

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FOC 1142/06-07 KZN (5)

In the matter between:

C J FERREIRA

Complainant

and

TYRAZ INVESTMENTS CC

Respondent

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

A. THE PARTIES

[1] The complainant is Cornelius Johannes Ferreira, retired male, residing at Bellair, Durban, Kwazulu-Natal.

[2] The respondent is Tyraz Investments CC, a close corporation registered in terms of the Close Corporations Act, No 69 of 1984, and having its registered address at 18 Spencer Street, Shalcross, Kwa-Zulu Natal. At all material times respondent was represented by its member Mr Jan Hendrik Van Zyl ('Van Zyl').

B. COMPLAINT

- [3] Complainant seeks to recover an amount of R28 967, 00, being the balance outstanding on the guaranteed portion of a R50 000, 00 investment placed with respondent.
- [4] In terms of an agreement respondent was to 'manage Forex, CFD or Commodity trades' on complainant's behalf. The actual dealing or trades were to take place in a managed trading account opened up in complainant's name with FX Active Limited, an independent entity and the trading platform utilized by respondent.
- [5] Complainant contends that 70% of his capital was guaranteed and that only with his permission could respondent trade below the 70% guaranteed amount. The guaranteed portion amounted to R35 000, 00 and complainant was only able to recover R6 033, 00 hence his claim for R28 967, 00

BACKGROUND AND UNDISPUTED FACTS

- [6] Save for a telephone conversation in September 2007 between this Office and Van Zyl in which he stated that the investment occurred prior to the jurisdiction of the Financial Advisory and Intermediary Services Act No 37 of 2002, ('FAIS Act'), and that the matter had been referred to his attorney, respondent has not replied to the complaint and therefore I have only the version of respondent on which to determine this matter.

[7] According to complainant his dealings with respondent began when, in response to an advertisement in a local newspaper, he contacted respondent and spoke to Van Zyl who explained how the investment worked. After he spoke to Van Zyl he was initially not comfortable investing because the respondent was not registered with the Financial Services Board ('FSB'). However he was assured by Van Zyl that they were in the process of registering. In fact a copy of a document headed 'FSP Application Progress' was given to complainant at a meeting on 14th October 2004 to convince him that there was an application in progress. This coupled with a 70% guarantee is what convinced him to invest. Accordingly and after the investment was explained to him by Van Zyl at the meeting of 14th October 2004 he concluded a contract of investment.

[8] Complainant provided a copy of his contract with respondent, which has the following definitions and terms:

8.1 'Agreement – The agreement entered into by and between the Client and Tyrax Investments CC;

8.2 Facilitator – Tyrax Investments CC a closed corporation duly registered with registration no (2001/081268/23) in terms of the companies act;

8.3 Dealing Platform - FX ACTIVE SA Trading or other similar recognised platforms as chosen by the Facilitator;

- 8.4 Investment – Trading in Foreign currencies through FX ACTIVE SA Trading or other similar recognised platforms as chosen by the Facilitator;
- 8.5 Investment – Trading in foreign currencies through FX Active SA....;
- 8.6 Investment restrictions - 70% capital guaranteed under normal trading conditions. Client to be contacted and permission to be granted before trading on the account can continue;
- 8.7 Facilitator is entitled to receive commission, incentives, fee reductions or rebates from a trading platform for placing and trading the Client's funds with them.'

[9] The contract was accompanied by a limited power of attorney which authorised respondent to trade complainant's 'Trading Account held with FX Active.' In simple terms this allowed respondent to trade and hence take positions in foreign currencies through FX Active.

[10] Complainant provided a copy of the newspaper advertisement, which promises a 'monthly income of 3% or compound your profits to 42% pa' from investing 'in the world's largest capital markets'. This advertisement also makes the claim that respondent is 'FICA Compliant', in other words in compliance with the Financial Intelligence Centre Act 2001 (Act No. 38 of 2001) ('FICA Act'). The main purpose of the FICA Act is the combating of

money laundering.

[11] The trading platform FX Active Limited, allowed complainant to view his managed account via the internet and hence five months later he discovered that the amount had reduced to R6033, 00.

[12] Complainant subsequently phoned Van Zyl on the 22nd March 2005 and on a daily basis thereafter requesting that the 70% guaranteed portion of his investment be repaid. Despite visiting respondent's offices and receiving several assurances by Mr Van Zyl that the funds would be paid, this did not materialise. Even a letter of demand forwarded to Van Zyl by complainant's attorneys proved fruitless.

[13] As he was unsuccessful in obtaining payment from respondent, complainant requested the trading platform, FX Active Limited, to pay out the balance of R6 033, 00 remaining in the trading account under his name.

INVESTIGATION

[14] As respondent was not listed as an authorised financial services provider with the Financial Services Board ('FSB') a copy of the document provided by complainant and headed 'FSP Application Progress' was forwarded to the FSB in order to ascertain if respondent had, as set out on in this document, indeed applied for a licence.

- [15] This document appears to be what would be termed a screenshot or computer printout of a page from the FSB website. The document contains the FSB insignia and lists respondent as having applied for a license as a financial service provider.
- [16] The FSB advised that there was no record of an application having been received from respondent and that the screenshot appeared to be 'bogus'. In response to further enquiries with the FSB, they advised that if such an application had in fact been received, this would have been scanned into a file using the reference number provided on the document. They went further and pointed out that the font utilised for their name differed from that used on their website.
- [17] As respondents name appeared similar to another entity also known as 'Tyrax Investments' it was initially thought that these were possibly one and the same and hence the FSB conducted a company's search with the Registrar of Companies & Close Corporations as at 29 January 2007. This confirmed that respondent was another entity whose members as at 29 January 2007 were as follows:

| | |
|------------------------------|------------------|
| Cyril Arumugam | ID 6804235291084 |
| Frans Willem Andries Van Zyl | ID 6012185092086 |
| Peter Justin Hitchinson | ID 8012185285084 |
| Jan Hendrik Van Zyl | ID 6112265059086 |

THE ISSUES TO BE DETERMINED ARE THE FOLLOWING

- (a) Whether the respondent rendered a financial service within the jurisdiction of the FAIS Act.
 - (b) Whether in rendering a financial service respondent contravened any provisions of the FAIS Act or General Code.
 - (c) Whether the contraventions of the Act resulted in a loss, and if so the extent of such loss.
- (a) Whether the respondent rendered a financial service within the jurisdiction of the FAIS Act.**

[18] The jurisdiction of this Office came into effect on 30th September 2004 and respondent contends that the investment took place prior to the jurisdiction of this Office. I can only assume that he means that the advice rendered in respect of the investment was made prior to 30th September 2004. The newspaper advertisement is undated and there are no records of the dates of the initial telephone conversations between the parties. This is the stage at which the investment was according to complainant initially explained to him. This may well predate the coming into effect of the FAIS Ombud's jurisdiction and the Rules on Proceedings and other applicable sub-ordinate measures.

[19] In order to fall within the jurisdiction of the Office, a financial service must have been rendered on or after the date of commencement of this act.

Section 1 of the FAIS Act defines the rendering of a financial service as:-

- (a) giving advice, or
- (b) giving advice and rendering an intermediary service; or
- (c) rendering an intermediary service.

[20] The definition of Advice is broad and incorporates 'any recommendation, guidance or proposal of a financial nature furnished by any means or medium, to any client or group of clients:-

- (a) in respect of the purchase of any financial product ; or
- (b) in respect of the investment in any financial product; or
- (c) on the conclusion of any transaction, including a loan or cession...'

[21] Intermediary service is defined as:-

'...any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

'the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or... buying, selling or otherwise dealing in (whether on a discretionary or non discretionary basis), managing administering, keeping in safe custody '

[22] Considering the advice aspect I have no doubt that the actions of Van Zyl in explaining the investment on a board, on 14th October 2004 clearly fall within the definition of advice. According to complainant Van Zyl in this presentation

emphasised the 70% guarantee and the impressive returns. It is no mere coincidence that immediately thereafter complainant entered into the transaction. This was clearly advice being 'any recommendation guidance or proposal.' In simple terms even if discussions took place prior to the jurisdiction of this Office, there can be no doubt that the critical discussions, and hence advice took place well within the jurisdiction of the Office.

[23] Even if I were to give respondent the benefit of the doubt, and say that no advice was rendered within the jurisdiction of the Office, which in my view is not the case, respondent cannot escape the fact that a financial service includes an intermediary service. Not only was the 'FSP Application Progress' document provided and the necessary forms completed, but the very purpose of this investment was the trading in foreign currencies or contracts for difference. The contract itself clearly states that respondent is to place and trade the client's funds with them. This trading activity falls squarely within the definition of an intermediary service given that it is an act other than the furnishing of advice which amounts to 'buying, selling or otherwise dealing' as set out in the definition of an intermediary service.

(b) Whether in rendering a financial service respondent contravened any provisions of the FAIS Act or General Code.

[24] Investigations confirm that respondent was not registered as a financial services provider. In terms of Section 7 (1) of the FAIS Act:-

'a person may not act or offer to act as a financial services provider unless such person has been issued with a licence under Section 8.'

Subsection (2) however states that:-

'a transaction concluded on or after the date contemplated in subsection (1) between a product supplier and any client by virtue of any financial service rendered to the client by a person not authorised as a financial services provider, ... is not unenforceable between the product supplier and the client merely by reason of such lack of authorization.'

[25] However the lack of authorisation is just one aspect of non compliance. Quite apart from respondent's attitude that that this was pre-FAIS, when clearly the main interaction took place post-FAIS, respondent was quite comfortable to simply take clients money under the pretext of being a discretionary FSP trading in a forex investment environment. This would at the very least have required a category II discretionary FSP licence, a category of licence that carries with it strict compliance requirements.

[26] It follows that respondent has not even complied with the most basic pre-requisites to provide financial advice, as set out in the General Code Of Conduct For Authorised Financial Services Providers and Representatives, Board Notice 80 of 2003 ('the Code'). In this regard there has been no attempt to gather available information in order to provide complainant with appropriate advice. No analysis has been conducted, or any attempt made to identify appropriate products suitable to complainants needs. These are basic requirements of Section 8 of the Code. In addition there is certainly no record

of any advice as required by Section 9 of the Code.

- [27] The advertisement which led to this investment was published prior to the FAIS Act and hence the relevant sections of the Code do not apply in the instance. It must be noted that Section 14 of the Code states that:-

'An advertisement by any provider must not contain any statement, promise or forecast which is fraudulent, untrue or misleading' and if it contains 'illustrations, forecasts or hypothetical data contain support in the form of clearly stated basis assumptions ...with a reasonable prospect of being met under the current circumstances.'

- [28] However whilst Section 14 of the Code may not have been applicable at the time this does not change the fact that appropriate advice should have been rendered at the point of sale on the 14th October 2004. The interaction between the parties was initiated in response to this advertisement, which is clearly misleading in that it promises unrealistic returns. Even in the unlikely event that the returns were attainable they would have been at an attendant risk unsuitable to complainant's situation.

- [29] The requirements of the Code are succinctly summed up in Section 2 which requires that a:-

'provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients....'

In this instance the financial service rendered was the complete antithesis of the requirements of the Code. There can be no doubt that not only was complainant not advised but even more alarmingly fraudulently led to believe that he was dealing with a duly licensed FSP in order to convince complainant to part with his money.

(c) Whether the contraventions of the Act resulted in a loss, and if so the extent of such loss.

[30] It is evident that there are numerous contraventions of the FAIS Act, and given that there is no dispute that complainant's funds reduced from R50 000, 00 to R6 033, 00 it remains to be determined whether in fact the contraventions of the FAIS Act resulted in this loss.

[31] Complainant has advised this Office that the R50 000, 00 was part of a retrenchment package, which he is dependent upon to see him through retirement. In discussions with the Office it has become apparent that complainant is not a man of means. In fact quite the contrary; the phrase '*every cent counts*' to quote complainant would be appear to be appropriate. Given his circumstances complainant can ill afford to risk money on speculative schemes, particularly those operating outside the ambit of the law. Had respondent been registered and followed the requirements of the Code, there is little doubt that complainants money would not have been invested in this manner.

[32] It is pertinent that complainant sought assurances that he was dealing with a legitimate enterprise, operating in compliance with the FAIS Act. Instead he was provided with a 'bogus' certificate purporting to show that registration was in progress. In reality this investment was induced by an intentional, material misrepresentation.

[33] Complainant has restricted his claim to the '70% capital guaranteed under normal trading conditions' as set out in the contract between complainant and respondent. However as already mentioned, complainant would not have concluded this investment were it not for the questionable actions of respondent. In fact it is fairly safe to say that appropriately invested, complainant would have seen a positive return on his capital as opposed to the loss suffered. The link between respondent's conduct and the loss is clear and given the many contraventions of the FAIS Act I must question whether the supposedly 70% guarantee was worth the paper it was written on.

[34] Although complainant appears to accept that he could lose 30% of his investment, such a decision could only have been made when properly appraised of all material information as required by the Code. The extent to which complainant was misled into believing that respondent was in the process of being registered, coupled with the lack of necessary documentation and promises of unrealistic return is so material that I have no hesitation in concluding that 100% of the loss was directly attributable to respondent.

[35] In the light of the above I find that the only equitable determination would be to place the parties back in the position in which they were before the contract was entered into.

[36] In the circumstances I make the following order in terms of Section 28 of the FAIS Act.

Order

1. The respondent is hereby ordered to compensate complainant in the amount of R43 967, 00 being (R50 000, 00 less R6 033, 00).
2. Respondent is pay interest on the aforesaid amount at the rate of 15.5% seven (7) days from the date of this order to date of final payment.
3. Respondent is to pay case fees to this Office in the amount of R1 000, 00.

DATED AT PRETORIA ON THIS THE 14th DAY OF APRIL 2009



**CHARLES PILLAI
OMBUD FOR FINANCIAL SERVICES PROVIDERS**