IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ~~YES~~ / NO.	
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.	
(3) REVISED.	
11/11/2013 DATE	SIGNATURE

CASE NO: 34349/2010

DATE: 11/11/2013

IN THE MATTER BETWEEN

WENNENI INVESTMENTS (PROPRIETARY) LIMITED	FIRST PLAINTIFF
SHANE JEDEIKEN	SECOND PLAINTIFF
AND	
KEITH LARRY BROUZE	FIRST DEFENDANT
DAVID SOLOMON BROUZE	SECOND DEFENDANT
SHAWN MAURICE LASHANSKY	THIRD DEFENDANT

JUDGMENT

KOLLAPEN J:

Introduction, the parties and other role-players

1. In this action, the first plaintiff, Wenneni Investments (Pty) Ltd ('Wenneni'), a shareholder in the company Golden Pond Trading 291 (Pty) Ltd ('Golden Pond'), and the second plaintiff, Shane Jedeikin, a director and chief executive officer of Wenneni, seek damages as against the three defendants, all of them directors of the company Busby Trading (Pty) Ltd ('Busby Trading').

2. What brought the parties together in the context of this action was that Wenneni and Busby Trading were the only shareholders in Golden Pond, Wenneni holding 49% of the shares and Busby Trading 51% of the shares.

3. There were four directors of Golden Pond during the time-period relevant to this action and they were Jedeikin and one Guy Baxter representing Wenneni, while the first and the third defendants were directors representing Busby Trading.

4. Apart from its shareholding in Golden Pond, Busby Trading held numerous interests in other entities, in the main in the retail clothing and apparel sectors, both in South Africa and Australia.

5. The other significant role-players in this dispute are the Consensus Business Group Limited ('CBG'), Ethos Private Equity ('Ethos') and the House of Busby Limited.
   i. CBG is a London-based investment company headed and controlled by Vincent Tchenguiz and it provided part of the funds to the first plaintiff when it entered into a joint venture with Busby Trading using the vehicle of Golden Pond. CBG's interests in South Africa were handled by Guy Baxter and Brian Gamsu. Baxter was appointed to the board of Golden Pond to represent the interests of CBG.
   ii. Ethos is a private equity company that effected a management buy-out of Busby Trading during the year 2007.
   iii. The House of Busby Limited was a listed company and it owned the whole of Busby Trading.

6. The significant event upon which the action is anchored is the exit of Wenneni from Golden Pond during the period late July to early August 2007. The plaintiffs' stance in launching these proceedings is that the first plaintiff's exit from Golden Pond was induced by misrepresentation and non-disclosure on the part of the defendants and that but for the misrepresentation and non-disclosure, the first plaintiff would not have exited Golden Pond, as and when it did, on the terms which it did.

7. The position of the defendants in opposing the relief sought is to deny that any misrepresentations were made to the plaintiffs, contending that whatever was said to the plaintiffs was factually correct, while in respect of the allegations of non-disclosure, they place in issue whether under the circumstances it could be said that there was a legal duty to disclose, which they failed to discharge.

The factual background

8. The factual background is drawn largely from the evidence of the parties and the common cause facts. In addition reliance was placed on the various bundles of documents handed in by agreement between the parties. The plaintiff called one witness, Shane Jedeikin (the second plaintiff), while the defendants called five witnesses in support of their case namely the first and third defendants, Guy Baxter of CBG, Salome Peterson, an employee of the Busby Group, and Michael Jensen, an associate at Ethos.

9. In early 2005, Shane Jedeikin, keen to bring high-end labels in the fast fashion industry to South Africa, identified as leading brands two Spanish labels, Mango and Zara, and went about trying to secure the rights for the first plaintiff to bring those brands to South Africa.

10. In this regard he used his family connections with the royal family of Spain and invoked the assistance of the South African embassy in Spain to secure meetings with the Spanish companies that held the rights to Mango and Zara.

11. His efforts appeared to yield positive results when Mango, in mid-2005, intimated that it was willing to consider a serious potential relationship. Jedeikin was mindful that if

he was to succeed in securing the Mango, and possibly the Zara rights, it would become necessary to identify a partner with a strong foothold in the South African retail market. This would not only make good business sense but would be essential in convincing Mango that the necessary skills, infrastructure and experience were in place to achieve the successful introduction of the Mango brand into South Africa.

12. To this end and assisted by his uncle, Howard Bloomberg, he was able to secure a meeting with the first defendant, who headed the Busby Group. The outcome of that meeting was an in-principle decision that Busby would work with Wenneni in order to take forward the positive intimations from Mango and to ultimately secure the rights to Mango. Busby however would require Wenneni to contribute finances for the launch of the Mango brand and would seek full management control of the Mango license and business in South Africa. Wenneni was willing to accept these conditions.

13. By July 2005 Mango had committed itself to granting the first plaintiff the sole rights to the Mango brand in South Africa on the understanding that those rights would be exercised in a joint venture with the House of Busby Limited or one of its subsidiaries. This would have provided the basis for the formalization of the arrangements between Wenneni and Busby which would culminate in a shareholders' agreement and a management agreement to which I will return later.

14. One of the consequences of the discussions between Wenneni and Busby was that the former was required to contribute to the financing of the launch and roll-out of the Mango brand in South Africa. Wenneni, in pursuit of securing the necessary funds for the operation, was able through the efforts of Jedeikin to convince Vincent Tchenguiz, a London-based billionaire and chairman of the Consensus Business Group (CBG), to financially support the initiative to the extent of 250 000 pounds and this led to the conclusion of an agreement between Wenneni and CBG and the payment of 250 000 pounds to Wenneni.

15. In the early part of 2006 a written contract with the effective date of the 15th of February 2006 was concluded between Mango and Golden Pond securing for Golden Pond the rights to Mango in South Africa.

16. On the 25th of April 2006 a shareholders' agreement was concluded between Busby Trading, Wenneni and Golden Pond which provided in broad terms as follows:

    a) Wenneni would hold 49% of the issued share capital of Golden Pond and Busby Trading would hold 51%;
    b) The holder of each 20% of the issued share capital in Golden Pond would be entitled to appoint one director of Golden Pond, which had as its consequence that Wenneni and Busby could each appoint two directors;
    c) That Wenneni, if it was offered the opportunity to participate in the Zara brand, would be obliged to offer that opportunity to Golden Pond and if the latter took it up, it would require Busby and Wenneni to each have a 50% shareholding and directorship in that opportunity;
    d) The shareholders' agreement also provided that the consent of 70% of shareholders would be required in order to undertake certain acts and this would include the sale and disposal of all or a major part of the company's assets. The parties were in agreement that this would have included the transfer of the Mango licence.

17. Shortly after this, Jedeikin secured the other funds required as Wenneni's initial contribution to Golden Pond which together with the 250 000 pounds that CBG had advanced, made up a sum of R 4,5 million.

18. The directors of Golden Pond, following the shareholders' agreement to which reference has been made, were the first and third defendants representing Busby Trading, and the second plaintiff and Baxter representing Wenneni with the latter in truth and reality representing the interests of CBG and Tchenguiz through Wenneni.

19. The conclusion of the shareholders' agreement in April 2006 was followed by the signing of a management agreement between Golden Pond and Busby Retail in July 2006. The management agreement provided that Busby Retail would have full management and operational control over the Mango license in return for the payment of a management fee.

20. Plans for the launch of a store in Sandton scheduled for October 2006 were far advanced and while the parties, certainly on paper, appeared to have the fundamentals in place for the conclusion of a successful joint venture through the agency of Golden Pond, difficulties in their relationship began to emerge when as early as September 2006, Jedeikin expressed the view to Busby that he felt he was being sidelined.

21. The launch of the first Mango store in South Africa in Sandton City was regarded by all as successful, premised as it was on a sound business model combining as it did the initiative, enthusiasm and persistence of Jedeikin, with the experience, networking reach and positive public profile of Busby. The months that followed however would reveal a deep chasm in that relationship for a variety of reasons and the relationship steadily deteriorated, so much so that it increasingly became adversarial, antagonistic and sometimes even hostile.

22. On or about the 26th of July 2007 and following discussions between Jedeikin and Keith Brouze (the first defendant), Wenneni exited from Golden Pond on the basis of the full repayment of its loan to Golden Pond together with interest as well as a consideration of R50-00 in respect of the 49% of the shares it held in Golden Pond.

23. It is the reasons that prompted the exit of Wenneni from Golden Pond that are at the heart of the dispute between the parties. What ultimately is to be determined is whether the decision to exit was, as is contended for by the plaintiffs, premised on misrepresentations regarding the performance of the Mango brand and the financial position of Golden Pond as well as the non-disclosure of the discussions between the House of Busby and Ethos about the possible buy-out of House of Busby, or whether it was, as contended for by the defendants, premised on business reasons such as the withdrawal of CBG from Wenneni and the desire to protect the investment of the Wenneni shareholders and investors, and was totally unrelated to the alleged misrepresentations and non-disclosure.

The issues in dispute

24. A series of events played themselves out almost simultaneously and parallel to each other in the months preceding the exit of Wenneni from Golden Pond and the

takeover of Busby by Ethos. Those events underpin the issues in dispute between the parties and require determination. They are:

a) The performance of the Mango brand and the question whether the defendants in their dealings and interactions with Jedeikin made misrepresentations with regard to the performance of the brand and the financial position of Golden Pond in the period preceding the decision by Wenneni to exit Golden Pond, leading to the exit of Wenneni from Golden Pond;

b) The interaction between House of Busby and Ethos in the period preceding the exit of Wenneni from Golden Pond, and whether it could be said that the defendants owed a duty to the plaintiffs to disclose those discussions and developments in the period preceding the exit of Wenneni from Golden Pond;

c) Whether the alleged misrepresentations and non-disclosure induced the exit agreement; and

d) Whether, but for the misrepresentations and non-disclosure, Wenneni would have exited on the terms and conditions that it did.

25. In addition to the above there may be a need to consider the following issues which may be tangentially related to and relevant to the determination of the main issues in dispute:

a) The relationship between Jedeikin and the Busby group including the decision to retrench Jedeikin;

b) The decision by CBG to exit Wenneni, the reasons for the exit and its relationship if any to Wenneni's exit from Golden Pond;

c) The matter of the Zara brand and in particular Busby's overtures to Zara;

d) The manner in which the defendants made discovery in these proceedings; and

e) The manner in which the defendants dealt with the request made by the plaintiffs for information in terms of the Promotion of Access to Information Act 2 of 2000.

26. The issues above are in essence at the core of the dispute between the parties and each will be considered on its own and to the extent that the issues are related and may

overlap with each other, the necessary connection and appropriate reference will be made.

<u>The separation of issues and the dispute around it in particular the question of causation</u>

27. At a pre-trial conference held on the 19th of April 2011, the parties agreed to a separation of issues and the relevant extract from those minutes reads as follows:

'The defendants have agreed to a separation of issues on the basis proposed by the plaintiffs i. e. that the issues arising from paragraph 1-25 of the particulars of claim (as amended) as read with the defendant's plea thereto would be determined at the trial commencing on the 14 November 2011 and that the remaining issues arising from paragraphs 26 to 37 of the plaintiff's particulars of claim (as amended) as read with the defendants' plea thereto would be determined, if needs be, at a later stage'.

28. There was a further amendment effected to the plaintiffs' particulars of claim which introduced paragraph 25A and the parties were in agreement that paragraph 25A also falls to be determined in this part of the proceedings.

29. There is a dispute between the parties, notwithstanding the agreement on separation arrived at, as to what the plaintiffs must prove at this stage in particular if regard is had to paragraph 25A.

30. Paragraph 25A of the plaintiffs' particulars of claim reads as follows:

'Had it not been for the aforesaid misrepresentations and non-disclosures, 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 which it did'.

31. The plaintiffs' stance is that in the context of paragraph 25A, all that is required to be shown is that Wenneni would not have exited from Golden Pond at the time it did, on the terms and conditions that it did. The precise terms and conditions under which Wenneni would have exited, but for the misrepresentations and non-disclosure,

including the value they would have sought for their shares, is a matter, the plaintiffs argue, for determination in the next stage of the proceedings, if the matter should progress that far.

32. The defendants on the other hand take the position that what is required at this stage of the proceedings is for the plaintiffs to go beyond simply proving that they would not have exited Golden Pond on the terms and conditions on which they did, but they are required to prove on what terms and conditions they would have so exited but for the misrepresentations and non-disclosure.

33. In determining this aspect of the dispute and when one has regard to the pleadings and the pre-trial minute to which reference has been made, then it is apparent that the effect of the decision to separate is that the plaintiff is required to prove the following issues:
    a) Whether there were misrepresentations;
    b) Whether there was non-disclosure;
    c) Whether the misrepresentation and non-disclosure induced the exit agreement;
    d) Whether, but for the misrepresentation and non-disclosure, Wenneni would have exited on the terms and conditions which it did.

34. It is in my view clear that the consequence of the decision to separate is that all that is required of the plaintiff in the context of causation is to prove that it would not have exited on the terms and conditions which it did. What those terms and conditions would have been will, if necessary and required, have to be determined by further evidence and a process whereby the conduct which is the cause of the harm is eliminated and one then asks what probably would have happened if lawful conduct was substituted for the conduct which is eliminated.
(See Wille's Principles of South African Law 9th edition[1] on page 1117)

35. It is clear that such an exercise was not one contemplated by the parties at this stage of the proceedings if one simply has regard to the formulation of the issues in dispute and the evidence led in support of those issues. I am accordingly of the view, regard

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[1] DU BOIS, F et al (2007) *Wille's Principles of South African Law* 9th edition. Cape Town: Juta & Co Ltd

being had to the pleadings and the pre-trial minute, that all that the plaintiffs are required to prove is that they would not have exited from Golden Pond on the terms and conditions which they did, but for the misrepresentations and non-disclosure.

Mango's performance in South Africa and the issue of the alleged misrepresentations

36. The management agreement to which reference has already been made provided that Busby Retail would be responsible for the management of the Mango brand including all the operational aspects attached thereto. Busby accordingly was responsible for the preparation of the management accounts and the collection and collation of all financial data. For this they received a management fee of R 85 000-00 per month.

37. Busby was accordingly, on account of their management role as well as their vast experience of the retail clothing sector, best placed and eminently qualified to pronounce on the performance of the brand as and when this was necessary.

38. The plaintiffs' case is that Busby Trading as well as the first and the third defendant failed to present a fair picture of the financial position of Golden Pond to Wenneni. They contend that the following was communicated by Busby to Jedeikin and others regarding the financial position of Golden Pond:

    a) That Golden Pond was suffering significant losses;
    b) On the 4th of July 2007 Busby Retail informed Jedekin that the Mango brand was not doing as well as expected and that this necessitated cost-cutting measures;
    c) On the 25th of July 2007, the first defendant informed Jedeikin that Golden Pond was in a poor financial position, that shareholders faced the risk of losing their investment and suggested that Wenneni exit Golden Pond. At that point Jedeikin was willing to exit on the basis of the repayment of the Wenneni loan account and a fair value for the shares it held; and
    d) On the 26th of July 2007 the first defendant informed Jedeikin that if Wenneni did not sell its 49% equity interest in Golden Pond to Busby in return for payment of Wenneni's loan to Golden Pond, Busby would apply for the winding up of Golden Pond. After the discussion, Jedeikin agreed

to exit on the basis of the repayment of the loan account and the payment of R50-00 in respect of the shares Wenneni held.

39. The plaintiffs' stance is that the description of Golden Pond as being in a poor financial position was false and it relied on the following in support of its stance:

a) During September 2007, some two months after the alleged misrepresentation, House of Busby in a SENS announcement advised that its South African retail division had successfully launched Mango into the South African market and that the concept was meeting expectations;

b) During February 2008, House of Busby in a SENS announcement reported that all divisions in the group had performed well and that the group had delivered meaningful growth across its portfolio of brands;

c) In a report called the Benefits and Concerns (B's and C's) that Ethos had prepared on the 24th of July 2007 it was stated that 'A world-leading brand such as Mango has only been rolled out in Sandton, with great success'. This report was based in large measure on information the plaintiffs argue could only have been sourced from Busby and it is not in dispute that Busby's corporate advisers, Java Capital, had made information, including financial information, available to Ethos on a confidential basis before the preparation of the report;

d) In addition the plaintiffs argue that it was in the contemplation of Busby that Mango would only be profitable from the second year onwards as time and patience were required to develop a brand and that if Golden Pond was in a poor financial position in July 2007, only some 10 months after the launch of the brand, it was precisely what was expected and contemplated when the Mango brand was launched.

40. The first defendant disputes the version of the plaintiff with regard to the discussions and the statements made on the 25th and the 26th of July 2007. His version was to admit that he informed Jedeikin that Golden Pond was not in a good financial position and that the Mango brand needed time. In addition he said that the shareholders of Golden Pond risked losing their investment in the event of there not being a large capital injection into Golden Pond.

41. In assessing the veracity of the claims with regard to misrepresentation the following in my view provides a useful prism through which to assess whether the statements made, even on the defendants' version, represented the true picture of the performance of the Mango brand or on the other hand constituted such a distortion of the true picture that it would constitute a material misrepresentation:

a) It was hardly in dispute that the introduction of a new brand such as Mango was likely to be challenging and that it would need between two and three years to show profitability. In this regard the evidence of the third defendant was that he did not expect Golden Pond to be solvent in the first year of operation while the first defendant informed the board of Golden Pond in February 2007 that while there were challenges with the opening of any store, the store in Sandton was doing well;

b) The third defendant conceded in his evidence that when Jedeikin was informed in July 2007 that the Mango brand was not performing to expectations, this was a reference to budgeted expectations, which could have been incorrect, and was not a reference to the performance of the brand as such;

c) The third defendant also conceded that there was no real difference in the performance of the brand from July 2007 to when the SENS announcement was made in September 2007;

d) It must accordingly follow that if the brand was meeting expectations in September 2007, it also was meeting expectations in July 2007 if there was no real difference in its performance as testified to by the third defendant;

e) The third defendant sought to explain the difference in the July 2007 communication to Jedeikin and the September 2007 SENS announcement by distinguishing between the concepts of budgeted expectations and performance expectations and stated that what was said to Jedeikin was in relation to budgeted and not performance expectations while the SENS announcement related to performance and not budgeted expectations;

f) While no doubt such a distinction may have existed at the time, the problem is that both the July communication to Jedeikin and the September 2007 SENS announcement were without qualification or explanation and clearly on the face of it both related to one aspect of the brand only – its performance in relation to expectations;

g) The explanation offered by the third defendant, is with respect convoluted and not supported by the text of the two statements but in any event his evidence that there was no real difference in the performance of the brand between July and September 2007 is telling.

42. Accordingly and even on the version of the first defendant it is clear that what was being presented as Golden Pond being in a poor financial position was hardly consistent with the communication of Busby to the outside world and in particular to Ethos in July 2007 almost at the time of the exit of Wenneni, namely that the Mango brand had been rolled out with great success and was meeting expectations.

43. In addition it could hardly be said that the risk of investors losing their investment in Golden Pond was a real or imminent risk at the time the statement was made on the 25th of July 2007 by the first defendant to Jedeikin. If there was such a risk at all, it hardly makes sense that in the Benefits and Concerns (B's and C's) document prepared by Ethos and based in part on information provided by Busby through its corporate advisors Java, the Mango brand is described as having been rolled out with great success and that there were absolutely no reservations expressed with regard to the performance of the brand.

44. On the contrary the B's and C's report in motivating the attractiveness of the business of Busby places considerable emphasis on the place of brands in the retail market and uses the example of the introduction of the Mango brand as evidence of the success of such brands and their potential in the context of Busby.

45. Whatever the true position may have been as at July 2007, and even accepting that there were liquidity challenges with regard to the funding of further Mango stores, the portrayal of Golden Pond as being in a poor financial position with the attendant risk of investors losing their investment was a misrepresentation of the true position and given that it went to the heart of the very existence of Golden Pond and the possibility of its demise, it was clearly material in nature.

46. The defendants have sought to challenge the honesty and the reliability of the evidence of Jedeikin with regard to the telephone conversations he held with the first

defendant and have suggested that he gave differing accounts of what transpired in those conversations during his cross-examination.

47. When one has regard to the evidence of Jedeikin and his cross-examination which was extensive, and while it may be so that the actual words and phrases he used to describe the discussions between himself and the third defendant do differ in his various responses, the thrust of the responses remained substantially the same. What is constant and consistent in his responses is that in all of them he describes how the first defendant alluded to the poor financial prospects of Golden Pond and the risk of investors losing their investment which in any event accords in large measure with the version of the defendant.

48. I am of the view that the difference the defendants have sought to highlight does not lend itself to the conclusion that the evidence of Jedeikin was dishonest and unreliable on this aspect given that the thrust of his responses demonstrates a consistency that militates against the conclusion the defendants seek.

49. The defendants in addition point out that the failure by Jedeikin to record the conversation with the first defendant in the form of an e-mail or note as well as the absence in his attorney's letters of any threat of liquidation being made by the first defendant supports the contention that his evidence on this aspect was a fabrication. I am unable to agree with that conclusion.

50. The mere failure to record and the absence of the details of the threat of liquidation in the attorney's letter cannot sustain the conclusion of fabrication and does not in my view detract from the conclusion that while Jedeikin may have at times been long-winded, circuitous, combative and argumentative, requiring the intervention of the Court on several occasions, I found his evidence to be generally truthful and reliable.

51. On the other hand when one has regard to the evidence of the first defendant, in particular his evidence that despite his statement at the Golden Pond board meeting of the 9^{th} of February 2007 that Busby was not interested in the Zara brand, he made contact with Zara the very next day to seek a relationship between Zara and Busby to

the exclusion of Wenneni – a direct contradiction of what he communicated to his fellow directors.

52. He was both unsuccessful and unconvincing in attempting to explain away his approach to Zara as a general overture for the future, which in any event was contradicted by the very precise terms of his e-mail to Zara of the 10th of February 2007 seeking a business relationship, advising that time was of the essence and categorically stating that there would be no third parties involved (a clear reference to Wenneni/Golden Pond).

53. This conduct was described as dishonourable by Brian Gamsu of CBG. Guy Baxter who testified for the defendants, when comparing the communication of the first defendant to his fellow directors with his immediate approach to Zara thereafter, properly characterised it as a misrepresentation to his fellow directors. This points tellingly in the direction of what can only be described as highly questionable conduct and a willingness to distort the truth when business exigencies required it. I did not find the first defendant to be a reliable witness and he made a poor impression in the witness box.

54. In dealing with his approach to Zara in February 2007 and in attempting to explain his stance of non-interest as communicated to his fellow directors in Golden Pond on the 09th of February 2007 as opposed to his letter to Zara the following day clearly expressing an interest and willingness to do business with them, the following exchange provides some insight into how he conducted himself when he responded to a question by counsel for the plaintiffs:

> *'Question: Is it not dishonest to say to them something which you do not believe to be true?*
> *Answer: No'.*

55. In my assessment of the evidence on this issue, I am of the view that the plaintiff's evidence is more reliable than that proffered by the defendants. The version of the defendants does not in my view accord with the factual reality of the performance of the Mango brand as it existed on the 25th of July 2007, in particular that there was

nothing negative about the performance of the brand mentioned in the B's and C's report. If the brand was performing as poorly as the defendants would have Jedeikin believe, it would certainly have warranted mention in the B's and C's report.

56. In my view and having regard to the above, the probabilities lean overwhelmingly in favour of the version of the plaintiff with regard to the telephone conversations of the 25th and 26th of July 2007 and this is fortified by the almost immediate change in stance adopted by Jedeikin with regard to his abandoning his claim for payment at fair value for the Wenneni shares after the telephone discussion with the first defendant.

57. I am accordingly satisfied that the defendants misrepresented the financial position of Golden Pond and the performance of the Mango brand in South Africa in their interactions with the plaintiffs and that when the threat of liquidation of Golden Pond was made, it was made at a time when to the belief and knowledge of the first defendant, there was no basis for making such a threat. These misrepresentations were by their very nature material, going as it were to the very heart of the Mango business and its future.

58. In the context of this matter I am satisfied that the representations were false.

59. When Busby Trading informed Jedeikin in early July 2007 that the brand was not meeting expectations and when the first defendant informed Jedeikin on the 25th of July 2007 that there was a risk of liquidation and that investors faced losing their money, there was no objective basis for such statements and they were not in accordance with the reality of the performance of the Mango brand. That they were nevertheless made without regard to their truthfulness renders them not only false but in my view, and as I will demonstrate, they were made deliberately and with the knowledge of their falsity and with the intention of inducing the first plaintiff to exit from Golden Pond on the terms and conditions which it did.

<u>The Ethos discussions and negotiations leading to the buy-out</u>

60. By way of introduction Mr Michael Jensen of Ethos took the Court through the various stages that would theoretically form part of a transaction process from an

Ethos perspective. Obviously not all initiatives would result in a transaction and while some progressed to finality, many were aborted at some stage of the process. He described the various stages as follows:

a) The fund-raising which requires accessing capital or obtaining a commitment to that effect;
b) The deal transaction origination which entails looking at the opportunities and undertaking a broad assessment of them;
c) The assessment, processing and approval which involves a more detailed assessment of the opportunity. This requires analyzing public information and possibly non-public information and provides a thorough analysis of the benefits and concerns regarding the potential transaction. It also may entail a preliminary investment committee meeting which may give the deal team approval to start incurring transaction costs. In his view a decision of the preliminary investment committee would signify 'real intent' and such a decision would involve all partners, principals and associates of Ethos, clearly suggestive of the seriousness of the process;
d) This would then lead to the submission of a non-binding expression of interest letter, followed by the processing of the transaction, due diligence and structuring;
e) A follow-up meeting of the investment committee would be held which would then lead to the submission of a firm intention to offer;
f) Finally the processes around a scheme meeting and High Court sanction of the scheme would be given effect to.

61. In the context of the Ethos and Busby discussion, the interaction commenced in late February 2007 when Ethos staff identified Busby as a retail entity that Ethos may be interested in investing in.

62. A meeting was held on the 02nd of March 2007 attended by representatives of Ethos and the first and second defendants representing Busby which was largely exploratory in nature.

63. This was followed by telephonic discussions between Mr Jos van Zyl of Ethos and the first defendant until about the 25th of May 2007 when the first and second defendants indicated to Ethos that Busby was interested in looking at a possible transaction.

64. A meeting was then held on the 31st of May 2007 attended by Jensen and other Ethos representatives and the first and second defendants representing Busby at which meeting Busby intimated its keenness to do a transaction with Ethos. Ethos in its turn would require further information, including non-public information in order to take the process forward.

65. Towards the end of June 2007, Jedeikin approached the third defendant and asked him about a possible buy-out by a private equity company. The third respondent did not respond and his evidence was that he did not tell Jedeikin about the Ethos approach as in his view it was sensitive information and he was concerned that if the information came into the public domain it would have an effect on the share price of Busby.

66. On or about the 12th of July 2007, Busby and Ethos concluded a confidentiality agreement in relation to the possible transaction and in terms of which Busby intimated a willingness to disclose corporate, business and financial information relating to the House of Busby to Ethos on the basis of confidentiality. This information was thereafter made available to Ethos by Java Capital, the corporate advisors to Busby.

67. Ethos proceeded to prepare the B's and C's Report which was approved by Ethos at an internal meeting on the 24th of July 2007 and which then served before a meeting held on the 25th of July 2007 between Ethos and the House of Busby, it being shared with Busby in advance of the meeting.

The following appears from the B's and C's Report:

a) That during the March meeting between Ethos and Busby to which reference has already been made, the first and second defendants intimated that the timing of the Ethos approach was appropriate as they 'were looking to realize some/all of their investment';
b) That the number and quality of the brands in Busby was an attractive aspect of the possible transaction;

c) That the Mango brand, described as a 'world leading brand' has been rolled out with great success;

d) That Ethos was the only potential bidder that had received non-public information from Busby;

e) That Ethos has prepared a presentation for a proposed transaction structure and will meet David and Keith Brouze, the first and second defendants, as soon as possible;

f) The report concluded with a recommendation that Ethos proceeds with a proposal to the major shareholders of Busby and for testing their support for the deal structure and pricing.

68. The B's and C's report and recommendation it made was approved by the preliminary investment committee of Ethos and then shared with House of Busby. On the 25th of July 2007 a meeting was held between Ethos and Busby where the B's and C's report served as the basis for discussion.

69. At the meeting of the 25th of July 2007 which was attended by the first and second defendants, Ethos made certain proposals which Busby found unacceptable from a price and structure perspective. The principle of a possible transaction was however not jettisoned and Busby agreed to prepare a revised proposal that would accord with the structure Busby preferred and the price that would go with it.

70. Further meetings followed early in August 2007 as well as the exchange of various e-mails and other documents in advance of the proposed transaction resulting in the investment committee of Ethos deciding on the 18th of September 2007 to submit a non-binding expression of interest to Busby. This was followed by further processes which culminated in the submission of a firm offer in November 2007 which led to the conclusion of the transaction.

71. The defendants and Jensen have contended that the Ethos approach was only in respect of acquiring the majority interest in Busby and there was at no stage any interest in acquiring the interests of minority shareholders or subsidiaries. To this end they argue that the discussions and the negotiations would have no impact or

consequence for minority shareholders in a subsidiary, the position in which Wenneni was prior to its exit from Golden Pond.

72. In addition it is the stance of the defendants that the acquisition and control of licenses to brands was never part of the discussions held and accordingly the fact that a 70% majority was required to effect transfer of the Mango license in Golden Pond which would have required the support of Wenneni, was not an issue.

73. It is against this background and in particular the trajectory of the discussions, negotiations and the exchange of information between Ethos and Busby that the question of whether as at the 25th of July 2007 or at any earlier date it could be said that the defendants were under a duty to disclose to Jedeikin and Wenneni the nature of the contact and the discussions between Ethos and Busby must be determined.

The duty to disclose and the legal convictions of the community

74. The determination of what the legal convictions of the community would require of parties in a given relationship and a particular time is an exercise that cannot be determined by reference to what was described in the majority judgment in *BRISLEY v DROTSKY* 2002 (4) SA 1 as the 'idiosyncratic inferences of a few judicial minds'. In Brisley (supra) Cameron JA, in a separate concurring judgment, in expressing the view that the phrase 'the legal convictions of the community' may be a concept open to misrepresentation and misapplication, suggested that it should be replaced by reference to 'the appropriate norms of the objective value system embodied in the Constitution.'

75. He concluded that those values had to be employed to achieve a careful 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.

76. The argument that the Constitution should form the template for determining the legal and policy considerations in imposing a legal duty also found support in *TRUSTEES, TWO OCEANS AQUARIUM TRUST v KANTEY & TEMPLER* 2006 (3) SA 138

(SCA). The Court, in the context of dealing with a claim for pure economic loss and in dealing with the existence of a legal duty, expressed the view (at 144C) that '(T)he imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms'.

77. It must accordingly have regard to a number of factors and they would include but not be limited to:

    a) The Constitution and the legal framework in support of it including the values underpinning the Constitution such as dignity and equality.
    b) The relationship between the parties and whether information falls within the exclusive knowledge of one party while the other relies on frank disclosure thereof.
    c) The previous dealings between the parties and whether there could be said to be a duty to make full disclosure if a previous statement or representation of the one party constitutes an incomplete or vague disclosure which requires to be supplemented or elucidated.

(See *McCANN v GOODALL GROUP OPERATIONS (PTY) LTD 1995 (2) SA 718 (C)*)

78. Applying those principles and criteria to the matter on hand and working on the version substantially of the defendants which is the only version before the Court, the plaintiffs not being privy to the Ethos dealing and discussions, the following emerges:

    a) While at the 25th of July 2007, no transaction had been concluded, it could be said that Ethos and Busby had made progress from the 2nd of March 2007 in moving beyond a general sounding out to the further phases in the transaction cycle described by Jensen;
    b) That at the 25th of July 2007 from the Ethos perspective they had resolved to proceed with the deal and had made certain proposals as well as having committed funds to undertake various investigations and inquiries that could become necessary in order to advance and conclude the deal. The B's and C's report requested R46 million for this purpose which was approved by the preliminary investment committee of Ethos;

c) Ethos was in a very different position from any other potential bidder. Its decision of the 24th of July 2007 signified 'real intent' according to Jensen and it was the only bidder who was favoured with non-public information – certainly an indication of the seriousness of the level to which matters had progressed between Ethos and Busby;

d) While the high-level meeting of the 25th of July 2007 did not result in the acceptance of the proposals Ethos had made, they were rejected on price and structure with the understanding that a new proposal would be submitted by Busby shortly. This is indicative that the principle of advancing the deal was very much alive even if agreement on the proposals had by then not materialized.

79. While one must immediately accept that as at the 25th of July 2007, there was no certainty that a deal would be concluded, it must also be evident on the other hand that the duty to disclose cannot arise only at the point where there is certainty of a deal being concluded. There would in this regard be a point somewhere along the continuum of activities that led to the conclusion of the deal, where matters had progressed to the point, that regard being had to the legal convictions of the community, the duty to disclose would have arisen and my view is that by the 25th of July 2007, following Ethos' adoption of the B's and C's report and the high-level meeting between Ethos and Busby this point was reached at least then, if not earlier.

80. In coming to this conclusion the evidence of the third defendant is also relevant to the extent that when he was asked by Jedeikin at the end of June 2007 about an Ethos approach, of which the third defendant was aware at the time, he elected to remain silent. The response of silence was not in accordance with the factual reality and was dishonest and the third defendant sought to justify his silence on the basis that the information was price-sensitive.

81. If, as the defendants contend, the discussions were at a very preliminary stage and there was no duty to disclose as nothing material had transpired, then it hardly makes sense that non-material information could be price-sensitive. If it was price-sensitive as the third defendant has testified, then it must in my view follow that the

information had become sufficiently material by then and there could be no justifiable basis not to disclose it.

82. Accordingly all three defendants who either had knowledge of and/or were involved in the actual discussions between Ethos and House of Busby which ultimately resulted in the transaction, had by at least the 25th of July 2007, the duty to disclose those discussions to the plaintiffs. It is common cause that there was no such disclosure.

<u>The argument that the Ethos approach was for the holding company and not the subsidiaries or the minority shareholders</u>

83. The defendants have formulated the following question in seeking to argue that the duty to disclose could never arise under circumstances where what Ethos was interested in would have no bearing on Golden Pond:

'At the heart of this case is the question whether the Chief Executive Officer of a listed company, and the managing director of a wholly owned subsidiary thereof, which latter company is a 51% shareholder of a trading company, is duty bound to inform the 49% co-shareholder of the trading company (who is disposing of such shareholding in favour of the 51% shareholding), of negotiations being conducted by them on behalf of the listed holding company with a private equity firm for the latter to acquire a majority shareholding in the holding company, in circumstances where the private equity firm does not express an interest in acquiring minority shareholdings of trading subsidiaries, nor the transfer to it of or 100% control over trading licences'.

84. The stance of the defendants is that the interest of Ethos was confined to acquiring the majority interest of House of Busby and it was not concerned with the minority shareholders, the subsidiary companies or in seeking 100% control over licences. Under those circumstances they argue that the Ethos approach was neither of interest to nor was of relevance to the minority shareholders or subsidiaries, of which Golden Pond was one and it could therefore not be said that there was a duty to disclose under such circumstances. In order to illustrate this, Jensen produced an organogram of the Busby corporate structure at the time which is attached here as annexure A and

insisted that the entities above the red line on the organogram de-lineated what Ethos was interested in, while those below the red line held no interest for Ethos.

85. This argument would have held attraction if that which was below the so-called red line was of no interest to Ethos and did not feature in how it was conceived, constructed and motivated the deal.

86. While it may be correct that Ethos did not seek to acquire minorities, subsidiaries or licences, what was happening in trading entities below the red line was clearly important. The B's and C's report makes reference to the retail operations of Busby, the brands it held including the Mango brand, which was in a subsidiary.

87. In rule 28(4) proceedings in this action, Jensen filed an affidavit in support of the defendants and in that affidavit he deals with the internal Ethos approval of the 24th of July 2007 and sets out in detail the further steps that would have had to be put in place to conclude any proposed transaction and they include what he describes as 'approvals from the licensors of Guess, Nine West, Aldo, Esprit and Mango for the change in control of Busby and the required transaction restructuring'.

88. As at the 24th/25th July 2007, this would have been the approval of Golden Pond in respect of the Mango licence and the shareholders' agreement would have required the approval of 70% of the shareholders (which would have necessitated the approval of Wenneni). Clearly as at the 24th/25th July 2007 on the version of Jensen, Golden Pond as licence holder of the Mango brand, would have had an interest in what was transpiring even if the proposed transaction was not in relation to its shareholding or the licence. Had Wenneni continued to remain in Golden Pond as the process unfolded, its approval would have been required.

89. In my view the so-called red line is not some impenetrable barrier. One must take a broad and realistic approach to what was happening at the time. The intention of Ethos to acquire the majority in House of Busby would have a cascading effect on other entities including subsidiaries and licensors as demonstrated by the B and C's report and the affidavit of Jensen.

90. Therefore returning to the question posed, it is evident that it cannot and should not be answered in isolation but in context. The answer cannot always be in the affirmative, but in this instance it must be. In doing so this does not constitute an unwarranted extension of the duty to disclose but rather interprets such a duty in context and on the unique facts and circumstances of each case and accords with the general policy approach that in such circumstances the legal convictions of the community would require disclosure.

91. The defendants' argument that the Ethos approach to the extent that it did not relate to the acquisition of minorities or subsidiaries or licensors, is in my view narrow and limited and loses sight of the fact that while Ethos sought to acquire the majority shareholding in House of Busby, what was happening in the trading entities which were subsidiaries was relevant and played an important role in how the deal was motivated and advanced. The defendants, who having considered the B and C's report, must have been aware of the thinking and approach of Ethos and what were the factors that made its proposed deal attractive and worth pursuing.

92. After all, the duty to disclose is to be assessed from the perspective of the defendants and not from the perspective of Ethos. The suggestion that the subsidiaries were so remote from the proposals discussed is accordingly not sustainable. There is in my view a sufficient connection as I have demonstrated to render the connection sufficiently close and to render the discussions material and thereby activate the duty to disclose.

Did the misrepresentation and non-disclosure lead to the exit of Wenneni from Golden Pond?

93. In my view what was portrayed by the first defendant to Jedeikin during the latter part of July 2007 could hardly have been as negative as it was made out to be. Jedeikin relied on it and was entitled to accept it as the correct status of the performance of the brand and the position of Golden Pond. This the plaintiffs argue is compellingly demonstrated by the virtually immediate change in stance in relation to the exit strategy of Jedeikin over the 24 hour period from the 25th July 2007 to the 26th July 2007.

94. The stance of Jedeikin on the 25th July 2007 was to seek an exit on repayment of the loan account together with interest as well as a favourable and fair value price for Wenneni's shares particularly in respect of the goodwill of the brand. This stance changed so dramatically by the 26th of July 2007 that Wenneni was prepared to exit without receiving any value for its 49% shareholding in Golden Pond.

95. This of course raises the question as to what prompted Jedeikin, who worked hard over time to contribute to securing the Mango brand for the South African market, to simply abandon his request for payment for the fair value of Wenneni's shares and be willing to part ways, as he ultimately did, in return only for his investment and interest and a nominal payment of R50-00 for the 49% of shares Wenneni held in Golden Pond?

96. In my view the most significant external event which occurred between the 25th and the 26th of July 2007 was the discussion between Jedeikin and the first defendant. The change in stance could only have come about, as Jedeikin stated in his evidence, following a real fear that the investment made by Wenneni was at risk in a possible winding up of Golden Pond by Busby.

97. With regard to the non-disclosure of the Ethos discussions the approach to be taken is obviously different in that what is required is a hypothetical exercise that removes from the equation the offending conduct and replaces it with what should have occurred, and then to pose the question – had Jedeikin been aware of the Ethos discussions what is likely to have occurred?

98. The evidence of Jedeikin in this regard was that Wenneni would have exited on different terms and conditions had he been told the truth. While those precise terms and conditions may have to be determined at a future time, I must accept that if regard is had to the totality of the evidence, then it is clear that if Jedeikin was not misled about the performance of Mango and the threat of liquidation and if he was informed of the status of the Ethos discussions as at the 25th of July 2007, he would not have exited on the basis of a nominal payment of R50-00 in respect of the 49% shareholding of Wenneni.

99. The defendants have argued that the exit of Wenneni was occasioned by the decision of CBG to call up its loan to Wenneni. They argue that as Wenneni had no other source of funds, the only way to repay the CBG loan was to exit Golden Pond on the terms and conditions they did at the time.

100. In examining this proposition the following is relevant:-

a) CBG's representatives in South Africa hardly had the appetite for the retail sector. They considered the Wenneni involvement as time-consuming and frustrating;
b) Vincent Tchenguez, who headed CBG, had a soft spot for Jedeikin and may have been motivated by altruism in becoming involved in Wenneni and Golden Pond;
c) With the passage of time CBG's South African representatives, Baxter and Gamsu, apart from their reservations about the retail sector and the business of Golden Pond, took a clear position with regard to the problems between Jedeikin and the first defendant, with Baxter stating unequivocally that Jedekin had antagonized the third defendant and that moving forward, CBG needed the support of Busby Trading;
d) Under these circumstances it was evident that from a local CBG perspective, Jedekin was seen as the problem.

101. The withdrawal of CBG cannot be viewed in isolation as it played itself out close to the timeline when the position of Jedeikin as an employee of Golden Pond was under threat as well as the misrepresentations made to him regarding the financial position of Golden Pond and the risk of loss to investors.

102. The evidence of Jedeikin was that if the supposed real risk to investors did not exist, then it would have been open to him to approach other investors and the name of Hans-Dieter Fuchs came up as one possible investor. While the stance of the defendants was that this was an afterthought as the name of Fuchs never featured as a possible investor, it was clear from the evidence of Baxter, called by the defendants to testify in their case, that Fuchs (accompanied by Jedeikin) had met with Baxter in early 2007 and expressed an interest in becoming financially involved in Wenneni and Golden Pond. Baxter's response was in the negative.

103.My view is that in considering whether the CBG loan was the reason for the exit, regard must be had not only to the CBG-Wenneni relationship but also to the operation of other factors which existed at the time including the effect the misrepresentations would have on securing other investors as well as the possible effect of the Ethos discussions on the entire decision to exit. It is not an event that stands in isolation or that can be considered without the operation of other facts and events which existed at that time. In my view even if CBG would have exited if they became aware of the Ethos discussions, this would not necessarily have resulted in the Wenneni exit as the Ethos discussions, if they were disclosed to Jedeikin, may well have enabled Jedeikin to attract another investor. In my view, the CBG exit was accordingly hardly decisive when viewed in context.

The retrenchment of the second plaintiff

104. On the 04th of July Shane Jedeikin received a letter on a Mango/Golden Pond letterhead advising him of his possible redundancy on the basis that the Mango brand was not performing as well as expected. The letter however was signed by Francois du Rand, the financial director of Busby Retail. In his evidence relevant to the redundancy of Jedeikin, Shawn Lashansky testified that apart from the letter to Jedeikin, no other employees received redundancy letters and he was unable to identify any other cost-cutting measures that were taken at the time.

105. If indeed the possible redundancy of Jedeikin was a genuine cost-cutting exercise, one would have expected that such an exercise would have been comprehensive in identifying both other employees to be retrenched and other areas of the operations of Golden Pond where costs could be cut. The fact that none of this happened must point overwhelmingly in the direction that the possible redundancy of Jedeikin was not genuine and was, as contended for by the plaintiffs, an attempt to get Jedeikin out of the picture as it were.

The defendant's discovery

106.A discovery affidavit was filed by the third defendant on behalf of all the defendants in these proceedings. In his evidence the third defendant conceded that the Ethos negotiations and the deal that followed it was at the centre of the litigation between the parties but notwithstanding this, there was no discovery in respect thereof with the exception of two documents. In this regard he conceded that the discovery affidavit contained an untruth. This of course necessitated further discovery.

107. In my view the deficient manner in which the defendants dealt with the discovery of the Ethos documents clearly demonstrates intent on their part to conceal the existence of any meaningful discussions with Ethos in relation to the sale of the House of Busby.

<u>The manner in which the PAIA request was dealt with</u>

108. Following the release on the 01st of October 2007 by the House of Busby of a cautionary announcement regarding the Ethos transaction, the plaintiffs through their erstwhile attorney submitted a request in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA') to the House of Busby for documents and information relating to Golden Pond, Busby and the interactions between Busby and Ethos in 2006 and 2007. The request was made on or about the 21st of December 2007.

109. The stance and the strategy of the House of Busby in dealing with this request is captured in a letter dated the 11th of February 2008 from Busby's then attorney (ENS) to the third defendant. The letter after referring to a meeting held on the 17th of January 2008, proceeds to confirm the following to Busby:

a) 'That we are to delay this matter for as long as possible;
b) That if Werksmans (the plaintiffs' then attorney) are able to comply with the requirements of the Act in submitting the request for information, there may be an obligation to disclose the information (or some of it) that could successfully be enforced in court;
c) That when a new request comes we again have 30 days within which to respond, and then will look at raising other deficiencies in the request or simply refusing to provide the information requested on one of the grounds set out in the Act and defend any court action that may follow.'

110. It is abundantly clear that the strategy adopted as evidenced above was to deliberately frustrate the plaintiffs' right of access to information even in the face of a concession that there was a duty to disclose the information and this in my view supports the conclusion, having regard to the other evidence including the failure to disclose the Ethos discussions and the deficient manner of discovery, of a persistent and considered pattern of non-disclosure by the defendants in order to frustrate the plaintiffs in the exercise of the rights they had.

111. Thus while the allegations of misrepresentation and those of non-disclosure played themselves out on different tracks, they were from the defendants' perspective happening simultaneously. The discussion between Jedeikin and the first defendant with regard to the performance of Mango and the possible demise of Golden Pond occurred immediately after the high-level meeting with Ethos where the B's and C's report was considered as well as possible proposals on a transaction. In my view the inference of a linkage between these separate events is irresistible. It could hardly be said that when the first defendant urged Jedeikin to abandon his claim for fair value for the Wenneni shares, the Ethos discussion and the positive intimations that flowed from it was not present in the consciousness of the first defendant. That the two events came together in the timeline as they did, in my view supports the conclusion that the duty to disclose the Ethos discussions became even more demanding.

Summary and conclusions

112. In summary I must accordingly conclude that the plaintiff has established on a preponderance of probabilities that:

a) The defendants misrepresented the performance of the Mango brand and the position of Golden Pond on the 25th and 26th of July at the time when the first plaintiff was considering the terms and conditions of its exit from Golden Pond;

b) The misrepresentations were material, going as they did to the heart of the performance of Mango and the security of the investments made by the investors in Golden Pond;

c) The defendants were, at the very least on the 26th of July 2007, under a legal duty to disclose to the plaintiff the status of the discussions between Ethos and the House of Busby;

d) The defendants failed to discharge the legal duty to disclose under circumstances where they should have been aware of its relevance in the consideration of the plaintiffs' decision to exit Golden Pond and the terms and conditions under which such exit was to take place;

e) The misrepresentations and non-disclosure were made knowingly with the intention of inducing the plaintiff to exit from Wenneni at the time it did and on the terms and conditions that it did;

f) The misrepresentations and non-disclosure induced the plaintiff to exit Wenneni at the time that it did and on the terms and conditions that it did;

g) But for the misrepresentation and non-disclosure, the plaintiff would not have exited Wenneni at the time it did on the terms and conditions it did.

ORDER

113. I accordingly make the following order in respect of the separated issues, being paragraph 1 to 25A of the plaintiffs' particulars of claim (as amended):

i. Had it not been for the misrepresentations and non-disclosure, the first plaintiff 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.

ii. The defendants are ordered jointly and severally, the one paying, the others to be absolved, to pay the costs of the action in so far as they relate to the separated issues, which costs are to include the costs of two counsel.

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

34349/10

HEARD ON: 14 to 16 November 2011; 25 to 28 September 2012; 23 to 26 April 2013 & 19 September 2013.

FOR THE PLAINTIFFS: ADV C D A LOXTON SC with ADV P B J FARLAM

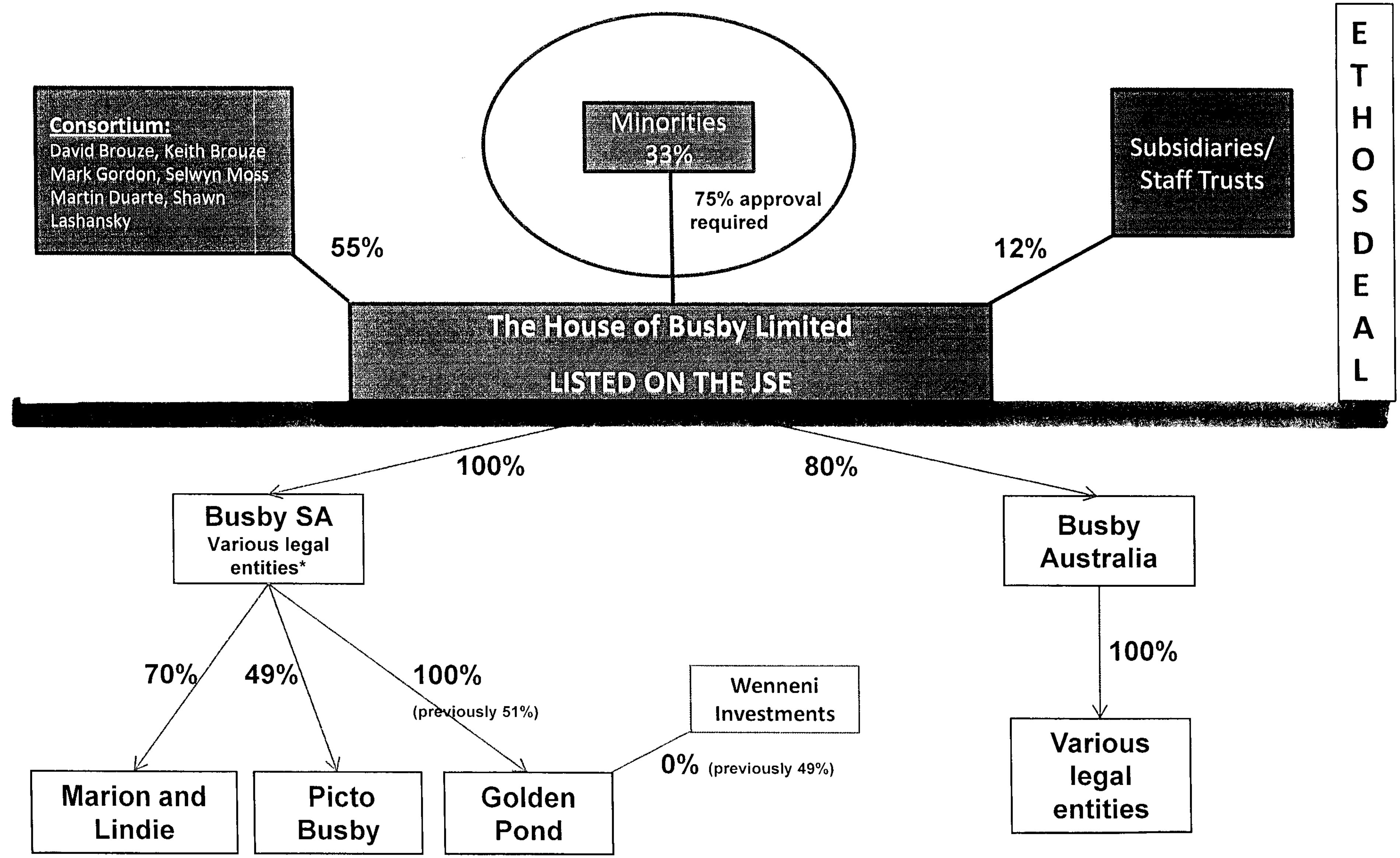
INSTRUCTED BY: KORBERS INC (correspondents Friedland Hart Solomon & Nicolson)

FOR THE DEFENDANTS: ADV C M ELOFF SC with ADV T DALRYMPLE

INSTRUCTED BY: KNOWLES HUSAIN LINDSAY (correspondents Fourie Fismer Incorporated)

ANNEXURE A

BUSBY CORPORATE STRUCTURE AT TIME OF FIRM INTENTION OFFER



* **Includes Busby Trading, Busby Retail**, GL Couture, Kinkazan, Buxton Leathergoods, Unitrade478 and Busbrand