IN THE GAUTENG DIVISION OF THE HIGH COURT

PRETORIA, REPUBLIC OF SOUTH AFRICA

29/01/2014.

CASE NO: 57810/11

In the matter between:

VALERIE ANN BADER	First Plaintiff
CHARLES MICHAEL BADER NO	Second Plaintiff
ANGELA LEE BADER (in her personal and representative capacity)	Third Plaintiff
JOHANNES PETRUS BARNARD NO	Fourth Plaintiff

and

(1) REPORTABLE: ~~YES~~ / NO

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

28/01/14
DATE

SIGNATURE

JAN PETRUS WENTZEL	First Defendant
DELRU MAKELAARS CC	Second Defendant

and

MANWOOD UNDERWRITERS (PTY) LIMITED	First Third Party
CENTRIC INSURANCE COMPANY LIMITED	Second Third Party

JUDGMENT

Tuchten J:

1 The plaintiffs are Mrs Bader senior, the CM Bader Family Trust and Mrs Angela Bader. Mr C M Bader himself is the son of Mrs Bader snr and the husband of Mrs Angela Bader.

2 The plaintiffs each mandated the second defendant (Mr Wentzel's close corporation) to give them financial advice. Wentzel himself was financial adviser to each of the plaintiffs, who each had cash to invest and sought Wentzel's advice on where to place their money. They wanted an investment that would be similar to that offered by a bank, free of risks other than those attendant on an investment with a bank and where their money would be available on 24 hour call. Such an investment is and was at the material times available in the market. The kind of fund which suited the plaintiffs' needs is called a money market fund. Wentzel recommended Corporate Money Managers, Cash Managed Fund (CMM). From time to time the plaintiffs each provided funds to CMM and withdrew amounts from the same source.

3 It was common cause on the pleadings that the second defendant was obliged to exercise the care and skill of an expert financial adviser in advising each of the plaintiffs where to place their cash.

4 CMM offered an interest rate on monies placed with it which was a percent or so above the rates offered by banks on equivalent investments and none of the plaintiffs saw any risk in their investments above those risks attendant upon investing with a bank.

5 But in 2009 it emerged that CMM was not operating a money market fund but one in which the investment risks were substantially higher. Indeed, CMM did not even hold itself out as operating a money market fund. CMM was unable to meet its obligations and on 28 April 2009 its business was provisionally placed under curatorship under s 5 of the Financial Institutions (Protection of Funds) Act, 2001. The curatorship took its course and the plaintiffs were only able to recover a small part of their investments from CMM.

6 On 26 February 2010 the plaintiffs, through their attorney, wrote to Wentzel and the second defendant, stating that the plaintiffs would hold them liable for their damages sustained arising from Wentzel's conduct in putting them into a fund which was not in the money market but invested in highly speculative and risky projects. At that time, the plaintiffs said, they were unable to quantify their damages.

7 The first attempt by the plaintiffs to quantify their damages was made in their summons, which was served on Wentzel as first defendant and the second defendant on 11 October 2011.

8 The defendants defended the action and in addition instituted third party proceedings against their underwriter and insurer as first and second 3rd parties. These third parties defended the third party proceedings. But by notice dated 26 November 2013 the second defendant's attorneys withdrew as its attorneys and the second defendant is presently in default. By notice dated 13 December 2013 the plaintiffs withdrew their action against the first defendant, with each party to pay their own costs.

9 Accordingly, when the trial of the action was called before me, only the plaintiffs and the third parties appeared. All of their counsel accepted that there was no *lis* between the plaintiff and the third parties. The third parties asked for, and were granted, the dismissal of the third party proceedings brought against them by the defendants, with an appropriate costs order. I dealt with this in a separate *ex tempore* judgment. The present judgment thus deals only with the *lis* between the plaintiffs and the second defendant.

10 The plaintiffs then sought default judgment against the second defendant under rule 39(1) which reads:

> If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.

11 Counsel for the plaintiff presented a detailed opening address. The address was designed not only to acquaint the court with the case to be presented but also to give notice to counsel for the third parties, who consented to remain present for this purpose, that in an action which the plaintiffs contemplated instituting against the third parties directly, under s 156 of the Insolvency Act, the plaintiffs would contend that any judgment which I gave as to the second defendant's liability to the plaintiffs would be binding on the third parties. As I was not asked to make any ruling in this regard I need not express any view on the proposition advanced by counsel for the plaintiffs. I should mention, however, that counsel for the third parties did not accept its correctness.

12 Although the practice of this court where judgment by default for unliquidated damages is sought is to require evidence only in regard to quantum, the plaintiffs led evidence on the merits as well. The plaintiffs were in my view entitled under rule 39(1) to do so because the rule in its terms entitles them to lead evidence on all those issues upon which they bear the burden of proof. The first plaintiff's health did not permit her to give evidence *viva voce* and her testimony was presented by affidavit. In addition, I allowed an affidavit by Mr Theo Vorster, for the limited purpose of establishing that he had been proposed by the plaintiffs as an expert witness.

13 The evidence adduced showed that Wentzel had not told any of the plaintiffs that CMM operated in a speculative and risky market. This fact gives rise, inexorably in my view, to one of two propositions. Either Wentzel did not know the true ambit of CMM's investment policy or he knew but did not tell the plaintiffs what he knew. The evidence showed that the true ambit of CMM's investment policy was readily ascertainable: indeed it could largely be determined from public documents. There was a simpler way in which Wentzel could have established the facts: he could have asked CMM. Wentzel did not suggest in any document before the court that he was misled as to the true position. I have no doubt that if he had asked, he would have been told the true position.

14 On any of these propositions, in my view, the second defendant is liable to the plaintiffs for the negligent conduct of the mandates entrusted to it by them. Either he negligently failed to establish the true ambit of CMM's investment policy or he knew it but negligently failed to tell the plaintiffs what he knew. This finding is in accordance with the evidence of Mr Goldhawk, who testified as an expert. The second defendant accordingly failed to exercise the care and skill of an expert financial adviser in advising each of the plaintiffs where to place their cash and thus breached the mandates given to it.

15 All of the plaintiffs said in evidence that if they had known the true position they would either not have invested through CMM or would, on finding out the true position, promptly have withdrawn all their money and invested it elsewhere. I believe them. The negligence execution by the second defendant of its mandate therefore caused the plaintiffs' damages.

16 I turn to the quantum of damages. Evidence was given by Mr Goldhawk of the returns which the plaintiffs would probably have enjoyed if Wentzel had done his job properly. The thrust of this evidence is that if the plaintiffs had been put into a money market fund properly so called, they would have received back, when they asked for it, their capital together with interest slightly lower than that offered

by CMM. I accept this evidence. The plaintiff assessed their damages as at the end of April 2009, the month in which CMM's business was placed under curatorship. Although the damages cannot be assessed with mathematical accuracy, the plaintiff has presented all relevant evidence and I am thus at large to do the best I can on what is before me. While there does not appear to be any reason in principle to perform the assessment exercise as at the end of April 2009, the selection of this date does not appear to be unfair to the second defendant. There is no reason to select an earlier date and a later date would inevitably increase the damages payable.

17 Calculated in this way, the damages proved by each of the plaintiffs are as follows: for Mrs Bader snr (the first plaintiff) R1 663 843; for the Trust R2 232 531; for Mrs Angela Bader (the third plaintiff in her personal capacity) R48 500.

18 As to *mora* interest on the judgment debts: in their particulars of claim the plaintiffs ask for interest from 30 April 2009. Where the claim is, as in the present case, for unliquidated damages, s 2A(2)(a) read with s 2A(5) of the Prescribed Rate of Interest Act, 1975 confer upon the court a discretion to make such order as appears just in respect of the date upon which interest on such a debt should run.

19 It weighs significantly with me that the commercial purpose (known to the defendants) of the plaintiffs' investments was to obtain interest on their surplus cash assets which they entrusted to CMM. I think it would be unfair if the plaintiffs were denied interest during the period from the date they chose for the assessment of their damages until they served their summons. There is nothing before me to suggest that the plaintiffs culpably delayed in the prosecution of a somewhat complex case. I shall therefore order *mora* interest from the date upon which damages were assessed.

20 I accordingly make the following order.

1 There will be judgment against the second defendant and in favour of:

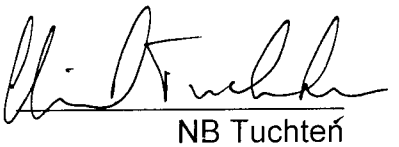
1.1 the first plaintiff for R1 663 843;

1.2 the CM Bader Family Trust ("the Trust") for R2 232 531; and

1.3 the third plaintiff in her personal capacity for R48 500.

2 Each of the judgment debts in paragraph 1 of this order will carry *mora* interest at 15,5% per annum from 30 April 2009 to date of payment.

3 The second defendant must pay the costs of suit of all the plaintiffs, including the qualifying fees of Messrs Goldhawk and Vorster.



NB Tuchten
Judge of the High Court
28 January 2014

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