PRETORIA **CASE NO: FOC 937/05/WC (5)**

In the matter between:

GEORGE PICKUP **Complainant**

and

JOHANN DE KLERK **1st Respondent**

ADFINITY FINANCIAL SERVICES CC **2nd Respondent**

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

A. INTRODUCTION

[1] This is a complaint relating to an investment in Leaderguard Spot Forex made by Complainant through Respondents. Leaderguard Spot Forex and its South African marketing arm, Leaderguard Securities (Pty) Ltd have since been liquidated.

[2] Complainant is George Pickup, a pensioner who resides in 68 Raglan Street, Oakdale, Bellville, Western Cape.

[3] 1st Respondent is Johann De Klerk, an authorised representative and key individual of the 2nd Respondent in terms of the FAIS Act.

[4] 2nd Respondent is Adfinity Financial Services CC, a close corporation registered in terms of the laws of South Africa and a licensed Financial Services Provider in terms of the FAIS Act with its registered address at Corporate Place, Bellville, Western Cape.

[5] At all times material hereto, Complainant dealt with 1st Respondent.

B. THE COMPLAINT

[6] On 3 June 2005, Complainant wrote to this office alleging that the 1st Respondent had advised him to invest into Leaderguard an amount of $13 369.61 US Dollars. The intention was to enable Complainant to draw income from the investment. With the demise of both Leaderguard Securities, (ôLSö) and Leaderguard Spot Forex, (ôLSFö), Complainant asks this Office to grant him relief by ordering the Respondents to compensate him for his losses on the basis that it is Respondentsø advice that he

ed in LSF. Complainant claims that, but for the

e suffered the resultant loss.

C. RESPONSE

[7] A license search conducted by this Office revealed that the Respondents were not licensed to render financial services in forex investments. The Office nonetheless, on 1 September 2005 referred the complaint to the Respondents with a request that they resolve it with their client within a period of six weeks. It transpired that Respondents had already written to Complainant in August 2005. A copy of that letter has been made available to this Office. In that letter Respondents advised Complainants about their participation in forming the Leaderguard Recovery Unit, (ôLRUô). A further point worth noting in the letter was the Respondentsô advice that a recovery team, part of the LRU, was to visit Mauritius where the team would seek a court interdict to discharge the then management of LSF followed with the appointment of the LRU as ôowners of the operationô. Needless to say, that did not materialise.

[8] On 9 September 2005 Respondents, once again wrote to Complainant. A copy of that letter, which was also furnished to this Office only deals with an update of the activities of the LRU. There is no reference as to how Complainantôs loss is to be dealt with. Evidently, the matter was not resolved.

e in terms of section 27 (4) of the FAIS Act to tober 2005. On 19 October 2005 this Office received a response enclosing a copy of a letter dated 17 October 2005. The letter is signed by the 2nd Respondentôs compliance officer, one Maryna Pieterse. In that letter Respondents advise and I quote directly:-

> ôComplainant signed a trading mandate for Leaderguard on 1st October 2004 agreeing to invest $ 13 384.27 US Dollars. All was well no body was aware of any concerns at Leaderguard. On 23rd March Mr de Clerk had a review appointment with his client to discuss his updated portfolio and feedback on his investments and this issue was discussed to invest a further amount into Leaderguard. A day later rumors circulated that there is problems at Leaderguard and the required action was taken to inform clients. Mr Pickup was advised and letter of appointment was signed to request the Leaderguard Recovery Unit to assist in recouping the original investment made in 2004ô

[10] On 21 October 2005, a further letter from Respondent was sent to this Office. This letter simply encloses the letter dated 17 October 2005 referred to above, with a request to the effect that should the Office require further information, Respondents should be contacted.

Uncontested Facts

[11] Respondents have not disputed that they advised Complainant to invest in LSF. I shall expand on this later in this determination. There is also no dispute that Complainant had not received the promised income, since March 2005 when LS applied for provisional liquidation. There is further

er Complainant has been paid back his initial clear that all that is happening is a desperate search for means to compensate investors for what they have lost.

[12] It is further common cause that both parties had known each other and had established a relationship which goes back to a period of some nine years.

D. JURISDICTION

[13] This Office has the necessary jurisdiction to entertain this case.

E. DETERMINATION AND REASONS

[14] There appears, from Respondentsô response to the complaint that they had little or no appreciation that, as financial services providers, operating under the legislative frame work of the FAIS Act, their conduct had to comply with the various tenets contained in the FAIS Act and its sub-ordinate measures. I refer in this regard to their written communication to Complainant after the complaint had been referred to them to address with Complainant. All they did was to furnish Complainant with details of intended activities of the LRU. Similarly, when a notice in terms of section 27 (4) was sent to them, they merely wrote back advising that the Complainant had signed a trading mandate for Leaderguard on 1st October 2004 agreeing to invest $ 13 384.27. All was well nobody was

at Leaderguard.ô There is no appreciation e FAIS Act demands of providers. The degree of incompetence, indifference and ignorance of the law leads one to question just how fit Respondents are to advise members of the public. It is a matter of grave concern.

[15] In order to determine this complaint, Respondentsô conduct as I have indicated must be tested against the FAIS Act, the Regulations promulgated there under, the General Code of Conduct for Authorised Financial Services Providers and Representatives, (ôthe Codeô) and the Code of Conduct for Authorised Financial Services Providers and their Representatives involved in Forex Investment Business, (ôForex Codeô).

Thus, the questions to be decided are:-

15.1 Whether Respondentsôconduct complied with the FAIS Act;

15.2 If it is found that Respondentsôconduct failed to comply with the FAIS Act, whether such failure caused Complainant to suffer financial prejudice or damage;

15.3 The quantum of such damage.

mply with the FAIS Act?

Authorisation in Terms of the Fais Act.

[16] I have already indicated that Respondents were not licensed at the time to render financial services in forex investments. This, they did not disclose to Complainant in violation of Part IV section 5 (d) of the Code which provides:

"Where a provider other than a direct marketer renders a financial service to a client, the provider must at the earliest reasonable opportunity furnish the client with full particulars of the following information and, where such information is provided orally, must confirm such information within 30 days:

(d.) details of the financial services which the provider is authorised to provide in terms of the relevant licence and of any conditions or restrictions applicable theretoé "

Approval of LSF as Foreign Forex Service Provider

[17] There is no evidence of any effort on the part of Respondents That they ever sought the approval of LSF as a foreign forex service provider. The Regulations & the Forex Code require that a foreign forex services provider has to be approved by the Financial Services Board ("FSB"). This, Respondent does not appear to have appreciated. Indeed, Respondent does not appear to have been aware, at the time that the financial service was rendered, that this is a requirement.

[18] Respondents have raised a point in their letter of 17 October 2005 that Complainant had signed a mandate in favour of Leaderguard. They make no specific reference as to which Leaderguard entity they refer to. It is known by now that there were several such entities. A form titled "Trading Mandate" was amongst the documents sent to this Office. This form indicates that the so-called mandate was signed in favour of LSF. The problem with this so-called mandate is that it was not approved by the registrar of the FSB as the forex code requires. In this regard Part III section 5 (2) of the Forex Code provides:

"The mandate of a forex investment intermediary must be approved by the registrar who may grant such approval subject to such conditions as the registrar may determine."

[19] It does not help the Respondents to argue that Complainant signed a mandate. The fact remains that Respondents went beyond the limitations of their license and, in so doing, it can be accepted that they were also ignorant of the provisions of the Forex Code. This of course is a matter that should have been reported on by the Respondents' compliance officer, the said Maryna Pieterse. Clause 1.4.2 of the compliance officer's report as set out in the FAIS Act deals with violations of limitations of the license. This is a matter which this Office has no power to deal with, as it falls squarely within the remit of the FSB. No doubt, the FSB will take the necessary steps.

[20] As I have already indicated, it is not in dispute that Respondents advised Complainant to invest in this product. This is borne out by the fact that Complainant has specifically alleged that Respondents advised him to invest into the Leaderguard scheme and nowhere in the Respondentsô reply do they place this in issue. Indeed the letter from Maryna Pieterse, dated 17 October 2005 makes it clear that not only did client sign a ótrading mandateô on 1 October 2004, but 1st Respondent was in the process of a review and a further investment into Leaderguard was discussed on 23 March 2005. This co-incidentally is the day before LS filed for liquidation. Based on the circumstances of this case and a consideration of all the evidence, it is abundantly clear that the Leaderguard product was purchased by Complainant as a result of Respondentôs recommendation.

[21] Respondents were asked to furnish documents in their possession which would support their case. Needless to say, one would expect that Respondents ought to have known that paramount to this inquiry would be establishing whether a need for this investment existed, or not. The need once identified, had to be recorded in terms of section 9 of the Code with written reasons as to why the forex investment was considered to be the appropriate product to address the need. Section 9 (1) of the Code provides:

(1.) A Provider must, subject to and in addition to the duties imposed by section 18 of the Act and section 3 (2) of this Code, maintain a record of the advice furnished to a client as contemplated in section 8, which record must reflect the basis on which the advice was given, and in particular-

(a.) a brief summary of the information and material on which the advice was based;

(b.) the financial products which were considered; and

(c.) the financial product or products recommended with an explanation of why the product o products selected, is or are likely to satisfy the clientôs identified needs and objectives:ô

In the circumstances, a record of advice should have been maintained. That record does not exist.

[22] Complainant was, at the time of Respondentôs proposal of this investment, seventy (70) years old. This is a time when most people jealously guard against loss of capital as they do not have a second chance of accessing it. Respondents must accept that unless cogent reasons exist for recommending the forex investment to Complainant, I have to seriously question whether, in doing so, Respondentsôwere acting in Complainantôs best interests or their own.

ance with the FAIS Act cause Complainant to

[23] In a letter dated 29 June 2005, 1st Respondent writes to Complainant as follows:

> ôAs you are aware, that we establish the Leaderguard recovery unité ..The recovery strategy are running according to plan. On the 5th September the Recovery team will be off to Mauritius. The goal is to request a court interdict to discharge the current management and to appoint the Leaderguard Recovery Unit as owners of the operation. From there we will send our own appointed manager and audit team. To date it is clear that the fund managers did operate outside the mandate given to them and therefore placed the funds at risk.ô

[24] Nowhere in the FAIS Act is there a requirement on a provider to render the type of service envisaged in Respondentsôletter referred to above. Put simply, this was a desperate attempt to appease the investor after the provider had already disregarded the law. Prior to Respondents even recommending the investment to Complainant, certain details should have been established regarding LSF. In terms of section 14 of the Financial Advisory and Intermediary Services Regulations promulgated in Government Notice 879 of 2003 as amended by Government Notice 297 of 2004 which was advertised in Government Gazette 26112 of 12 March 2004, (ôthe Regulationsô) the following was required:

gards the name and physical location and all other

rs of the relevant clearing firm or foreign forex service provider;

(b) full particulars as regards any authorisation required by such firm or provider for the conduct of business in the country in which it is located; and

(c) full particulars as regards the nature of the regulatory environment under which the firm or provider operates in the country concerned.ô

The details set out above should have then been forwarded by the Respondent to the registrar for the approval of LSF as a foreign forex service provider. Section 15 of the Regulations provides:

ôIt is a requirement for the granting of approval by the registrar of any application contemplated in regulation 14, that the regulatory framework of the country in which the clearing firm or provider is located must, to the satisfaction of the registrar, be substantively of the same nature and standing as that obtaining in respect of the applicant in the Republic.ô

[25] None of the above was ever done by Respondents. Effectively, what Respondents did was to take Complainants funds and place it into custody of an entity which they knew nothing about. The ensuing conduct of fund managers not sticking to their mandate would have been something that would have been addressed through legal mechanisms, provided the Respondents had complied with the law in the first place. There would then have been no need for Respondents to send representatives to Mauritius and request courts in that jurisdiction to grant interdicts to remove LSFôs management and have then have them replaced with the

to comment on the feasibility or otherwise of the ts and their fellow travellers on the LRU were contemplating. All that Respondents demonstrated in this case is a complete lack of knowledge and understanding of what the law expected of them whilst rendering financial services in forex. This cannot be tolerated. Respondents conduct following allegations of gross irregularities in LS and LSF was nothing but an attempt to shift focus from their lack of compliance with the FAIS Act. I find that Respondentsô conduct occasioned Complainantôs financial prejudice. I am persuaded to find in favour of Complainant. Accordingly, the complaint is upheld.

Quantum

[26] A statement from LS covering the period 11/12/2004 ï 2005/ 01/01 confirms Complainantôs investment as the amount of $ 13 369.61 US Dollars. There is no dispute as to quantum. It is this amount that Complainant has asked for.

ORDER

The following order is made:-

[1] Respondents are hereby ordered to pay Complainant the sum of $13 369.61 US Dollars jointly and severally, the one paying the other to be resolved. The rand value must be calculated as at date of payment.

foresaid amount at the rate of 15.5 % to be calculated SEVEN (7) days from the date of this determination to date of final payment;

[3] Respondents are to pay the case fee of R1000 to this Office.

DATED AT PRETORIA ON THIS THE 20th DAY OF MARCH 2007

CHARLES PILLAI

OMBUD FOR FINANCIAL SERVICES PROVIDERS