IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED. ✓

DATE SIGNATURE

28/3/18

Case Number: 1039/2009

In the matter between:

SCHALK LEON BAARD N.O.	First Plaintiff
HELENE CATHERINA BAARD N.O.	Second Plaintiff
LEONETTE HELENE VISAGIE N.O.	Third Plaintiff

and

PSG CONSULT LIMITED	First Defendant

PSG KONSULT FINANCIAL PLANNING (PTY) LTD	Second Defendant
PSG KONSULT SECURITIES (PTY) LTD	Third Defendant
PSG KONSUL NORTH (PTY) LTD	Fourth Defendant
PSG KONSULT FREE STATE (PTY) LTD	Fifth Defendant
PSG KONSULT TRUST ADMINISTRATORS (PTY) LTD	Sixth Defendant

JUDGMENT

POTTERILL J

Background

[1] In this action the plaintiffs' trustees of an *inter vivos trust*, [the Baard trust] is claiming from the defendants [PSG] rectification of paragraph 6 of the "Mandaatooreenkoms" as well as rectification of clause 4.1 of the "Produkooreenkoms" entered into between the Baard Trust and PSG. The Baard Trust also claims damages, to either the amount of R2 753 787.02 alternatively R1 753 787.02, for economic losses suffered due to trading by PSG in Contracts for Difference (CFD's). Mr Schalk Leon Baard [Baard] acted on behalf of the Baard Trust and for ease of reference "Baard' will be used with reference to Baard Trust as well.

The evidence

[2] Baard testified that he was a property developer. The Baard Trust initially traded in shares as long term investment through PSG. The Baard Trust then also invested in medium term investment via Ms Visagie [Visagie] of PSG. At the end of 2005 and/or beginning of 2006 Baard informed Visagie that Baard could not have money stuck in long term investments because he was developing a retirement village. Visagie then introduced Baard to Mr Greenan [Greenan], also a broker of PSG, who worked in short term investments. This was to facilitate the request of Baard to invest in a higher risk security with greater profit; he wanted to make money.

[3] Greenan on 9 February 2007 sent to Baard an e-mail that read as follows:

> *"Leon hierby leesstof oor CFD's. Indien jy wil he dat ek voortgaan moet jy asseblief meegaande dokumente teken en by al die nodige plekke parafeer. Jy kan dit aan my terug faks sodra jy reg is.*
>
> *Op die oomblik kan ons nog nie CFD's se holdings op die online platvorm sien nie maar daar word daagliks 'n email aan jou gestuur wat die totale posisie uiteensit. Verder sal ek natuurlik aan my kant 'n stelsel opsit wat die total [sic] portefeulje byhou."*

[4] Attached to the mail was:

4.1 A document with a heading CFD setting out what a CFD is;

4.2 A document from Nedbank Capital setting out what CFD's are;

4.3 A contract to be signed between Online Securities Limited and Baard;

4.4 A "mandaatooreenkoms" between PSG Konsult and Baard. Initially atmosphere was created that on the schedule to the agreement at par 6 the following words were not typed in when Baard signed: *"Risiko voorkeur-beleggings in CFD's- hoof oogmerk is kapitaal groei en die bestuur van 'n spekulatiewe portefeulje. CFD is riskant en ek is ten volle bewus van die gepaardgaande risiko."* In cross-examination he admitted that it was typed in before he signed the document. Similarly with the "leesstof" relating to CFD's he informed the court that he found it strange that he did not sign it, but then admitted that he received it and read it, but then did not understand it as he understood it now.

[5] Baard signed and initialled the agreements and faxed them back to Greenan.

[6] A CFD is a derivative, geared or leveraged instrument linked to shares listed and traded on the stock market. This geared instrument allows a person to "buy" a CFD with a deposit of 20% of the Cost Value (number of shares X cost per share) which is called the initial margin. The reason for trading in a CFD is that due to the initial

margin one can hold a position of 5 times greater than any other investment and this gearing can with the correctly anticipated price movement of the shares generate a greater profit. Trading in CFD's can be long or short. With short trade one is selling borrowed, not owned, shares and buying it back when the price has fallen. The proceeds of the sale is held by the stockbroker until the borrowed shares are returned when one closes your position by buying the shares. The profit or loss for trade is then credited to one's account. Just as a greater profit can be made, the risk of loss is unlimited; a great risk. It is possible to employ a stop loss to preclude losses beyond a certain amount.

[7] On 14 February 2007 Greenan transferred R1 million from the Baard Trust's ordinary share account to a separate CFD account.

[8] PSG did not report to Baard with a daily e-mail as set out in Greenan's e-mail. Baard contacted Greenan telephonically on numerous occasions to ascertain how the investments were doing and why he was not receiving reports. Although initially he created the impression that he could not get hold of Greenan and had to wait inordinately long before Greenan would answer, because everybody at PSG seemingly used only one telephone line, he admitted that on all the occasions he phoned he did speak to Greenan. He testified that during those calls Greenan would "babbel on" about the markets, but never told him about the losses.

[9] During August 2007 Baard received from Greenan a letter setting out the portfolio update. Of relevance is the second page where the following is recorded:

"*Die lank en die kort van die CFD posisie is as volg:*

Kapitaal ingesit R2.3m

Waarde tans R1,840.00

Opbrengs-20%"[1]

[10] Baard upon receipt of this letter phoned Greenan requesting to have a meeting with Greenan. He was upset that he had lost money and that Greenan had utilised R2.3 million. Greenan asked Baard to give Greenan 4 months to turn the situation around. Baard gave him such an opportunity because he thought if he stopped the trading he would lose further. He did however not know what would happen if he stopped further trading. He told Greenan to proceed because he trusted Greenan. He was however not informed that his loss could be unlimited; if he had been informed he would never have traded in CFD's. He never told Greenan he could utilise R3 million of his money for this trading.

[1] P2-19 of the trial bundle A

[11] Baard testified that he after the meeting kept on calling Greenan to ascertain what is happening and why he was not receiving reports. Greenan however had one excuse after another; he kept rambling on about the markets. He denied that during these conversations Greenan informed him of further losses.

[12] In January 2008 Greenan wrote a letter to Baard with the letter commencing as follows:

> *"Dit is met 'n swaar gemoed en die eerste keer in my loopbaan date ek 'n brief soos hierdie aan 'n klient moet skryf.*
>
> *Die mark het my nie die afgelope ruk goed behandel nie en dit word gereflekteer deur die CFD portfeulje se waarde wat tot R320 000 gedaal het."*

And:

> *"Ek wil jou nie as klient verloor nie, ek weet ek kan die verliese terug maak maar ek sal net tyd nodig he. Een oplossing is dan ek en jy nouer saam werk en dat ek eers koop en verkope met jou bespreek. Jy en ek is al 'n geruime tyd in die mark en ek weet dat jy sal verstaan dat market uiters moeilik is maar ek weet dat ek oor tyd die situasie kan herstel."* [2]

The letter also contains a list of all the transactions done.

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[2] P44 of Trial bundle

[13] Baard then, January 2008, decided that he would now stop the trading. He, with the assistance of an employee of T-Sec Pty Ltd, wrote a letter of complaint to the Chief Executive Officer of PSG. In this letter the nature of the complaint is formulated as follows:

> " *.....I was treated unfair and that you're representative Mr. W Greenan did not act in the best interest of the Baard Family Trust.*
>
> .....
>
> *Financial market performance accompanied with the management (if any) of the Baard Family Trust.*
>
> *Promises made by Mr. W. Greenman to recover the losses by December 2007.*
>
> *Furthermore various reasons were given for the poor performance, however no risk mitigation actions (Stop losses) were taken to mitigate the financial losses occurred by the Baard Family Trust,*
>
> *The representative Mr. W. Greenan stating that he suffered financial losses during this period and felt what was good for him is good for his clients.....*
>
> *To stay in close contact with me, in order to verify any decisions"*

In this letter there is no mention made of the complaints relating to daily e-mails not being sent and importantly that Greenan exceeded his mandate in utilising more than R1million of Baard's money for CFD's.

[14] Pursuant thereto a meeting was held between Baard, Greenan and Mr Taylor, the legal advisor of PSG. The upshot of the meeting culminated in a letter from Mr Taylor informing Baard that after the meeting and due consideration of the documentation he came to the conclusion that Baard was well aware of all the risks involved in specifically the CFD account. Baard was not only aware, but also signed the relevant documentation setting out the risks.

[15] The plaintiff's expert witness testified that when CFD's are traded, in this instance by PSG for Baard, then daily reporting is essential because there are changes in risks in the overall position and a client must be aware of the risk.

The history of the matter

[16] The trial commenced and before Baard testified there was an objection that the agreement attached to the plaintiff's particulars of claim is not the final agreement. The final agreement is the agreement that Greenan signed. Baard knew of this final contract since the opposition of the application for summary judgment. Baard's representative knew of this final contract and was warned to amend the particulars of claim and afforded an opportunity to do so before the trial commenced. The representative of Baard refused to do so. This was apparently not done because there were amendments to this final contract that were not in the documents that Baard

signed. This stance was irrelevant simply because the "amendments" are completed particulars of the Baard family trust; address, trust number, telephone numbers and the banking details of the Baard Family Trust. On the schedule attached to the contract that Baard is relying, at par 6 there is typed in that trade is in CFD's and that Baard is aware of the risk; so not a clause that Greenan is trying to slip in on the final contract.

[17] At the same time Baard's representative abandoned prayer 2.2 that sought rectification of the written agreement to incorporate the terms of the averred oral agreement that there must be reporting on the trading. Rectification of the "mandaatooreenkoms" was not necessary as they were now relying on the "produkooreenkoms" for this averment in the summons.

[18] Simultaneously the representative of Baard abandoned the "disclaimers" seeking clauses 3 and 11 of the "mandaatooreenkoms" to be deleted.

[19] It was also pointed out to Mr Bollo for Baard that there are no prayers according with para 13.3 and 13.4. He then requested an amendment, but when objected to, withdrew any request for such amendment.

[20] Baard started with his evidence and testified that he and Greenen concluded the contracts on the strength of the e-mail sent by Greenen. There was no discussion prior to the email about the amount to be invested, or the type of short term investment. This apparently caught Mr Bollo unawares and he asked for a postponement in order to amendment the particulars of claim.

The amended pleadings

[21] In the amended pleadings rectification is sought of the written schedule to the "mandaatooreenkoms." The "potential risk of loss must be limited to R1 million" must be inserted into a blank space in par 6 of the schedule. Rectification is also sought of clause 4.1 of the" produkooreenkoms" in that a daily e-mail must be sent , to Baard, setting out the total position and that a system be set up "wat die totale portefeulje byhou".

[22] In the alternative to rectification of the R1 million clause Baard alleged that an implied, alternatively tacit term of the written agreement [unspecified which contract] was that the exposure to losses was to be limited to R1 million.

[23] The rectification, if granted, would constitute the following breach of the contracts:

a. Baard was exposed to losses in excess of R1 million;

b. Baard did not get online access to his CFD portfolio;

c. Greenan failed to send daily emails to Baard informing him of the total position of Baard;

d. Greenan without permission from Greenan drew money from the Trust's share portfolio to cover the losses above R1 million;

e. Greenan did not inform Baard of the risk of the losses which could affect the funds not contained in the CFD account.

[24] Baard then prays for the total of the CFD losses as damages in lieu of the material non-disclosures. Baard would not have authorized any trade in CFD's or "mandaat"- and "produkooreenkoms" but the non-disclosures induced him to do so. In the same paragraph 22 of the particulars of claim it is also stated that the non-disclosures/breaches constituted a failure by Greenan to perform the specific mandate given to Greenan.

[25] Pleadings in general play an important role, not only do they define the issues, but a defendant needs to know what case it has to meet. A party is thus limited to their pleadings, one cannot plead one thing and then at trial attempt to canvass another.[3]

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[3] *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 212 (SCA) at 223G-H

It is impermissible to plead one particular issue and then seek to pursue another at trial.[4]

[26] In this matter the particulars of claim were already amended and further orally amended at the commencement of the trial. The representative for Baard was very much alive to the fact that the representative of Greenan was going to object if the evidence led was representing any other cause of action not pleaded. This was with specific reference to the actions or lack of action of Greenan; i.e. his negligence not flowing from breach of contract. Despite this knowledge, many objections to evidence in chief of Baard and the expert witness had to be raised with the result that the questions had to be withdrawn, or the objections sustained. This occurred simply because the real issue for the witness Baard was that Greenan in his capacity as a financial consultant was negligent and did not act according to what was expected of a financial consultant in those circumstances. He testified that he *"was tevrede met die kontrak"* and his complaint is not that the "*kontrak* ***se*** *nie iets wat dit moet* ***se*** *nie.*" In fact Baard testified that "*his verwyt was die manier waarop hy handel dryf met my geld.*" The expert witness was also warned that she could not testify as to what is expected of a person in the position of Greenan and why he was negligent. Mr Bollo for Baard, was thus acutely aware of this position, but persisted with the claim as formulated. It was thus clear to the court and all present that the negligence of

[4] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107G-H

Greenan was an issue, but falling outside of the pleadings. There was no hindrance to plead in the alternative to the breach of contract, negligence in delict.[5] Yet, there was no attempt to include this issue in the pleadings. So even if on the principle that pleadings are made for the court, not the court for the pleadings, and a court may have a duty to determine the real issues between the parties and thereon decide the case, this court could not exercise a discretion under these circumstances to include this issue without it having been pleaded because there would be severe prejudice to the defendant as the whole nature of their defence would have to change. In this instance there could be no reliance by Baard's representative on this court's readiness to consider and deal with the unpleaded issues.[6]

Rectification

[27] For Baard to succeed on the contractual claim the rectification is paramount because the "mandaatooreenkoms" and the schedule thereto do not contain a clause that the "potential risk of loss must be limited to R1 million." The "produkooreenkoms" similarly does not contain a clause that a daily e-mail must be sent to Baard, setting out the total position and that a system be set up "wat die totale portefeulje byhou".

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[5] *Durr v Absa Bank Ltd and Another* 1997 (3) SA 448 (SCA)

[6] *Woodways CC v Vallie* 2010 (6) SA 136 (WCC) at 142A-B; *Middleton v Carr* 1949 (2) SA 374 (A) at 386

[28] Baard did not prove rectification at all. There was no evidence that such clauses were by mistake left out of the two contracts. This is so because Baard never testified that it was his intention that these clauses be written into the contract and therefore there was no mistake. There was no evidence from Baard that it was the common intention of the parties to have included such clauses in the contract and the common continuing intention of the parties existed when the agreement was reduced to writing.[7] He did not testify he thought the clauses were in the contract or would be written into the contracts. Baard did not testify to the contracts not reflecting what they agreed to. No evidence was led that Greenan intended that the proposed clauses, or the contents of the e-mail, should have been written into the contracts. Baard persisted that Greenan did not do what a reasonable person in those circumstances should have done with his money; this evidence not supporting a claim for rectification.

[29] From the evidence before the postponement of the trial it is clear there was no antecedent agreement from which the common intention could be deduced. Prior to him signing the contracts, excepting for him wanting more profit and therefore more risk there was no discussion. He received the e-mail informing him of CFD's and after reading it, he signed the contracts.

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[7] *Propfokus 49 (Pty) Ltd v Wenhandel 4 (Pty) Ltd* [2007] 3 All SA 18 (SCA)

[30] Baard's own evidence about how much Greenan could use for CFD's are contradictory. The e-mail sets out that they begin with an R1 million. He testified that he could use up to R1 million, but with different angles. One stance was that he accepted that Baard would use the R1 million bit by bit, not all at once, but he also testified that Greenan could trade in CFD's forthwith in the amount of R1 million. He also testified that, despite his evidence that he was not aware of the leverage at the time, that Greenan could only use 20% of the R1 million for CFD's. What is even more astonishing is Baard then realises that Greenan has spent R2.3 million of his money, despite the averred R1million limit, and yet he tells Greenan to proceed to trade because he trusted him. It is improbable that a person would trust somebody who without your permission utilised R1.3 million of your money while suffering huge losses. In the letter of complaint nothing is set out relating to Greenan in effect stealing his money to trade; i.e not adhering to his mandate to only use R1million of his money.

[31] Even if the Court was to accept one of these versions then there is simply still no evidence pertaining to common mistake, only of Baard's unfortunate unilateral mistake.

[32] In the pleadings reliance is placed on the e-mail for the claim of rectification. Upon a proper reading of the e-mail it can never constitute an antecedent agreement or

negotiation. The e-mail states *"... ons begin met so R1.Om ..."* This is the amount to start with and does not reflect the rectification sought of "the potential risk of loss to be limited to R1 million."

[33] Despite Baard receiving no information while suffering great losses and him having to call regularly to find out what was going on he instructs Greenan to proceed with further trading because he trusted him. The fact that he was not receiving e-mails as stated in the e-mail was thus not a material breach; however it cannot constitute any kind of breach of contract because there is no such clause in the contract. Baard was happy with the contracts and did not testify that due to mistake a clause that a daily e-mails must be sent was not recorded in the contract. He never testified that Greenan and he had a common intention that it should have been reduced to writing in the contract.

[34] Rectification was not proven and accordingly the breach of the contract was not proven.

The alternative claim of the tacit or implied term

[35] I do not find it necessary to address the argument based on an implied term because the terms pleaded are not terms implied by law.

[36] In ***McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*** **[1974] 3 All SA 497 (A)** at 531-2 Corbett AJA a tacit term was described as "*an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances.*" In ***Wilkens NO v Voges*** **1994 (3) SA 130 (A)** at 136-137 the court found that a tacit term can be actual or imputed. An actual tacit term is *"if both parties thought about a matter which is pertinent but did not bother to declare their assent.*" As with the rectification, there was no evidence that Greenan and Baard both thought about the terms now to be imputed but did not bother to declare their assent. Baard testified that he was happy with the contracts. Baard did not testify that they thought about these terms, let alone prove this term as an actual tacit term.

[37] An imputed tacit term is a term that parties would have assented to if only they had thought about, but did not because *"they overlooked a present fact or failed to anticipate a future one...a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind ... The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn*

rests on the party seeking to rely on the tacit term."[8] Baard is relying on the fact that Greenan did not testify and therefor Baard's version that the potential risk of loss was to be limited to R1 million. This is not a term necessary to ensure the contract's business efficacy. It would be a term to protect Baard, but there is no evidence that both Greenan and Baard had this in mind. There is no material from which this inference can be drawn. The e-mail states they would start with a million, not stop with a million. No negative inference can be drawn from Greenan's closing of his case without leading evidence. There was no evidence led by Baard to be contradicted by Greenan. The subsequent conduct of the parties can also be relevant in indicating whether the contract contained the tacit term. The subsequent conduct is that Baard trusts Greenan enough to let him trade further after there was already trade of R2.3 million. This conduct does not support an inference that the potential loss was to be limited to R1 million.

[38] Greenan did not prove there was a tacit agreement as pleaded.

The non-disclosures

[39] In the particulars of claim the non-disclosures is the failure by Greenan to apprise Baard of the risk of the losses which could affect funds not contained in the CFD

[8] *Wilkens* matter *supra* p136-137

account from time to time and the non-reporting on a daily basis. These non-disclosures occurred prior to the conclusion of the contract and had such breaches been disclosed at the time, Baard would not have authorised any trade in CFD's or have concluded the agreements. As a result of the non-disclosures Baard claims the total of the CFD trading losses as damages.

[40] The non-disclosures occurred before the contracts were concluded and therefor the claim must be based on delict. To be successful in such a claim there must be an allegation of wrongfulness as wrongfulness cannot be presumed in non-disclosure claims. There is no such averment. *"A plaintiff who claims on this basis must plead and prove facts relied upon to support that essential allegation.*[9] Where a plaintiff claims for a loss resulting from an omission or for pure economic loss, the defendant's legal duty towards the plaintiff must be defined and the breach alleged.[10] Baard also needed to allege that Greenan was negligent. This was not done. As it was not pleaded, no evidence of negligence could be led and Baard did prove wrongfulness or negligence of Greenan.

[41] I accordingly make the following order:

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[9] *South African Hang and Paragliding Association and Another v Bewick* 2015 (3) SA 449 (SCA) at 453
[10] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency* [2009] 1 All SA 525 (SCA)

The plaintiff's claim is dismissed with costs. The costs to include the costs order that was reserved.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 1039/2009

HEARD ON: 26 May 2014, 4-8 December 2017

FOR THE PLAINTIFFS: MR. C.L.P. BOLLO

INSTRUCTED BY: Biccari Bollo Mariano Inc.

FOR THE DEFENDANTS: ADV. J.D. MARITZ SC

INSTRUCTED BY: Savage Jooste & Adams Inc

DATE OF JUDGMENT: 28 March 2018