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

**PRETORIA**

**Case Number: FAIS 04837/11-12/ EC 1**

**In the matter between:**

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| **MARGARETHA SUZANNE DELPORT** | **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** |

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

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## A. INTRODUCTION

[1] Complainant is a pensioner who invested the sum of R100 000 with the first respondent. First respondent held itself out to be a “Forex Services Provider”.

[2] She was introduced to First Respondent by a friend; here she met second respondent (Louw) whom she knew from childhood. Louw made a presentation of their product and complainant was persuaded to invest. The funds were paid to first respondent on the 29 February 2008. In 2011 she was told that there was less than five dollars left in her account and that the rest of her money was lost. She then filed a complaint in this Office.

**B. THE PARTIES**

[3] Complainant is a retired teacher, residing at 32 Tivoli Flats, Strand Avenue, Humewood, Port Elizabeth. In her complaint she also mentioned that she represented a close corporation called Gredel Beleggings CC of which she is the sole member. Louw stated in his response that he did not consider complainant to be his client but that the close corporation was the client. He points out that this is an investment owned by the close corporation. Having considered the documentation it appears that the R100 000 invested came from a bank account of the CC. However the contracts for the investment record that first respondent was contracting with complainant and she signed the documents in her personal capacity and not as a representative of the CC. I deal with this simply because Louw disputed that complainant was their client. I will therefore treat Mrs Delport as the complainant.

[4] 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. At the time of writing this determination, CBI was in the process of deregistering.

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

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

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

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

## C. THE COMPLAINT

[9] Complainant met a representative or “conduit” of CBI, Helgaard Zietsman, who explained the CBI product to her. She knew that Zietsman worked for Louw. Zietsman came to her house and made the presentation. He showed that their product promised “huge percentages of growth” but said that it was not guaranteed but she can expect “30% growth”.

[10] Complainant agreed to invest R50 000. Zietsman then called Louw on the telephone to discuss this. Louw insisted that the investment amount must be R100 000. He said that 80% of the funds will be deposited in the Bank of Scotland and that such amount will be guaranteed and “was perfectly safe”. According to complainant she was prepared to risk R20 000 of her money on forex. However, she is dissatisfied that CBI risked all her money and eventually lost it.

[11] In the presentation made, Louw explained that they will speculate with only 20% of her money and that 80% will be safe in the bank. Louw also promised her that they will make 30% on her investment. He guaranteed that 80% of her funds will be safe. Louw also represented to her that since the start of CBI’s business they were making 60% on investments.

[12] From 2010 complainant stopped receiving statements from CBI and early in 2011 she decided to redeem her capital. Louw advised her that the Rand was too strong and the money must stay or she will lose. As it turned out, this was a lie as by this time all her money was already lost. Louw also told her they were moving offices. In October 2011 complainant sent in forms to redeem her funds. From this point onwards she did not hear from Louw or anyone else at CBI. She also found their offices locked and she was unable to contact Louw.

[13] Complainant then saw Louw’s photograph in a local newspaper selling houses. This is how she managed to contact him. This resulted in Louw writing a letter to

her which she received on the 27th October 2011. In this letter she is informed as follows:

a) Louw had decided to close CBI as a business;
b) Many of the clients' including complainant's account was depleted and the amount left in the latter's account was less than five dollars; this explained why complainant did not receive any payment;
c) The matter will have to go to court and the FSB were informed. The fund manager has taken personal responsibility for what went wrong since November 2010;
d) Louw suggested that complainant should eventually recover at least 80% of her funds but he cannot say when this will happen;
e) Louw blames the fund manager for the losses, claiming that he was stabbed in the back, and states that the matter is in the hands of attorneys;
f) He expresses regret that complainant was affected and points out that he lost his own money as well;
g) Louw concludes by stating that he will provide more information about compensation for complainant and states that apart from the fund manager's personal guarantee there was also indemnity insurance.

[14] Complainant holds CBI and its representatives responsible for her loss and wants a refund of her investment of R100 000.

## D. THE RESPONSE

[15] In terms of the rules of this Office, the parties were afforded an opportunity to resolve the matter. This was not possible and the relevant notices in terms of section 27 of the Act were delivered to all the respondents. Louw instructed attorneys, Roelofse Meyer Inc, to respond to the notices. However, there was much delay in filing the response as these attorneys, for various reasons, repeatedly requested more time and extensions.

[16] Neither Otto, Johnson nor Henning 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.

[17] On the 12th January 2016, Louw deposed to an affidavit in response to the complaint and the Section 27 notice. This affidavit is in most parts identical to an affidavit he deposed to in response to a complaint by Alexander Frederick Carter (I refer to my determination in that matter under case number FAIS 04546-11/12 EC 1).

[18] At the outset I must say that Louw made a disclosure of the fact that CBI 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 Louw's response:

a) He gives a long history of how Deo Volente and CBI's 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 Otto who had the knowledge and expertise to trade forex on the markets. Louw and Otto started CBI and began to build a portfolio of trading accounts that were traded by Otto and other traders.

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

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) Louw pointed out that no client approached them for advice before making an investment in the CBI product. CBI was a product provider with only one product. CBI did not have any agreements with any other product provider except with the clearing house in London. It therefore was unable, “and not interested”, in comparing its product with other financial products and to advise clients about other financial instruments and products.

g) Louw pointed out that clients were given a power-point presentation, brochures and access to a website. The information provided was approved by compliance officers. Clients were warned that this was a high risk investment and that they must have the financial means and resources to invest in risk capital markets.

h) 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.

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

j) Louw 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. Louw states that he was unable to intervene in Otto's activities and in order to remedy the situation he requested their compliance officer to start disciplinary action against Otto.

k) Louw attempted to convene a meeting with Otto, Johnson and Henning but 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.

l) According to Louw, complainant was not a client of CBI. The client was Gredell Beleggings CC, "a professional investment company". This CC had an appetite for risk with investments on the JSE and understood the risks involved with speculation on the markets.

m) Complainant, as a member of the CC, was introduced by a friend Helgard Zietsman who acted as "conduit". Gredell, represented by complainant, was given all the factual information about the product in order for her to make an informed decision.

n) Louw knew complainant since childhood. After CBI dissolved, he wrote to complainant to say that he will do his utmost to assist her to get back as much

of her investment as possible. Unfortunately, due to Otto and his trading team, almost all of complainant's money was lost.

[19] Louw summarises his response as follows:

"I say that as key individual, in rendering of services in accordance with the key areas that I was responsible for and had authority over the business of the CC, I strictly adhered to the relevant policies of the CC, the advice, the instructions of the CC's external professional compliance officers, the FAIS Act, the Code of conduct and Board Notice 39 of 2004 for Forex FSPs; and therefore that I am not guilty of non-compliance of the FAIS Act and the Code of Conduct."

## E. THE ISSUE

[20] The issue before me is whether or not respondents, in selling their product to complainant, contravened the provisions of the Act and General code of conduct as well as the Code of Conduct for Authorised Financial Services Providers, and their Representatives, Involved in Forex Investment Business, 2004 (Forex Code). If I make such a finding then I must deal with the consequences for the respondents.

### The Product and its Marketing

[21] Respondents held themselves out to be "Forex Services Providers". In fact they were trading forex exchange, contracts for differences, or spread bets on margins. It is not disputed by respondents that this was a highly risky investment where clients were at risk of losing all their deposited funds. They also admitted that this

was an investment not suitable for clients who were unable to tolerate any risks to their capital.

[22] Respondents, Louw in particular, pointed out that all clients were warned of the risks inherent in this form of investment. However, on the advice of their compliance officers they believed that it was not for them to give advice and nor did any of their clients seek any advice.

[23] Louw submits that all of their information presentations were factually correct and contained a warning of the risks. I have looked at these presentations, including the power-point presentation and newsletters distributed to would be investors. Whilst it is true that the material states that there are risks, the following, *inter alia,* appears in the power-point:

a) A feature of this presentation is referred to as “Risk Management”. Here the following is stated:
   - CBI uses advanced strategic analysis techniques
   - There will be a maximum trade of 5% of capital
   - There will be a “stop loss”
   - A maximum “draw-down” of 20% applies
   - The investment promises exceptional growth and returns

b) The presentation promises that “accurate risk management” is possible.

[24] The news letters paint an exceptionally positive picture of CBI and its performance. A news letter dated January 2008, which was handed to complainant, stated that

since CBI received certification from the FSB in July 2006 “the nominal growth is exceeding 60%”. This news letter also states “Capital-Builder Investments give you the peace of mind of a unique capital guarantee.” These claims appear in at least two other newsletters.

[25] In another newsletter the following appears; “The good news is that our investment product is recession resistant and that our clients are still on track to realise their financial goals.”

[26] A Brochure was handed to complainant which carries the headline “Redefining the Art and Science of Venture Capital Investment”. This Brochure promises the following:

a) a projected nominal yield of 30% per annum;
b) maximum draw-down of 20%; and
c) Maximum of 5% exposure of capital.

[27] What CBI did was to market the investment as a high return product where risks were specially managed and limited to only 20% of the capital, if there was any risk at all. The allure of the product was the 30% per annum performance coupled with perceived low risk.

[28] The marketing was misleading. As fund managers, in the forex market, they could not responsibly promise such phenomenal returns nor could they responsibly claim to guarantee 80% of the capital. We now know that this promised growth did not

materialise; on the contrary CBI traded clients' funds into a loss, from which they could never recover.

## F. RESPONDENTS' CONDUCT

[29] 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."*

[30] 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 Otto 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.

[31] 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**

[32] 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 mislead 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**

[33] The Registrar of Financial Services Providers (Registrar) gave CBI written notice of intension 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.

[34] The Registrar found that Louw, Otto and Johnson 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.

[35] 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).

[36] 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

[37] CBI's conduct amounted to the following:

a) They were happy to take funds from anyone they could convince to invest;

b) On their own version, they were a one product business and did not assist clients by offering alternative products;

c) They did not carry out any analyses of client needs to determine if their product was appropriate;

d) Clients, after investing, were not given accurate accounts of what became of their funds;

e) They instead, deliberately misled clients into believing that their investments were performing as promised;

f) At all material times, they failed to provide clients with information that was factually correct;

g) They traded funds contrary to their mandate and withheld this from clients;

h) Their conduct is also in breach of the common law in their failure to carry out their obligations in terms of a written mandate.

[38] In the premises, I conclude as follows:

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 mislead complainant by providing accounts that misrepresented the truth; and
d) CBI's conduct amounted to a breach of the common law, Act; the General Code; the Forex Code and Discretionary Code; as detailed above.

The respondents do not dispute the above findings.

[39] As a direct result of such conduct, complainant lost her entire capital and did not receive the promised returns.

## H. QUANTUM

[40] Complainant invested R100 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 R100 000.

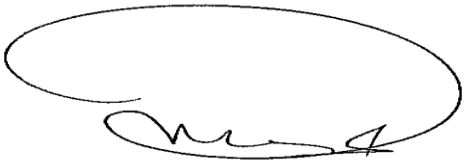
## I. THE ORDER

[41] 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 R100 000;
3. Interest on this amount at the rate of 10.25% from November 2011 to date of payment.

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



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**