

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS  
PRETORIA**

**CASE NUMBER: FAIS 07590/14-15/ KZN 2**

**In the case between:**

**ALVIN WILTON FILDES**

**Complainant**

**and**

**TRADING TO GET RESULTS CC**

**First Respondent**

**PIERRE-LOUIS VAN DER WALT**

**Second Respondent**

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

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**A. INTRODUCTION**

- [1] A representative of first respondent called on complainant and offered to invest his money with a promise of growth of at least 40% within the first twelve months. Complainant invested an amount of R33 273.17 and paid a registration fee of R4950. Respondents promised that in the event that the growth did not achieve 40% in the first twelve months, the registration fee will be refunded.
- [2] After making the investment the promised return did not materialize after one year and respondents failed to refund the registration fee as promised. Nor did respondents account for the capital invested. Complainant, on the 18<sup>th</sup> February 2015, filed a complaint with this office.

## **B. THE PARTIES**

- [3] Complainant is Alvin Wilton Fildes, an adult male whose details are on file in the Office.
- [4] 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*".
- [5] 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.
- [6] 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. However an email address was available.

## **C. COMPLAINANT'S VERSION**

- [7] Complainant received repeated calls from representatives of respondent wanting to offer him investment opportunities. At first complainant did not want to invest as

he did not have any available funds. He then obtained a loan of R50 000, from which he invested 3000 US dollars with respondent. This amounted to R33 273 .17 at the time. Complainant also paid a registration fee of R4950.

[8] According to complainant, he understood this to be a foreign exchange investment. He was persuaded to invest as respondent promised a growth of 40% within the first twelve months. Respondent also agreed to refund the registration fee should the promised growth of 40% not be achieved.

[9] Upon agreeing to invest, complainant was handed a document called "*Your Trading to get Results Welcome Pack*". A copy was provided to this office by complainant. Having considered this document, it is nothing more than a copy of information downloaded from the AVATRADE website. The information provides step by step instructions on how to access one's account with AVA.

[10] It appears that shortly after the investment was made complainant accessed an account with AVA and discovered that only 48 US cents remained of his \$3000 investment. From this point onwards, complainant was unable to make contact with respondent.

[11] Complainant states that respondent lost his investment and further failed to refund the registration fee. I must point out that complainant provided proof that he paid the money to respondent on the 18<sup>th</sup> February 2014. Complainant wants to recover his lost investment as well as a refund of the registration fee.

[12] In making this investment complainant signed the following documents:

- a) An “*Investment Agreement*” entered into between complainant and first respondent;
- b) A “*Limited Power of Attorney: Managed Account Authorization*”; and
- c) A “*Schedule of Fees*”.

All of the above documents were signed on the 4<sup>th</sup> February 2014. I will deal with the relevant parts of these documents below.

[13] Complainant’s profile shows that he did not have any previous experience of forex trading; nor did he have funds which he could afford to lose. The funds invested were borrowed at favourable rates and invested in the belief that there will be growth of at least 40% within the first 12 months from initiation of the investment.

#### **D. RESPONDENT’S VERSION**

[14] This office does not have any response from respondent. On the 3<sup>rd</sup> March 2015 a letter, in terms of rule 6(b) and (c) of the rules of this office, was emailed to respondent calling for their record of advice and proof that there was compliance with the Act. Respondent was requested to explain the motivation behind the recommendation of this investment. On the 19<sup>th</sup> January 2016 a notice in terms of Section 27(4) of the Act was emailed to respondent. Whilst the emails were received at respondent’s address, there was no response from the respondent.

[15] Accordingly there is no version 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 the information about the website in the "welcome Pack", no other information about AVA was provided to complainant.

[17] From this offices' 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 10<sup>th</sup> 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 is for a minimum of one hundred US dollars.

[18] From the information available to this office, it appears that AVA did not, at least not in 2014, 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 would have appointed 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 actually 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] Respondent and its representatives made extravagant promises to would be investors; promising a growth rate of 40% within one year of initiation of investment. The true nature of the investment was not explained to complainant. If respondent did in fact trade funds in a forex account; it was irresponsible and even reckless to promise a return of between 40% and 60% within one year. Certainly AVA made no such promise and actually warned the public that this was high risk investment and the possibility exists that more than 100% of invested funds can be lost.

[21] In this regard I refer to two documents signed by complainant at the instance of respondent; the "Investment Agreement" and the "Limited Power of Attorney". I begin with the Investment Agreement:

- a) To begin with, this agreement is not signed by the respondent, only the complainant's signature appears. This calls to question the validity of this contract.
- b) On page one there is provision for an "AVA Account Number"; the space for this number is left blank. The significance of this is that this office believes that no account was opened with AVA and this whole scheme was a fraud.
- c) In Clause 1, the agreement deals with risk. The agreement provides that 40% of the client's funds will be subject to risk, leaving "*the floor limit on client's account balance set at 60%*". This clause is misleading as AVA, as I will show below, who is the forex trader makes no such promise and goes further to warn that all the funds are at risk of loss. Besides, one has to question how growth of 40% per annum can be achieved when there is a risk of losing 40% of the investment in trading activity within months or possibly days of investing.
- d) In clause 2, respondent promises transparency by giving clients direct online access to their accounts and the provision of a weekly newsletter giving information on how the investment performed. This promise did not materialize as soon after the investment was made, complainant lost contact with respondent. Needless to say, no weekly newsletter arrived.

- e) Clause 6, provides that respondent confirms that “*the client will have access to his/her funds at all times without penalty.*” In breach of this provision, respondents simply disappeared with complainant’s funds with no prospect that the latter will have access to it. In fact, there is no evidence as to what respondent actually did with the funds. The only reasonable conclusion, in the absence of any explanation, is that respondent appropriated the money for themselves.
- f) Clause 12, provides for a “*Money Back Guarantee*”; the registration fee of R4950 is guaranteed to be returned should “*the investment not achieve at least a Net growth of 40% over the FIRST 12 (twelve) months from initiation of investment*”. Significantly only the registration fee is guaranteed. The contract contains a prominent heading “Money Back Guarantee”. The heading is deliberately misleading. There is no guarantee that the investment will be safe. In any event, respondent is in breach of this clause as the investment did not perform at all and no part of the registration fee was returned.

[22] I now turn to the Limited Power of Attorney signed by complainant. I will deal with some of the material provisions in this document to show that it actually contradicts the Investment Contract as well as the representations made to complainant regarding this investment.

- a) Clause 7 provides as follows:



*“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.

b) 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.

c) Clause 9 provides that *“The Trading Agent is not an employee or agent of AVA and AVA does not vouch or endorse the services provided by the Trading Agent”*. This document made it very clear that AVA will not be held responsible for respondent’s conduct of the trading account. This meant that complainant had no recourse against AVA for the performance of this investment. In fact this document even provides for an indemnity from

complainant in favour of AVA for any loss caused by the respondent as Trading Agent.

d) Clause 10, 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 40% and 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.

e) Clause 11, 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, whether through a Trading Agent or otherwise.”*

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.

f) Clause 12. 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 was investing borrowed money. Again, in the face of a clear warning of potential for loss, respondent gave assurances of fantastic profits to be made.

g) It is significant that the following warning appears in clause 14. :

*“The Trader acknowledges and understands that Foreign Exchange and/or CFD trading through a Trading Agent or otherwise, is very risky and may result in losses that equal to or exceed the amount of margin deposited with Ava.”*

Contrary to this, respondent promised returns of 40% to 60% within a year.

A promise AVA never made and will not make.

[23] Complainant also signed a schedule setting out the fees to be paid. This document provides that complainant agrees to respondent deducting 20% of the profits from complainant's account. However this document then states as follows:

*“Should this amount be negative, no amount is due to the Trading Agent.”*

Even this document provides for loss making. Even if profit was made, 20% was going to be deducted; this also calls for an explanation as to how growth of 40% can be promised.

[24] 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 the probabilities, respondent merely downloaded the documents from the AVA website and got his clients to sign them. Even if an account was opened for complainant with AVA, all this office knows is that only 48 US cents remain. There is no evidence to demonstrate how much of complainant's funds were actually invested and traded.

## **F. FINDINGS**

[25] 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.

[26] 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 person earning a modest salary and who borrowed money to invest in this scheme. If a risk analysis and needs analysis was done,

this investment was not appropriate for complainant. Nor is there a record to show what happened to complainants funds.

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

[28] As a result of respondent's conduct, complainant lost his capital and registration fees. The amount of the loss is R33 273. 17 in respect of the capital and R4950 in respect of registration fees. Respondent is liable to compensate complainant for the latter's loss.

#### **G. FRAUD**

[29] 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 complainant. 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.

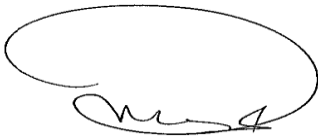
#### **H. THE ORDER**

[30] 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 R38 223.17.
3. Interest on this amount at the rate of 10.25% per annum from 18<sup>th</sup> February 2014 to date of payment.

**DATED AT PRETORIA ON THIS THE 18<sup>th</sup> DAY OF JULY 2016**

A handwritten signature in black ink, enclosed within a hand-drawn oval. The signature is cursive and appears to be the name 'M. N. Bam'.

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