings of the trial court and they need vindication. The amount claimed by Wenneni and Jedeikin is some R39.2 million, plus that amount in interest. The record is lengthy and the facts complex. The employment of three counsel was thus warranted. I agree.

[124] Accordingly:

1 The appeal is upheld with the costs of three counsel where so employed.

2 The order of the trial court is set aside and replaced with:

‘The plaintiffs’ claims are dismissed with costs including the costs of two counsel.’

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C H Lewis

Judge of Appeal

APPEARANCES

For Appellants:	W H Trengove SC (with him C M Eloff SC and T Dalrymple)
Instructed by:	Knowles Husain Lindsay Inc, Sandton McIntyre & van der Post, Bloemfontein
For Respondents:	C D A Loxton SC (with him P B J Farlam)
Instructed by:	Korbers Inc, Cape Town Webbers, Bloemfontein