IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBER: FAIS 04546/11-12/ EC 1

In the matter between:

ALEXANDER FREDERICK CARTER	**Complainant**
and	
DEO VOLENTE EMPOWERMENT AND TRADING CC	**1st Respondent**
PAUL LOUIS LOUW	**2nd Respondent**
JOHANNES THEODORUS OTTO	**3rd Respondent**
DENTON DEAN HENNING	**4th Respondent**
PAUL R JOHNSON	**5th Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO 37 OF 2002 (the Act)

A. INTRODUCTION

[1] Complainant received an amount of R800 000 as proceeds from his retirement funds. He was unemployed and wanted to invest the money in order to earn an

income. He met second respondent (Louw), whom he knew as a retired NG Dominie and who operated from the building of a local Christian radio station, in Newton Park Port Elizabeth. Louw conducted the business of first respondent (Deo Volente) which traded client funds on the foreign exchange markets.

[2] Second respondent promised complainant that he will earn 30% per month on his investment and the investment was “good and safe”. Complainant did not earn anything close to the promised returns and when he tried to redeem his funds, he got no response save for some small irregular payments. Soon afterwards, Deo Volente stopped operating after it lost client funds.

[3] Complainant wants to recover his investment and states that second respondent and the other respondents were dishonest and lost his money in reckless trading contrary to the terms of the contract he had with Deo Volente. Complainant felt strongly about this and claimed that respondents simply “hijacked” his funds leaving him destitute.

B. THE PARTIES

[4] Complainant is Alexander Frederick Carter an adult male residing at 31 Van Wyk Street, Westering, Port Elizabeth.

[5] First respondent is Deo Volente Empowerment and Training CC t/a Capital Builder Investments (CBI), a close corporation duly registered in terms of the company laws of South Africa, having its registered address at Suite K 23

Highgrove Estate, Collindale Road, Beverly Grove, Port Elizabeth. CBI was at all material times a licensed financial services provider (FSP) with license FSP 21606.

[6] Second respondent is Paul Louis Louw (Louw), an adult male, member and key individual of Deo Volente, residing at 22 Highgrove Estate, Collindale Road, Beverly Grove, Port Elizabeth.

[7] Third respondent is Johannes Theodorus Otto (Otto), an adult male, member and key individual of Deo Volente, residing at 7 Lotus Street, Sunridge Park, Port Elizabeth.

[8] Fourth Respondent is Denton Dean Henning (Henning) an adult male, member, representative and key individual of Deo Volente, residing at 12 Bluebell Place, Sunridge Park, Port Elizabeth.

[9] Fifth Respondent is Paul R Johnson (Johnson) an adult male key individual of Deo Volente, residing at 13 Ralston Road, Fernglen, Port Elizabeth.

C. THE COMPLAINT

[10] Due to circumstances unrelated to this matter, complainant was forced into early retirement. He received the proceeds from his pension fund in an amount of R800 000. Being unemployed, he wanted to invest the funds and earn an income from it. At the outset it must be stated that complainant was adamant that he had

no desire to put his funds at risk. This was his pension and he had no means of replacing it.

[11] Complainant knew Louw as a retired priest of the NG Kerk in Port Elizabeth. Louw was well known in the community. Complainant attended a presentation by Louw after reading an advertisement by first respondent promising very good returns. Second respondent explained that client funds are traded on the forex markets and profits are paid directly into individual client accounts. He represented that clients can earn 30% per month on their invested funds. Second respondent explained that first respondent had the technical expertise to conduct these trades and make money for their clients. Third respondent was represented as a person who was highly qualified and experienced and he was the person in charge of trading client funds. Second respondent stressed the fact that this was a "good and safe" investment.

[12] Complainant was persuaded by second respondent's presentation and also trusted him as a priest. He was also impressed by the prospect of earning 30% on his investment. At that time complainant's funds were in his bank account and not earning anything close to 30%. It must be stated that complainant had no history with investments and was entirely inexperienced in this regard. He was certainly not capable of understanding forex trading and the risks associated with this type of investment.

[13] Complainant made it clear that at no stage during second respondent's presentation did he mention the risks in this form of investment nor did he draw

attention to the fact that there was a risk of losing all his funds. Second respondent did not explain that this type of investment was not suitable for investing pension funds. On the contrary, second respondent's represented that this was a safe investment.

[14] On the 30th March 2009 complainant invested R800 000 with first respondent. The following material representations were made which induced him into making the investment:

a) CBI promised that complainant will receive 30% from the first month of making the investment;
b) That economic circumstances were irrelevant to the monthly returns as CBI had, for the last 10 years, exceeded the 30%;
c) That there was a three trillion US dollar market out there; and
d) With CBI's "expert technical ability" they would look after complainant and ensure the 30% return on the investment per month.

[15] Having been convinced of respondent's integrity and having being persuaded that this was "a safe haven and a good investment"; complainant invested all his funds in first respondent.

[16] Eight months after he made the investment, complainant received none of the promised 30% per month. In fact he received no returns for eight months. He then decided to redeem the funds. Second respondent advised against this pointing out that the Rand was strong and complainant should wait till the end of

March 2011. In the interim second respondent promised to reimburse complainant an amount of 1000 US dollars a month to “tide him over” as he was financially distressed.

[17] Complainant only received some payments of 1000 dollars, for which he had to beg and plead. By the end of March 2011 the promised returns still did not materialise. In August 2011 complainant signed a redemption form to obtain full payment of his investment. In terms of the redemption, it would take 60 days to return the investment. This too did not materialise. This is not surprising as at this stage, all of complainant’s investment was lost.

[18] After the passing of 60 days from issuing the redemption instruction, complainant found that he was unable to make any contact with first respondent or any of the other respondents. According to complainant, they seemed to have “disappeared”. Their offices were abandoned and no forwarding address was given. Complainant did however receive statements from first respondent showing that there was no growth on the investment. This, complainant points out, was contrary to the contract he had with first respondent.

[19] Complainant feels very strongly that the respondents, in particular Louw, Otto and Johnson, merely defrauded him of his pension. Complainant wants return of the full amount of R800 000 invested.

D. THE RESPONSE

[20] In terms of the rules of this Office, the parties were afforded an opportunity to resolve or settle the matter amongst themselves without Office intervention. They were given a period of 6 weeks to do so however this was not possible and the relevant notices in terms of section 27 of the Act were delivered to all the respondents affording them a further 2 weeks to respond to complainant's allegations. Second respondent instructed attorneys, Roelofse Meyer Inc, to respond to the notices. However, there was much delay in filing a response as these attorneys, for various reasons, repeatedly requested more time and extensions.

[21] Eventually and in January 2016, a response was received in the form of an affidavit deposed to by second respondent. At the outset I must say that second respondent made a disclosure of the fact that first respondent traded client funds and lost all of it. He also admitted that the respondents traded the funds contrary to the terms and conditions of the contract they had with their clients. The following are the main features of second respondent's response:

a) He gives a long history of how the business developed. He also explained the role of each of the respondents. This history is not useful and I do not intend dealing with it;

b) It was third respondent who had the knowledge and expertise to trade forex on the markets. Second respondent and third respondent started first

respondent and began to build a portfolio of trading accounts that were traded by third respondent and other traders.

c) In July 2006 first respondent was issued a category 2 FSP license (FSP 21606) and ODL Securities in London was approved by the FSB as the clearing firm. Third respondent, as a member of first respondent was designated “director of trading” as fund manager. Trading compliance was the sole responsibility of third respondent.

d) Deo Volente and CBI began attracting clients through word of mouth and investments were being made by clients who had previously invested with CBI. Louw makes the point that at all times, CBI strictly complied with the FSB’s mandate and the instructions from their compliance officers. He also states that it was “imperative” that clients were made fully aware of the risks involved and that no guarantees as to future performance could be made.

e) Moonstone was appointed as compliance officers and CBI was at all times guided by them. Moonstone advised that CBI was a product provider with only one product and was therefore unable to provide comparisons with other financial products. Moonstone further advised that CBI need not carry out needs analyses for clients as a standard procedure, unless clients requested same.

f) Second respondent pointed out that no client approached them for advice before making an investment in the CBI product.

g) No client funds were channelled through CBI’s bank accounts. All client funds were paid directly into client trading accounts opened at the clearing firm in

London. In order to redeem funds, clients had to submit a completed redemption form directly to the clearing firm. Funds were then paid directly into the bank accounts where the funds originated.

h) During 2010 third respondent appointed a trader by the name of Pieter de Necker. Between this individual and third respondent, they accelerated trading activity with initial success. During the last quarter of 2010 second respondent noticed that draw-downs were beginning to occur causing him to be concerned that clients' mandates were being overtraded. Third respondent explained that this was temporary due to "market conditions" and promised that the situation will improve.

i) Second respondent was away from the office for about a month and when he returned in January 2011 he found that mandates were exceeded and the managed accounts were overtraded. Clients had suffered losses. Second respondent states that he was unable to intervene in third respondent's activities and in order to remedy the situation he requested their compliance officer to start disciplinary action against third respondent.

j) Second respondent attempted to convene a meeting with third respondent, fifth and fourth respondent to no avail. He then put them on terms that if they did not respond he will close the business and report the matter to the FSB. There was no response from his colleagues. This resulted in a letter being sent to all CBI's clients informing them of the termination of the business and providing instructions on how to redeem the balance of their funds at the clearing firm. Clients were also notified that they could complain to this Office.

k) Second respondent then deals with complainant specifically. He states that complainant was introduced by a friend and visited CBI's offices where fifth respondent gave all the information about the investment; including documentation which he took with him. According to second respondent, fifth respondent explained the risk in the investment to complainant. A few weeks later complainant returned and requested that CBI accept his investment.

l) Second respondent then explains that "some days" after complainant's funds were received by the clearing firm in London; third respondent noticed a transfer from complainant's account to another that was unrelated to third respondent's trading system. It transpired that complainant, without third respondent's knowledge and without consulting CBI, on his own initiative requested the clearing firm in London to give him "personal authority" to trade his account in addition to the mandate he gave CBI. According to second respondent, complainant "lost a significant amount of his funds through his own trading actions". Third respondent then demanded that complainant quit trading himself.

m) Later complainant made an arrangement with CBI to send redemption forms to the clearing firm for regular monthly withdrawals of 1000 US dollars, irrespective of the rand dollar exchange rate. According to second respondent these amounts were paid by the clearing house directly into complainant's bank account. No details of how much was paid into complainant's bank account was provided by second respondent.

n) Third respondent, according to second respondent, took full responsibility for the trading losses incurred by CBI's clients.

o) Second respondent ends his submissions by stating that he at all times complied with the Act, General Code of Conduct and Board Notice 39 of 2004 for Forex FSPs. He was therefore not guilty of non-compliance with the Act and the Code.

[22] I must say that I was not convinced by the contents of this affidavit. Second respondent had an opportunity to make a full disclosure of what CBI did with client funds; but failed to do so. This affidavit is lacking in detail and is deliberately vague. It is also of no assistance to second respondent that he places all the blame on third respondent.

[23] On the 19th October 2011, the compliance officer of CBI wrote to third respondent informing him of the initiation of disciplinary action against him. Third respondent was informed that he was accused of trading funds outside of client mandates, resulting in losses to various clients. He was informed that the disciplinary hearing will take place on the 21st October 2011 at 10h00. Third respondent did not respond to the compliance officer, failed to turn up at the hearing and failed to account for the losses he made in trading client funds.

[24] Neither third, fifth nor fourth respondents responded to any correspondence from this Office. They chose to ignore the section 27 notices that were delivered to them. I can only conclude that they had no explanation for the losses they

incurred and, in particular, no explanation for the fact that they traded client funds contrary to their mandate.

E. DETERMINATION

[25] Issues to be determined:

a. Compliance with the code and Act?

b. Quantum?

F. RESPONDENTS' CONDUCT

[26] All CBI's clients entered into a written contract, including complainant. The following were material terms of the contract which are relevant for purposes of this determination:

"*The investment objective*

The objective is a wealth creation strategy through profit sharing by trading with Client's venture capital and simultaneously limiting the risk.

Capital Exposure

To limit the risk the Forex Services Provider will not expose more than 5% of the client's capital to any single trade at any point in time.

Draw Down

In the event that a total loss of 20% or more on the Client's initial investment occurs, trading on the investment will be terminated and the Client will be informed. Further trading will commence only with the Client's written instruction."

[27] It is well known that the risk of loss in margin trading in Forex can be substantial. The above terms of the agreement were meant to assist the clients as well as CBI in managing the risks and to limit losses. The following is undisputed:

a) CBI, traded client funds and began sustaining losses;
b) The losses were not reported to clients as agreed in the contract;
c) CBI traded more than 5% of client capital in a single trade;
d) When losses occurred, CBI, with third respondent being the principal trader, committed more of client's capital to trading in an attempt to recover losses;
e) More than 20% of client capital was lost in an attempt to trade out of losses; and
f) After more than 20% of client capital was lost, CBI continued to trade more funds without first obtaining a written mandate from clients.

[28] The above trading took place with complainant's funds as well. The net result was that CBI, instead of recovering losses, actually sustained more loss and lost all of complainant's capital. CBI's conduct was in breach of their mandate and amounted to sheer recklessness. As I will set out below, this conduct was also a breach of the Act and General Code as well as the Code of Conduct for Authorised Financial Services Providers, and their Representatives, Involved in Forex Investment Business, 2004 (Forex Code).

The Compliance Officer

[29] CBI's compliance officer, Leanne Morgan, became aware of the trading losses at CBI and was informed that the business was about to close down. As CBI's

compliance officer she investigated the problem and found compliance irregularities at CBI. She then reported the irregularities to the FSB in terms of section 17 (c) of the Act. Her report uncovers the following:

a) CBI failed to adhere to the 20% draw-down clause contained in all client mandates;

b) Due to trading losses, CBI traded more than the agreed 20% draw-down in an attempt to rectify losses already incurred. After not being able to recover losses CBI opened a trading account of their own into which their own funds were deposited and this was traded as client funds in a further attempt to trade back losses. This was no longer viable when a large number of clients requested redemption of their funds at once. CBI did not have the funds to subsidise all client losses and they decided to cease trading.

c) CBI opened three accounts for their clients into which their original funds were placed, namely high, medium and low risk profile trading accounts. When CBI started subsidising trading losses they reflected a fourth account on client statements showing an amount in the fourth account as client funds. This misled clients into thinking that their investment was higher than it really was. This amounted to a breach of sections 2(a) and 6(1) (2) of the Forex Code. These misleading accounts were calculated to buy time so that CBI could trade out of the losses. This was not possible.

d) Section 3 of the Forex Code provides:

“3. A forex investment intermediary must-

(b) observe high standards of integrity and fair dealing in all matters relating

to intermediary services;

(c) act in the interests of the clients;

(d) act with due skill, care, diligence and good faith;

(e) observe high standards of market conduct;"

CBI contravened this section of the Forex Code.

I must also add that their conduct also amounted to a breach of section 2 of the General Code.

e) CBI concealed their irregular activities from the compliance officer in breach of section 36 of the Act.

The Registrar

[30] The Registrar of Financial Services Providers (Registrar) gave CBI written notice of intention to suspend authorization and requested a response. CBI's attorneys requested an extension of time to respond. However, there was no response from either CBI or their attorneys. On the 8th August 2012 the Registrar gave final notice of withdrawal of CBI's licence. In the same notice Louw, Otto and Johnson were debarred from rendering any financial services to clients in terms of section 14A of the Act.

[31] The Registrar found that second, third and fifth respondents no longer met the personal requirements of honesty and integrity as contemplated in section 8 of the Act. It was also found that the respondents had breached the provisions of the Act in a material manner.

[32] Having investigated CBI's conduct, the Registrar came to the following material conclusions:

a) CBI traded client funds contrary to their mandate. The mandate provided for a 20% draw-down clause. CBI exceeded this in an attempt to recover losses. CBI was in breach of Section 5(1) (b)(iii) of the Forex code and Section 5 (1)(b) of the Discretionary Code.

b) CBI provided clients with misleading statements of account; thereby inducing them to believe that their investment was bigger than it really was. This was in breach of Sections 2(a) and 6(1) (c) of the Forex Code and sections 6.2(b) and (c) and 6.3(a) of the Discretionary Code.

c) That CBI's conduct amounted to a breach of Section 2 of the General Code as they had not acted with the requisite honesty, fairness and due care and diligence.

d) CBI provided information to clients that was not factually correct and was misleading. This is a breach of Section 3(1) (a) (i) and (ii) of the General Code.

e) The Registrar received complaints, in January 2011, that CBI was not paying their funds and that all they received was excuses. On the 12th October 2011, CBI informed the Registrar that they had reached an amicable solution with clients. On the 14th October 2011 clients informed the registrar that no payments were made on due date.

f) Clients informed the Registrar that CBI had vacated their premises. This was done without any communication to clients.

g) CBI concealed material information from their compliance officer and thereby contravened Section 36 of the Act.

h) The Registrar stated as follows; "*the severity and nature of the non-compliances coupled with the fact that it happened over a long period of time, is of utmost concern to the Registrar since it exhibits a total disregard for the FAIS Act and subordinate legislation under which the licensee operated.*"

i) CBI and its representatives no longer comply with the provisions of Section 8 of the Act.

j) CBI's licence was withdrawn in terms of Section 9 (a) of the Act and its representatives are debarred in terms of Section 9(6) (a).

[33] The Registrar also notified respondents they had a right to appeal the decision to the Board of Appeal. There was no appeal and the Registrars decision stands.

G. FINDINGS

[34] Having investigated the matter, I confirm the findings made by CBI's compliance officer as well as the Registrar. There are, however, a few issues to be dealt with that emerge from second respondent's response. They are as follows:

a) Louw submits that he, at all material times, complied with the provisions of the Act and Codes of conduct. On the findings of the compliance officer and the Registrar, this is not sustainable and I must therefore reject it;

b) Louw states that complainant was aware of the risks involved in the investment. I accept that the contract signed by complainant contains a warning that this is a risky investment. However, complainant trusted Louw

who assured him that this was a safe investment. Louw further enticed complainant with a promise of returns of 30% per month. Even though complainant signed a contract stating that the investment was risky, CBI still traded complainant's funds contrary to his mandate and deliberately misled him about the performance of his investment through misleading accounts;

c) Louw made a weak attempt at blaming complainant for his loss. Louw's version is that Complainant sought permission to trade his funds on his own and thereby lost his money. This version is lacking in detail. Louw provided no documentation to support this allegation. There was no detail as to when this happened and how much money was lost by complainant through personal trading. The only inference to be drawn is that such documentation does not exist. Besides, it is undisputed that complainant had no history of investing and knew nothing about forex trading. On complainant's version, he received none of the promised returns and began demanding back his investment. CBI then paid him a few instalments of $1000 "to tide him over". Thereafter no money was received. This is the more probable version. I reject Louw's version that complainant lost his own money.

[35] In the premises, I make the following findings:

a) CBI traded complainant's funds contrary to their agreed mandate;
b) CBI exceeded the 20% draw-down in a vain attempt to trade out of their losses;
c) CBI misled complainant by providing accounts that misrepresented the truth; and

d) CBI's conduct amounted to a breach of the Act; the General Code; the Forex Code and Discretionary Code; as detailed above.

The respondents do not dispute the above findings.

[36] As a direct result of such conduct, complainant lost his entire capital and did not receive the promised returns, save for a small payment to tide him over.

H. QUANTUM

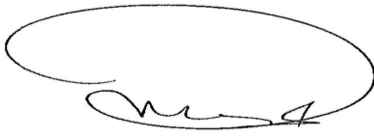
[37] Complainant invested R800 000 in CBI. For reasons stated above, being the breach of the Act and Codes of Conduct as well as common law breach of contract, respondents are jointly and severally liable to pay to complainant the full amount of R800 000. I did not think it appropriate to deduct the small amounts received after complainant demanded a refund of his capital. Such amounts nevertheless represent returns that were promised to complainant.

I. THE ORDER

[38] 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 sum of R800 000;
3. Interest on this amount at the rate of 10, 25% from August 2011 to date of payment.

DATED AT PRETORIA ON THIS THE 7th DAY OF SEPTEMBER 2016.



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