

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 03507/15-16/MP 1

In the case between:

SALOMON JOHANNES DU PREEZ

Complainant

and

TRADING TO GET RESULTS CC

First Respondent

PIERRE-LOUIS VAN DER WALT

Second Respondent

**DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY
AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('the Act')**

A. INTRODUCTION

[1] Complainant invested just over R100 000 in the respondent's close corporation. The purpose of the investment was to obtain growth through online trading in forex. Soon after transferring the funds to respondents, the promised returns did not materialize and complainant could obtain no response from the respondents. Complainant then filed a complaint in this office.

B. THE PARTIES

- [2] Complainant is Salomon Johannes Du Preez, a retired businessman from Volksrust Mpumalanga.
- [3] First respondent is Trading to Get Results CC, a close corporation duly registered according to the company laws of South Africa. According to CIPC this close corporation's registered office is at 25 Carnegie Park, Blarney Street Hennops Park Centurion. First respondent's business is described in the companies register as *"Investing and consulting. Trading in all aspects"*.
- [4] Second respondent is Pierre-Louis Van Der Walt, whose full details are unknown and who, according to CIPC resides at the same address as the registered address of the first respondent. He also owns 100% of the member's interest in the first respondent. He is 37 years old and by all accounts is the driving force behind the first respondent.
- [5] For purposes of this determination I will refer to both respondents as "respondent". At the time of receipt of this complaint, respondent had disappeared. Neither the first nor second respondent can be located at the registered and residential address. As complainant puts it "they closed shop" and left no alternative address. However an email address was available.

C. COMPLAINANTS VERSION

- [6] During November 2012 complainant consulted with a certain Quintus de Hart, a consultant with respondent, and was offered investment in a vehicle which traded

funds on an online trading center including, *inter alia*, forex trading. Complainant was informed that an account will be opened for him and he will be able to track the performance of his investment through the internet. Nothing is known about Quintus de Hart save that he signed some of the documents as “consultant”.

[7] Complainant had to first pay a registration fee of R4950, after which an account will be opened for him into which his investment funds will be paid. To this end, on the 26th November 2012, complainant signed an application form promising to pay respondent R4950 by way of an electronic funds transfer. This form also promised complainant the following services:

- a) Trading results will be made available daily by means of email;
- b) Complainant will receive a weekly newsletter;
- c) Complainant will receive a performance schedule on a weekly basis compared with the average achieved on the markets;
- d) Detailed statements every 3 months; and
- e) Complainant can withdraw his funds at any time with no penalty.

This section of the form also pointed out that for these services a subscription fee of R249 per month will be levied.

[8] Complainant was also given a written “money back guarantee”. This document was signed by de Hart on behalf of respondent, and promised as follows”:

*“Trading Results will refund you, your full registration fee, as per your order number, should you **NOT** achieve;*

- a) 15% growth in 3 months.
- b) 30% growth in 6 months.

c) 60% growth in 12 months.”

[9] Complainant was also required to sign a power of attorney giving respondent “*permission to trade on your behalf*”. On the 18th January 2013 complainant signed a “Limited Power of Attorney – Managed Account Authorization”.

[10] Thereafter complainant made the following payments to respondent:

- a) R4950 in respect of the registration fee; and
- b) R100 000 on the 4th March 2013.

[11] After payment was made, complainant received no responses from respondent. He also did not receive any emails informing him of how his investment was performing. He tried to secure an appointment with them but was frustrated. Complainant then discovered that respondent had moved from their premises and left no forwarding address.

[12] As for the investment:

- a) No proof was provided that a trading account for complainant was ever opened;
- b) No statements were received indicating the performance of trades made for complainant;
- c) No returns were paid to complainant; and
- d) Complainant was unable to withdraw his money.

[13] Complainant also realised that respondent had no intention of paying back the capital and registration fee. Complainant would like respondent to pay back the invested funds.

D. RESPONDENT'S VERSION

[14] This office does not have any response from respondent. On the 6th October 2015 a letter, in terms of rule 6(b) of the rules of this office, was emailed to respondent calling for their record of advice and proof that a needs analysis was done. Respondent was requested to explain the motivation behind the recommendation to make this investment. On the 19th January 2016 a notice in terms of Section 27(4) of the Act was emailed to respondent. There was no response from the respondent to any of these emails.

[15] Accordingly there is no version of facts from the respondent. As will appear below, this office is justified in making the adverse inference that respondent was not conducting any legitimate business and had no intention of returning complainant's funds.

AVA FX

[16] For the purposes of this determination it is important for me to deal with the entity with which respondent was supposed to trade complainant's funds. Respondent represented to complainant that his funds will be traded on an "online trading center" provided by AVA FX. Save for an address on the "Limited Power of Attorney", no other information about AVA was provided to complainant.

[17] From this office's own investigations the following emerged:

- a) This entity is owned and operated by Ava Financial Ltd, a company based in the British Virgin Islands.
- b) AVA Financial Ltd provides online forex trading and brokerage services. It offers AvaTrader, a forex trading platform to trade financial instruments, such as oil, stock indices, gold, silver, sugar, cotton, and gas. AVA Financial Ltd was founded in 2006 and is based in Road Town, British Virgin Islands.
- c) Ava Capital Markets Ltd, which operates the AvaTrade platform, is a subsidiary of the financial holding company Ava Financial Ltd. The broker is located in Dublin, Ireland.
- d) On the 10th November 2015 Ava Capital Markets (Pty) Ltd was registered as a financial services provider by the Financial Services Board; with FSP number 45984. They were given a category 1 licence.
- e) AVA's main business is in CFD (contracts for difference) online trading of currencies, commodities and indices. Any individual may register and invest money in a trading account provided the investment must be for a minimum of one hundred US dollars.

[18] From the information available to this office, it appears that AVA does not, at least not in 2012/13, appoint "Trading Agents" in this country. Respondent provided no proof that it was a duly appointed trading agent of AVA. Until November 2015 AVA was not licensed to conduct business in this country, it is highly unlikely that they will appoint respondent as their agent. It was also illegal for respondent to deal with

an unlicensed financial services provider, in the unlikely event that they did do business with AVA.

[19] The investment offered by AVA is a highly risky investment in that there is no safety net for losses and potentially an investor could lose more than 100% of the investment.

E. RESPONDENT'S CONDUCT

[20] At respondent's instance, complainant was expected to sign a "Limited Power of Attorney". A copy of this document was handed to this office by complainant. The document was in fact signed by complainant on the 18th January 2013. It was noted, however, that there is no signature from respondent, as trading agent, nor is there any signature or official approval from AVA. The space for trading agent's signature is left blank.

[21] The terms and conditions of the power of attorney are extremely onerous and is drafted entirely in favour of AVA. The document does, however, repeatedly warn that this is a high risk investment where more than 100% of the investment can be lost. The following are some of the provisions of this document:

a) Complainant is described as the "*Account Holder – Trader*"; and respondent is described as the "*Trading Agent*".

b) Clause 7. states:

"The Trading Agent represents, and Trader hereby confirms, that he/it has all the required governmental approvals, license and permits for managing the Account and performing all the actions set forth herein."

The significance of this is that at no time was respondent licensed to conduct this business. In fact at all material times, respondent was acting in blatant contravention of Section 7 of the Act. Respondent was never issued with a licence in terms of Section 8 of the Act. There is again, no possibility that AVA will appoint an agent who is unlicensed, besides, in January 2013 AVA was itself unlicensed to provide financial services in this country.

c) Clause 8. states:

“The trader acknowledges that AVA has not solicited, or in any other way recommended his/her participation in trading with AVA pursuant to any particular trading system. The trader has made inquiries and conducted researches sufficient to make an informed investment decision.”

Here the complainant did not conduct any research of his own and simply relied on respondent. Even if complainant did carry out some research, he is not likely to understand the complex world of currency trading in CFDs.

d) Clause 10. states:

“AVA shall send the Trader a confirmation of trades made for the account via email.”

No such confirmation was ever received by complainant. In fact no documentation at all was received by complainant from AVA. The only reasonable conclusion to be drawn, in the absence of an explanation from respondent, is that no account was opened with AVA.

e) Clause 11. states:

“The Trader acknowledges that the risk factor in trading foreign exchange, commodities, futures, contracts for difference (CFDs), and or options is substantially high, and therefore the Trader further acknowledges that he/she shall not participate in a trade through AVA if the Trader does not have capital she/he can afford to lose.”

If this was explained to complainant, he would not have made this investment. Instead complainant accepted respondent’s representations that growth was guaranteed, up to 60% in twelve months. This flies in the face of the power of attorney complainant signed. Of greater significance is the fact that had respondent intended to trade on AVA, the latter made no promise of a guaranteed return. Respondent’s representation was false and he made it knowing that it was false and it was made in order to induce an unsuspecting complainant to invest.

f) Clause 12. states:

“The Trader acknowledges that AVA cannot and does not guarantee profits or avoid the risk of loss or, under some circumstances, even limit the extent of the potential loss to the account.”

Plainly it was therefore not possible for respondent to guarantee the extravagant returns he promised complainant. Respondent was merely misleading the complainant into parting with his funds.

g) Clause 13. states:

“The Trader further confirms that he/she understands the potential losses embodied in the aforementioned trading activities and that the only certainty

is that the trading contemplated with the Account possesses a high degree of risk.”

This document makes it very clear that the investment is high risk. This office has no explanation from respondent as to why he recommended this product to a person who is retired. Again, in the face of a clear warning of potential for loss, respondent gave assurances of fantastic profits to be made.

h) Clause 15. states:

“The Trader acknowledges and understands that trading in margined foreign exchange, commodities, futures, contracts for difference (CFD) transactions is very risky and may result in losses that equal to or exceed the amount of margin deposited with AVA. Trader has read and is familiar with AVA’s discussion of the risks involved in trading.”

This clause alone will dissuade any conservative investor from investing; provided they read and understood the document. The onus was on the respondent to explain the product and to give accurate information about it. This was not done, in contravention of the Code, and it appears that complainant merely signed the document on the advice of respondent.

[22] Complainant also signed a schedule setting out the fees to be paid and an “optional profit sharing agreement”. This is a one page document that was signed by complainant but there is no signature from the respondent, as trading agent, nor is there any signature from AVA. For purposes of this determination it is not necessary to discuss this document in detail.

[23] There is absolutely no evidence that respondent actually opened a trading account with AVA. There is no evidence that AVA had anything to do with respondent. On a balance of probabilities, respondent merely downloaded the documents from the AVA website and got his clients to sign them.

F. FINDINGS

[24] It cannot be disputed that at all material times, respondent provided financial services and advice and sold an investment product without the necessary license. In fact respondent had absolutely no licence to operate. Respondent contravened section 7 of the Act. Further, respondent intentionally mislead complainant into believing that they were licensed.

[25] Respondent failed to inform complainant that this was a highly risky investment where all of his capital could be lost. There is no advice of record to show why this investment was suitable for a retired person. Nor is there any record as to what happened to complainants funds.

[26] On the information before this office, respondent failed to comply with the following sections of the Code: 2, 3, 4, 5, 7 and 9.

[27] As a result of respondent's conduct, complainant lost his capital and registration fees. The amount of the loss is R100 000 in respect of the capital and R4950 in respect of registration fees. Respondent is liable to compensate complainant for the latter's loss.

FRAUD

[28] From the investigations in this office, it appears that respondent committed fraud.

There was no appointment as agent to AVA. The money was not deposited in a trading account with AVA. Respondent has never accounted for what he did with the funds. The only reasonable conclusion is that he appropriated the funds for himself with no intention of returning any amount to respondent. All the representations regarding the investment were false and they were made with the sole intention of defrauding complainant of his funds.

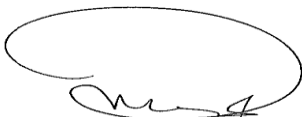
I recommend that Pierre-Louis van der Walt and Quintus de Hart be reported to the South African Police Services; to be investigated for fraud.

G. THE ORDER

[29] In the premises I make the following order:

1. The complaint is upheld;
2. Respondents are ordered to pay to complainant, jointly and severally the one paying the other to be absolved, the amount of R104 950. 00.
3. Interest on this amount at the rate of 10.25% per annum from 4th March 2013 to date of payment.

DATED AT PRETORIA ON THIS THE 18th DAY OF JULY 2016



**NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS**