

SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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***Brouze v Wenneni* [2015] ZASCA 142**

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal today upheld an appeal against a decision of the Gauteng Division of the High Court which had found Keith Brouze, David Brouze and Shawn Lashansky of the House of Busby, liable for misrepresentations and non-disclosure to a company controlled by one Shane Jedeikin, Wenneni Investments (Pty) Ltd. The alleged misrepresentations and non-disclosure were held by the trial court to have induced an agreement (the exit contract) to transfer shares in a company, Golden Pond (Pty) Ltd, in return for the loan Wenneni had made to it, plus interest. The claim for damages was for some R39.2 million. The trial court did not deal with quantum as the parties had agreed that it should first determine liability.

Jedeikin, as a very young man, introduced to Keith Brouze, a director of the House of Busby, a major retailer and supplier of clothing and accessories in the South African market, the idea of bringing the Spanish fashion brands, Zara and Mango, to South Africa. As a result of negotiations between Busby and Wenneni, the Mango licence to distribute Mango products was awarded to a Golden Pond in early 2006. A subsidiary of the House of Busby, Busby

Retail, acquired 51 per cent of the shares in Golden Pond for R5.1 million. Wenneni acquired 49 per cent for R4.9 million.

Wenneni and Busby Retail entered into a shareholders' agreement that gave Busby sole management control of any Mango store to be opened in South Africa. Jedeikin was appointed as a 'brand ambassador' for Mango fashions, and was paid to work three days a week for Golden Pond. The first Mango store, opened in Sandton City in October 2006, was managed entirely by Busby, but Jedeikin kept a watchful eye on the daily sales figures and accounts. The opening of the store was regarded as successful, but the brand did not do as well as hoped, and by July of 2007 it was still running at a loss.

In order for the Mango brand to be sold at a profit it was necessary to inject capital into Golden Pond to finance the opening of a second Mango store in Cape Town. Busby's share of the capital to be provided was 51 per cent and Wenneni's 49 per cent. The estimated sum needed to open the store in Cape Town was some R6 million.

The company that held the Zara brand had decided that it was not ready to open in South Africa in 2007, and it had advised Brouze of that in late 2006. At a board meeting of Golden Pond in February 2007, Jedeikin said that Zara was coming to South Africa. Brouze responded that Busby was not interested in the Zara brand at that stage and would not bring it in with a joint venture. He suggested to Jedeikin that he pursue the brand on his own. However, surprised that Zara had apparently changed its position, he telephoned the Zara representative to make enquiries. There followed an email exchange about a meeting in Spain and Brouze said he would like to reiterate that Busby was not interested in pursuing the Zara brand with a third party.

When Jedeikin heard of the interaction he was infuriated that Brouze had gone behind his back. He threatened litigation. In fact, Brouze had told Zara no more than that if Busby were to win the licence they would not go ahead with any other entity. Jedeikin, in April 2007, gave an interview to Business Day which reported that Wenneni was going to list on the stock exchange and

would compete in the same space as Truworths and Foschini. That infuriated Brouze because it was not true and because it upset the two retailers which were large customers of Busby. The relationship between Wenneni and Busby had soured.

At much the same time, a funder of Wenneni, Mr V Tchenguiz, decided to withdraw a loan that he had made to it. The investment in Mango was troublesome. Notice that the loan had to be repaid by 31 August 2007 was given to Jedeikin in July. So on 25 July 2007, Wenneni was in a financial predicament. It had to pay R3 million to Golden Pond, and repay GBP250 000 to a company controlled by Tchenguiz that had made the loan to it.

A telephone call between Brouze and Jedeikin on 25 July 2007 was followed by an email from Jedeikin to Brouze in which Jedeikin confirmed that Wenneni would transfer all its shares in Golden Pond to Busby immediately and that Busby would repay the amount that Wenneni had invested in Golden Pond. Jedeikin asked that Wenneni be paid for his goodwill. The following day there was another call. And it was followed by an email from Jedeikin to Brouze, in curt terms, confirming that a token amount would be paid to Wenneni for goodwill. That was the exit contract allegedly induced by misrepresentations made by Brouze and others. The contract was implemented in August 2007. Jedeikin advised Tchenguiz that Wenneni had lost the Mango licence because of his withdrawal of the loan. He was to blame.

At the end of September 2007 the House of Busby issued a SENS announcement that a private equity company, Ethos (Pty) Ltd had offered to buy the controlling shareholding in it for some R1.3 billion. Reference was made to some of the brands sold by Busby, including Mango. A takeover of the House of Busby in fact ensued in early 2008.

When Jedeikin heard of the proposed takeover, following the SENS announcement, he sought information about the transaction from Busby's attorneys. They delayed the response because they thought he might in some

way jeopardize the application to court to sanction the acquisition of the House of Busby's shares.

Wenneni and Jedeikin instituted action against the Brouzes and Lashansky claiming damages for fraudulent misrepresentation and non-disclosure which they alleged had induced the exit contract. The trial court found that the appellants were liable. The alleged misrepresentations were said to have been that, prior to the agreement, Busby had told Jedeikin that Golden Pond was in a perilous financial situation; that on 25 July 2007 when Brouze and Jedeikin had their first telephone conversation, Brouze had said that the company was insolvent; and that in the second conversation he said that Busby would liquidate Golden Pond and they would all lose their investments.

The non-disclosure complained of was that the Brouzes and Lashansky had failed to disclose the proposed transaction with Ethos. Had Jedeikin known the truth about Golden Pond's financial status, and had the fact of the proposed takeover been disclosed, Wenneni would not have concluded the exit contract, it claimed.

The SCA found, however, that Jedeikin had full knowledge about Golden Pond's financial status, and that the statements that it was running at a loss were true. It found also that the onus of proving the alleged threat to liquidate had not been discharged, and that even if Brouze had said something to that effect it was nothing more than a threat and Jedeikin knew that it was not real.

The SCA found further that there was no duty on any of the appellants to disclose to a shareholder in a subsidiary company that they had started negotiations to sell their shares in the holding company of the subsidiary that in turn held shares in Golden Pond. On the date of the exit contract negotiations had just begun and there was nothing to disclose. The trial court had thus erred in finding that misrepresentations had been made at all, and that the appellants had a duty to disclose a transaction that had not even been concluded. It had erred also in not considering the real cause of the exit contract: that Wenneni could not finance the next Mango store and that

Tchenguiz required the loan to Wenneni to be repaid. The appeal against the trial court's findings was thus upheld.