REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2007/9251

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

BAYETT, JOHN HENRY	First Plaintiff
FOUCHE, TRACY JOAN	Second Plaintiff
THOMAZ, FRANKLIN CLIFFORD	Third Plaintiff

and

BENNETTT GEORGE SYDNEY JOHN	First Defendant
WALES, JAMES PETER	Second Defendant

J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] Initially, there were three (3) independent suits, each with its own plaintiff and defendants under different case numbers. They were all for malicious prosecution against the defendants herein. The defendants also instituted a counterclaim against the first plaintiff premised on delictual fraudulent misrepresentation.

[2] The first case instituted by the first plaintiff against both defendants was recorded under Case Number 2007/9251. The second suit by the third plaintiff was opened under Case Number 2007/12177 and the third, by the second plaintiff was recorded under Case Number 2007/12178.

[3] All three malicious prosecution cases were consolidated as one under Case Number 2007/9251.

[4] Consequently, when the trial herein started, there was one consolidated case instituted by all the plaintiffs under the case number previously allocated to the first plaintiff, John Henry Bayett and the

counterclaim lodged by the defendants fell to be heard and decided at the same time.

[5] The allegations and issues material to the determination of all the disputes herein are in my considered view so intertwined that justice will be served adequately if they should be assessed as a whole or holistic unit rather than as separate facts in respect of each set of original individual or separate cases, thus compartmentalising same. It is my further view and finding that similar factual evidence and evidential material in many instances overlapped all of them.

THE ALLEGATIONS

[6] By the first plaintiff:

In the summons issued on 2 May 2007 against both the defendants, the first plaintiff sued for –

6.1 R100 000,00 for falsely accusing the first plaintiff of fraudulently misrepresenting the gross profit percentage of Melville Spar to them and at the same time attempting to extort the sum of R7,1 million from the first plaintiff, thereby acting wrongfully, unlawfully and with the intention of injuries him, i.e. with the requisite *animus injuriandi*.

6.2 R1 154 541,80 being special damages arising out of the costs the first plaintiff reasonably expended in defending himself against criminal proceedings instituted maliciously or without probable cause by the defendants by laying charges against him with the police of fraudulently misrepresenting the truth about the financial affairs of Melville Spar, and

6.3 R500 000,00 general damages for contumelia, among others, great humiliation, degradation and injury to his self-esteem and to his esteem in the eyes of others and his own family.

[7] By the second plaintiff:

Her claim against the defendants was for the sum of R100 000,00 plus costs and interest *a tempore morae* for the malicious prosecution and the consequences thereof.

[8] By the third plaintiff:

He claimed R400 000,00 plus costs, plus interest *a tempore morae* against the defendants for malicious prosecution and its *sequelae*.

[9] The defendant's counterclaim to the first plaintiff's particulars of claim was for the amount of R5 373 707,00 plus costs plus interest at 15,5% per annum *a tempore morae* for fraudulent misrepresentation of percentage profits at Melville Spar.

FACTUAL MATRIX AND CHRONOLOGY

[10] The first plaintiff was at all relevant times, especially around 2004, the sole shareholder and managing director of a company called Quantum Leap Investments 123 (Pty) Ltd, ("*Quantum Leap*"). Quantum Leap was the conductor of a business known as Melville Spar.

[11] The franchise owner, Spar Ltd, offered the first plaintiff two other or separate Spar businesses, which prompted the latter to decide to sell Melville Spar.

[12] In preparation for this intended sale, with the assistance of his in-house bookkeeper, Tracy Joan Fouche, the second plaintiff herein, the first plaintiff prepared a document entitled "*Melville Spar - - Monthly Expenses 2004*". This document was commonly referred to at the trial hereof as "*Annexure B*" and I will refer to it as such hereinafter.

[13] For convenience sake the principals refers herein will henceforth be referred to by their names, e.g. first plaintiff as "*Bayett*", second plaintiff as "*Tracy*" or "*Fouche*" or by both name and surname; third plaintiff as "*Thomaz*"; first defendant as "*Bennett*" and second defendant as "*Wales*".

[14] Following up on an advertisement for the sale of Melville Spar in a local publication the two defendants entered into negotiations with Bayett with a view to purchasing same.

[15] Annexure B showed the turnover and expenses of Melville Spar for the period March 2004 to August 2004.

[16] According to Bayett, he initially compiled Annexure B in order to show "*some*" of the expenses and turnover a prospective purchaser could expect to have from the business. He had been involved in an illegal practice of skimming on the finances of Melville Spar. Skimming meant taking money out of the business without declaring and paying tax thereon to the South African Revenue Services ("*SARS*"). During a previous tax amnesty period declared by SARS, he (Bayett) had applied for and was granted amnesty in regard to the skimming. That was before he contemplated the sale.

[17] His external accountant at Melville Spar, Thomaz, advised him to include the amounts skimmed in the turnover figures in the management accounts because the management accounts were drawn solely for the benefit of the owner of the business and that as such it was important that

those management accounts should reflect the true position. He accepted the advice and did so. As a result, since the skimmed amounts were part of the management accounts from which he prepared Annexure B, Annexure B's figures therefore included the skimmed amounts.

[18] Bayett entered into an Agreement of Sale over Melville Spar with the defendants on the 21 October 2004. Clause 4.2 of the Agreement of sale provided that the purchasers were at liberty to verify the accuracy of Annexure B between March and October 2004 to satisfy themselves before committing themselves. This period, i.e. March 2004 to October 2004 was thus referred to as the "*verification period*".

[19] The purchasers, (Bennett and Wales) elected to verify the accuracy of Annexure B by way of a due diligence. After the due diligence the parties agreed to an Addendum in terms of which clause 4.2 of the Agreement was amended to provide for a closing stock take at the end of January 2005 in order to determine the gross profit percentage. The Addendum provided further that if the gross profit percentage was less than 21,3% the purchasers were at liberty walk away from the deal without any consequences to them but that however, they were not obliged to resile from the Agreement. The gross profit percentage was to be calculated for the period March 2004 to January 2005.

[20] It is my considered view and finding that the two periods that have added relevance, importance and materiality to issues to be decided herein are the verification period (March 2004 to August 2004) and the gross profit percentage period (March 2004 to January 2005).

[21] According to evidence led through Thomaz and Greyling, who both testified as experts on behalf of the plaintiffs in this trial, the total amount skimmed during or in the verification period amounted to R350 000,00.

[22] According to Bayett in his testimony in the trial he did not show all the actual expenses in Annexure B as the latter was not meant to be a document including all expenses. To illustrate his point he referred to the following expenses which were not part of Annexure B:

Repairs and maintenance

[23] The budgeted figure for repairs and maintenance in Annexure B was given as R8 000,00. He stated that as the narrative showed, it was not an actual figure but an estimated or budget amount. His explanation of this disparity was that the budget amount was estimated on what he thought a new owner might have had to spend as by that time he had already spent a lot of money in getting almost everything ship-shape. It emerged in the analysis given by Greyling in court that the actual average monthly figure for

repairs and maintenance for the months following on the verification period i.e. September 2004 to January 2005; was approximately R10 700,00.

Salaries

[24] Bayett excluded from Annexure B his salary, that of his wife Claire, Fouche's who was about to leave Melville Spar's employ and those of two of his managers who were to join him in his new ventures or leave with him because he felt that and as established practice, the new owners would have preferred their own management team and that he expected them to allocate their own structures for salary purposes.

Depreciation, leases, travelling and bank charges

[25] According to Bayett he did not include these expenses in Annexure B, his reasons therefor being that depreciation was an audit calculation and that the other expenses would normally be personal to a new purchaser and not a reflection of expected monthly expenses of the business itself.

[26] Bayett testified that he stated the gross profit percentage on Annexure B as 21,9%, the basis being that he assumed that the gross profit would be in that region. He submitted that this was not fatal to the deal because it was not in dispute that the gross profit percentage could only be calculated after a closing stock take and that in any event Bayett did not guarantee the gross

profit percentage for that very reason. He did not state any nett profit as Annexure B did not provide for a column to show same.

[27] It was Bayett's further testimony that he gave Annexure B to one Brian Mendelson ("*Mendelson*") of Mel Abro Brokers CC who was mandated to find a purchaser for the Melville Spar business. When the latter advertised the sale, he mentioned the following among others:

> "*… Nett R350K p.m.*"

It was this advert that attracted the attention of Bennett and Wales.

[28] When he testified, Bennett confirmed that he met Mendelson on 19 October 2004 and the latter made him aware of the additional amounts of R50 000,00 per month that were skimmed. He further mentioned that handwritten notes mentioning the R50 000,00 skimmed amounts were made on the Annexure B copy they had on hand. Bennett also confirmed that Mendelson also told him that the salary figures on Annexure B included an amount of R40 000,00 which represented salaries of two of the Melville Spar managers who would be leaving with Bayett. He also made manuscript notes hereof on the Annexure B copy at hand. He (Bennett) then made some calculations based on the Annexure B given expenses and deducted the R40 000,00 he was told was the salaries of the two managers who were leaving and then arrived at a nett profit of R330 000,00.

[29] On 20 October 2004 Bennett and Wales met with Bayett and Mendelson at the Melville Spar. The former had allegedly taken a decision:

"*… to look at the store as a viable proposition* …"

(Bennett's statement at paragraph 5.)

[30] After this "*inspection-in-loco*" Bennett and Wales concluded the Agreement of sale of Melville Spar in their capacities as trustees for a private company to be formed. The purchase price was R9,1 million excluding stock. Annexure B, not one with handwritten notes by Bennett which he effected or made when discussing the details of the deal with Mendelson on 19 October 2004 but a "*clean*" Annexure B was incorporated in clause 4.2 of the Agreement. This is confirmed by paragraph 6 of the defendants' counterclaim as well as Bennett's own evidence at page 1155 of the Transcript of the proceedings.

[31] As already stated hereinbefore, clause 4.2 of the Agreement provided that Bennett and Wales could verify the accuracy of Annexure B and that should it occur during the verification that the turnover and expenses in Annexure B showed a difference of more than 10% of the verified turnover and expenses, they could resile from the Agreement.

[32] Bennett and Wales instructed an auditor, Lomnitz to do the due diligence to verify the accuracy of Annexure B. The latter delegated that function to another auditor, Robinson.

[33] There were certain variances that were discovered during the due diligence, which in my view may have prompted Bennettt and Wales to act in the manner they did as would become clearer as this judgment proceeds.

[34] It is a fact that Bennett and Wales elected not to resile from the Agreement but instead agreed to amend clause 4.2 of the Agreement as set out above. As already stated again, this amendment was incorporated in an Addendum to the Agreement which was executed on 21 December 2004. In terms of this Addendum, the amendment provided for a closing stock take by or on 31 January 2005 and for the calculation of the gross profit percentage. The nett results of the amendment among others amounted to the following: If the gross profit percentage after the stock take of 31 January 2005 was less than 21,3%, then Bennett and Wales could but would not be obliged to resile from the Agreement. I therefore cannot disagree with the plaintiff's averments and contention hereon that the Agreement's amendment had superseded any previous reliance on the accuracy of Annexure B for a possible reliance on an agreed or given gross profit percentage as an option to resile from the Agreement.

[35] In January 2005, prior to the take-over date being 1 February 2005, one Mr Laas, seemingly a partner or business associate of Bennett and Wales instructed one Sean Tanzer ("*Tanzer*"), a labour consultant, to do an assessment relating to the staff at Melville Spar as well as the control structures. Tanzer tabled his report on 15 January 2005. In that report Tanzer drew attention to the following:

- incorrect sectoral payments for some of the employees and

- payment of overtime in cash, which aspect was already known to Bennett and Wales by virtue of the due diligence.

[36] The closing stock take was performed on 31 January 2005 and the agreed upon amount was R1 438 458,00. The gross profit percentage was stated then as 22,26% and Thomaz, as the accountant for Melville Spar, issued a certificate to that effect.

[37] After the take over date, which was between 1 and 2 February 2005, Bennett and Wales opted not to be personally involved in the day-to-day operations of the business and appointed operators including a new manager on a profit-share basis.

[38] The issue of hidden files also came to the fore around August 2005, which is one of the aspects the defendants contend Bayett did not play open cards with them : When Fouche testified, she made mention of the fact that

the new manager at Melville Spar, one Panyiotou, did not need the information relating to gross revenue verifications (GRV's) for the verification period. One Yolande Reyneke ("*Reyneke*") had furtively or surreptitiously kept information relating to same in a hidden file at a time when she was allegedly told by Fouche that she (Fouche) was going to delete that information from the computer as part of a cleansing process. During August 2005, most possibly for purposes of buying favour or patronage Reyneke made the GRV information for the verification period available to Bennett. As fate would have it, nothing ultimately turned on this aspect and disclosure as the GRV's ultimately found by the plaintiffs and used by Greyling for his analysis of the gross profit percentage and expenses were similar or the same as the GRV's hidden by Reyneke. This rendered the reference to those GRV's allegedly as the hidden files or part of the hidden files not being capable to advance the defendants' case any further.

KNOWLEDGE BY BAYETT OF ALLEGATIONS AGAINST HIM

[39] According to evidence during the latter part of 2005, around September or October, Bayett came across information that rumours or allegations were flying around that he had defrauded Bennett and Wales during the Melville Spar sale. He accordingly telephoned Wales about the allegation. Wales requested a meeting at which they agreed that they could attend with their attorneys. Bayett requested Wales to send him written representations of his alleged complaints. The latter agreed but never complied to date.

[40] During the beginning of December 2005 Bayett contacted his attorney, Brian Kahn ("*Kahn*") to inform him that there were rumours flying around that Bennett and Wales intended laying criminal charges against him relating to the sale of Melville Spar, allegedly on account of fraudulent misrepresentations made by him. Kahn contact an attorney, a Mr Nowitz ("*Nowitz*"), assuming he was Bennett and Wales' attorney. It emerged that at the time he was not and he thus did not have any instructions on those allegations. He, (Nowitz) contacted Bennett and Wales and they set up a meeting for 13 December 2005 at 14h00. Bennett disputes the time of this meeting : he avers it was scheduled for 12h00 on that day. After their meeting they met with Kahn that very same day. According to Kahn's evidence he was told at that meeting that Bayett had made fraudulent misrepresentations to the defendants and that he if he (Bayett) did not repay to them an amount of R7,100 million of the R9,100 million purchase price they paid to him, the two would proceed with criminal charges for fraud against him. According to Kahn, he complained to them that he did not have sufficient information to meaningfully respond to those allegations. During his cross-examination it was put to him that he (Kahn) in fact demanded the appointment of a forensic auditor at that meeting.

[41] Kahn confirmed the deliberations at this meeting in a letter addressed to Nowitz dated 20 December 2005. Nowitz only responded to this letter in February 2006 and did not deny any of the contents thereof save to state that he would take instructions from his "*clients*". I assume that at this stage Bennett and Wales were now his clients. This is an interesting, if not strange

turn of events, because Nowitz was present at the meetings whose outcomes were confirmed by Kahn's letter and thus did not need an instruction to respond or reply to most if not all of the contents thereof, most of all, those allegations that dealt with his own personal involvement at that meeting.

[42] When he was cross-examined further it was put to him (Kahn) that Nowitz did not meaningfully respond to the letter because he did not want to get embroiled in an exchange of correspondence in a matter that he was not involved in. This was also strange because he exchanged further correspondence with the plaintiff's attorneys subsequent to his short response but he did not once attempt to deny or disown the allegations made by Kahn in his letter dated 20 December 2005.

[43] On 26 June 2006 Bayett, Thomaz and Fouche were charged with fraud in the Specialised Commercial Crimes Court in Johannesburg. When they appeared in court Bayett and Thomaz were in leg irons like common robbers or murderers. The charge against them was that they had misrepresented the gross profit percentage to be 22,26% well knowing that it was in fact 19,47%.

[44] They appeared again in court on 31 August 2006, 2 October 2006, 23 November 2006, 28 November 2006, 9 January 2007 and 30 March 2007. On 30 March 2007 the State withdrew the charges against him.

[45] They instituted these proceedings against the defendants in three separate actions on 23 April 2007. As already stated hereinbefore, the actions were subsequently consolidated, hence it is one matter in this trial.

REQUIREMENTS FOR ACTION FOR FRAUDULENT MISREPRESENTATION

[46] In order to successfully rely on a delictual claim premised on an alleged prior fraudulent misrepresentation inducing an agreement, the claimants, in this case, Bennett and Wales, had to prove the following on a balance of probabilities:

46.1 A representation by Bayett and/or his agent;

46.2 The representation must have been made fraudulently, which should have involved knowledge by Bayett that the representation was false;

46.3 It must be shown that the fraudulent misrepresentation was made with the actual or constructive intent to injure the misrepresentee or to benefit the misrepresentor.

See: *Berkemeyer v Woolf* 1929 CPD 235 at 242-3

46.4 Bennett and Wales must show that they were in fact induced by the misrepresentation to enter into the contract.

See: *Pathescope (Union) of SA Ltd v Mallinick* 1927 AD 292 at 300.

Kahn v Naidoo 1989 (3) SA 724 (N).

46.5 The misrepresentation must be material in the sense that it is not incidental or unimportant.

See: *Service v Pondart-Dianna* 1964 (3) SA 277 (B) at 279A-D.

46.6 It must be proven that Full Swing has suffered damages as a result of the fraud and that the claim of Full Swing on account of such damages was ceded to Bennett and Wales.

THE COUNTERCLAIM

[47] The trial herein was long or protracted and the volume of evidence adduced thereat not only voluminous but also involved and complicated. It is my considered view and finding that it is prudent and desirable that I start with the counterclaim.

[48] In the counterclaim and for purposes of the alleged prior fraudulent misrepresentations, it is alleged that –

48.1 On 19 October 2004 Mendelson represented to both Bennett and Wales that over and above the turnover showed on Annexure B, the Melville Spar generated an additional R50 000,00 per month in undeclared income;

48.2 That on the basis of such representations, Bennett calculated a nett profit of R330 000,00 per month, which amount was later amended to R340 000,00;

48.3 That on 20 October 2004, Bennett and Wales met with Bayett who represented that:

48.3.1 the figures provided by Mendelson were correct;

48.3.2 he was selling a cash-positive store;

48.3.3 he would guarantee a gross profit of 21,9% for the Melville Spar but could only confirm same after a final stock taking at the end of January 2005.

[49] It was further alleged that the above representations were false, were known to Bayett to be false and were done to induce Bennett and Wales to purchase the Melville Spar for R9,1 million, which they acted upon and did purchase it.

[50] A closer look at the alleged misrepresentations relied upon in the counterclaim the following in my view emerges:

50.1 No specific allegation is made that Annexure B was ever represented to Bennett and Wales as being the sum total of all the expenses. This is corroborated by all the experts who testified in this trial who stated that a nett profit could only be calculated or arrived at after all expenses have been considered;

50.2 The allegations that the gross profit percentage was guaranteed at the time they allege subject to a stock take at the end of January 2005 does not tally with the chronology of events herein because the issue of stock take and concomitant guarantee was only agreed to in the Addendum that was signed on 21 December 2004;

50.3 The defendants contend that the amount of R330 000,00 initially claimed, which was ultimately amended upwards to R340 000,00, which is claimed as being the alleged misrepresentation

> in regard to the nett profit was calculated on the expenses shown on Annexure B minus the R40 000,00 expenses in respect of the salaries of the two managers who were to leave with Bayett. The plaintiff's version is that the R340 000,00 was calculated on a totally different basis, namely, the turnover on Annexure B minus the expenses plus the R50 000,00 that was skimmed. Should this Court accept the defendants' version as set out above, then the alleged misrepresentation in regard to each of the two different calculations would have yielded different results or been very different and would not be reconcilable into one alleged misrepresentation for both calculations. The plaintiffs submit and contend that the probable inference to be drawn is that Bennett has now changed the basis of his earlier or original allegation in regard to the alleged misrepresentation of the nett profit and/or has decided to substitute the initial alleged misrepresentation allegations with one more convenient to him or his fellow defendant or claimant in the counterclaim.

[51] What is also apparent in my view is that the allegations of prior misrepresentation are not premised on the advertisement posted by Mendelson.

[52] In their counterclaim further, Bennett and Wales rely on an alleged cession from Full Swing Trading 357 CC and alleged in that respect that Full Swing ceded to them –

> "*… all right, title and interest in and to such claims as it enjoys against John Henry Bayett and Quantum Leap Investments 123 (Pty) Limited, arising out of the purchase and sale of the Melville Spar …*'
>
> (See paginated folio 54 of the pleadings.)

[53] It is common cause that Full Swing was registered on 19 August 2004. (See page 70 of Plaintiffs' Bundle.) It is not clear how the defendants arrive at the above conclusion because there was no evidence led in this trial as to how, on what basis and when, if ever at all, such a transfer of the business took place from Bennett and Wales to Full Swing as the plaintiffs herein were not party to such a deal or transaction. A perusal of the trial bundles yielded the following:

53.1 The offer to purchase Melville Spar was between Bennett and Wales, who were purchasing the business only, i.e. Melville Spar, from Quantum Leap Investments 123 (Pty) Ltd represented by John Henry Bayett, which agreement was signed by the parties on 21 October 2004. No cession of rights is mentioned between Full Swing and any of the defendants involving Bayett.

(See: Plaintiffs' Bundle File 1 at pages 263 to 274.)

53.2 The next agreement in the papers herein is the Addendum to the Agreement of Sale of Melville Spar dated 21 October 2004 which is also between Bennett and Wales as purchasers and Quantum Leap as the seller. Herein also no mention is made of any cession.

(See: Plaintiffs' Bundle 1 pages 278 to 285.)

53.3 At folio 296 of the same Plaintiffs' Bundle 1 is an agreement between Full Swing Trading 357 CC represented by Bennett and Wales on the one hand as the purchaser and Quantum Leap on the other. This agreement only deals with notification that all suspensive conditions recorded in the original Agreement and the Addendum had been fulfilled and the attorney and Mel Abro Brokers were authorised to release the funds held in trust and deduct their commissions. No mention is made of any cession.

53.4 The next agreement on record is a sale of business (Melville Spar) entered into between Full Swing Trading 357 CC as sellers and Wild Goose Trading and Services 39 CC which was signed on 24 April 2008. This agreement is irrelevant to what we are dealing with as it does not involve Bayett. Suffice to mention here that Full Swing sold Melville Spar to Wild Goose Trading

for a total of R10,5 million as a going concern inclusive of stock whose value was placed at R2 million.

[54] As such I found no evidence was led by any of the parties to the effect that there was such a cession, and if there was, that such a cession could have any legal consequences.

[55] What this Court is called upon to do is not only to determine whether or not the alleged misrepresentations were made, and if so made, whether they induced the Agreement, but also whether or not the alleged misrepresentations remained relevant and material in the light of the agreed upon events envisaged by the Agreement as qualified by its Addendum and agreed on amendments or as agreed to subsequently by the parties.

[56] To be able to determine issues relating to the counterclaim in their correct perspective I agree that an assessment of the chronology of the events again can and will best paint the correct colours to the picture caricatures that have been sketched by the evidence of the respective parties in this trial, duly supplemented by the papers generally filed of record in the case. In my assessment the chronology of events reads as follows:

56.1 On 18 October 2004 Bennett and Wales become aware of the advertisement of the sale of Melville Spar;

56.2 On 19 October 2004 Bennett meets with Mendelson and he (Bennett), on his own version, states that Mendelson represented to him that Annexure B was accurate except for the turnover which did not include the additional amount of R50 000,00 per month due to skimming;

56.3 On 20 October 2004 Bennett and Wales met with Bayett and Mendelson and according to Bennett, Bayett confirmed that the store (business) was cash positive and that subject to a closing stock take at the end of January 2005 he would guarantee a gross profit percentage of 21,9%;

56.4 On 21 October 2004 the main Agreement was concluded. Clause 4.2 thereof provided that Bennett and Wales could verify the accuracy of Annexure B and that if during such a verification Annexure B was shown to be inaccurate by more than 10%, then Bennett and Wales had a choice of continuing with the deal on such terms as may be mutually agreed upon or resile from the Agreement without any consequences to them;

56.5 The mere fact that the accuracy of Annexure B could be verified and that Bennett and Wales chose to do such verification through a due diligence performed by experts of their choice in my view limited even to the extent of nullifying or neutralising any purported reliance by the defendants on alleged prior

misrepresentations as well as the materiality thereof to the time period prior to the verification;

56.6 The purported reliance on the alleged prior misrepresentations and the reliance thereon was further eroded or adulterated by the facts that the Annexure B document without the notes thereon by either Bennett or Mendelson or both was incorporated into the Agreement, thereby meaning that reliance was had on a document which did not contemporaneously reflect all that it should have represented;

56.7 Clause 7 of the Agreement provided that the seller would not be bound by prior representations and furthermore excluded reliance on the purported prior misrepresentations. It is our law however that such a clause would not generally protect a seller against prior "*fraudulent*" misrepresentations. That is why it did not protect Bayett against the perceived inconsistencies noted by Bennett on a copy of Annexure B the day he met with Mendelson. The fact of the matter is that the parties herein consciously and with open eyes agreed that the document which had Bennett's notes on it should not form part of the Agreement. They preferred a copy that did not have Bennett's handwritten notes or comments on it.

56.8 Clause 10 of the Agreement provided expressly and specifically that the Agreement that was to be respected as enshrining the parties' intentions is the one in writing and signed by the parties. It is my further view and finding that this operative Agreement, when read as a whole, excluded reliance on any representations which would invariably include those noted on Annexure B by Bennett. What really puts the matter at or to rest is Bennett's testimony in the trial to the effect that the prior representations did not form part of the agreement and that he was willing and ready to enter into the agreement on the basis of the Annexure B copy which did not have his notes on it.

(See page 1157 of the Transcript.)

56.9 The above concession alone in my view brings to an end the debate in relation to alleged prior representations inducing the Agreement.

56.10 Robinson conducted a due diligence on the defendant's instructions or bidding. He did so for a whole two to three weeks. This process exposed quite a number of fallacies surrounding Annexure B.

56.11 Bennett and Wales had all opportunity to resile from the Agreement without any consequences to them if they genuinely had justifiable grounds to do so. They instead agreed to have the Agreement's clause 4.2 amended through the instrumentality of the Addendum. The requirement that a misrepresentation must be material in the sense that it was not incidental or unimportant was seriously compromised.

56.12 Finally, but not least, the Addendum substituted any possible initial reliance on Annexure B with an agreement on the gross profit percentage after the final stock take.

[57] A closer scrutiny of the above events demonstrates, in my view, that any purported reliance on alleged prior misrepresentation is not entirely supported by the facts in this case. This becomes more pronounced when one takes into account the ostensible situation appearing from all the haze, that the defendants' counterclaim does not look to have been premised on the allegation that the issue of the certificate that the gross profit was 22,26%, among others, was a prior misrepresentation. Even if this Court were to accept that fact as being so indicative, the evidence of Greyling and Thomaz in my view would have pointed to a contrary view or scenario. The situation is compounded adversely against the defendants when one accepts or notes that one of the defendants' witnesses, Davis, made material concessions confirming or corroborating Greyling and Thomas's evidence in that regard.

[58] The abovementioned regardless, it is still possible for the scenario to change if the rest of the analysis of the evidence is taken as a unit or holistically. This Court should therefore continue to determine whether or not, there may still be substance in the defendants' contentions in regard to the purported reliance on the alleged misrepresentation. It should still be determined whether or not, despite the argument to the contrary, it may still be found that the terms of the Agreement, the due diligence and the existence of the Addendum did not eliminate or terminate the materiality of the alleged fraudulent misrepresentation.

SPECIAL ASPECTS THAT INFORM A DECISION

The advertisement

[59] As stated above, it is not alleged in the counterclaim that the advertisement was a prior misrepresentation that induced the conclusion of the Agreement. In our law, an advertisement in itself or on its own does not constitute a firm offer which, in our case, Bennett and Wales could accept.

[60] Wille and Millins put it as follows in their works, *Mercantile Law of South Africa,* 18th Edition at pages 10 and 11 thereof about the legal consequences of an advertisement:

> "*Such an advertisement merely amounts to an invitation to the public to do business, and every time a customer appears and tenders the advertised price of an article, it is he who is making the offer, and the advertiser can either accept or reject it as he thinks fit.*"

[61] In *Du Toit v Atkinson Motors Bpk* 1985 (2) SA 893 (A) the court held that if the advertisement was aimed at creating an impression on a material term and the purchaser was unaware of a term excluding reliance on such impression and the seller is silent in respect of such a provision, the seller may be held liable on account of such misrepresentation. In this case (*Du Toit v Atkinson Motors*) the advertisement described a motor vehicle on sale as a 1979 model. The parties concluded a verbal agreement for the purchase of the vehicle which was based on the advert. Thereafter the seller purported to reduce the oral agreement to writing and placed that instrument in front of the purchaser to sign. The purchaser signed the written agreement without reading it, thus missing the fact that the document did not mention the year of manufacture of the vehicle. The seller also did not invite the purchaser's attention to a clause therein excluding any reliance on the year of manufacture. When the purchaser went to court on the grounds that the year of manufacture of the vehicle was misrepresented to him, the court sided with him and found that he (purchaser) was misled by the seller's silence.

[62] The facts in the *Du Toit* matter can be distinguished from the facts of our present case : In this matter (our present case) Annexure B was incorporated in clause 4.2 of the Agreement and the purchasers had the benefit of an option to verify its accuracy. The purchasers chose to embark on a verification process which was in the form of a due diligence process. In the face of this ostensible escape route they elected to proceed with the deal and to that effect agreed to an amendment of clause 4.2 in terms whereof the relevance of Annexure B was relegated to near irrelevance and substituted by

a gross profit percentage calculation. As compared with the purchaser in the *Du Toit* matter, where the former was not that business literate, the purchasers in this matter are astute, experienced and accomplished business persons who had no difficulty reading and understanding what the Agreement and its Addendum were all about. They also had the benefit of being assisted by qualified and until the contrary is shown, competent and matter-knowledgeable legal practitioners.

[63] As a consequence it is my considered view and finding that even if the defendants had relied upon a misrepresentation through the advert, which they have not done in this matter, the advertisement could not have constituted a misrepresentation which induced the Agreement. In any event, it played no role whatsoever because the Addendum which was subsequently agreed to saw to that.

MEETING WITH MENDELSON ON 19 OCTOBER 2004 IN RELATION TO NETT PROFITS

[64] It is common cause between the parties that when Bennett discussed the sale of the business with Mendelson on 19 October 2004, he (Bennett) made manuscript notes on Annexure B, the gist whereof were as follows:

> "*… + R50K (skimmed …*"

next to salaries as well as "*… +R40K less a month for two managers …*" alongside.

[65] Bennett's statement to the police dated 15 December 2007 becomes more insightful when juxtaposed to the above. In his evidence in this Court Bennett conceded that his statement was more reliable than his *viva voce* evidence. He was struggling to reconcile the various scenarios the totality of his testimony was bringing to the fore.

[66] In paragraph 4 of this statement Bennett seemingly, after he had parted with Mendelson, made some calculations : He arrived at R3 317 000,00 as monthly turnover and R396 000,00 as monthly expenses. He deducted the R40 000,00 for salaries and arrived at a profit of about R330 000,00.

[67] It is clear from the above that Bennett had not at the time calculated the nett profit on the turnover as shown on Annexure B plus R50 000,00 skimmed. This was contradicted by his testimony in court as well as the calculations of his expert, Davis, when he sought to state that he calculated the nett profit on Annexure B in the amount of R290 000,00 and then added the R50 000,00 skimmed amount. The above, in my view, are irreconcilable. In the circumstances the plaintiffs' argument to the effect that the defendants deliberately adapted their version to introduce an alleged misrepresentation is lent more credence. Furthermore, when the defendants amended their counterclaim, they came up with an amount of R340 000,00 (up from R330 000,00) as the amount allegedly represented to Bayett to Bennett. The problem is that the basis for the calculations is not the same and the specifics of the alleged representations are also different. It is tantamount to

substituting one representation for another in order by better suit the projected and changed circumstances, which is not or should not be permitted to occur.

MEETINGS WITH BAYETT ON 20 OCTOBER 2005

[68] My understanding of paragraph 5 of Bennett's statement is that there was no reference to the R50 000,00 having been included in the turnover on Annexure B. No reference is also made of the alleged R340 000,00 nett profit.

[69] When confronted during cross-examination he attempted to explain himself. However, in my view, his explanation became fractured, leading one to see several answers : At first he stated that his previous calculations did not include a calculation of nett profit in the amount of R340 000,00. Secondly, he stated that if he had been told that the R50 000,00 was part of the R290 000,00 nett profit calculated and shown on Annexure B, he would have said so in paragraph 4 of his statement to the police. He also stated in the same breadth that if the R340 000,00 was a key factor, he would have expressly dealt with it in paragraph 5 of his statement.

[70] As against the above, paragraph 5 of his statement mentions among others that –

> "*… the GP (gross profit) percentage was a key factor to me in the viability of the store as a proposition …*"

[71] Of more importance in this case, Bennett, in paragraph 5 of his statement, did not state that Bayett had told him that the monthly nett profit would be R340 000,00; that he (Bennett) was only willing to conclude the deal if Bayett could guarantee to him that the monthly nett profit was R340 000,00; that he was assured that Annexure B contained all the expenses and that such expenses had been taken into account in the calculation of the nett profit as shown on Annexure B; and that Mendelson told him the R340 000,00 in Annexure B included all the expenses.

[72] On the contrary, Bennett states in paragraph 20 of his statement that –

> "*Figures that John and Brian produced created an impression that the store was generating a nett profit, before interest and tax, of R289 151,96 … per month.*"

[73] The above, in my view, and finding, refutes the defendants' reliance on an alleged representation of R340 000,00 nett profit per month.

[74] A nett profit can only be arrived at after including all expenses in the calculations. Annexure B does not even have a column for nett profit. It is my view and finding therefore that with Annexure B as a basis, nett profit in this instance could only have been arrived at after a normal calculation which should have included all expenses, not only those seen on Annexure B, which are not all the expenses.

[75] Annexure B showed "*Repairs and Maintenance*" expenses only as budget amounts, not actual expenses. The defendants' expert, Davis, accepted or conceded to this also. The item "*salaries*" on Annexure B did not include the salaries of Bayett, his wife, Fouche and the two managers Bayett wanted to leave with. Davis also acknowledged being told of this. "*Depreciation*" which experts on both sides agreed was an important expense that must have been included in the calculations was not included in Annexure B. Also not included were lease expenses as well as expenses relating to transport and bank charges.

[76] What the defendants seem to have overlooked in their testimony and submissions is that Annexure B was subject to verification. Its contents were not guaranteed.

[77] The above in my view also, militate against any misrepresentation of a nett profit. A reading of clause 4.2 of the Agreement of Sale in my view and finding, negates the materiality of or reliance on an alleged prior misrepresentation. Furthermore, those expenses that the defendants sought to rely on as constituting prior misrepresentations were proven during evidence not to have been misrepresentations at all. The defendants' experts conceded as much.

[78] When the parties signed the Agreement on 21 October 2004, the defendants had already met with Bayett and Mendelson. If they wanted to contract or were induced to contract or bind themselves on the basis of the

advertisement or the alleged misrepresentations made allegedly by Mendelson on 19 October 2004, they should or ought to have used a copy of Annexure B which had the manuscript notes made by Bennett on it. In any event, clause 4.2 of the Agreement clearly shows that the accuracy of Annexure B was not guaranteed. Worse still, Bennett and Wales were given the opportunity to verify its contents and could resile from the signed agreement if there was a variance of 10% or more.

[79] It was demonstrated in this case that Bennett and Wales were experienced and astute businessmen. They conceded having read and understood what they were binding themselves to before they signed the Agreement. In evidence, Bennett conceded that he knew that the alleged prior misrepresentations did not form part of the Agreement. He however also stated that he assumed that Annexure B contained all the expenses. He also stated late in his testimony that he also assumed that Bayett and Mendelson were guaranteeing the expenses as being all the expenses. An assumption is different from a fact.

[80] In *Van Reenen Steel (Pty) Ltd v Smith NO and Another* 2002 (4) SA 264 (SCA) the learned judge put it as follows in relation to assumptions:

> "*The next problem the appellant faced was that it was common cause that the written contract expressed the parties' consensus. It was for these reasons that the appellant took refuse in the doctrine relating to assumptions, arguing that a false common assumption relating to a present or past fact vitiated a contract even if it was not a term or condition of the contract. The appellant also relied on the doctrine of error in substantia*."

The learned judge went on to state that –

> "*… assumptions or suppositions could have many forms and different effects, depending on the circumstances. Assumptions relating to present or past facts, if unilateral, went back to the effect of a unilateral mistake on contract. If common, unless elevated to terms of the Agreement, they amounted to no more than common mistakes relating to the motive for entering into the agreement. Whether or not a motive that induced a party into entering into an agreement was based upon an assumption of fact it remained a motive, and a party was not entitled to vitiate a contract on the ground of a mistaken motive even if the motive was common, unless the contract was expressly or impliedly made dependent upon the motive, or if the requirements for misrepresentation were present.*"

[81] The principles of the above case cannot avail or assist the defendants. The fact that Bennett and Wales elected to perform a due diligence on the store point to them not trusting the contents of Annexure B. This negates reliance on the assumptions. This is also borne out by the fact that Annexure B had R1 759 000,00 as opening stock but after the due diligence the amount was agreed to as R1 593 206,00.

ALLEGED PRIOR MISREPRESENTATION ON GROSS PROFIT PERCENTAGE

[82] Reliance by the defendants on an alleged misrepresentation of a guaranteed gross profit percentage of 21,9% is not borne out by the evidence. Even Bennett's own evidence makes it clear that Bayett did not guarantee the 21,9% gross profit as he (Bayett) made it clear that a gross profit percentage could only be guaranteed after a closing stock take, which had not yet been

undertaken at the time. As such the reference in Annexure B of a gross profit of 21,9% could not have induced the conclusion of the Agreement. It is thus my considered view and finding that Bennett was telling a patent untruth when he stated in paragraph 6 of his statement that –

> "*… (A) clause (4) was included in the offer to purchase Agreement … which inter alia guaranteed the GP and the information that had been presented to us as true and correct …*"

[83] That reliance is further refuted in the Addendum to the Agreement. This document provided for a gross profit of 21,3% as at the end of January 2005 on the understanding that if the gross profit percentage was less than 21,3% at that point and time, Bennett and Wales were entitled, though not obliged to resile from the Agreement. The Addendum was amending clause 4.2 of their Agreement, changing the gross profit percentage from 21,9% to 21,3%.

[84] For the record, the plaintiffs' experts, Greyling and Thomaz convincingly showed in evidence that the gross profit percentage was in excess of 21,3% and the defendants' own expert, Davis, conceded that the gross profit percentage was at least 21,2% before account was taken of the amount skimmed. Davis did not deny that he was told of the skimming. He only stated that he disregarded it as there was no documentary evidence to substantiate it. This was contradictory because the instructions he accepted from Bennett and Wales were not supported by documentary evidence either.

[85] When Davis realised that the issue relating to skimmed amounts was not adding up, he shifted is accusations to VAT manipulation by the plaintiffs, especially Bayett. However, at the end of the day Davis also conceded that he could not substantiate the VAT manipulation charge. He blamed lack of source documents on his failure or inability to substantiate his VAT manipulation charges. He also conceded that the methodology used by Frank Thomaz to extract the correct value of the non-vattable purchases was correct. He stated that he did not follow the same methodology because he did not have access to source documents. Unfortunately he ignored the fact that all the experts including himself had agreed that the gross revenue verifications (GRV's) were correct and he also could have easily done re-calculation on the same basis as Thomaz.

[86] This case was adjourned for a long period while he was still on the witness stand and the above aspects had been put to him. The parties were at liberty to correct and/or rectify their mistakes or supplement what they had testified on. The plaintiff's witness did just that but Davis did not attempt to do any re-calculations or explain his earlier incoherent testimony after that much time to do so. It is my view and finding that the above points to the fact that Davis knew that a calculation based on the methodology used by Thomaz would destroy his own evidence on alleged VAT manipulation.

[87] What compounds the situation further for the defendants is that when Bennett testified, he stated that he knew about the VAT manipulation when he took the business over and that, according to him, Bayett had told him that the VAT manipulation was –

"*… to the tune of between R12 000,00 and R15 000,00 per month.*"

The above evidence completely pulverises Davis's calculations of ± R52 000,00 per month arrived at by dividing R574 479,05 by 11 months.

[88] The defendants' counterclaim was initially not based on alleged VAT manipulation. This aspect was introduced later by way of an amendment to the pleadings. Under normal circumstances, an issue like VAT manipulation which was not there initially could not be introduced retrospectively as a purported prior misrepresentation inducing an Agreement. Extraordinary or special or cogent circumstances have not been brought forward to justify this introduction.

[89] Even the criminal complaint the defendants laid against the plaintiffs did not rely on any alleged VAT manipulation. Bennett's explanation during his testimony that at the time he did not realise the significance or relevance thereof is in my view and finding, far-fetched. An issue like VAT manipulation, if it was indeed relevant and present, should not have been introduced, as it was in this case, approximately three (3) years after the conclusion of the Sale Agreement.

ALLEGED PRIOR MISREPRESENTATION OF EXPENSES INDUCING AGREEMENT

[90] I have already dealt with Annexure B insofar as it relates to expenses. The defendants did not substantiate their allegations hereon. Although I have already mentioned salaries, repairs and maintenance as well as depreciation cursorily, I will briefly deal with them as expenses hereunder. Bennett agreed that there are expenses that are a cause for concern. However, his expert, Davis, conceded in evidence that these expenses could not have been misrepresentations. He conceded that repairs and maintenance was given out as budget figures only. He further conceded that he could not say that Bayett told him prior to or at the signing of the Agreement that the budget figures for repairs and maintenance were in fact actual figures. What he said was that he in fact did not ask Bayett what the actual figure was as he left t hat to the due diligence process. This thus in my view and finding excludes repairs and maintenance figures as contained in Annexure B from being validly relied upon as inducements or misrepresentations that induced the singing of the Agreement.

[91] Depreciation was initially not in the picture as a misrepresentation inducing the conclusion of the Agreement. It was not relied upon when the criminal complaint was laid. I agree with the plaintiff's submission that depreciation in this instant could only have constituted a misrepresentation if there was evidence that Annexure B contained all the expenses and the

wording of the Agreement itself as well as the due diligence process were to be ignored.

[92] Davis testified that he only realised that depreciation was not contained on Annexure B during the forensic investigation and that from that moment onwards he regarded it as a misrepresentation inducing the conclusion of the Agreement. He however conceded during cross-examination that he was wrong to do so. That concession is contained at page 886 of the Transcript of this case at lines 18-23 which is recorded as follows:

> "*Q. So should your answer not be now that I am asking you that you were maybe not correct in accepting depreciation as a misrepresentation for purposes of your calculations?*
>
> *A. … It is possible, yes, I was not correct.*"

At page 887 lines 6-7 he went further to answer as follows:

> "*… At the time I made that statement I believed it to be correct. In retrospect it might not be correct.*"

[93] Davis also conceded that Robinson dealt with depreciation in the due diligence process he conducted at the instance of the defendants but for some unknown reason his principal, Bennett had failed to disclose this fact to him, making him to act in ignorance of this fact.

[94] However, in his evidence, contrary to the above facts, Bennett tried to revive this issue, of depreciation as a factor inducing the Agreement : He stated that Bayett had told him that depreciation was not a concern as a Spar owner made a monthly provision therefor in the amount of R10 000,00 which was being paid into the Development Fund, with Spar mother body matching the owner's contribution. This flew in the face of Robinson's due diligence process and one of its findings that Bayett in fact owed money on the Development Fund, at the same time negating the aspect he testified to of equal contribution to the Fund by Spar. What made it worse is the fact that when Bayett was in the witness box, this aspect was never put to him. In any event it is not part of the counterclaim. It forms part of aspects which the plaintiffs submitted are red-herrings or attempts to bring in new allegations of misrepresentation through the back door.

[95] As regards the salaries of Bayett, his wife, (Claire) Fouche (who was resigning) and the two managers who were leaving with Bayett, the plaintiffs contended that they did not feature in the figures on Annexure B. Bennett's evidence was that those salaries were in fact included in Annexure B. However, Davis roundly contradicted him when he testified that Bennett had instructed him, at the time he conducted the forensic audit, that those salaries, especially those of the two managers, were not included in Annexure B. He (Bennett) was also contradicted on this aspect by Davis insofar as he stated that Mendelson had also told him this. In his own statement to the police at paragraph 10 thereof he also recorded that those salaries were not included.

WAGES OF WORKERS

[96] It is so that Annexure B depicted that some of the workers were paid certain amounts whereas in terms of the law and sectoral determinations they ought to have been paid more. This does not rhyme with the counterclaim that is based on prior express fraudulent misrepresentation.

[97] The defendants in my view tried very hard to elevate the alleged payments of wages on an incorrect scale and the payment of cash to employees working on Sundays and public holidays to be some misrepresentation. However, he could not say whether or not they induced the Agreement. As against this, the reports of a labour expert, Tanzer of Sihlangene Brokers as read with the pre-trial or joint minute prepared by agreement of the respective labour brokers revealed that the alleged underpayments were reduced to a labour dispute of whether or not a trainee should be paid in accordance with the sectoral determination for the job description he or she was being trained in. According to Tanzer, such a trainee, if under supervision, he/she should not be paid in terms of the sectoral determination – he/she is being trained for. By January 2005, the above issue as well as the cash payments for Sundays and public holidays were already known by Bennett and Wales : Tanzer reported to them on 15 January 2005, well before the take-over date. Worse still, the short or underpayments were not calculated by a labour expert, Tanzer or Laas, but by Davis. He based his calculations on the assumption that all the employees worked on Sundays and public holidays, which was actually not the case.

[98] The labour experts could not come up with cogent and verifiable evidence of any wrong doing, thus leaving the aspect speculative and inconclusive.

[99] As already stated above, the defendants' principal expert witness, Davis, conceded that these expenses were not misrepresentations and were proved by facts not to be misrepresentations and definitely not misrepresentations inducing the Agreement and the Addendum.

DUE DILIGENCE

[100] Even if it could be accepted, which is contrary to the facts herein, that Bennett and Wales were indeed induced to enter into the Agreement as a result of prior misrepresentations relevant to Annexure B, the issue still to be decided is the materiality of and the continued reliance upon such representations.

[101] *Norman's Law of Purchase and Sale in South Africa*, 5th Edition, by Zulman and Kairinos, at 172, para 16.8.3 deals with the unavailability of a redhibitory action where a party had knowledge of defects or where there was an inspection which identified the defects and the learned authors state as follows:

"*(i) If the purchaser knew of the defect at the time of the contract, the redhibitory action will not assist him, and this is so, whether he has been warned by the vendor in plain words or by the state of the thing sold, or whether he had obtained the knowledge from other sources before the sale. (Voet 21.1.9 – Gane's Translation, Volume III, pages 654-655).*

(ii) 'Knowledge' therefore has an extensive meaning with reference to the redhibitory action and includes:

(a) where the vendor has informed the purchaser of the defect at or before the time of the sale;

(b) where the purchaser had knowledge of the defect from other sources at the time of the sale;

(c) where the purchaser discovers the defect by inspection on or before the time of the sale and proceeds with the sale (Knight v Trollip 1948 (3) SA 1009 (D+CLD) at 1013 approved in Sarembock v Medical Leasing Services (Pty) Limited 1991 (1) SA 344 (A); Van der Merwe v Meades 1991 (2) SA 1 (A); SA Wood Turning Mills v Price Bros (Pty) Limited 1962 (4) SA 263 (T), per Kuper J at 266 and at page 173 where the following is said:

> *'As regards knowledge on the part of the purchaser, … Where there has been an inspection on or before the time of the sale, the question whether knowledge of a defect will be imputed to the purchaser or not is a question of fact in every case. (Knight v Hemming 1959 (1) SA 288Fc at 291-292), and the enquiries directed at the following elements:*
>
> *(a) the nature of the inspection made (Lakier v Hagar 1958 (4) SA 180 (T);*
>
> *(b) whether the purchaser was negligent at such inspection in not noticing the defect;*
>
> *(c) whether the purchaser, whether an expert or not, relied upon his own knowledge or upon the statement of the seller when making the inspection (Corbett v Harris 1914 CPD 535);*
>
> (d) *whether the seller disclosed a latent defect known to him;*"

and at 175:

> "*(v) On the other hand, where goods are carefully examined by an expert utilising his skill and knowledge and the buyer purchases on his advice, he cannot afterwards, when sued for the purchase price, plead that the goods are not suitable for the purpose for which they are required fortiori, when the goods are purchased 'as they stand' or 'with all faults'. The same is the case where the buyer, though he may state his purpose, selects the goods he requires after a cautious inspection as would be made by any reasonable person relying on his own skill and judgment.*"

Although the above refers to a redhibitory action, the same principles will apply in respect of an alleged prior misrepresentation where the Agreement provides for an inspection and where there was an inspection.

See also *Van Reenen Steel (supra)* where the purchaser performed a due diligence and thereafter unsuccessfully tried to rely on a contractual term relevant to the quality of the goods contrary to what was found at the due diligence.

See also in this regard *Imprefed (Pty) Limited v National Transport Commission* 1993 (3) SA 94 (A) and *Papadopoulos v Trans-State Properties and Investments Ltd* 1979 (1) SA 682 (W) where the facts in both cases (like in the case of *Van Reenen Steel*) showed that where a party conducted an inspection or due diligence he cannot rely on a repudiation premised on the quality of the goods as stated in the agreement.

[102] There is no evidence to suggest that at the time of the due diligence, Bayett concealed any information or refused to co-operate with Robinson. On the contrary, the evidence of Bennett is that Robinson never complained to him that he was not getting co-operation from anyone at Melville Spar including Frank Thomaz.

[103] In the due diligence, Robinson:

103.1 verified the turnover by *inter alia* comparing the sales on Annexure B with the POS sales. He considered the difference he found not to be material.

103.2 observed that in regard to wages, that overtime and public holidays were paid in cash and were not processed through the VIP wages system;

103.3 observed that for the verification period, leave pay and sick pay were not accounted for and needed to be calculated as payments had been made in cash. He referred to work performed by him on the "*Salaries File*" which file was never discovered;

103.4 found casual wages to be understated;

103.5 queried accommodation and travel expenses which were not included in Annexure B;

103.6 observed that depreciation was not taken into account on Annexure B;

103.7 performed tests on major expenses and although he found a number of variances, he did not consider the variances to be material, but for depreciation;

103.8 was satisfied that there were no major differences in the revenue stated in Annexure B and tests performed by him;

103.9 calculated the average nett monthly profit to be R240 000,00;

103.10 knew that the Development Fund was a liability, i.e. money owed to Spar;

103.11 knew the business was in overdraft;

103.12 knew the business had a loan from Spar;

103.13 observed that bank charges had been understated or were not shown correctly;

103.14 held the view that the gross profit percentage could not be calculated pending a closing stock take.

[104] Therefore, after the due diligence, Bennett and Wales knew that the information on Annexure B was not and could not be accurate, *inter alia* that:

104.1 Annexure B did not contain all the expenses;

104.2 a nett profit could not be calculated on the information in Annexure B;

104.3 the gross profit percentage could only be calculated after a closing stock take;

104.4 the information on Annexure B was not accurate.

Addendum

[105] Instead of electing to walk away from the deal, Bennett and Wales agreed to enter into the Addendum which would make the Agreement effective in an amended form after a closing stock take.

[106] As such and at the time when Bennett and Wales entered into the Addendum, they could have had no reason to rely on the accuracy of Annexure B or on any alleged representation prior to the Agreement.

[107] The Addendum also does not guarantee a future gross profit percentage of 21,3% but merely refers to a gross profit percentage as at the time of take-over.

EVENTS AFTER THE ADDENDUM BUT BEFORE TAKE OVER

[108] Notwithstanding receipt of the report by Tanzer on 15 January 2005, Bennett and Wales (and/or Laas) did not communicate any concerns in regard to the wages to Bayett before and at the time of take-over but rather opted to go with a closing stocktaking at the end of the month in order to proceed with the operation of the business.

[109] Bennett appointed Panyiotou to manage the business. Bennett, in an affidavit deposed to by him on 5 February 2009, gives the court insight into the problems experienced by the business after take-over. In that statement Bennett patently blames Panyiotou for the demise of the business although he later in his evidence tried to justify the contents of that affidavit to have a meaning inconsistent with the plain language thereof. Suffice to say that these attempts were sad, poor and disingenuous and displayed a total disregard for the court and a failure to take the court into his confidence.

[110] To compound the difficulties already prominent in the counterclaim, Wales failed to give evidence on matters where his evidence could or would have been material in corroborating the version of Bennett.

[111] In *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* Beadle CJ stated:

> "*If the defendant closes his case without giving evidence, in a proper case, an inference may always be drawn against him from his failure to give evidence contradicting that of the plaintiff … the fact that the defendant has not given evidence at all to refute what appears in the plaintiff's evidence is often a cogent factor to be taken into account.*"

[112] Bennett and Wales have a further difficulty and that is that the *onus* rests on Bennett and Wales to prove not only that they were induced into the agreement by an alleged fraudulent prior misrepresentation which were and remained material and relevant but also whether or not they were actually misled and would a reasonable man have been misled with due regard not only to the negotiations and the Agreement but also with due regard to the due diligence. In *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA) the following was said:

> "*[55] The approach to be adopted in a case such as this was set out in Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis, supra, at 239F-240B, as follows:*
>
> > *'If regard is had to the authorities referred to by the learned Judges (see Logan v Beit 7 SC 197 at 215; I Pieters and Company v Salomon 1911 AD 121 at 137; Hodgson Bros v South African Railways 1928 CPD 257 at 261; Van Ryn Wine and Spirit Co v Chandos Bar 1928 TPD 417 at 422-4; Irvin & Johnson (SA) Ltd v Kaplan 1940 CPD 647 and, one could add, Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 430 – 1), I venture to suggest that what they did was to adapt, for the purposes of the facts in their respective cases, the well-known dictum of Blackburn J in Smith v Hughes (1871) LR 6 QB 597 at 607, namely:*

> *"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."*
>
> *In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? Compare Corbin on Contracts (one volume edition) (1952) at 157. To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? See also Du Toit v Atkinson's Motors Bpk 1985 (2) SA 893 (A) at 906C-G; Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd 1986 (1) SA 303 (A) at 316I-317B. The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 (1) SA 978 (A) at 984D-H, 985G-H.'"*

[113] It is clear that apart from all the other shortcomings in defendants' case, it can never be suggested that having regard to the terms of clause 4.2, the format of Annexure B, the due diligence and amendment of the Agreement thereafter, that a reasonable man would still have had any regard to the alleged prior misrepresentations and would and could have relied on them or even regarded them as relevant or applicable. There is also no reason to prefer Bennett's evidence to that of Bayett (even leaving aside the experts) and the absence of any explanation in the defendants' case why Lomnitz, Robinson and Wales were not called as witnesses is consequential to the further demise of the acceptability, credibility and reliability of defendants' counterclaim and defence to the action for malicious prosecution.

The cash positive store

[114] As a last resort Bennett and Wales sought to rely on an allegation that Bayett had told them that the store on sale was a cash positive store.

[115] The evidence of Davis that the business was in trouble did not convince and he failed to meet the standard of evidence expected of an expert but rather came across as a hired gun. His inappropriate conclusions on law in his expert statement further exposed his status as a hired gun.

(*Schneider NO and Othes v AA and Another* 2010 (5) SA 203 WCC.)

[116] Greyling, on the other hand, convincingly explained that the business was in fact cash positive and that periods of cash flow difficulties did not detract from the financial viability of the business.

[117] The non-impairment of the goodwill by Full Swing in the financial statements in 2005/8 and 2006/7 (dealt with hereinlater) confirmed that the business was financially sound when it was sold to Bennett and Wales.

[118] In any event, the due diligence eliminated any materiality of an alleged prior misrepresentation as explained above.

The meeting of 13 December 2005

[119] The events leading up to and at the meeting on 13 December 2005 are relevant to expose that Bennett and Wales knew they could not resort to any lawful claim in a court of law for damages and as such not only expose the absence of a claim for alleged damages but also their malicious actions in regard to the criminal complaint.

[120] Therefore, they had to resort to an unlawful attempt to put pressure on Bayett to meet a ridiculous demand to repay R7,1 million from a purchase price of R9,1 or face a criminal prosecution.

[121] The events at the meeting on 13 December 2005 also expose that Bennett and Wales knew there was no merit in a civil remedy and therefore then rather opted to resort to unlawful conduct.

[122] Consequently the events leading up to and on 13 December 2005 will be dealt with herein later under the heading "*Malicious Prosecution*".

DAMAGES

[123] Apart from all the insurmountable difficulties relevant to the counterclaim referred to above, the calculation of the damages in any event does not make any legal or logical sense.

[124] Bennett and Wales as trustees for a private company to be formed paid R9,1 million for the business of Melville Spar. They claim Full Swing suffered patrimonial damages in the amount of R5 373 707,00 which at least is not as outrageous as the initial R7,1 unlawfully demanded on 13 December 2005. If the amount of damages alleged to have been suffered is deducted from the purchase price R9.1 million, it leaves an amount more or less equal to the value of the unencumbered assets (Plaintiffs' Bundle 1, page 183) which was R3 623 559-00.

[125] This means in effect that Bennett and Wales claimed that they or Full Swing should have paid principally only for the assets of the business and that the business had no goodwill at the time when they purchased it.

[126] However, when one has regard to the financial statements of Full Swing Trading for the periods 2005 and 2006, it is significant that Bennett and Wales as members thereof did not impair the goodwill which shows that they regarded the goodwill paid for the business to be correct. Goodwill was explained by Greyling to "*represent(s) the payment made by the acquirer in anticipation of future economic benefits from assets…"* (Expert Volume 3, page 767). At Expert Volume 3, page 776, paragraph 4.16 Greyling stated that *"(T) he definition of goodwill according to IFRS is the premium an*

acquirer pays in a business combination over and above the identifiable assets (both tangible and intangible). The premium arises from the acquirer paying in anticipation of future economic benefits for assets which are not capable of being individually recognised. By implication therefore the goodwill arises from the expectation of future profits and for no other reason."

[127] The goodwill was therefore the difference between the value of the assets (± R3.6 million) and the purchase price paid (R9.1 million). By not impairing the goodwill in the 2005/6 and 2006/7 financial statements of Full Swing, Bennett and Wales conceded the purchase price paid for the business (other than the assets and stock) was sound and remained for the years following in good standing.

[128] Notwithstanding, in the counterclaim Full Swing purportedly suffered damages notwithstanding the non-impairment.

[129] The alleged damages is further suspect (and untenable) in view of the fact that in September 2009, Full Swing sold the business to Wild Goose Trading for R10.5 million (including stock) (Transcript, page 1290). Regard must be had to the fact the Bennett and Wales or Full Swing paid for the business of Melville Spar approximately R9.1 million (including stock) which shows that they sold the business for more or less the same amount, if not for slightly more.

[130] Furthermore, when Bennett and Wales took over the business they left the operation of the business to Panyiotou, who according to an affidavit deposed to by Bennett in proceedings for the liquidation of the business, focussed on his own business in stead of the business of the Melville Spar (Plaintiffs' Bundle 3 700/403 to 700/406) A proper reading of that affidavit makes it clear that Bennett blamed the demise of the business of the Melville Spar on Panyiotou and not on alleged misrepresentations by Bayett. However, in the present proceedings Bennett attempted to blame Bayett and not Payiotou.

[131] As such, Bennett and Wales failed to prove that the business suffered damages as a result of the alleged misrepresentations by Bayett. Bennett in his evidence attempted to suggest that they successfully increased the turnover of the business as a result of which they could sell the business to Wild Goose for an amount more or less equal the amount they had paid for it. Apart from the fact that this is contrary to his affidavit in the liquidation proceedings, it does not avail Bennett to suggest that he increased the turnover by simply reducing prices. He conceded in evidence that the business was making a loss at the time when he sold it, which renders meaningless the alleged increase in turnover.

[132] As such, Full Swing did not build up the business before selling it but on the probabilities sold the same business that Bennett and Wales purchased from Bayett at more or less the same price if not slightly more than they had paid for the business, which in itself negates any alleged damages.

[133] Moreover, Bennett in his evidence conceded that Bayett had no control over their future conduct of the business and that their future profits would be dependant inter alia on their policies, management and controls. There is thus also no evidence to show that the alleged damages are causally connected to the alleged representations inducing the Agreement including the Addendum.

[134] In addition, Bennett and Wales failed to prove that Bayett had made any misrepresentation to Full Swing and that Full Swing suffered any damages as a result of such an alleged misrepresentation.

The counterclaim of Bennett and Wales was made dependent on a cession and in the absence of any proof of a misrepresentation by Bayett *vis-à-vis* Full Swing the cession is meaningless.

[135] It is respectfully submitted that the counterclaim should be dismissed with costs.

THE ACTION PREMISED ON MALICIOUS PROSECUTION

[136] In *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 SCA, the Supreme Court of Appeal referred with approval to the requirements for successful claims for malicious prosecutions as follows:

> "*[16] The requirements for successful claims for malicious prosecution have most recently been discussed in Minister of Justice and Constitutional Development v Moleko 4 as follows:*

> *'In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove-*
>
> *(a) that the defendants set the law in motion (instigated or instituted the proceedings);*
>
> *(b) that the defendants acted without reasonable and probable cause;*
>
> *(c) that the defendants acted with malice (or animo injuriandi); and*
>
> (d) *that the prosecution has failed.*'"

[137] I will proceed to deal with each of the requirements.

THAT THE DEFENDANT SET THE LAW IN MOTION (INSTIGATED OR INSTITUTED THE PROCEEDINGS

[138] LAWSA at paragraph 318 deals with the following instances where the defendant was held to have maliciously instigated proceedings:

> "*A defendant has been held to have instigated a prosecution where, for instance, he or she makes a statement to the police which is wilfully false and without which a prosecution would not have ensued;* [1] *or where the defendant fails to make a full or fair statement of the facts when placing the matter in the hands of the police and has threatened the plaintiff with imprisonment in so doing.* [2] *A defendant identifies him- or herself with the prosecution where he or she is present at the arrest, makes suggestions for searching the plaintiff, provides a room for his or her detention and allows a servant to take charge of the plaintiff while he or she is in custody;* [3] *or where the defendant makes a definite charge and indicates that he or she is prepared to withdraw the charge under certain conditions.* [4] *A person is actively instrumental in the prosecution where he or she obtains the warrant, assists the police in locating the plaintiff, is present at the arrest, and employs his or her attorney to assist the prosecutor,* [5] *or assists with the arrest and sits with the prosecutor at the trial.* [6]

Where a person acts in such a way that a reasonable person would conclude that he or she is acting clearly with a specific view to procuring the prosecution of the plaintiff and such prosecution is a consequence of his or her actions, that person is responsible for the prosecution. [7] "

Authorities for the various scenarios above are set out below in the consecutive numbers annotated above;

1 *Madnitsky v Rosenberg 1949 1 ph j5 (W) 13 15; of Lederman v Moharal Investments (Pty) Ltd 1969 1 All SA 297 (A); 1969 1 SA 190 (AD) 197; Prinsloo v Newman 1975 2 All SA 89 (A); 1975 1 SA 481 (AD) 492. But it would not be proper to say that anyone who knowingly gives a piece of false information to the police about a case, however insignificant that information, is responsible for the prosecution: Amerasinghe Aspects of Actio Injuriarum 15.*

2 *Baker v Christiane 1920 WLD 14 17.*

3 *Moreno v Milner (1880) 1 EDC 145 147.*

4 *Kroomer v Lobascher 1903 CTR 674 678.*

5 *Waterhouse v Shields 1924 CPD 155 161.*

6 *Heyns v Venter 2003 3 All SA 176 (T); 2004 3 SA 200 (T) 209-211.*

7 *Amerasinghe 20 et seq. It has been submitted that in Sri Lanka a person will be liable as a prosecutor where he or she has (a) formulated the charge; (b) solicited or requested the prosecution; and (c) incited the prosecution: Saravanamuttu v Kanagasabai (1942) 43 New LR 357 359; Amerasinghe 18. See also Neethling Law of Personality 173"*

[139] A case on point in this regard is *Baker v Christiane* 1920 WLD 414 where the following was summarised in the headnote:

"*Where a Defendant in an action for malicious prosecution was shown to have had an indirect motive in putting the matter into the hands of the police, to have failed to make a full or fair statement of the facts in doing so and to have threatened the Plaintiff with imprisonment prior to*

doing so, held sufficient evidence that Plaintiff had instigated the prosecution."
And see page 17 where the following was said:

> "*On all these authorities the test is whether the Defendant did more than tell the detective the facts and leave him to act on his own judgment. That is all the Defendant says he did; and, on Tranter's case direct evidence to the contrary is impossible. But there is good deal of circumstantial evidence. In the first place the Defendant put the matter into the detective hands, because he wanted to get the property back by indirect means, and not by civil proceedings. Then, the Defendant failed to tell Clark, the detective, all the facts. He did not tell him that the Plaintiff claimed a right to retain the goods, and he did not tell him what he, the Defendant, knew perfectly well, where the goods were kept by the Plaintiff. Instead of telling the detective that, he allowed him to go about for a whole fortnight investigating the whereabouts of these things. There never was any question of the things being concealed. Then there is evidence that the Defendant said to the Plaintiff, 'I'll have you put in'. All this is very strong circumstantial evidence showing that the Defendant actually instigated and encouraged the prosecution.*"

[140] Having regard to the principles enunciated in our case law referred to above, it can with respect never be suggested that it was the decision of the police or state to arrest, charge and/or prosecute the plaintiffs and therefore the defendants did not set he law in motion. It must be borne in mind that in virtually every case of a malicious prosecution, an accused was charged and/ or prosecuted. Sometimes the matter was withdrawn and sometimes the accused was acquitted.

[141] Therefore it is rather a question of whether or not Bennett and Wales instigated the criminal proceedings by:

141.1 making false allegations in their statements to the police

without which a prosecution would not have ensued; and/or

141.2 by failing to make a full or fair statement of the facts in their statements to the police; and/or

141.3 by threatening Bayett with criminal proceedings if an amount of R7.1 million was not repaid; and/or

141.4 by making a definitive and unambiguous charge to the police without first requesting an investigation; and/or

141.5 by being actively instrumental in the investigation and prosecution; and/or

141.6 by acting in such a way that the reasonable man would conclude that they are acting clearly with the specific view to procuring the prosecution of Bayett, Thomaz and Fouche and such prosecution was a consequence of their actions.

[142] It is my considered view and finding that on the facts as referred to above and hereunder, Bennett and Wales' actions fall squarely within all the instances of instigation referred to above.

[143] This becomes particularly evident as it will be demonstrated that Bennett (and Wales) deliberately made false and distorted allegations in their

respective statements and deliberately omitted material facts in their statements.

[144] The falsity, distortions and omissions were designed to ensure an arrest and prosecution which they hoped would pressurise Bayett to pay the R7.1 million demanded at the meeting of 13 December 2005.

[145] In order to ensure that the false statements and deliberate omissions caused the desired outcome, Bennett and Wales furthermore used decisive legal language to prompt an arrest and prosecution well knowing that the police could react positively to the demands of business persons that fraudsters be prosecuted.

[146] Their designed maliciousness and ulterior motives become evident when the statement or Bennett to the police is examined. (Wales' statement is similar if not identical in most respects). The statement contains so many deliberate untruths and material omissions that at the very least the most probable inference, if not the only inference, is that they instigated the prosecution maliciously, without probable cause and with an ulterior purpose to cause an arrest and prosecution which would "*convince*" Bayett to rather succumb to their financial demand.

[147] In examining the statement it is prudent to have regard to the type of language used by Bennett (and by Wales) in the police statement to demonstrate that he acted in such a way that a reasonable man would conclude that he was acting clearly with the specific view to procuring the

prosecution of Bayett, (and Thomaz and Fouche to put additional pressure on Bayett), and that the prosecution was a consequence of his (their) actions. They resorted to the following decisive legal language with a view to procure a definite charge and a prosecution

[148] See in this regard the following with reference to his statement:

Paragraph 10 thereof:

> "*The figures that were then available to me gave me reason to suspect beyond all reasonable doubt that the figures presented to us by John or Brian were a misrepresentation of the truth.*" (emphasis supplied)

Paragraph 13 thereof:

> "*I cannot think of any acceptable lawful reason… and therefore the GP percentage supplied by John and Brian was also a misrepresentation of the truth*." (emphasis supplied)

Paragraph 14:

> "*I have no doubt that John and possibly Brian made a wilful unlawful misrepresentation that led to my prejudice as well as an actual and potential loss in finances.*" *(emphasis supplied)*

Paragraph 17:

> "*I cannot think of any acceptable lawful reason for John and Brian not declaring the expenses accurately and truthfully.*" (emphasis supplied)

Paragraph 18:

> "*I cannot think of any acceptable lawful reason for John and Thomaz not declaring the expenses as I stated here above.*" (emphasis supplied)

Paragraph 20:

> "*I cannot think of any acceptable lawful reason for John and Brian making the representations…*" (emphasis supplied)

Paragraph 21:

> "*This further leads me to believe that John did everything that he could to further his nefarious actions to our determent (sic).*" (emphasis supplied)

Paragraph 22 thereof:

> "*I am of the opinion that John's actions were wilful, premeditated and designed with the purpose to mislead and prejudice me and/or cause me potential prejudice.*" (emphasis supplied)

And further down:

> "*I therefore am of the opinion that the perpetrators of these acts should be given an opportunity to answer the charges of Fraud and Defeating and/or Obstructing the Course of Justice in a court of law therefore request prosecution regarding this matter.*" (emphasis supplied)

[149] Quite clearly Bennett's statement (and that of Wales) was designed to also cause the arrest and prosecution of Thomaz and Fouche (and in fact they were arrested prosecuted). It is respectfully submitted that the inclusion of Thomaz and Fouche was not only designed to cause also their arrest and prosecution but also with the ulterior purpose to put pressure on Bayett to succumb to their outrageous demand for payment of R7,1 million.

[150] The arrest and prosecution of Thomaz and Fouche were the consequence of the following:

150.1 In paragraph 18 of his statement, Bennett made it clear that he could not think of any acceptable lawful reason for Bayett and Thomaz not declaring the expenses. This in itself introduced Thomaz as a perpetrator and caused Thomaz to be associated with the *"fraudulent acts"* of Bayett.

150.2 In paragraph 10 of his statement Bennett alleged that Fouche was going to destroy the information and in paragraph 22 of his statement he stated *inter alia* the following:

> "*I am further of the opinion that the differences in the figures were not by mistake and it is by all indications clear that John and/or persons acting on his behalf have taken steps to conceal the act by destroying evidence that could have reasonably been foreseen as being material evidence against him.*"

It is clear that the above is a direct imputation that Fouche concealed and destroyed evidence.

150.3 In paragraph 23 of his statement Bennett in fact provides the particulars of also Fouche and Thomas and there could only be one reason for that, i.e. for purposes of an arrest as Fouche was also now associated with the "*fraudulent acts*" of Bayett.

[151] Bennett's statement (and similarly that of Wales) was in many instances false and/or distorted and/or failed to be a full or fair statement of the facts. The consequences of the false and distorted statement (and supporting false statements) were the following:

151.1 The Police arrested Bayett, Thomaz and Fouche without employing a forensic auditor.

151.2 The State prosecuted them but before the trial commenced realised the absence of merits and withdrew the matter.

If the Police (and prosecution) were privy to the true and full facts they would never have arrested them. This can be stated with certainty as the full facts are available now and should have been available then if it was not for the untruths, distortions and omissions in the pre-drafted statements offered to the Police.

[152] Bennett and Wales deliberately made it very easy for the Police to arrest and the State to prosecute. They provided them with all the statements they needed without the need to do an in-depth independent investigation. This was carefully designed by drafting the statements in such a way that they purportedly contained decisive facts leading to obvious conclusions (unfortunately based on untruths, distortions and designed omissions).

[153] The contents and language of the already drafted statements, designed omissions and the corroborative style of the misleading statements had the effect that the Police did not appreciate the need to independently investigate. Had they done so, the outcome of such an investigation could only have been:

153.1 that the due diligence was the consequence of a contractual provision (clause 4.2); and

153.2 that there were no prior misrepresentations. Even if there were, that the contractual provisions eliminated any reliance on prior misrepresentations;

153.3 that Annexure B on the gross profit percentage was not guaranteed but rather that its accuracy was subject to verification;

153.4 that Annexure B could never have been an all-inclusive document;

153.5 and that Bennett and Wales waived reliance on Annexure B by agreeing to the amendment contained in the Addendum.

[154] As such the balance of probabilities dictates that there would have been no basis for the Police to accept the correctness of the criminal complaint by Bennett and Wales and to arrest and prosecute the plaintiffs.

[155] Examples of false allegations and allegations out of context or incomplete allegations or serious omissions are the following:

155.1 In paragraph 6 of his statement Bennett refers to a due diligence as if it was an isolated and insignificant occurrence removed from the terms of the Agreement and without disclosing that the due diligence in fact countered all the alleged misrepresentations or the materiality thereof.

155.2 In particular the statement failed to direct the Police to the following:

155.2.1 that in fact a due diligence was conducted;

155.2.2 that the due diligence took 2-3 weeks and was done by an auditor;

155.2.3 that many differences were found not to be material;

155.2.4 that at the due diligence Robinson found a number of aspects to be at variance with Annexure B which would have entitled them to resile from the Agreement but notwithstanding he, (Bennett) (and also Wales) elected to proceed with the Agreement by amending clause 4.2 thereof to eliminate the reliance on Annexure B.

155.3 No doubt, had Bennett and Wales told the Police about the due diligence, and more importantly that as a result of the due diligence they chose not to further rely on Annexure B and entered into an Addendum, the Police (and State) would have been very careful to arrest and prosecute particularly without a proper investigation and without the assistance of a forensic auditor. The State would have been in a position to far earlier than the ultimate withdrawal, appreciate the total lack of substance in the criminal complaint. Unfortunately the State was blinded by the veneer skilfully applied to the allegations in the statements to conceal the true facts.

155.4 In the same paragraph 6 of his statement, Bennett stated that:

> "*A … clause was included in the offer to purchase Agreement which guaranteed the GP and the information that had been presented to us as true and correct.*"

155.5 This is also patently false as a clause was not included in the offer to purchase which guaranteed the GP. On the contrary, clause 4.2 makes it clear that the contents of Annexure B were not guaranteed but indeed that the accuracy thereof was made subject to a verification process.

155.6 Furthermore, if one has regard to paragraph 6 of the statement of Bennett and then considers paragraph 7 of his statement, it becomes patent that there is a huge time gap. This is coincidentally the time period relevant to the due diligence and the deliberate concealment thereof is present.

155.7 In paragraph 7 of his statement Bennett said that the only figure that they could verify was the actual closing stocktaking figure. This is a lie as Bennett and Wales followed a verification process in the form of a due diligence where a number of material aspects were in fact verified.

155.8 In paragraph 8 of his statement, Bennett stated that from the time of take-over, they *inter alia* appointed labour consultants (Tanzer) who then informed them that the majority of the wages were either under paid or wrongfully paid. However, the correct position is that Tanzer had already furnished his report to Laas on 15 January 2005 which was before take-over. (See Expert Volume 2, page 378.) As such, Bennett and Wales knew before

take-over about the alleged incorrect sectoral payments and about cash payments.

155.9 Moreover there was no evidence at any stage by Tanzer that the "*… majority of the staff were either underpaid or wrongly paid*" as alleged in paragraph 8 of his statement. Ultimately it turned out in Tanzer's evidence that such submission was patently false and that Davis was used to manipulate the wages identified by Tanzer to create purportedly huge underpayments.

155.10 In paragraph 9 of his statement, Bennett alleged that Bayett and Mendelson had guaranteed the gross profit, which again was false. The maliciousness of the false statement becomes more pertinent if one is mindful of the fact that Bennett and Wales at the time were experienced and astute businesspersons with vast experience in business. There was not even a remote possibility that Bennett (and Wales) could have read any such guarantee in the Agreement. The wording of the relevant clauses of the Agreement is plain and makes it patently obvious that none of the clauses provided for any guarantee.

155.11 In paragraph 11, Bennett alleged that he had discovered in the hidden GRV's, expenses which were far above those that were declared to them by Bayett and Mendelson. What he deliberately omitted to tell the

Police was that Robinson had conducted a due diligence also on expenses and that Robinson had found certain differences but that Bennett and Wales notwithstanding the differences, opted to proceed with the purchase and in fact waived reliance on *inter alia, the* expenses. This is so because all the experts agreed that expenses are irrelevant in the determination of the gross profit percentage and the Addendum replaced any reliance on Annexure B with reliance on an agreed gross profit percentage.

155.12 Apart from the fact that Bennett failed to disclose the above, the figures for instance for "*Repairs and Maintenance*" were budget figures but once again Bennett graciously omitted to tell the Police in his statement that the figures for the item "*Repairs and Maintenance*" in Annexure B were budget figures and not actual figures. It is also known from his evidence that Bayett never represented to him that the budget amount was the same as the actual amount. As such, the distortion of the truth was malicious and designed to secure an arrest and prosecution.

155.13 In paragraph 15 of his statement Bennett alleged that the turnover was R350 000,00 lower and amounted to R36 259 946,00. What Bennett omitted to tell the Police was that Robinson in the due diligence tested the turnover against the POS system and found the difference between the declared turnover and the turnover as shown on the POS not to be material.

155.14 In paragraph 16 of his statement Bennett alleged that the opening stock as at 1 March 2004 amounted to a value of R1 756 000,00. He failed to inform the Police that at take-over they (Bennett and Wales) in fact agreed to an opening stock for 1 March 2004 to be in the amount of R1 593 208,00. He deliberately used the higher opening stock figure to create a greater distortion of the gross profit percentage.

155.15 In paragraph 16 of his statement, Bennett also referred to a closing stock of R1 593 206,00 and said that figure was in strong contrast with the original figure given to him in October 2004. This allegation is simply false as Bennett and Wales were party to the closing stock take at the end of January 2005 and knew and agreed the figure was R1 436 458,00. In addition, Bennett (and Wales) also knew that there was no closing stock take at the end of August

2004 and therefore there could not have been a closing stock figure in "*strong contrast*". Bennett well knew that the very reason why Robinson could not calculate a gross profit percentage and why the parties agreed to a closing stock at the end of January 2005 was that there was no stock take in October 2004.

155.16 In paragraph 17, Bennett alleged that the purchases were also misrepresented. Apart from the fact that this was not true and that there was no substance in the allegation, he failed to inform the Police once again about the due diligence.

155.17 In paragraph 18 of his statement, Bennett alleged that the cost of packaging material was understated notwithstanding the fact that he well knew at the time that the costs calculation was for a different period and that he calculated the costs for February 2004 to December 2004 and the correct period was March 2004 to January 2005.

155.18 In paragraph 20 of his statement, Bennett said Bayett had guaranteed a gross profit of 21,9%. Apart from the fact that Bennett knew that the gross profit percentage was not guaranteed to be 21,9%, he failed to inform the Police

that he and Wales had in fact subsequently agreed to a gross profit percentage of 21,3% in the Addendum.

155.19 Further in paragraph 20 of his statement Bennett alleged that the nett profit was presented to be R289 151,96 per month without informing the police that Robinson in the due diligence calculated the nett profit to be R240 000,00 per month.

155.20 In paragraph 21 of his statement, Bennett said that Bayett certified the due diligence to be true and correct but he deliberately failed to disclose any further facts including those referred to above under the heading "*Due Diligence*" to the Police.

[156] Bennett and Wales also filed a statement by Yolande Reyneke. This statement is in the same font and style. A reading of the contents thereof makes it clear that it was designed to further their malicious ulterior conduct. When she testified, I had the privilege to observe the absolute poor quality of her evidence and her inability to support facts upon which she initially sought to give evidence.

[157] If Reyneke's evidence and the absolutely poor quality thereof is for instance compared to the contents of her statement, it becomes more than clear that allegations were incorporated in her statement which she could

factually not state. Instances of such inclusions are to be found in the last part of paragraph 4 and in paragraph 13 of her statement and a mere reading of the aforesaid two paragraphs in comparison with her evidence in court, makes it abundantly clear that Reyneke's statement was prepared for her and designed to obtain incriminating evidence which she personally did not have any knowledge of and could not say.

[158] It does not avail Bennett and Wales to have made available a short report of Lomnitz to the Police (Plaintiffs' Bundle 1, page 245). That was rather another deliberate design by Bennett (and Wales). Bennett testified that he (Bennett) was the one who calculated the gross profit percentage to be 19,47%. Lomnitz in his short report made it clear that his report was limited to "*an analysis of certain information … did not constitute an audit and may not necessarily have revealed all material facts*" and that "*this trading account* (was) *prepared by the purchasers …*" (Plaintiffs' Bundle 1, pages 245/6.)

[159] Bennett and Wales did not call Lomnitz as a witness as they appreciated that Lomnitz based his "*report*" on their say so and that Lomnitz did not even do the due diligence. Therefore, they could not risk exposure of the above.

[160] However, it suited them to present the "*report*" to the Police as on the face of it, it would create the impression that their complaints were supported by an auditor.

[161] Bennett and Wales did not leave it to the Police to take their statements and the statement of their witnesses as such investigation by the Police would have unearthed omitted facts and untruths. Instead they employed one Lobo Das Neves to do the "*investigation*". (Pleadings : Further Particulars, paragraph 2 and paragraph 1.2, page 321.)

[162] In addition to all of the above, once the State had withdrawn the charges, Bennett and Wales instructed (and paid) AIN to further the investigation in an attempt to achieve the reinstitution of the prosecution and at their costs caused hundreds of subpoenae to be issued. Ultimately the information obtained as a result of all the subpoenae proved the GRV's as discovered on behalf of Bayett to be correct. (Plaintiffs' Bundle 2, page 601.)

[163] This in my view, further exposes that Bennett and Wales instigated the proceedings with the specific view to procuring the prosecution of Bayett, Thomaz and Fouche and there can be no doubt that such prosecution was a consequence of the misrepresentations, misstatements and omissions in the affidavits of *inter alia* Bennett, Wales and Reyneke.

[164] It is not surprising that Wales did not give evidence as he probably realised that he would not have been able to defend his statement at all.

[166] It is also significant that Bennett and Wales did not seek to call Panyiotou as a witness as they knew that Panyiotou's statement was similarly designed by them to procure and secure a prosecution and more importantly,

they knew that Panyiotou would not be able to substantiate the contents of his statement (as was the case with Reyneke).

[165] It is my considered view and finding that all the deliberate misrepresentations of the truth and flagrant omissions in Bennett's statement (and the statement of Wales) should be viewed cumulatively and as such justify an inescapable inference that the statements were designed to instigate and secure an arrest and prosecution with the ulterior purpose to put pressure on Bayett to pay to them R7,1 million demanded on 13 December 2005.

[166] If ever there was a clear example of a (malicious) instigating of proceedings, this is the case. Furthermore it will in my further view become even more clear when the other requirements for a malicious prosecution are dealt with hereunder.

BENNETT AND WALES ACTED WITHOUT REASONABLE AND PROBABLE CAUSE

[167] LAWSA at paragraph 323 says the following about "*reasonable and probable cause*":

> "*Reasonable and probable cause means an honest belief based on reasonable grounds that the institution of the proceedings complained of was justified.*[1] *There must be sufficient facts known to the defendant from which a reasonable person could have concluded that the plaintiff had committed the offence in question, and a mere honest belief that the facts amount to an offence irrespective of the legal*

requirements is insufficient.[2] The defendant is only expected to have taken reasonable measures to discover the facts upon which he or she bases a conclusion that the plaintiff was guilty of the offence: the defendant need not test all the relevant facts.[3] Though the defendant had an honest belief in the charges where there were no reasonable grounds for that belief, there can be no reasonable and probable cause.[4] Mere honest belief in the truth of the facts upon which the accusation is based is not conclusive of the presence of reasonable and probable cause.[5] There may be absence of reasonable and probable cause irrespective of whether there was an honest belief in the guilt of the accused.[6] If the defendant is found to have acted with reasonable and probable cause an action for malicious prosecution will fail, no matter what his or her motive is for instituting the prosecution.[7] The test of reasonable and probable cause involves both subjective and objective elements.[8] Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his or her belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.[9]"

See: the authorities below that illustrate the various elements of this requirement which I have highlighted with numbers corresponding with the authorities;

1 *Hotz v Shapiro* 1902 CTR 988 992; *William Temple Nourse v The Farmers' Co-operative Co Ltd, Guy Barber Nourse v The Farmers' Co-operative Co Ltd* (1905) 19 EDC 291 316 327; *Waterhouse v Shields* 1924 CPD 155 162; *Madnitsky v Rosenberg* 1949 1 PH J5 (W) 13 14; *May v Union Government* 1954 1 All SA 76 (N); 1953 3 SA 899 (N); 1954 3 SA 120 (N) 129; *Beckenstrater v Rottcher & Theunissen* 1955 1 All SA 146 (A); 1955 1 SA 129 (AD) 135; *Van der Merwe v Strydom* 1967 3 All SA 281 (A); 1967 3 SA 460 (AD) 467; *Prinsloo v Newman* 1975 2 All SA 89 (A); 1975 1 SA 481 (AD) 495 *et seq; Landman v Minister of Police* 1975 2 All SA 76 (E); 1975 2 SA 155 (E) 156; *Ochse v King William's Town Municipality* 1990 2 SA 855 (E) 857; *Mthimkhulu v Minister of Law & Order* 1993 4 All SA 315 (E); 1993 2 SACR 206 (E); 1993 3 SA 432 (E) 439; *Heyns v Venter* 2003 3 All SA 176 (T); 2004 3 SA 200 (T) 211.

2 *Waterhouse v Shields supra* 162 168; *cf Ochse v King William's Town Municipality supra* 858 *et seq*; *Heyns v Venter supra* 211.

3 *Madnitsky v Rosenberg supra 14.*

4 *Pyett v Francis* (1907) 28 NLR 194 200; *cf Heyns v Venter supra* 211.

5 *Fyne v The African Realty Trust Ltd* 1906 EDC 248 256.

6 *Maserowitz v Richmond* 1905 TS 342 344; *Pyett v Francis supra* 199 *et seq.*

7 *Ochse v King William's Town Municipality supra* 857.

8 *Van Noorden v Wiese* (1882) 2 J 43 54; *Fyne v The African Realty Trust Ltd supra* 256; *Banbury v Watson* 1911 CPD 449 460; *Madnitsky v Rosenberg supra* 14; *May v Union Government supra* 129.

[168] Bennett (and Wales) chose to depose to affidavits for purposes of the criminal complaint by not only making false and distorted allegations but also by not disclosing full and fair facts to the police as referred to above. Bennett (and Wales) also omitted material facts in their respective statements as stated above.

[169] There can be no doubt that Bennett and Wales did not have reasonable and probable cause to believe, based on reasonable grounds, that the institution of the proceedings complained of was justified. In fact Davis conceded that there was no substance in the criminal complaint.

[170] That concession by Davis was unavoidable as it was plain, simple and logical that:

170.1 the gross profit percentage was never guaranteed;

170.2 the nett profit was never guaranteed; and

170.3 the correctness of Annexure B and the expenses therein was never guaranteed.

[171] On the contrary, the Agreement made it clear that Annexure B dealing with turnover, gross profit percentage and expenses had to be verified and Bennett and Wales opted to do that verification by means of a due diligence.

[172] Bennett and Wales were at the time experienced and astute businessmen and Bennett conceded in evidence that the contractual terms were not foreign to him.

[173] As such there can be no question that Bennett and Wales knew that they did not have reasonable or probable cause to institute the criminal proceedings but as stated above, criminal proceedings were instituted for an ulterior purpose. That also explains why they did not institute civil proceedings.

[174] Their unwillingness to allow Nowitz to first further investigate and verify their allegations and their unwillingness to first agree to a forensic audit before instituting criminal proceedings further corroborates not only their absence of reasonable cause but indeed the objective absence of reasonable and probable cause.

THAT BENNETT AND WALES ACTED WITH MALICE (OR *ANIMO INIURIANDI*)

[175] LAWSA at 321 states the following about the meaning of "*animus iniuriandi*" in this context;

> "*An action for malicious prosecution lies under the actio iniuriarum and the element of animus iniuriandi is therefore a requirement.*[1] *Apart from the other elements, the plaintiff must prove that the defendant had the necessary animus iniuriandi.*[2] *Animus iniuriandi includes not only the intention to injure but also consciousness of wrongfulness,*[3] *and is distinguishable from improper motive or malice.*[4] *Malice is the actuating impulse preceding intention.*[5] *A person who lays a criminal complaint against another intends to injure him or her. The complaint's act, however, is lawful, provided he or she had reasonable and probable cause for laying the charge and was not actuated by malice. Proof of animus iniuriandi satisfies the fault element, but the defendant's act will not be wrongful unless he or she abused the right to lay a complaint with the police by acting without reasonable and probable cause and out of malice.*
>
> See the authorities hereunder substantiating the numerical digit accentuated above;
>
> 1 *Prinsloo v Newman* 1975 2 All SA 889 (A); 1975 1 SA 481 (AD) 492: "*In actions of this nature the plaintiff's remedy is provided under the action injuriarum, from which it follows that what has to be alleged and established is animus injuriandi.*" *Cf Lederman v Moharal Investments (Pty) Ltd* 1969 1 All SA 297 (A); 1969 1 SA 190 (AD) 196; *Ramakulukusha v Commander, Venda National Force* 1989 3 All SA 140 (V); 1989 2 SA 813 (V) 837; *Ochse v King William's Town Municipality* 1990 2 SA 855 (E) 857; *Heyns v Venter* 2003 3 All SA 176 (T); 2004 3 SA 200 (T) 208; *Amerasinghe Aspects of Actio Injuriarum 6.*
>
> 2 *Prinsloo v Newman supra* 492; *Moaki v Reckitt & Colman (Africa) Ltd* 1968 3 All SA 242 (A); 1968 3 SA 98 (AD) 105. See titles DEFAMATION; DELICT; PERSONALITY INFRINGEMENT.

3 *Maisel v Van Naeren* 1960 4 All SA 447 (C); 1960 4 SA 836 (C) 840 850 *et seq; Smit v Meyerton Outfitters* 1971 1 All SA 102 (T); 1971 1 SA 137 (T) 139; *SA Uitsaaikorporasie v O'Malley* 1977 3 All SA 631 (A); 1977 3 SA 394 (AD) 403; *Ramsay v Minister van Polisie* 1981 4 All SA 692 (AD); 1981 4 SA 802 (AD) 818-819; *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 All SA 411 (A); 1989 1 SA 390 (AD) 396; *Minister of Justice v Hofmeyr* 1993 2 All SA 232 (A); 1993 3 SA 131 (AD) 154.

4 *Basner v Trigger* 1946 AD 83 95; *Moaki v Reckitt & Colman (Africa) Ltd supra* 104; *SA Uitsaaikorporasie v O'Malley supra* 405.

5 *Gluckman v Schneider* 1936 AD 151 159. See par 322 *post*.

[176] The deliberate omissions and false statements in Bennett and Wales' respective statements as stated above without a doubt justify the probable inference that they acted with malice.

[177] In addition, the following acts by Bennett and Wales in my considered view corroborate that they acted with malice:

177.1 Bennett and Wales prepared statements for the criminal complaints without first meeting with Bayett.

177.2 Bennett and Wales took over the business and were unable to achieve the gross profit percentage due to theft of stock, (R650 000) their non-involvement in the operations of the business and the fact that their manager, Panyiotou, rather focussed on his own businesses Instead of seeking the advice of Bayett or at least explanations from Bayett, Thomaz and Fouche on the way

foward, they chose to blame Bayett. This behaviour together with their conduct at the meetings on 13 December 2005 demonstrates they had no real intention of settling the matter through genuine discussions, but rather they chose to abuse the criminal justice system to further their own agenda.

177.3 When Bennett and Wales attended the pre-meeting with Nowitz on 13 December 2005, Nowitz understandably could not get a full understanding of the facts in that short period.

177.4 Nowitz was of the view that if Bennett was correct then he could investigate it from his (Nowitz's) side and verify what the position was.

177.5 Bennett and Wales did not follow the advice but wanted R7,1 million repayment or else they would proceed with the criminal charges. This is clear from Kahn's evidence and more importantly from his letter addressed to Nowitz on 20 December 2005 which was addressed shortly after thatmeeting.

177.6 Nowitz in his reply to the said letter (in February 2006) did not deny the correctness of the allegations made by Kahn in the letter. It would have been very easy for Nowitz to deny the allegations as he (Nowitz) was privy to the meeting and to a large extent did not need instructions from Bennett and Wales to

determine whether or not the facts therein stated were true or not.

177.7 It was put by Levin SC in cross-examination to Kahn that Nowitz did not want to get embroiled in an exchange of correspondence in the matter that was pending and which he was involved in. (Transcript, page 434.) This simply cannot be correct. Nowitz was at the meeting and he in any event responded to the letter but in his response he did not deny the allegations made by Kahn.

[178] It is respectfully submitted that Kahn's evidence and the contents of his letter of 20 December 2005 should be accepted on a balance of probabilities as the correct version. That being so, the purpose of the meeting was to demand payment of R7,1 million from the first plaintiff failing which Bennett and Wales would proceed with a criminal complaint. This unavoidable inference is also compatible with what was put to Kahn by Levin SC at Transcript, page 428, where the following was put:

> "*Now you and he go out of this meeting, just you and he and he (Nowitz) repeated to you that to resolve the matter, let your client tell you whether the complaints are wrong or whether he admits them. To the extent that he admits them, the matter could be resolved and if not, well then the matter would have to follow its course …*"

[179] Bennett in his evidence conceded that he wanted repayment of the amount of R7,1 million. He did not institute civil proceedings for the amount

but rather used the criminal justice system because, according to him, he paid his taxes. (Transcript, pages 1182-5.) It is my considered view that the above response is in the circumstances that prevailed, not only arrogant but condescending.

[180] He also admitted that when the matter was not resolved, they proceeded with the criminal complaint on 15 December which was merely two days later.

[181] Bennett admitted in cross-examination that the defendants' plea in paragraph 4.3.3 was wrong where it was pleaded that Bennett and Wales would have proceeded with the criminal action whether or not settlement was reached at the meeting of 13 December 2004. The plea in this regard was obviously false and it was falsely pleaded in an attempt to avoid any assertion or admission of extortion.

[182] The objective facts in my further view, show that Bennett and Wales were wrong in their calculations and even more wrong in the demand for R7,1 million. The evidence as a whole shows that Bennett and Wales chose to manipulate the facts to ensure a prosecution with the purpose of putting pressure on Bayett to meet their outrageous demand.

[183] Bennett and Wales could never have genuinely or *bona fide* believed that they were entitled to request payment of the amount of R7,1 million

thereby in effect purchasing a business at a price approximately half its agreed unencumbered asset value.

[184] At the time they purchased the business, the goodwill of the business was approximately R5,5 million and the agreed unencumbered asset value was about R3,6 million (in order to make up the purchase price of R9,1 million).

[185] Bennett and Wales did not impair the goodwill in 2005/2006 and 2006/2007 financial statements of Full Swing and as such the probable inference is that they accepted the goodwill or value of the business as it was in 2004. This is apart from the agreed unencumbered asset value.

[186] In claiming R7,1 million they erased all the accepted goodwill and nearly halved the agreed unencumbered value of the assets. This makes it clear that the demand for R7,1 million could not have been *bona fide* apart from the fact t hat it was objectively proved to be wrong.

[187] This, in my view, explains the need to try and enforce payment of the wrong amount by putting pressure on Bayett by threatening him with criminal proceedings.

[188] The *mala fide* and malicious conduct by Bennett and Wales further comes to the force by the fact that they ignored the advice of Nowitz to allow

him to further investigate and verify their allegations and their failure to proceed with civil proceedings. They also ignored the request for the appointment of a forensic auditor before laying criminal charges.

[189] Bennett tried to explain this by saying that he paid tax and the inescapable inference in that is that he believed that he was entitled to abuse the criminal justice system to pressurise Bayett to succumb to his unjustified demand.

[190] It is also significant that:

190.1 Bennett knew that the State was under pressure in terms of funding (i.e. to appoint a forensic auditor); and

190.2 Bennett believed that because he paid tax in the country that the criminal complaint and thus the police would do his job for him.

[191] Therefore it was not necessary for Bennett to institute civil proceedings as the criminal justice system would have resolved the disputes and if necessary he could have thereafter instituted civil proceedings.

[192] Bennett knew that the State did not have the necessary funds and consequently he knew that they would not investigate the matter with the luxury of a forensic auditor. This turned out to be an objective fact. Bennett and Wales therefore knew that by using strong language (as they did) their

statements would have sufficient persuasive value to cause Bayett and the others to be charged and prosecuted.

[193] The prosecution at some point in time realised the lack of merit and withdrew the matter. Such a withdrawal came as no surprise as it is an objective fact that there were no merits in the prosecution. This was also admitted by Davis.

[194] Factually Bennett and Wales only resorted to civil proceedings in the form of a counterclaim after they had received the summons for malicious prosecution.

[195] It also comes as no surprise that Bennett and Wales allowed or caused their expert Davis to resort to inappropriate legal conclusions in his expert report (which is unheard of) such as:

> "*8.1.1 The seller knowingly and intentionally misrepresented to the purchasers the facts pertaining to the business as purchased by the purchasers.*
>
> *8.1.2 The seller manipulated the financial affairs …*"

> "*8.1.5 … to cancel the information which supported his wrongful and intentional misstating of the financial affairs of the Melville Spar.*"
>
> .

> "*… there were misrepresentations, the gross profitability and level of monthly expenses is incorrect and was wilfully misrepresented by the sellers.*"

"*8.1.4 … monthly expenses were incorrect and wilfully misrepresented …*

8.1.5 The net profitability as stated by the seller was accordingly also wilfully misrepresented …"

Expert Bundle, Volume 2, page 346-348.

[196] The malice becomes further evident in regard to the alleged VAT manipulation (premised on Bennett's version):

196.1 Bennett chose not to play open cards with the Police by not telling them about his knowledge of the alleged VAT manipulation. This is apart from the fact that Bennett and Wales were prepared to proceed with the purchase of the business after hearing about the skimming and the alleged VAT manipulation.

196.2 The law is clear they had the right to resile from the Agreement if those facts (i.e. the skimming and the alleged VAT manipulation) came to their knowledge even after the Agreement.

[197] The contrary is true, even assuming that Bennett was correct in his evidence that Bayett did not only tell him about the skimming but also about the VAT manipulation, Bennett and Wales with the full knowledge of the

disclosure opted not to cancel the Agreement or to claim damages but elected rather to proceed with the Agreement. However, they deliberately did not share this crucial information with the Police under the guise that Bennett thought it was irrelevant or that he purportedly did not understand the significance thereof.

[198] It is clear that Bennett and Wales knew that if they put correct facts and all the facts in their criminal statements that there could not and would not have been a prosecution. They therefore resorted to the twisting of facts, the telling of untruths and the deliberate omission of crucial facts as referred to above.

[199] As such the malice and the motive for the malice is patent. See Baker v *Christiani (supra)*.

[200] In *Heyns v Venter* 2004 (3) SA 200 (T) the court went even so far as to state the following *inter alia* in the headnote:

> "*Held, further, that within the context of the actio iniuriarum 'malice' meant animus iniuriandi or intent. The existence of a malicious motive could, however, show intent and whether the person in question had acted unlawfully. (Paragraph [12] at 208F.)*
>
> *Held, further, as to the requirement of knowledge of unlawfulness, that the Courts were constitutionally obliged to develop the common law in order to bring it in line with the spirit, purport and objects of the Bill of Rights. The dignity of a person could be unreasonably impaired if defendants were permitted to raise a defence of absence of knowledge of unlawfulness in cases of malicious prosecution. In view of the constitutional protection of human dignity, the ambit of the delict of malicious prosecution had to be extended: if it was clear that a defendant had as a result of gross negligence thought that an act*

constituted a crime and had instigated a charge, he should not be allowed to raise as a defence that he was unaware that it was not a crime. To ensure that this development did not go too far, gross negligence had to be required. (Paragraph [14] at A 209C-D and G-H.)

Held, further, that since the sale of a res aliena was permitted in law, there was no reasonable cause for the plaintiff's prosecution. (Paragraph [16] at 211D-E.) The defendant's attitude that such conduct was a crime accordingly constituted a material misconception of the law. (Paragraph [17] at 211H/I.)

Held, further, that the defendant had instigated the charge by actively associating with the prosecution of the plaintiff. Prosecution would not have ensued had it not been for defendant's unreasonable conduct, and accordingly the defendant's conduct was factually connected to the ensuing result. His conduct was for purposes of legal policy also sufficiently connected to such conduct to constitute legal causation. (Paragraph [18] at 211I-212B.)

Held, further, that animus iniuriandi was present when there was insight into the material facts of the delict coupled to a realisation that the conduct was unlawful. In the present case the defendant had complied with the animus iniuriandi requirement as he ought to have realised that one was entitled to sell the property of another and that this did not constitute either theft or fraud. He was a businessman in the motor industry and in that capacity a higher level of knowledge could be expected of him. He should have known that the plaintiff's conduct was at most breach of contract. (Paragraphs [20]-[21] at 212E/F-G.)

Held, further, that general damages had to be awarded for the indignity suffered by the plaintiff, as well as for his legal costs and loss of earnings for six months. (Paragraphs [23]-[25] at 212J-214B.)"

THAT THE PROSECUTION HAS FAILED

[201] It is common cause that on 30 March 2007 the State withdrew the charge against Bayett, Thomaz and Fouche.

[202] During this trial it seems that an attempt was made to suggest that the withdrawal was provisional and thereby to suggest that the action for malicious prosecution was premature. However, Bennett and Wales did not present any evidence that the withdrawal was provisional but for the fact that through AIN they have unsuccessfully attempted to revive the criminal proceedings after its withdrawal. The withdrawal occurred on 30 March 2007 more than 3½ years ago and thus is inconsistent with a "*provisional*" withdrawal.

[203] In *Lemue v Zwartbooi* (1896) 13 SC 403 at 405, De Villiers CJ said the following in this regard:

> "*For the first time the question has been raised in this court whether, in an action for malicious prosecution, the refusal of the Attorney-General or Solicitor-General to prosecute constitutes sufficient proof of a termination of the prosecution in the Plaintiff's favour. It has been urged on behalf of the Defendant that such refusal is equivalent to a nolli prosequi which, according to the English law, has been held not to terminate the prosecution. Considering, however, the wide difference between the functions of the Attorney-General, as well as the systems of criminal prosecution in the two countries, the English precedent cannot be regarded as binding her.*"

And further at page 406:

> "*In this country the public prosecutor really performs the functions of a grand jury in addition to his other duties. He indicts where the preliminary examination discloses a prima facie case against the accused, but he declines to prosecute it there is no reasonable prospect of a conviction by an impartial jury. This refusal to prosecute does not operate as res judicata so as to prevent a future prosecution for the offence charged, for it has been held that the Attorney-General*

> *may indict in the case where the Solicitor-General has declined to prosecute (which is not the position at present) and the private party who has suffered injury by any crime or offence may, subject to the restrictions mentioned in Ordinance No. 40 prosecute (private prosecution now provided for in the Criminal Procedure Act where the public prosecutor has declined to prosecute) But so far as the original proceedings are concerned, they are terminated by the public prosecutor's refusal to prosecute. This view has been taken for granted in numerous actions for malicious prosecution which have been brought in this court.*"

And further at 407:

> "*While a prosecution is actually pending its results cannot be allowed to be pre-judged by the civil action, but as soon as the Attorney-General, in the exercise of his quasi judicial function, has decided not to prosecute, there is sufficient termination of the original proceedings to allow of the civil action being tried. A different view of the law would lead to the extraordinary result that the clearer the proof of a person's innocence is, the greater difficulty would he have in obtaining damages for false and unfounded charges maliciously made against him. On the other hand, the law, as I have stated it to be, need not lead to any hardship on the Defendant in an action for malicious prosecution. If, after the Solicitor-General has refused to prosecute, there is a reasonable possibility that the Attorney-General will prosecute or an undertaking by the Defendant himself to prosecute without delay, it would be quite competent for the court to postpone the civil trial until after the verdict in the fresh criminal proceedings. In the present case there was no suggestion that the Attorney-General was likely to prosecute the Plaintiff for perjury, or that the Defendant himself intends to institute a private prosecution for that offence.*"

[204] In addition to the above, it is simply not possible for the criminal charge as it stood at the time to be reinstituted. Davis as stated before, agreed there was no substance in the criminal charge and that concession is in accordance with the views expressed also by Greyling and Thomaz that Bayett did not falsely represent the gross profit percentage. Bennett and Wales, through

Davis, at some point in time tried to introduce an alleged VAT manipulation to demonstrate that the gross profit percentage was less than represented but those efforts also came to nothing and as stated before Davis correctly conceded that his approach to the calculations of the alleged VAT manipulation constituted a problem. In any event, this is irrelevant as the alleged VAT manipulations did not form part of the criminal complaint. It is thus my considered view and finding that in the peculiar circumstances in this case the prosecution can and is being regarded as having failed.

DAMAGES

[205] It is not in dispute that Bayett, Thomaz and Fouche were arrested on 26 June 2006.

[206] It is not in dispute that they appeared in court on 31 August 2006, 2 October 2006, 23 November 2006, 28 November 2006, 9 January 2007 and 30 March 2007 on which date the charge was withdrawn.

[207] It is also not in dispute that the legal costs incurred by Bayett in defending the criminal matter amounted to R1 154 541,80.

[208] Bayett also claims general damages for *contumelia* as a consequence of the malicious prosecution in the amount of R500 000,00.

[209] It is my considered view and finding that the separate Claim A for R100 000,00 should rather be included in the consideration of the claim for general damages on account of the malicious prosecution.

[210] Thomaz claims general damages in the amount of R400 000,00 and Fouche claims general damages in the amount of R100 000,00.

[211] A factor that must be taken into account in assessing the amount for general damages to be awarded to the plaintiffs is the fact that notwithstanding the withdrawal of the matter, Bennett and Wales still tried to revive the matter to further a malicious prosecution in order to try and avoid the action instituted against them. They in fact went so far to institute a counterclaim to try and avoid the action against them.

[212] Moreover until this day, they have not taken any steps to apologise to any of the plaintiffs even at the point where it became clear in this trial that there was no merit in the criminal charges.

[213] What is further aggravating as far as Bayett is concerned, is the fact that Bennett and Wales knew Bayett and they moved in the same social circles and their children attended the same school. Bennett and Wales did not care as their ulterior purpose overshadowed expected moral, social and legal decency.

[214] In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) an amount of R90 000,00 was awarded for general damages. In that matter Seymour was detained for 5 days although the majority of the detention time was in a hospital bed. Seymour also only appeared once in court.

[215] In this matter the plaintiffs Bayett and Thomaz appeared in leg irons in the criminal court and had to appear many more times which caused huge embarrassment and humiliation to them. The evidence of Bayett, Thomaz and Fouche in regard to their embarrassment, *contumelia* and humiliation was not disputed. In respect of Thomaz and Fouche it must be borne in mind that they had no interest in the sale but they were dragged in to pressurise Bayett.

CONCLUSION

[216] After listening to the entirety of the evidence led in this matter and having taken into consideration counsels' closing argument, it is my considered view and finding that the plaintiffs have succeeded in making out a case for the grant of the orders sought in the particulars of claim. What remains to be undertaken is what quantum of damages to award to or in favour of the plaintiffs.

[217] The *modus operandum* of the defendants and their purported intentions have come out clearly out of the evidence that had been led.

[218] It is clear in my view, that the defendants either misconstrued the facts themselves or they were ill-advised about the state of affairs and circumstances surrounding the sale of Melville Spar. This became apparent when the defendants' expert, Davis, testified. He practically refuted and negated whatever assertions the defendants were projecting as the foundations of their case against the plaintiffs. He conceded that the basis of his report was wrong, mostly agreeing with or confirming what Bayett and his experts testified about. These concessions eroded the very foundations of the defendants' defence to the claims as well as de-legitimise the framework of their counterclaim.

[219] The defendants' counterclaim consequently fall to be dismissed with costs.

[220] The plaintiffs thus succeed with their claims against the defendants.

ORDER

[221] The following order is thus made:

221.1 In respect of Bayett (first plaintiff)

221.1.1 The defendants are ordered to pay to Bayett the amount of R1 154 501,80 as special damages for legal costs he incurred defending and prosecuting this action;

221.1.2 The defendants to pay to Bayett the amount of R200 000,00 as general damages;

221.1.3 Interest *a tempore morae* at the rate of 15,5% per annum calculated on the amount of R1 154 501,80 from 30 March 2007 until date of payment;

221.1.4 Interest *a tempore morae* on the amount of R200 000,00 awarded as general damages from date of issue of summons herein until date of payment;

221.1.5 First defendant (Bennett) and the second defendant (Wales) are further ordered to pay the above amounts and the costs jointly and severally, the one paying, the other being absolved.

221.2 <u>In respect of Thomaz (second plaintiff)</u>

221.2.1 The defendants are ordered to pay to the second plaintiff (Thomaz) the amount of R120 000,00 being general damages;

221.2.2 They are also to pay interest on the above amount at the rate of 15,5% per annum *a tempore morae*, payable from the date of service of summons until date of payment;

221.2.3 Costs of suit, jointly and severally, the one paying, the other being absolved.

221.3 In respect of Fouche (third plaintiff)

221.3.1 The defendants are ordered to pay to the third plaintiff the amount of R80 000,00 as general damages;

221.3.2 Interest on the above amount at the rate of 15,5% per annum *a tempore morae* payable from the date of service of summons until date of payment;

221.3.3 Costs of suit, jointly and severally, the one paying, the other being absolved.

N G KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE PLAINTIFFS	ADV BARRY ROUX SC
INSTRUCTED BY	EVERSHEDS SCHREINER CHAMBERS, JOHANNESBURG TEL NO: 011 – 523 6088
FOR THE DEFENDANTS	ADV LEVIN
INSTRUCTED BY	NOWITZ ATTORNEYS HYDE PARK JOHANNESBURG TEL NO: 011 – 325 5300
DATE OF FINAL ARGUMENT	22 NOVEMBER 2010
DATE OF JUDGMENT	17 FEBRUARY 2012