

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

CASE NUMBER: FAIS 07961/14-15/ GP 1

In the matter between:

WAYNE BERNARD KLUG

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] The complaint arises from an investment made by complainant, following advice of respondent. Complainant was promised growth of at least 40% within the first 12 months. The terms of investing further required complainant to pay a registration fee on the basis that same would be refunded in the event that the promised growth was not achieved.

[2] After making the investment, the promised return did not materialize, and respondent failed to refund the registration fee. Respondent further failed to account for the capital invested. Complainant, on 3 March 2015, filed a complaint with this Office.

B. THE PARTIES

- [3] Complainant is Mr Wayne Bernard Klug, an adult male whose particulars are on file with this Office.
- [4] First Respondent is “Trading to get Results”, a closed corporation duly incorporated in terms of South African Law, registration number 2011/096294/23, with its principal place of business at 25 Carnegie Park, Blarney Street, Hennops Park, Centurion. First respondent’s principal business is described in the companies register as *“Investing and consulting. Trading in all aspects”*.
- [5] Second respondent is Mr Pierre-Louis van der Walt, an adult male whose last known address was confirmed by a tracing agent as 25 Miles Broadwood, Port Elizabeth, Eastern Cape. Second respondent 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] In this determination, I refer to first and second respondents as respondent. Where appropriate, I specify.

C. COMPLAINANT’S VERSION

- [7] Complainant was introduced to respondent by a friend, who presumably also invested through respondent. Complainant had never met second respondent personally, but was enticed to invest because of a “signing bonus” of \$1500 that would be added to the investment by AVA Trade.
- [8] On or about the 25th of February 2014, complainant entered into an agreement with first respondent that supposedly offered forex trading.

- [9] In terms of the agreement, complainant had to pay a registration fee of R4950, after which an online account would be opened for him, in order to track the performance of his investment.
- [10] Complainant, on 25 February 2014, deposited an amount of R4950 in respect of the registration fee into first respondent's account. Complainant further deposited an amount of \$3000 (R40 414.75)¹ into an account, which is supposedly that of AVA FX on 27 February 2014.
- [11] During or about April 2014, complainant accessed his account with AVA and discovered that there were losses on his account. By December 2014, complainant was left with \$27, and by January 2015, a zero balance.
- [12] Complainant made various attempts to resolve the matter with respondent. Apart from one phone call, it was impossible to reach respondent telephonically. He exchanged numerous e-mails with second respondent where the latter promised to resolve the matter, but matter was never resolved.
- [13] Complainant was further informed of a recuperation fund, which respondent had allegedly set up at "CM Trading", in an attempt to recoup the losses suffered. Despite these promises, complainant has not received a single cent of his investment.
- [14] In making this investment complainant signed the following documents:
- 14.1 An "*Investment Agreement*" entered into between complainant and first respondent;

¹ The rand value on 30 January 2017 as per the exchange rate

14.2 A “*Limited Power of Attorney: Managed Account Authorization*”; and

14.3 A “*Schedule of Fees*”.

I will deal with the relevant parts of these documents below.

[15] Complainant’s profile shows that he did not have any previous experience of forex trading. Complainant invested in the belief that there would be growth of at least 40% within the first 12 months from the initial investment.

D. RESPONDENT’S VERSION

[16] On 23 November 2015, a notice in terms of rule 6 (b) was sent to respondent, calling for respondent’s complete file of papers. Respondent was further invited to respond to complainant’s contention that he was advised that he would not suffer a loss greater than 40% of the investment including the promise of refunding the registration fee.

[17] On 11 February 2016, a notice in terms of section 27 (4) of the Act was e-mailed to respondent. No response was received to either notices.

[18] From the information that will be provided below, the Office is justified in making the adverse inference that respondent was not conducting any legitimate business and had no intention of returning’s complainant’s funds.

AVA FX

[19] For the purposes of this determination it is important for me to deal with the entity on which respondent was supposed to trade complainant’s funds. Respondent represented to complainant that his funds would be traded on an “online trading

centre” provided by AVA FX. Save for an address on the “Limited Power of Attorney”, no other information about AVA was provided to complainant.

[20] Investigations conducted by the Office², revealed the following:

20.1 This entity is owned and operated by Ava Financial Ltd, a company based in the British Virgin Islands.

20.2 AVA Financial Ltd provides online forex trading and brokerage services. It offers AvaTraders 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.

20.3 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.

20.4 On 10 November 2015, Ava Capital Markets (Pty) Ltd was granted its license as a financial services provider, by the Financial Services Board; with FSP number 45984. They were granted a category 1 licence.

20.5 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 \$100.

² See the determination of Du Preez v Trading to get Result and Others, FAIS 03507/15-16/MP 1, available on www.faisombud.co.za/determination

[21] From the information available to this Office, it appears that AVA did not (at least 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 therefore 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 do business with AVA.

[22] The investment offered by AVA is a high risk investment, in that there is no safety net for losses. Potentially, an investor could lose more than 100% of the investment.

E. RESPONDENT'S CONDUCT

[23] Respondent and its representatives made extravagant promises to potential investors; promising a growth rate of 40% within one year of initial 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. AVA definitely made no such promise and actually warned the public that this was a high risk investment, with the possibility that more than 100% of invested funds could be lost.

[24] I refer in this regard to two documents signed by complainant; the "Investment Agreement" and the "Limited Power of Attorney". As for the Investment Agreement, the following is relevant:

- 24.1 Firstly, the agreement is not signed by respondent. Only complainant's signature appears. This calls into question the validity of this contract.
- 24.2 Page 1 provides 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.
- 24.3 Clause 1 of 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. AVA, as I will point out below, 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.
- 24.4 In clause 2, respondent promises transparency by giving clients direct online access to their accounts, as well as the provision of a weekly newsletter giving information on how the investment performed. This promise did not materialize. Soon after the investment was made, complainant, despite various attempts, could not get hold of respondent. Respondent replied in one of the e-mails stating that he could not talk to complainant during the day, as he was "monitoring the market". There is no proof that the promised newsletters were ever sent to complainant.
- 24.5 Clause 6 provides 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 that respondent had ever traded complainant's money. The only reasonable conclusion, in the absence of any explanation, is that respondent appropriated the money for themselves.

24.6 Clause 12 provides for a "*Money Back Guarantee*"; the registration fee of R4950 is 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.

[25] 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.

25.1 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. Besides, in January 2013 AVA was itself unlicensed to provide financial services in this country.

25.2 Clause 8 states that:

“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.”

There is no evidence that complainant conducted any research of his own. He simply relied on respondent. Even if complainant did carry out some research, it is highly unlikely that he would have understood the complex world of currency trading in CFDs.

25.3 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 makes it very clear that AVA will not be held responsible for respondent's conduct in respect 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 respondent as Trading Agent.

25.4 Clause 10 states that:

“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, it is highly unlikely that complainant would have made this investment. Instead complainant accepted respondent's representations that growth was guaranteed, up to 40% and 60% in twelve months. 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 representations were false, and he made them knowingly in order to induce an unsuspecting complainant to invest.

25.5 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.

This was a promise AVA never made and would not make.

[26] 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 balance of probabilities, respondent merely downloaded the documents from the AVA website and enticed his clients to sign it. Even if an account was opened for complainant with AVA, all this Office knows is that complainant was left with a zero balance by the end of January 2015. There is no evidence to demonstrate how much of complainant's funds were actually traded.

F. FINDINGS

[27] It cannot be disputed that at all material times, respondent provided financial services to complainant without the necessary license. Respondent contravened section 7 of the Act. Further, respondent intentionally misled complainant into believing that they were licensed.

[28] Respondent failed to inform complainant that this was a high risk investment where all of his capital could be lost. There is also no record as to what happened to complainant's funds.

[29] From the information before this Office, respondent failed to comply with sections 2, 3, 4, 5, 7 and 9 of the Code.

[30] As a result of respondent's conduct, complainant lost his capital and registration fees. The amount of the loss is R40 414,75 in respect of the capital, and R4950 in respect of registration fees. Respondent is liable to compensate complainant for his loss.

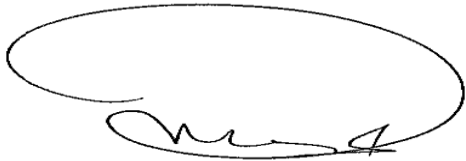
G. THE ORDER

[31] 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 R45 364.75³.
3. Interest on this amount at the rate of 10.25% per annum from 25 February 2014 to date of payment.

³ As per the rand dollar exchange rate on 30 January 2017.

DATED AT PRETORIA ON THIS THE 30th DAY OF JANUARY 2017

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a series of connected, cursive letters, all contained within a large, hand-drawn oval.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS