



NOT REPORTABLE

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

CASE NO. 11199/2013

BUSINESS PARTNERS LIMITED

PLAINTIFF

and

BOLD MOVES 277 (PTY) LIMITED

FIRST DEFENDANT

TYSON TRADING CC

SECOND DEFENDANT

DEBORAH JANE ROWE

THIRD DEFENDANT

LYNNE COLLEEN SCHWAN

FOURTH DEFENDANT

JUDGMENT

Delivered on 19 September 2016

MOODLEY J:

[1] The plaintiff, Business Partners Limited ('Business Partners'), a duly incorporated and registered company with limited liability which carries on business as a lender of money, granted the principal debtor, Bold Moves 277 (Pty) Ltd ('Bold Moves'), a loan of R1 949 970 on terms set out in a loan agreement, which Bold Moves accepted on 23 June 2008.

[2] Security for the repayment of the loan by Bold Moves comprised suretyships provided by Tyson Trading CC, Deborah Jane Rowe and Lynne Colleen Schwan, and a special notarial bond registered by Bold Moves and two surety bonds registered by Ms Rowe and Ms Schwan over their respective immovable properties, in favour of Business Partners.

[3] In October 2013, Business Partners instituted action against Bold Moves and its sureties, its cause of action being the failure of Bold Moves to repay the loan in accordance with the terms of the loan agreement, and sought judgment against the defendants for payment, jointly and severally in the amount of R1 485 511.69, interest and costs and an order enabling execution against the immovable and movable property mortgaged by the defendants as security.

[4] The proceedings against Bold Moves, Tyson Trading and Deborah Rowe, the first, second and third defendants respectively, were finalised when judgment by default was granted against them.

[5] The trial therefore proceeded only against the fourth defendant, Ms Schwan. Business Partners persisted with the monetary relief sought in the summons and an order declaring Ms Schwan's mortgaged immovable property specially executable.

[6] The terms of the loan agreement, suretyships and mortgage bonds are not in dispute, rendering the repetition of the material terms superfluous. Ms Schwan put Business Partners to the proof of the failure of Bold Moves to pay the loan in accordance with the terms and conditions of the loan agreement and pleaded further that:

‘2.

2.1 During or on or about the first week of June 2008 and at Westville the Plaintiff and the Fourth Defendant, with the consent of the First and Third Respondents, concluded an oral agreement in terms of which the Fourth Defendant would provide the First Surety Bond and Deed of Suretyship referred to in paragraphs 8.1.2 and 8.1.4 of the loan agreement subject to the Plaintiff:

2.1.1 Carrying out a Due Diligence Audit, investigation and report (“Due Diligence”) on the financial affairs of the First Defendant;

2.1.2 concluding from the report and advising the Fourth Defendant that the business of the First Defendant was a sound one and one well capable of repaying the loan sought by the First Defendant.

2.2 In concluding the aforesaid agreement the Plaintiff was represented by Jason Doig (Doig”) and the Fourth Defendant acted in person;

2.3 The Plaintiff, First Defendant and the Third Defendant agreed to the condition imposed by the Fourth Defendant.

3.

Thereafter and on the 23 June 2013 and at Westville the Plaintiff represented to the Fourth Defendant that:

3.1 it has carried out its Due Diligence; and

3.2 the business was a sound one and one in respect of which the Fourth Defendant could safely:

3.2.1 conclude the First Surety Bond and Deed of Suretyship; and

3.2.2 take up a 30% shareholding in the First Defendant as security for her obligations to the Plaintiff.

4.

4.1 Pursuant to the representations referred to in paragraphs 2 and 3 above the Plaintiff granted the Second Defendant a loan in an amount approximately R 1 949 970.00

4.2 included in the loan was a fee charged by the Plaintiff for the Due Diligence, which included a “mentorship” fee, in a total sum of R13, 623.00

5.

5.1 in making representations referred to in paragraph 3 above:

5.1.1 The Plaintiff was represented by Doig and the Fourth Defendant acted in person.

5.1.2 Doing knew them to be false in that no Due Diligence had been carried out; and

5.1.3 the business contemplated by the First Defendant was not a viable one and the First Defendant was not in a position to meet its obligations under the loan Agreement.

In the alternative to paragraph 5.1 above

5.2 in the event that a Due Diligence was carried out it was carried out negligently and under circumstances where the Plaintiff owed the Fourth Defendant a duty of care, for those reasons outlined in paragraphs 2 and 3 above.

6.

In consequence of the misrepresentations made by the Plaintiff and in accepting the truth thereof the Fourth Defendant was induced to:

6.1 provide the Plaintiff with the First Surety Bond over her immovable property;

6.2 conclude the deed of Suretyship; and

6.3 take up a 30% shareholding in the First Defendant as security for her obligations to the Plaintiff.

7.

Had the Fourth Defendant known that the Due Diligence had not been carried out or that the business of the First Defendant was not a viable one or that the First Defendant was not in a position to meet its obligations under the loan agreement she would not have concluded the First Surety Bond and the Deed of Suretyship.

8.

For the reason of the fraudulent, alternatively negligent, misrepresentations aforesaid the loan agreement together with the First Surety Bond and the Deed of Suretyship are void ab initio, alternatively fall to be declared null and void.'

[7] Ms Schwan subsequently alleged that the Business Partners representative referred to in her plea was not Jason Doig but Sudhir Sahadeo ('Mr Sahadeo'), who was employed by Business Partners as Portfolio Manager. She sought an order declaring the loan agreement, the First Surety Bond and the Deed of Suretyship executed by her null and void, and dismissing Business Partners action with costs on an attorney and own client scale.

[8] It was common cause that in 2006 Business Partners advanced Tyson Trading a loan of R 2 400 000 to purchase a franchise business, the Bangkok Wok restaurant in Hillcrest ('the business'), from the franchisor and concluded a 'Royalty Agreement'; and that to facilitate the first loan Ms Rowe and Ms Schwan signed suretyships and registered surety bonds over their respective immovable properties.

[9] It was also not in dispute that in 2008 a Risk Partner facility was negotiated whereby Bold Moves became the new debtor. Business Partners loaned the new entity, Bold Moves, R1 950 000. R1 800 000 of the loan was applied to settling the existing facility of Tyson Trading. The Royalty Agreement was cancelled and replaced with a Shareholder's Agreement, and Business Partners acquired a 30% shareholding in the business. Both Ms Rowe and Ms Schwan again furnished security by way of suretyships and security bonds over their immovable properties.

Onus

[10] Business Partners bore the onus in respect of the breach of the loan agreement by Bold Moves, and the balance due.

[11] In order to succeed with her defence and claim in reconvention, Ms Schwan was required to establish:

1. the oral agreement and the representations alleged by her;
2. that these representations were material¹ and wrong and intended to induce her to act on them;
3. that the misrepresentations were made fraudulently or negligently;
4. the misrepresentations induced her to sign the surety and mortgage documents, and that the loan agreement, first surety bond and /or deed of suretyship are void *ab initio*;²
5. the misrepresentations were the cause both, factually and legally, of the loss suffered by the Fourth Defendant; the Defendant; and
6. the extent of the damages suffered.³

Business Partners' Claim

[12] Business Partners called one witness to prove its claim. Mr Alick Rajkaran, a Senior Credit Controller in the employ of Business Partners, confirmed the details and the transaction history of the loan account for Bold Moves, as reflected in his certificate in terms of s 15(4) of the Electronic Communications and Transactions Act No 25 of 2002.⁴ He testified that Bold Moves had made poor and erratic payments in

¹ *Jones v Mazza & another* 1973 (1) SA 570 (R) at 573H: '...a representation need not relate only to the quality or suitability of the subject-matter of a contract to maintain an action based on fraudulent misrepresentation. It is a representation if it materially concerns or is associated with some aspect or circumstance of a proposed contract.'

² *Feinstein v Niggli & another* 1981 (2) SA 684 (A) at 695B-C: 'Now a representation, in order to found a cause of action for rescinding a contract for fraud, must relate to a matter of present or past fact. Hence, a statement of opinion about the future prospects of a business may for that reason not amount *per se* to an actionable representation if it turns out to be wrong.' Ms Schwan must therefore prove that the representations were intended to and did induce her to sign the suretyship and bond.

³ *mCubed International (Pty) Ltd & another v Singer & others* NNO 2009 (4) SA 471 (SCA).

⁴ Exhibit A2 pages 135- 143. The name of Bold Moves is incorrectly stated as Bold Moves 377 (Pty) Ltd.

amounts lower than the due instalment. The final payment by Bold Moves was R8 000 on 19 February 2013 and the payments from 31 January 2014 onwards were received from the proceeds of the sale of Ms Rowe's immovable property. Mr Rajkaran confirmed that the balances as reflected at the end of the transaction history, and on the 'certificates of outstanding balance' dated the 24 August 2016 viz R 1 371 597.55 and dated 7 October 2013 viz R 1 485 511.69 were correct.⁵

[13] Under cross-examination Mr Rajkaran clarified that he was only involved with the loan account after the loan had been advanced and was not part of the preceding negotiations. The balances and transaction history were not disputed.

Ms Schwan's case

[14] Ms Schwan testified that when Tyson Trading (of which she was not a member) applied for a loan from Business Partners to buy the business, she signed the suretyship to enable her erstwhile partner, Ms Rowe, to provide security for the loan. She herself knew nothing about the restaurant business and 'had never been involved in the business'.

[15] According to Ms Schwan, the previous owner of the business had overstated the monthly turnover by including tips to the value of R 40 000. Tyson Trading therefore ran into financial difficulty and defaulted with the payments due to Business Partners within five to six months of being granted the loan. Ms Rowe worked overseas in 2008 to ease the financial constraints, put money back into the business and paid the suppliers, which lent the impetus to her approach to Business Partners to renegotiate the agreement. When the loan was restructured in the name of Bold Moves, Tyson Trading 'disappeared'.⁶

[16] Ms Schwan admitted that it was mainly Ms Rowe who dealt with the three signatories to the Investment Proposal;⁷ she had limited dealings with them. But she disputed that the business had 'an excellent repayment record' or was 'trading profitably' as reflected in the Investment Proposal, and alleged that the Chief Operating Officer and Mr Sahadeo were aware to the contrary.

⁵ Exhibits C and D respectively.

⁶ Tyson Trading also signed a deed of suretyship and bound itself as surety for and co-principal debtor with Bold Moves in respect of the loan.

⁷ Exhibit A1 pages 1-15.

[17] Further, 'according to her knowledge' Business Partners had not asked for financial statements and no VAT and bank statements were furnished to Business Partners, as listed in the Due Diligence summary of credit checks (clause 8) in the Investment Proposal, and the valuation of the business was provided by the previous owner.

[18] Ms Schwan testified that she had spoken to Mr Sahadeo about the Due Diligence which was supposed to have been done on both Tyson Trading and Bold Moves. She denied that the Due Diligence investigation was conducted on Tyson Trading although the defendants had paid for it. She and Ms Rowe had discussed the Due Diligence with Mr Sahadeo and requested the Due Diligence report from him per email and telephonically, prior to the signing of the loan agreement by Bold Moves, but did not receive the report despite numerous promises. She was however advised by Mr Sahadeo that it was viable to refinance the business and that the Due Diligence, for which they paid R50 000, had been conducted. She would otherwise have not signed the Deed of Suretyship or mortgage bond.

[19] Although Ms Schwan testified that she knew nothing about the restaurant business and had never been involved in the Bangkok Wok business, she was not uneducated; her work experience included employment with a bond originator and as an estate agent and she had knowledge of financial management, albeit limited, as she reluctantly admitted under cross-examination. The impression she attempted to create was that her involvement with the business was remote and minimal, even when she admitted that she 'supervised' the business when Ms Rowe was overseas, while the Manager was responsible for the day to day running of the business. However her evidence was contradicted by Mr Sahadeo, who stated that Ms Schwan's involvement and level of expertise was reflected in her *curriculum vitae* which had been provided to Business Partners, who was informed that she was the person responsible for the financial management of the business and he personally had observed her direct involvement in the business.

[20] Ms Schwan confirmed that she had an interest in the viability of the business because she had mortgaged her house as security and that when Tyson Trading defaulted, Business Partners would have foreclosed on her home, but she denied any involvement or participation in the running of the business as she 'did not have a

huge interest in it' and was running another business at the time. Nevertheless she disputed that the business had 'an excellent repayment record' or was 'trading profitably' while admitting that the statement on page 4 of the Investment Proposal that Business Partners 'will be investing in a successful franchise' was correct, and that the restructured loan eased the cash flow albeit 'slightly'.

[21] Although Ms Schwan testified that Tyson Trading ran into trouble in 2006 and Ms Rowe went overseas to work in 2008,⁸ she was unable to explain how the business survived for two years before the restructuring in June 2008, especially if there was a shortfall in the turnover of a minimum of R40 000 per month. The probabilities, in my view, favour Mr Sahadeo's evidence that Ms Rowe was disappointed with the profits because the business was not as lucrative as she had anticipated, but the business was trading profitably and had an excellent payment record, as evinced by the Due Diligence investigation.

[22] In attempting to distance herself from the operation of the business, Ms Schwan testified under cross-examination that she did not have recourse to the 'printouts' of the daily takings, as a result of which she was compelled to concede that her evidence about the turnover being inflated by the previous owner was based on what Ms Rowe told her and she had herself not ascertained any shortfall. She also conceded that her evidence related to the transaction involving Tyson Trading and not Bold Moves.

[23] Ms Schwan testified that she had spoken to Mr Sahadeo about the Due Diligence which was supposed to have been done on both Tyson Trading and Bold Moves. But Tyson Trading was the existing juristic entity which was trading, not Bold Moves, which was a new company which was to take over the business; so a Due Diligence on Bold Moves would have been unfeasible. Ms Schwan admitted that she had not requested for a Due Diligence to be done for her.

[24] It was apparent that Ms Schwan's evidence that the credit checks were not conducted in accordance with the Due Diligence summary (clause 8) in the Investment Proposal by Business Partners was unfounded. Ms Schwan was not an impressive witness. Her lack of confidence arose from her inability to substantiate

⁸ The Investment Proposal indicates that 'from 2006 to date' Ms Rowe was employed by Bangkok Wok.

her allegations. Her evidence as a whole lacked credibility, which is demonstrated further in the following evaluation of her defence and counterclaim.

[25] In rebuttal of Ms Schwan's defence and counterclaim, Business Partners called one witness, Mr Sahadeo, who is currently an Area Manager, but was a Portfolio Manager and Financial Advisor tasked with compiling deals and credit reports for Business Partners in 2008, and was responsible for the loans granted to Tyson Trading and Bold Moves. His evidence about the structure of the loan granted to Tyson Trading is common cause. He clarified that the payment in terms of the Royalty Agreement was based on a percentage of the monthly turnover of the business, provided by the previous owner.

[26] Mr Sahadeo confirmed that Business Partners was approached by Ms Rowe in 2008 with a request that the loan be restructured to ease the constraints with the cash flow. Subsequent to negotiations between Ms Rowe, Ms Schwan and Mr Sahadeo, Business Partners concluded an equity finance loan agreement for R1.95 million and a shareholders' agreement with Bold Moves. The monthly payment was reduced because the royalty fee was cancelled and the five year loan repayment was effectively extended to seven years because Tyson Trading was already two years into the loan. Ms Schwan who had provided security for the Tyson Trading transaction, put the security into place again for the Bold Moves loan.

[27] Mr Sahadeo confirmed that he and other representatives of Business Partners conducted a Due Diligence investigation into the business, Bangkok Wok, in terms of clause 3 of the loan agreement, and that a R2 233 Due Diligence and administration fee was debited in terms of clause 4 of the loan agreement. He established the valuation of the business which was presented as a part of the credit assessment. He then prepared the Investment Proposal for consideration by the Credit Committee. The report was not furnished to anyone outside Business Partners. Mr Sahadeo denied that Ms Rowe and/or Ms Schwan had asked him for the Due Diligence report or to compile a report for them. He also denied that he had discussed the Due Diligence investigation or report with Ms Schwan or received any emails querying the report or investigation from her. He denied further that he had entered into an oral agreement on behalf of Business Partners or made any representations as pleaded by Ms Schwan.

[28] Mr Sahadeo explained that he had reported that the business had 'an excellent repayment record' and 'trading profitably' because it was producing a profit and servicing its debt to Business Partners and had specifically recorded that 'as a *precautionary measure* the client has approached Business Partners to restructure her debt'. He explained his comment that 'trading circumstances are expected to be difficult for the next 12 months' arose from the forecast that the economy was going into a recession at the time, disposable income in the restaurant business was reducing and Ms Rowe had approached Business Partners to restructure the loan.

[29] When he conducted the Due Diligence investigation and proposal Mr Sahadeo went to the business premises of Bang kok Wok. Ms Schwan was present because she was involved in the running of the business. She participated in the discussions and confirmed her involvement as the Financial Manager of the business.

[30] Under cross-examination Mr Sahadeo testified that as Tyson Trading was an existing client, the financial statements and transaction records required for the Investment Proposal were already available. Although Ms Schwan had not utilised the recourse available to her in terms of Rule 35(3) of the Uniform Rules, when Mr Sahadeo indicated under cross-examination that the documents which were referred to in the letter from Cox Yeats dated 18 June 2015 should be on file, Mr *Jeffreys* requested that the documents be made available, which I directed Mr Sahadeo to do. Although Mr Sahadeo located some of the documents, nothing significant emerged from this exercise as the documents were irrelevant to the current cause of action.

[31] Mr Sahadeo was aware that Ms Rowe went overseas but did not know why. He reiterated that Ms Rowe had advised him that cash flow was becoming marginal and she did to want the account to fall into arrears. Therefore in assessing risk, Business Partners had considered her advices against the current business environment for the restaurants. The profit and turnover margin was not what she had expected from the advices of the franchisor, and as a precautionary measure, Ms Rowe had approached Business Partners to restructure the loan, which was intended to alleviate the cash flow constraints she anticipated.

[32] Mr Sahadeo was a good witness who responded to all questions without hesitation and confidently. Under cross-examination he was consistent with his evidence in chief. He substantiated his comments and conclusions in the Investigation Proposals credibly and coherently. Consequently his credibility was not undermined.

Argument

[33] Mr *Quinlan* submitted that Business Partners had proved its claim through its evidence in respect of the default of Bold Moves and the balance outstanding under the loan agreement. He contended that Ms Schwan had failed to provide any proof of her counterclaim or her special defence, as pleaded in paragraphs 2 and 3 of the plea, that there was an oral agreement between her and Mr Sahadeo, which had induced her to sign the suretyship and pass the mortgage bond as security. She had not provided any evidence in respect of the consent alleged in paragraph 2.1, and under cross-examination, she had conceded there was no oral agreement and that there was no other Due Diligence that was to be carried out by Business Partners, except the internal investigation. She had further accepted that the Investigation Proposal was a confidential document for Business Partners own purposes and it had not been provided to her. She also conceded that no representations were made, while Mr Sahadeo testified that he made no representations. Mr *Quinlan* concluded with the submission that Ms Schwan had failed to discharge the onus on her in respect of her special defence, which was merely dilatory. She had already signed a suretyship and a bond to secure the indebtedness of Tyson Trading to Business Partners, and she had signed a similar suretyship and bond to enable the granting of the loan to Bold Moves. Business Partners was therefore entitled to the relief sought.

[34] Mr *Jeffreys* submitted that Ms Schwan had relied on fraudulent, alternatively negligent, misrepresentation, because she had consistently asked for a Due Diligence report, which was not furnished to her despite undertakings that it would be. The plea was signed on 29 August 2014 and despite the delivery of a discovery affidavit and a supplementary affidavit on 15 August 2016, the Due Diligence report was only made available at the trial. He contended that there were a number of allegations in the Investment Proposal that could not be sustained, inter alia that

Tyson Trading had an excellent payment record, and that the members of Tyson Trading were entrepreneurs with sound financial basis. Ms Schwan had testified that, to the contrary, the business under Bold Moves was suffered financial woes from the beginning. Therefore the probabilities did not favour Mr Sahadeo's evidence that Ms Rowe approached Business Partners to restructure the business relationship because she wanted more profit.

[35] Mr *Jeffreys* argued further that Business Partners had not disproved that Ms Rowe went overseas to earn more money which kept the business afloat, and Mr Rajkaran had confirmed that the business under Bold Moves had defaulted from the beginning. Therefore it was improbable that business was sound as suggested in the Investment Proposal. Further Mr Sahadeo's evidence that Ms Rowe wanted more profit was inconsistent with Business Partners taking a 30% shareholding, which would have depleted the profits in the business. Although the payments were reduced, Bold Moves could not meet the repayment, which indicated that the business was not viable. Mr *Jeffreys* made no submissions on the counterclaim.

[36] Finally, relying on the judgment in *Business Partners Limited v Silver Stars Trading* 245 CC⁹, Mr *Jeffreys* argued that the Royalty Agreement was contrary to public policy and that it should be struck out because it offended against public policy, and that Ms Schwan had been prejudiced by the failure of Business Partners to inform her that the Royalty Agreement was a simulated transaction which effectively constituted additional interest on the loan.

[37] However Mr *Quinlan* favoured me with a copy of the judgment which upheld the appeal against the judgment relied on by Mr *Jeffreys*.¹⁰ In any event, not only was the issue of the Royalty Agreement being contrary to public policy not raised by Ms Schwan in her plea or at any time prior to argument, she did not testify that the implications or true nature of the Royalty Agreement were not explained to her or that she did not appreciate or comprehend such ramifications, or that it impinged upon the loan agreement between Business Partners and Bold Moves, the breach of which constitutes the cause of action in this matter. The argument that the Royalty Agreement between Business Partners and Tyson Trading was contrary to public

⁹ 2012 JDR 0865 (GNP).

¹⁰ A762/2012 delivered on 27 May 2015.

policy finds no favour with me because it is ill-conceived, and lacks merit and relevance.

Default of Bold Moves and payment due to Business Partners

[38] The undisputed evidence of Mr Rajkaran established the default of Bold Moves and the amount due to Business Partners.

The Oral Agreement and Fraudulent / Negligent Misrepresentations

[39] In determining the defence of misrepresentation, I adopted a holistic view of the terms of the alleged representations and the context in which they were allegedly made.¹¹

[40] Although Ms Schwan testified that she had specifically asked Mr Sahadeo for the Due Diligence report for Bold Moves before the loan agreement for Bold Moves was signed and was promised that it would be given to her, under cross-examination she admitted that the parties had agreed, in terms of clause 3 of the terms and conditions to the loan agreement, that Business Partners would conduct an internal investigation which would be used in determining whether to grant the loan. She also acknowledged that the Investment Proposal was marked 'Confidential' and prepared for Business Partners' Credit Committee.

[41] Mr Sahadeo denied that Ms Schwan and Ms Rowe had at any time requested the Due Diligence report or discussed it with him personally. He was very clear and confident in his testimony that the Investment Proposal contained the report and recommendations arising from the Due Diligence investigation he conducted with the other signatories in accordance with clause 3, the purpose of which was to provide the Credit Committee with the information necessary to determine whether or not to grant the restructured loan to Bold Moves. The Investment Proposal was not made available at any stage to the defendant prior to the trial because it was a confidential document for Business Partners purposes, and not intended for the client. Nor had

¹¹ *Presidency Property Investments (Pty) Ltd & others v Patel* 2011 (5) SA 432 (SCA) headnote at 433A-B: 'A misrepresentation is actionable if it relates to an ascertainable fact and not if it consists in a mere expression of opinion, although a dishonest opinion as to a future event may found an action for fraudulent misrepresentation insofar as it falsely reflects the state of mind of the representor. The terms of the representation and the context in which it was made will be decisive in this regard.'

Ms Schwan requested that Business Partners prepare a Due Diligence report for her.

[42] This purpose for which the Investment Proposal was intended is consistent with the context in which the investigation was undertaken. It is a commercial reality that as a 'lending institution' Business Partners would have had to assess the risk which its exposure through the loan would entail. The confidentiality of the Investment Proposal is signified by the document bearing the heading 'CONFIDENTIAL' and as such was clearly intended for use by Business Partners only.

[43] Therefore Mr Sahadeo's confirmation that he had carried out the Due Diligence investigation as well as his denial that he had discussed the Due Diligence report or been requested to furnish the report by Ms Schwan, is consistent with the probabilities and corroborated by the loan agreement and the Investment Proposal.

[44] Ms Schwan on the other hand, vacillated between discussions between Ms Rowe and Mr Sahadeo at which she was not present, between Ms Rowe and herself and Mr Sahadeo, and 'a suggestion that Mr Doig was involved at some stage', as put to her by Mr Jeffreys. Ms Schwan furnished no proof of the emailed requests, and relied on the 'crashing' of her computer, which I shall deal with more fully below.

[45] When asked if there were any other conditions when she signed the suretyship and bond, Ms Schwan responded, 'No, the most important thing was to get the due diligence', and she was reassured when she was told that the Due Diligence was done. She admitted that she and Ms Rowe saw value in the business. However when taken through the pleadings and when referred to clause 3¹² of the loan agreement, Ms Schwan alleged then that the purchase of the business was dependent on the Due Diligence report; she had been told that it was done and would not have signed the suretyship and bond documents had she known that the Due Diligence was not done, and had she not been given the assurance that the business was viable.

¹² 'DUE DILIGENCE AND ADMINISTRATION FEE

Business Partners shall be entitled to a due diligence and administration fee of R1 950,00 (one thousand nine hundred and fifty rand)(plus VAT). The Borrower acknowledges that this fee is payable in respect of Business Partners' investigation to determine whether or not it is willing to grant the loan to the Borrower. The fee shall constitute a charge against the loan and may be recovered from the first draw which the Borrower makes against the loan.'

[46] The evidence of Ms Schwan was therefore inconsistent and contradictory. She admitted under cross-examination that the Due Diligence investigation as provided for in the loan agreement had been conducted. She initially denied that there were any conditions other than the Due Diligence investigation being conducted, until she was referred to the loan agreement. When asked how Mr Sahadeo had established viability, she responded that Mr Sahadeo must have looked at the turnover, but she was not involved and he must have discussed the viability with Ms Rowe. It follows that any assurance about the viability of the business would not have been given by Mr Sahadeo to Ms Schwan. Consequently her allegation that he made representations in respect of the viability of the business to her cannot be sustained.

[47] Ms Schwan admitted that she had, prior to the granting of restructured loan to Bold Moves, executed a suretyship in favour of Business Partners in respect of the loan agreement with Tyson Trading. Therefore Business Partners could have executed against her, had Tyson Trading defaulted with payment.¹³ She admitted further that she received the letter of grant dated 24 April 2008 issued to her and Ms Rowe when the loan was approved¹⁴ which set out the terms and conditions of the loan; and that in order for the loan to Bold Moves to be approved, she had to execute the suretyship and bond. She also conceded that the terms and conditions under the restructured loan to Bold Moves were more favourable than the loan to Tyson Trading, and that the Royalty Agreement was cancelled.

[48] Mr Sahadeo stood by his comments in the Investment Proposal that the business had 'an excellent repayment record' and was 'currently trading profitably'. He explained that the account of Tyson Trading had not lapsed into arrears and the instalments were being maintained. However Ms Rowe was unhappy that the profits were lower than she anticipated and approached Business Partners to restructure the loan. The financial statements on which his analysis was based, which are annexed to the Investment Proposal, do not contradict his conclusion as expressed in the report or his evidence. Further Tyson Trading had to render monthly financial

¹³ But Mr Sahadeo testified that Tyson Trading did not default which is why he stated that it had an 'excellent repayment record'.

¹⁴ Exhibit A1 page 34.

statements, and Business Partners would have been able to monitor the profits and turnover.

[49] Had there been any merit in the allegation that the Due Diligence investigation had been conducted negligently by Business Partners, no doubt Mr Sahadeo would have been cross-examined on the financial statements furnished by Business Partners. Instead Mr *Jeffreys* led the evidence of Ms Schwan on agreements to be entered into in terms of clause 8.2 and other precedent conditions as stipulated in clause 8.4 of the loan agreement, which were irrelevant to her defence as asserted in her plea.

[50] Ms Schwan's unsubstantiated evidence that Ms Rowe injected her foreign earnings into the business to pay the instalments due to Business Partners does not undermine Mr Sahadeo's conclusion that the business was not in arrears, and therefore had a sound credit record. Further the employment history of Ms Rowe¹⁵ does not reflect that she was employed overseas during the trading period of Tyson Trading. Therefore there is no proof that, as alleged by Ms Schwan, that the business ran into financial trouble within a few months of the loan being granted to Tyson Trading because the previous owner had inflated the turnover and that the business was not profitable when Ms Rowe applied for the restructuring.

[51] It is also relevant that Mr Sahadeo (and the other signatories) were unlikely to place their own positions with their employer at risk by confirming that the business was viable and trading profitably, or declaring in clause 2.1 of the Investment Proposal that the granting of the restructured loan was to the benefit of Business Partners as it would achieve a higher return than on the loan agreement with Tyson Trading, if the relevant documents had not been perused and the resultant conclusions were not sound. It is also pertinent, as pointed out by Mr *Quinlan*, that Business Partners accepted a 30% shareholding in Bold Moves, which would not have made commercial sense if it was not confident that the business would be profitable.

[52] In her evidence in chief Ms Schwan testified that they were charged R50 000 for the Due Diligence, and in her plea she alleged that the fee, including a

¹⁵ Page 8 of the Investment Proposal.

'mentorship fee', was R13 623. Under cross-examination Ms Schwan admitted that in terms of clause 4 of the loan agreement the funds applied to the Due Diligence and Administration Fee was R2 223. It was also clear from clause 3 of the Standard Terms and Conditions that the fee charged was only R1 950 plus VAT.

[53] Finally, as properly pointed out by Mr *Quinlan*, there was no evidence of any consent by Business Partners, and Bold Moves and Ms Rowe to the alleged oral agreement.

[54] I am therefore satisfied that no oral agreement was concluded between Business Partners and Ms Schwan. Further if Ms Schwan had not discussed the viability of the business with Mr Sahadeo, and had not received the Investment Proposal, no representations could have been made to her by Business Partners as alleged in paragraph 3 of her plea, as again properly contended by Mr *Quinlan*.

[55] In the premises, the averments in respect of the fraudulent and negligent misrepresentations to Ms Schwan by Mr Sahadeo as representative of Business Partners cannot be sustained, nor does the evidence support the allegation that the Due Diligence investigation was conducted negligently. Therefore her defence to Business Partners' claim must fail.

Ms Schwan's claim in reconvention

[56] Ms Schwan also pursued a claim in reconvention, alleging that she was induced into investing a sum of R 80 000 (eighty thousand rand) into the business of Bold Moves by the fraudulent, alternatively negligent, misrepresentations made by Business Partners through its representative. She alleged that she would not have made the investment 'had she known that the Due Diligence had not been provided'¹⁶ or had she been aware that the business was not viable and could not meet its obligations to Business Partners under the loan agreement. Consequent to Business Partners misrepresentations, she suffered damages to the value of her investment. Ms Schwan therefore sought judgment against Business Partners for payment in the sum of R80 000, interests and costs on an attorney and client scale.

¹⁶ Para 3.3 of Ms Schwan's claim in reconvention.

[57] In defending the counterclaim, Business Partners averred that it had conducted a Due Diligence investigation in processing Bold Move's loan application for its internal purposes only, and denied that it or its representative made either a fraudulent or negligent misrepresentation and sought the dismissal of the claim in reconvention with costs.

[58] Ms Schwan bore the onus to prove that she had invested the sum of R80 000 into the business, that she was induced to make such investment by the fraudulent or negligent misrepresentations made by Mr Sahadeo and that she would not have invested in the business had she known that the Due Diligence had not been carried out or that the business was not viable and /or that Bold Moves could not meet its obligations under the loan agreement.

[59] I have already found that Ms Schwan failed to prove the alleged misrepresentations, either fraudulent or negligent. Therefore she could not have been induced to invest in Bold Moves.

[60] Ms Schwan also furnished no proof of the alleged investment of R80 000. Her blatant dishonesty was apparent when in response to a question from Mr *Jeffreys* about whether she had documentation to prove her claim, she stated 'Not here.' I then questioned her about her failure to bring the proof when she knew she was testifying; she merely responded that she could 'produce the proof'. Mr *Jeffreys* then addressed Ms Schwan, saying that he was instructed that her computer had crashed which is why she could not provide proof, to which she replied that she did not have proof for the full amount, 'only a small amount, perhaps R25 000'. It was apparent that by Mr *Jeffreys*' interjection, she was reminded of 'her instructions' that she did not have any proof of the debt. I am of the view that her contrived response was also untrue, as she had adequate opportunity to provide the proof prior to the trial, and she did not.

[61] Consequently her counterclaim must fail, and costs be ordered against her.

Order

[62] In the result, judgment is granted against the Fourth Defendant, jointly and severally with the First, Second and Third Defendants, the one paying the others to be absolved for:

1. Payment of the sum of R 1 485 511,69.
2. Interest on the above sum at the prevailing prime rate charged by The Standard Bank of South Africa, in accordance with Clause 5 of Loan Agreement read with Clause 5 of the Standard Terms and Conditions annexed to the agreement, from date of service of summons viz 18 October 2013, to date of final payment.
3. Costs of suit on an attorney and client scale.
4. The Fourth Defendant's immovable property, described as Portion 11 (of 10) of Erf 175 Botha's Hill, Registration Division FT, Province of KwaZulu-Natal, in extent 1 873 (one thousand eight hundred and seventy three) square metres, held under Deed of Transfer No T33978/2003, is declared specially executable.

MOODLEY J