IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 5050/2014

In the matter between:

ASHARA SUKDEO GOVENDER	**PLAINTIFF**
and	
KAASTURIE MOODLEY	**FIRST DEFENDANT**
NICHOLAS ITOPOULOS	**SECOND DEFENDANT**

J U D G M E N T
Delivered on: Thursday, 12 July 2018

Olsen J

[1] The plaintiff in this action sues the two defendants for repayment of the purchase price she paid to them in order to acquire a one-third interest in a restaurant business based at Ballito, KwaZulu-Natal, and known as Olive and Oil. She pleads that she was the victim of a misrepresentation intentionally made to induce her to conclude the agreement.

[2] In concluding the agreement the plaintiff was represented by her husband, Mr Sharmlin Govender. The first defendant was represented by her husband, Mr Wentzel Moodley. (It appears clear that the first defendant's interest in the business was her's in name only, and that it was controlled entirely by her husband.) The second defendant acted personally. That statement, and the statement that the first defendant was represented by her husband, needs perhaps to be qualified by the observation that on the evidence Mr Moodley and the second defendant were for much of the time acting in concert.

[3] Before furnishing an account of the evidence led in support of the plaintiff's case it is necessary to mention one or two facts by way of background.

(a) The Olive and Oil restaurant group was started by the second defendant about 13 years ago. At the time when he gave evidence the group comprised ten restaurants. (He called them "shops".) He is a director of the holding company and attends to all new developments and group operations.

(b) The Ballito restaurant (which for convenience sake I will call "the restaurant") was opened in 2010. It was owned by Olive Terrace CC, a close corporation in which each of the defendants held a 50 per cent interest.

(c) In or prior to February 2012 it became apparent to Mr Moodley and the second defendant that money was being siphoned off from the restaurant. According to the second defendant the guilty parties were the then general manager of the restaurant acting in concert with an employee of the Hampshire Hotel which is also situated in Ballito, and with which the restaurant did a fairly considerable amount of trade. This led to the engagement of a forensic auditor and the placement of temporary managerial staff at the restaurant. One of the personnel sent there was a Ms Girdhari who was called as a witness for the defendants.

(d) After the plaintiff's action had been instituted the defendants instituted a separate action against the plaintiff, claiming that the plaintiff had undertaken to join the two defendants in standing surety for an indebtedness owed by Olive Terrace CC to Nedbank, something which the plaintiff had refused to do. They sought an order holding the plaintiff liable to them for one-third of the claim which they had to meet as sureties. The second action was consolidated with the present matter for the purposes of trial. The allegation that the plaintiff had made such an undertaking was hotly disputed during the course of the plaintiff's case. However after the close of the plaintiff's case, and by agreement between the parties, the defendants were granted leave to withdraw their action upon the footing that the costs incurred in it would be costs in the cause in the plaintiff's action.

(e) The account of the facts which follows reveals that Mr Moodley was a vital witness for the defendants. He was not called. The reason for this, which the plaintiff accepted for the purpose of the case, was that he has succumbed to a psychiatric illness which is a degenerative condition involving atrophy of the brain, and which, according to medical opinion, renders him unable to participate in legal proceedings. In order to dispense with medical evidence the plaintiff placed on record that she would not seek an adverse inference to be drawn against the defendants because Mr Moodley did not testify; ie it would not be argued that he was deliberately not called because his evidence would contradict the defendants' case. But where the evidence led for the plaintiff stood un-contradicted for want of evidence from Mr Moodley, the plaintiff would be entitled to the benefit of that. All of this was placed on record.

THE PLAINTIFF'S CASE

[4] Both the plaintiff and her husband, Mr Govender, gave evidence. As Mr Govender was the principal player one needs to look to his evidence in order to paint the clearest picture of the facts upon which the plaintiff relies. In her evidence the plaintiff (who was called first) corroborated what emerged from Mr Govender's evidence wherever her relatively limited involvement allowed this.

[5] Mr Govender is an accountant by profession. He served articles with a well-known firm, Deloitte. He passed his board examinations in June 1997 and completed articles in January 2000. He thereafter stayed on with Deloitte until 2001. After a four year stint with another company, Mr Govender joined

Grafton Everest in 2005 and he has been employed there since in the finance section.

[6] Mr Govender met Mr Moodley when the former joined Deloitte. Mr Moodley had just become a senior manager at Deloitte and, as Mr Govender put it, he looked up to Mr Moodley as a qualified accountant. It emerged that Mr Govender respected the professional integrity displayed by Mr Moodley whilst the two were both employed at Deloitte.

[7] In February 2005 the two met up again, when a pre-audit meeting was held at Grafton Everest. Deloitte was the company's auditor, and it turned out that Mr Moodley would be the person who signed off the financial statements. Thereafter they met every year in connection with the audit. Mr Govender was the client and Mr Moodley was (Mr Govender believes) a partner at Deloitte. They became acquainted on a more personal level, as their sons played soccer together. In about 2010 or 2011 Mr Moodley took the Grafton Everest administrative team and his audit team to the Olive and Oil restaurant in Ballito, and on that occasion disclosed to Mr Govender that he owned a 50 per cent share in the restaurant.

[8] In July 2012, during the Grafton Everest audit for the year-end June 2012, Mr Govender asked Mr Moodley how the restaurant was going. Mr Moodley said that he was concerned as it was suspected that a manager had been stealing and that the owners of the restaurant were in the process of finalising a forensic audit. It appeared to Mr Govender, from what Mr Moodley said, that the latter and the second defendant had left the running of the restaurant to a manager.

[9] Towards the end of July or early August 2012 Mr Moodley telephoned Mr Govender and suggested that the latter might like to join the defendants in the restaurant. Mr Moodley and Mr Govender could work together to help put things right. Mr Govender found the suggestion intriguing, and Mr Moodley said that he would speak to the second defendant about it.

[10] A few days later Mr Moodley reported to Mr Govender that the former had spoken to the second defendant and that the two of them had decided that they would be willing to sell a one-third interest in the restaurant for R750 000. Mr Govender replied that he did not have that sort of money and would have to borrow it on the security of the mortgage bond over his house. But he would need to see what he would be getting for the money.

[11] Mr Govender asked Mr Moodley for the most recent financial statements of the restaurant but was told that they were not ready as they were still being worked on. Neither were monthly management accounts available. Mr Moodley conveyed that this state of affairs was connected with the mismanagement and fraud which was being investigated. He accordingly proposed that Mr Govender be provided with a realistic estimate of what the business would do in the future. This was about mid-August 2012.

[12] Under cover of an email dated 24 August 2012 Mr Moodley sent Mr Govender the document which is at the centre of this case. The document (which I will call the "budget") predicted the performance of the restaurant for the months of October 2012 through to February 2013 (inclusive). It listed projected monthly income from restaurant sales, the costs of those sales (in the restaurant trade, that is the cost to the restaurant of the raw food needed to generate the turnover), the resultant gross profit, then the other expenses; all of this then generating a final net profit figure. It is the plaintiff's case that the budget constitutes the misrepresentation which gives rise to her cause of action.

[13] The email which accompanied the budget contained the following statement.

'Nickos [the second defendant] and I must [sic] spent a fair amount of time yesterday on this with the aim of getting to realistic numbers, perhaps somewhat conservative (i.e. cost of sales 40% versus 36% that is the first target).'

Mr Govender's evidence was that the whole of the so-called budget was presented as a conservative prediction.

[14] After receiving the budget Mr Govender did some work on it, classifying certain of the items of expenditure as variable costs; that is to say costs which vary with turnover. He made some adjustments to the figures on that account. The result was to decrease the predicted profit for the five months in question from R542 000 to R507 667. Mr Govender then discussed the figures with the plaintiff. He conveyed to her that on these figures, after corporate taxes, more or less R100 000 would be due to each of the members of the close corporation after five months of trading. The proposition he put to her was that on the figures they would have to pay an extra R7 000 per month on their bond (which would be increased to cover the purchase price of a one-third interest), but would get back approximately R20 000 per month.

[15] Between 29 August and 3 September 2012 a meeting was held between the plaintiff, Mr Moodley, the second defendant and Mr Govender at the Olive and Oil restaurant in Umhlanga. There agreement in principle was reached that the deal should go ahead. The Govenders had gone to the restaurant on 29 August 2012 to celebrate their anniversary, and based on that visit they made some suggestions as to features of the restaurant which could be upgraded, and the suggestion was made at the meeting that if each of the one-third partners put in R40 000, that should cover it.

[16] After that there were exchanges between the parties in an attempt to put something down in writing, but no written agreement was ever signed. A meeting was then held at the restaurant on 27 September 2012 attended the by the Govenders, Mr Moodley and the second defendant. Agreement was reached at that meeting that the deal would go ahead. A further draft written agreement was provided but never signed. Nevertheless the parties proceeded on the basis that agreement had been reached. Payment of the purchase price was made towards the end of October 2012.

[17] Up to this stage the only financial data available to Mr Govender was reflected in the budget provided by Mr Moodley, and sanctioned by the second defendant. In his evidence in chief and under cross-examination Mr Govender insisted that he trusted Mr Moodley, regarding him as a

professional person of integrity. Furthermore Mr Moodley had by then acquired some experience in the industry, and he was supported in that regard by the extensive experience of the second defendant. The plaintiff, according to both Mr Govender and her own evidence, had no accountancy experience and relied on her husband's assessment of the reliability of the budget based especially on his trust in Mr Moodley.

[18] Mr Govender first started considering turnover figures towards the end of November. He became concerned as they appeared not to be in line with the budget. He confronted Mr Moodley who said that he would speak to the second defendant who was responsible for driving turnover. The management accounts for October and November were then sent to Mr Govender by Mr Moodley via email dated 1 December 2012. They showed that the restaurant had sustained a loss of R152 000 for the two months; whereas, allowing for depreciation, the budget had reflected a profit of R82 000 for the same months. Mr Govender was very unhappy. He discussed the matter with his wife who was even more unhappy. He persuaded her that they should "stick it out" as December might change everything. The Govenders then monitored the December turnover on a daily basis. Up to 30 December the turnover was R752 000, whereas what had been predicted was R900 000. In January they decided that they needed to get out of the business. Mr Govender told Mr Moodley, explaining that the failure of the restaurant to perform as the Govenders had been led to believe was causing severe trouble at home, and that they had to withdraw from the transaction.

[19] A meeting then took place between Mr Moodley, the second defendant and Mr Govender. Mr Govender had earlier conveyed to Mr Moodley that the Govenders were withdrawing. The second defendant and Mr Moodley expressed their regret that the Govenders proposed to leave. They suggested that a buyer should be found and that while matters were being sorted out they wanted Mr Govender to continue to help Mr Moodley dealing with payments which had to be made by the restaurant, something he had

been doing up to that time. Mr Govender agreed to do that. There was however no offer of repayment from the two defendants.

[20] Subsequently Mr Moodley and the second defendant informed Mr Govender that they wished to sell their interests in the restaurant business. Mr Govender's response was that each of them should repay their share of the purchase price to the plaintiff, after which they could sell the restaurant themselves. The defendants did not accede to that request. It appears that things went from bad to worse for the restaurant which closed its doors, according to the second defendant during 2014.

[21] The account of the evidence given so far does not on its own reveal that the plaintiff was necessarily the victim of actionable misrepresentation. Mr Govender conducted an analytical exercise, which he described in evidence, which was designed to close the net around the defendants by illustrating that the presentation of the budget did amount to factual fraudulent misrepresentation justifying the claim for repayment of the purchase price. It is convenient, before giving an account of Mr Govender's work, to consider the legal principles against the background of which it must be considered within the factual matrix already set out above.

THE LEGAL FRAMEWORK

[22] In *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) para 14 Theron JA said the following concerning misrepresentation in a contractual context.

'A misrepresentation has been described as a false statement of fact, not law or opinion, made by one party to another before or at the time of the contract, concerning some matter or circumstance relating to it. A party seeking to avoid a contract on the ground of misrepresentation must prove that: (a) the representation relied upon was made; (b) it was a representation as to a fact; (c) the representation was false; (d) it was material, in the sense that it would have influenced a reasonable person to enter into the contract; and (e) it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided.' (Footnotes omitted.)

The above statement of our law was sufficient for the purposes of the case being dealt with in *Quartermark*, and required no embellishment or further explanation.

[23] In *Presidency Property Investments (Pty) Ltd and Others v Patel* 2011 (5) SA 432 (SCA) the court had occasion to consider the principle that statements of opinion will not suffice, and drew the distinction between a "mere expression of opinion" and a dishonest opinion. The following appears in paragraph 28 of the judgment.

'In order to constitute such a representation the statement or assertion must relate to an ascertainable fact as distinct from a mere expression of opinion – see *Jones v Mazza and Another* 1973 (1) SA 570 (R) at 572B – 573E, although a dishonest opinion as to a future event may be sufficient to found an action for fraudulent misrepresentation insofar as it falsely reflects the state of mind of the representor – see *Van Heerden and Another v Smith* 1956 (3) SA 273 (O) at 275 – 276. As in many other cases what is decisive is a holistic view of the terms of the representation and the context in which it was made.'

In *Van Heerden's* case (at 276C) the court concluded that a dishonest and erroneous opinion about a future event can form the basis of an action for fraudulent misrepresentation,

'but in such case the cause of action will be the dishonesty of the person about the state of his own mind when he gave expression to the erroneous opinion, and not the mere fact that the opinion afterwards proved to be wrong.'

[24] In *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 695 (a case which co-incidentally also concerned representations made to induce a contract for the purchase of a restaurant) the court endorsed two propositions which may be regarded as qualifications to the rule that a statement of opinion about the future does not give rise to an action for fraudulent misrepresentation.

[25] As to the first of these the court endorsed the proposition stated in Halsbury *Laws of England* 3 ed vol 26 para 1520:

'…a statement of expectation or a statement in the future tense may impliedly say something as to the existing position and so import an implied representation.'

On the same subject the court referred to a passage in Kerr *Fraud and Mistake* 7 ed at 31 which was taken from the *dicta* of Bowen LJ in *Smith v Land and House Property Corporation* 28 Ch D 7 at 15.

'It is often fallaciously assumed that a statement of opinion cannot involve a statement of fact. But, if the facts are not equally known to both sides, a statement of opinion by the one who knows the facts best often involves a statement of a material fact, for he implicitly states that he knows facts which justify his opinion.'

[26] The second qualification endorsed by the court at 695F-G (with reference, inter alia to *Van Heerden*) is that:

'a person's statement of opinion or forecast of the future success or profits of a business may, at the very least, amount to a representation as to his then state of mind, ie that he actually believes in what he says, …'.

As to this issue, bearing in mind the requirement stated in *Presidency Property Investments,* that one should take a holistic view of the matter and the context, one would think that a false expression of opinion of a future event would not qualify as an actionable misrepresentation unless it could be shown that it was material to the person to whom the opinion was expressed that the particular representor honestly held the opinion.

MR GOVENDER'S ANALYSIS

[27] The crucial period in the lifetime of the restaurant for the purposes of this case is the financial year ending 28 February 2013. The budget which the plaintiff claims to reflect the misrepresentation she relies on dealt with the last five months of that financial or tax year. The performance of the restaurant during the first seven months of that tax year (or perhaps the first six months of the year, bearing in mind when the budget was produced) are crucial to the central issue raised by the plaintiff's claim, as it defines the state of affairs from which the predictions contained in the budget would flow. The manager of the restaurant who had been responsible for siphoning off funds had been replaced before1 March 2012.

[28] The material available to Mr Govender to construct his analysis of the information available to the defendants when the budget was prepared is as follows.

(a) He had received the monthly management accounts for the restaurant for the months of October and November on 1 December 2012.

(b) In February 2013 Mr Moodley sent the January 2013 management accounts to Mr Govender.

(c) The defendants discovered the annual financial statements of the restaurant for the year ending 28 February 2013, which, in usual form, record the performance of the restaurant for the entire year without any reference to performance in any particular periods during the year. (The annual financial statements for the year ending February 2012 were also available.)

(d) Mr Govender had monitored the turnover of the restaurant up to 30 December 2012 at which stage it stood at R752 000, and was accordingly able to postulate a turnover for that month of R800 000. (That seems reasonable bearing in mind that the missing day is New Year's eve.)

[29] The defendants failed to discover any of the monthly management accounts for the first seven months of the financial year in question. In his evidence the second defendant claimed that the missing management accounts were available on Mr Moodley's computer at the time the budget was constructed. Nevertheless they do not feature in discovery. They were not produced at trial in any shape or form. The first defendant was not called to give evidence as to what had happened to her husband's computer, nor indeed to state that it was not available.

[30] Dealing with turnover first, Mr Govender took what might be described as an educated guess as to the turnover the restaurant might have achieved during February 2013. The turnover for January 2013 was R371 803, and he

postulated a turnover of R350 000 for February 2013. On this basis the conclusion he drew was that the turnover for the five months covered by the budget was R2 145 372, some 23 per cent less than the R2,8 million which the budget predicted.

[31] The annual financial statements of the restaurant record that the turnover for the whole of the 2012/2013 financial year was R3 900 999. Deducting from that the turnover of R2 145 372 for the last five months reveals that the total turnover for the first seven months was in the region of R1 755 627, or an average of R250 804 per month. The average monthly turnover predicted by the budget, excluding December where R900 000 was predicted because of the holiday season, amounts to R475 000. What had actually been achieved in the earlier seven months of the tax year was 47 per cent less than that.

[32] Mr Moodley's assertion made to Mr Govender that there were no management accounts available for the seven months which preceded October 2012 (the first month of the budget) seems to be borne out by the fact that such documents have never been produced. However it is difficult to believe that Mr Moodley and the second defendant would not have been aware of the turnovers achieved in those earlier months. Mr Govender argues that no person aware of those figures, and especially no qualified accountant (as Mr Moodley was) and seasoned restaurateur (as the second defendant was and is) could have honestly believed in the predicted turnovers set out in the budget, let alone have regarded them as "conservative" as represented by Mr Moodley to Mr Govender in writing when the budget was produced.

[33] Mr Govender attempted a similar exercise in connection with expenses, but with rather less material available to him. The two largest (by far) items of expenditure in the restaurant were wages and rent.

(a) According to the budget the average monthly wage bill would be R69 000, despite the fact that in the financial year 2011/2012 it had been some R96 000 per month. The financial statements for the year ending February 2013 reveal that in fact during that year the average monthly wage bill was R93 500.

(b) According to the budget the average monthly rent would be R68 000, despite the fact that it had been R75 000 per month during the 2011/2012 financial year. It turned out to be some R82 500 per month during the year ending February 2013.

[34] On Mr Govender's evidence, and on the available documents, the disparity between earlier expenses and those postulated in the budget cannot be explained. No explanation for the disparity was tendered by the defendants in evidence. Indeed, Mr Govender's analysis went unchallenged.

[35] As is the case with turnover figures contained in the budget, Mr Govender's argument is that no person, and again, certainly no trained accountant such as Mr Moodley was, and seasoned restaurateur such as the second defendant was and is, could have believed that the expenses reflected in the budget would be realised. Accordingly, looking at expenses and turnover together, Mr Moodley and the second defendant could not but have understood and known that the predictions as to profitability made in the budget could not be justified, and were contradicted by the then available information concerning the performance of the restaurant.

[36] As it turned out, during the year ended February 2013 the restaurant incurred a loss of some R1.4 million.

<u>THE DEFENDANTS' CASE</u>

[37] In their plea the defendants averred that the parties jointly undertook a feasibility and profitability study during September 2012, to determine what might be expected from the proceeds of the business in the future. It was pleaded that the budget represents "part of" the study and reflects the parties'

"reasonable assumptions arrived at from the circumstances known at the time". It was admitted that the feasibility study influenced the plaintiff to enter into the contract with the defendants. It was also alleged that at the time of negotiations and at the time of contracting the parties were aware that the restaurant was trading at a loss, but nevertheless "reasonably assumed, after performing a due diligence and feasibility study which [the budget] forms part of, that the business would, after the implementation of certain agreed strategies, begin generating the profits contemplated in [the budget]".

[38] The defence to the plaintiff's pleaded claim is based on these propositions.

<u>THE DEFENDANTS' EVIDENCE, AND AN EVALUATION OF ALL THE EVIDENCE</u>

[39] It is convenient at this stage both to give an account of the evidence led for the defendant, and to evaluate it and the evidence led for the plaintiff.

[40] It should be stated at the outset that I found the plaintiff and Mr Govender to be good witnesses. Their answers were direct and they did not seek to evade questions. It is especially important in the case of Mr Govender that he was obviously concerned to ensure that his answers were precise and accurate. Neither he nor the plaintiff resorted to vague generalisations when asked questions which required a specific answer. Indeed, in argument counsel for the defendant made the point that Mr Govender revealed himself to be a meticulous and rational man who paid attention to detail. Counsel argued that this militated against a finding that Mr Govender relied on the budget in advising the plaintiff to purchase a one-third interest in the restaurant. Of course the argument overlooks the proposition that 'even Homer nods', and the level of trust Mr Govender reposed in Mr Moodley.

[41] Ms Girdhari was the first witness for the defendants. Counsel for the plaintiff made the observation in argument that it was not perfectly clear why

she was called at all, unless it was because shortly before 1 October 2012, but certainly before 3 October 2012, she had expressed the view that the figures set out in the budget were in her opinion too conservative, as a result of which a recast budget, reflecting her opinions, and a better outcome, was produced and sent by Mr Moodley to Mr Govender under cover of an email dated 3 October 2012. Although this more optimistic prediction was not relied upon by the plaintiff, the evidence concerning it is symptomatic of unsatisfactory features in the evidence presented on behalf of the defendants.

(a) According to Ms Girdhari she was shown the budget before 1 October 2012, and the more optimistic budget was produced at a meeting between her and Mr Moodley. (Whether this was the occasion on which she was first shown the budget is not clear.)

(b) According to the second defendant he first saw the more optimistic prediction at the shop in Ballito at the beginning of October. He said he remembers that there was what he called a big meeting between Mr Govender, Mr Moodley, the plaintiff and Ms Girdhari where they changed the budget because they thought they could do better.

(c) According to the second defendant when he saw the more optimistic prediction he "told them they were very optimistic".

(d) As mentioned, this more optimistic prediction was sent to Mr Govender by Mr Moodley via email on 3 October 2012. In the email Mr Moodley recorded that he had updated the budget following Ms Girdhari's request, and had this to say concerning the second defendant's response to it.

> 'Nicos came to see me to assist with his asset and liability statement. I made him check as well – he is happy.'

(e) The evidence for the plaintiff is that there was no such meeting which produced the more optimistic budget.

(f) The aim of the evidence concerning the more optimistic prediction, certainly from the second defendant’s perspective, was to fix joint responsibility for the inaccuracies of the document on Mr Govender, to the obvious advantage of the contention that the plaintiff and her husband, Mr Govender, were party to an analysis which generated the original budget.

(g) The second defendant’s version on this issue is contradicted by Ms Girdhari’s evidence and the available documentary evidence.

(h) I reject the second defendant’s evidence that the plaintiff and Mr Govender had a hand in the more optimistic prediction and find that they only became aware of the document when it was sent to Mr Govender via email on 3 October 2012.

[42] According to Ms Girdhari she was sent to Ballito as general manager in February 2012. According to her Mr Moodley kept management accounts on his computer for the months that she was there. She said that she received such accounts monthly from at least March onwards. Reference was made during the course of the case to emails sent by Mr Moodley to Nedbank which suggest that he had access to management accounts for those crucial months, but that they were “inappropriate”. Ms Girdhari did not produce copies of the alleged management accounts. As already discussed earlier they have never been produced, and neither Ms Girdhari not the second defendant was able to furnish a satisfactory explanation for this. According to the medical evidence presented to the plaintiff, which she was asked to and did accept, it was only in 2016 that Mr Moodley was diagnosed with the problems which led to him being unable to give evidence. That was two years, more or less, after this action commenced. There is no explanation for why the accounts were not accessed and stored for the trial if they existed and would support the budget. From the outset the plaintiff’s case hinged on the budget. The importance of the performance of the restaurant during the months leading up to the production of the budget could not have been overlooked by the defendants.

[43] Ms Girdhari gave notice of her immediate resignation on 3 November 2012. (There is contradictory evidence tendered by her and by the second defendant as to the circumstances in which she resigned, and her reasons for doing so.) What was produced in evidence and put to Ms Girdhari was an email written by a group employee, one Danya Fairney, on 22 October 2012, which reported on the attempts of Ms Fairney to counsel Ms Girdhari, and which questioned her ability to run the restaurant. The October management accounts (the accuracy of which is not disputed) illustrate that the performance of the restaurant under her guidance in that month fell below what was postulated in the budget, and obviously even further behind what had been postulated in Ms Girdhari's more optimistic rendition of the budget. Ms Girdhari's failings appear to me to be consistent with Mr Govender's analysis which reveals a poor performance by the restaurant during the first seven months of the 2013 financial year, when Ms Girdhari was in control.

[44] It was put to Mr Govender in cross-examination that before final agreement on the sale was reached Mr Govender had met at least once per week with both the second defendant and Mr Moodley; that this was during the period July, August and September 2012; and that at these meetings turnover figures, expenses and payments for 12 months back from the date of each meeting were available on Mr Moodley's computer, and discussed. This was denied by Mr Govender. In his evidence the second defendant said that it was during May 2012 that Mr Moodley had raised the question of Mr Govender with the second defendant, saying that Mr Govender was one of his best friends, who at that time had problems with his wife; and that the couple were therefore looking to buy shares in a restaurant in the hope that working there (in the restaurant) together would help their marital situation. None of this was put either to the plaintiff or Mr Govender as a reason why they would have wanted to go into the restaurant business.

[45] The second defendant said he met the plaintiff and Mr Govender in June 2012 when they were brought to him by Mr Moodley. At that stage, according to the second defendant, Mr Moodley and the Govenders had already had a lot of discussions about the restaurant, and they came to speak

to the second defendant about their interest in it. After that, said the second defendant, they used to come and see him (in Umhlanga) every week to talk to him; sometimes, this occurred twice a week. Sometimes it was both the plaintiff and her husband and on other occasions only Mr Govender, but Mr Moodley was always there. The second defendant said in evidence that he did not really want a new partner, and he implied that these frequent meetings at the Umhlanga restaurant were designed to persuade him to relent. It was not put to Mr Govender that any interest he had in the business arose any earlier than at the end of the audit in July 2012 (which would have been in the middle of or shortly after the middle of that month). When both he and the plaintiff denied any allegation that there were weekly meetings with the second defendant, their denials were not challenged upon the basis that these meetings were the product of their own anxiety to get into the business; nor that such anxiety arose out of marital difficulties; nor that the second defendant exhibited a reluctance to take on a third partner. It was not put to the Govenders that they wanted to work together in the restaurant. Both of them were in full time employment. The plaintiff and Mr Govender did have marital difficulties on their own version, but these, they said, arose as a result of failure of the restaurant venture and the plaintiff's manifest dissatisfaction with the poor advice given to her by Mr Govender, that they should go into the venture.

[46] I accept the evidence of the Govenders as to the circumstances in which they came to be interested in the restaurant. It was not challenged in a manner consistent with the version eventually given in evidence by the second defendant. (I intend no criticism of counsel for the defendants when I say that, as counsel was in a position only to challenge the plaintiff's evidence on the basis of instructions.)

[47] Putting aside the conflicts between the evidence of the second defendant and Mr Govender on the circumstances in which the budget came into being (ie who had a hand in it), and what material was available at that time, I find the second defendant's explanation of the basis upon which the figures were established (and on his version subsequently interrogated)

unconvincing. According to him, despite the fact that the management accounts for the first seven months of 2012 were available, the budget was based on the figures for the last five months of the 2012 tax year. This was measured against an average for the whole of the 2012 tax year which came to just less than R450 000. He said that the loss of the Hampshire Hotel business was ignored on the basis that the staff at the restaurant would increase ordinary turnover in order to overcome that. The evidence concerning the contribution previously made by the Hampshire Hotel business to the turnover of the restaurant was vague and unsubstantiated. It had been put to Mr Govender that it was R80 000 to R100 000 per month. In his evidence the second defendant played it down, suggesting that it was R50 000 to R60 000 per month, contradicting the instructions he had given to counsel. No attempt was made by the defendants to produce any paperwork generated by the hotel business. Mr Govender said in evidence that he did not know anything about earlier turnovers generated by business with the Hampshire Hotel. I find it improbable that the loss of an income flow of the size attributed to the Hampshire Hotel would be overlooked or swept aside in the course of a genuine attempt to create a predictive document such as the budget, and that the figures for the 2012 tax year would be regarded as a satisfactory basis for structuring the budget for the last five months of the 2013 tax year without having regard to what was achieved during the first six or seven months of the 2013 tax year.

[48] Nothing which the second defendant said in evidence served to correct or render unreliable the product of Mr Govender’s analysis as to what the management accounts for the restaurant for the months March to September 2012 would have revealed (or must have revealed if they existed).

[49] I found the second defendant to be an unsatisfactory witness. He had little regard for accuracy, resorted to generalisations and was aggressive at times. I have concluded that where on any material issue there is a conflict between the evidence of the plaintiff and Mr Govender (on the one hand), and the second defendant (on the other), the version of the Govenders is to be preferred. Their evidence was consistent, not contradicted by documentary

evidence, not internally contradictory, and in my view accords with the probabilities.

CONCLUSION

[50] I also find that the product of Mr Govender's analysis dealt with earlier in this judgment is as near as may be correct. I accept the arguments advanced by him and on his behalf as to the implications of that analysis when considering the question as to whether Mr Moodley and the second defendant genuinely and honestly believed that the budget constituted the realistic estimate promised to Mr Govender, and needed by the Govenders to make their decision as to whether they would buy into the restaurant.

[51] When the budget was presented to the Govenders, and when, relying on it, they made their decision, the facts concerning the then current condition of the restaurant were not equally known to the plaintiff and the defendants. The statement by and on behalf of the defendants that the budget was a realistic basis upon which to make the contractual decision implied that those figures were consistent with what the defendants and Mr Moodley knew of the then current performance of the restaurant, at least from March through to August 2012. Whether there were or were not management accounts for those months available at the time seems to me to make little difference. Mr Moodley and the second defendant had to know what turnovers were being generated in those months. The second defendant did not attempt to justify the prediction in the budget for the last five months of the financial year by making a comparison with the turnovers which had been generated during the first seven months of that year. I find that the presentation of the budget to the Govenders constituted an intentional misrepresentation as to the current condition of the restaurant.

[52] In addition I find it probable that Mr Moodley and the second defendant did not genuinely believe that the budget constituted a reasonable and satisfactory source of information upon which a decision as to whether to get involved might be made by the plaintiff and Mr Govender. I reject the second

defendant's evidence that he was reluctant to take on a new partner. (Even Ms Girdhari expressed no surprise about being informed that a new partner was coming in, given that she had understood that the restaurant was suffering from what she called "financial issues".)

[53] On the authorities already mentioned, the false implied representation as to the current state of affairs at the restaurant, and its recent performance; and the false representation as to a belief on the part of Mr Moodley and the second defendant in the genuineness of the predictions contained in the budget, are actionable. The plaintiff must accordingly succeed in this case.

[54] Through an oversight the particulars of claim, and in particular the order prayed at the end of them, reflected the purchase price as R700 000 as opposed to R750 000. Counsel for the defendant did not object to an application from the bar at the conclusion of the trial to amend the prayer to reflect the correct amount, which was accordingly granted.

[55] From the outset the plaintiff's prayer for judgment was for a singular amount on the premise that the defendants are jointly and severally liable for payment thereof. No argument was raised before me against the proposition that any judgment should be against the defendants, jointly and severally.

[56] This trial was previously set down to commence on 7 June 2017. On that day the plaintiff found it necessary to amend her particulars of claim as the incorrect version of the budget had erroneously been annexed to the particulars of claim. The defendants sought an adjournment on that account, presumably contending that they were prejudiced. The plaintiff agreed to the adjournment on condition that costs should be reserved. Counsel for the plaintiff now argues that the amendment to substitute the annexure was a small matter causing the defendant no prejudice on the day. I am inclined to accept that. But in my view, if that was the case, then the adjournment ought to have been resisted. It was not brought to my attention during argument that any other factors were material to the question as to whether the trial

should have been adjourned on that day. I conclude that no party should have the benefit of a costs order for that day.

I accordingly make the following order.

1. Judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved for:
   (a) payment of the sum of R750 000;
   (b) interest thereon at the rate of 15.5% per annum from 1 November 2012 to date of payment;
   (c) subject to paragraph 2 below, costs of suit including the costs of senior counsel, the costs of preparation of written heads of argument, and the costs of the action under case number 50/2015.

2. There is no order as to the wasted costs occasioned by the adjournment of the trial on 7 June 2017.

Olsen J

Date of Hearing:	19 FEBRUARY to 21 FEBRUARY 2018 and 16 APRIL 2018 to 20 APRIL 2018
Date of Judgment:	THURSDAY, 12 JULY 2018
For the Plaintiff:	Mr AK Kissoon Singh SC
Instructed by:	P R Maharaj & Company Plaintiff's Attorneys 2nd Floor, Ridge 63 8 Sinembe Park Douglas Sauders Drive La Lucia Ridge Office Park Umhlanga Rocks Durban (Ref.: JJN/G381) (Tel.: 031 – 566 1696)
For the Defendant :	Mr I Dutton
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