

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

**PRETORIA**

**CASE NO: FAIS 03070-14/15- WC 1**

In the matter between:

**HENDRIK JOHANNES CARSTENS**

**Complainant**

and

**IMPACT FINANCIAL CONSULTANTS CC**

**1<sup>st</sup> Respondent**

**MICHAL JOHANNES CALITZ**

**2<sup>nd</sup> Respondent**

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

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**A. THE PARTIES**

- [1] The Complainant is Mr Hendrik Johannes Carstens, an adult male, whose full contact details are on file with the office.
- [2] The 1<sup>st</sup> respondent is Impact Financial Consultants CC, a close corporation and authorised financial services provider, (FSP 4274), and carrying on business at 5<sup>th</sup> Floor, The Cliffs, Niagara Road, Tyger Falls Belville.
- [3] The 2<sup>nd</sup> respondent is Michal Calitz, key individual and member of 1<sup>st</sup> respondent, and residing at 123 Mauritius Singel, Stellenberg 7550. Calitz at all material times

rendered financial advice to complainant on behalf of 1<sup>st</sup> respondent. In this determination respondent or respondents are used interchangeably.

## **B. THE COMPLAINT**

- [4] During the period August 2007 to March 2011 the complainant invested various sums in RVAF. The investments were made in consequence of the recommendation and advice of the respondent who acted as complainant's financial adviser; a role respondent had fulfilled since 1985.
- [5] In 2007 the complainant went into early retirement<sup>1</sup>, invested the lump sum from his pension with Sanlam Glacier and the balance in an Allan Gray Living Annuity.
- [6] Complainant asserts that respondent was fully aware of his needs for capital growth with little risk of capital loss.
- [7] During the same year respondent introduced complainant to the RVAF trust and suggested that complainant invest all his money in RVAF. Apparently the respondent contended that RVAF would yield bigger returns for no more risk than there was with his then existing investments. Complainant states that he was told numerous times that the RVAF had very low risk profile and was suitable for a person at the stage of retirement.
- [8] Consequently complainant was advised to cash out all his Glacier investments and invest the proceeds in RVAF. Similarly with the Allan Gray Living Annuity, he was advised to select the largest income, which was then reinvested in RVAF.

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<sup>1</sup> He did however continue with contract work until August 2012

[9] The sums invested are as follows:

- 9.1. R300 000,00 - in August 2007;
- 9.2. R1 935 000,00 - in March 2008;
- 9.3. R30 000,00 - in March 2010;
- 9.4. R30 000,00 - in December 2010;
- 9.5. R30 000,00 - in March 2011.

[10] Out of these amounts complainant over time withdrew the sum of R175 000.

[11] Complainant's understanding of the underlying investment was that it had to do with the trading of shares locally and internationally.

[12] At all times, complainant was advised by the respondent that the fund was doing well. His impressions about the investment changed in June 2012 when complainant attended a presentation, where Herman Pretorius discussed the allegations that were made in the press concerning the RAAF trust. Subsequent thereto, in July 2012 complainant submitted a request to respondent to withdraw the funds.

[13] This was unsuccessful; the scheme was at that stage already in trouble and Herman Pretorius killed himself on the 26<sup>th</sup> July 2012.

[14] Having lost a substantial part of his savings in RAAF, complainant had no choice but to go back to work and accept what he describes as, a less than ideal position. Complainant's wife also had her funds invested in RAAF, thereby compounding the problem.

### **C. RESPONDENTS' REPLY**

[15] Respondent makes mention of the fact that the funds invested with Glacier were in the Stable and Balanced funds. However, poor returns of 4.96% and -0.66% respectively led to a discussion with complainant, in turn leading to complainant asking whether they could transfer the funds across to Abante Capital.

[16] Complainant attended several presentations where the product was explained. He adds that what attracted investors was the fact that the fund was explained as a market neutral investment which could take positions in both a positive and negative markets. Investors were in fact very happy with the fund for years before the bubble burst.

[17] Respondent further referred to his replies in the other RVAF matters before this Office. With regards thereto, he contended that the long and short positions make these investments market neutral if managed correctly. He further stated that whilst these instruments were not regulated, Abante Capital was registered as an investment manager with the Financial Services Board. Accordingly the RVAF was recommended.

[18] Respondent also argues that the loss did not arise out of any risks taken but was directly attributable to one person's fraud.

### **D. DETERMINATION**

[19] Reference is made to the determination of *Inch vs Calitz*<sup>2</sup> where this Office dealt with the key issues, which pertain to the rendering of advice to invest in RVAF.

2. **Graig Stewart Inch v Impact Financial Consultants CC and Michal Johannes Calitz FAIS 0497/12-13/MP1**

Principally the issues pertain to the respondent's failure to understand the entity, (RVAF) and the risks to which he was exposing his clients when he advised them to invest therein.

[20] Evident therein are the material deficiencies in the application forms; the latter, lacking in substance or form it is difficult to understand who or what the complainant was dealing with. Yet in spite of these failings, funds were transferred directly into RVAF without even the protection afforded by a nominee account.

[21] In attempting to support his version, Calitz stated that he enclosed as part of his investigations into the investment vehicle a copy of the FSB License brochure on 'Abante Capital (managing agent)' and presentations done by Abante Capital. Yet there is not so much as a single mention of Abante within the contractual documentation, further reinforcing the fact that Calitz himself failed to understand the contracting entity.

[22] Quite simply, no adviser would have recommended this product as a suitable component of any investment portfolio had they so exercised the required due skill care and diligence.

[23] Complainant as a client of a registered financial adviser, relied on Calitz' advice when making this investment. When rendering financial services to clients, the FSP is required to act in accordance with the FAIS Act. Calitz failed in this regard.

[24] As with most of respondent's RVAF matters before this Office, there is a notable

lack of compliance documentation.

[25] Quite simply there is no needs analysis as required in terms of section 8 of the General Code to establish the suitability of the product; no record of advice in terms of section 9 of the Code; and no proof of any disclosure the material terms including risk as required by section 7 of the Code.

[26] There is not a single disclosure of the actual fees charged as required by section 3.(1) (vii) of the Code, nor is there even a hint that complainant would once again be charged commission for the RVAF transactions, this after having been charged commission for the Glacier transactions.

[27] The basic risk mitigation method of not putting all your eggs in one basket is one that the respondent as an experienced adviser should be well familiar with and yet he saw fit to place complainant in this position.

[28] He now wishes to attribute the loss to one person's fraud yet, but for his actions in contravening the most basic elements of the FAIS Act, complainant would not have been in this position in the first place.

[29] For the reasons set out in the Inch determination, complainant's complaint must succeed.

## **E. JURISDICTION**

[30] Given that the March 2008 investment exceeds the R800 000,00 jurisdictional limit of this Office, the complainant has consented to forgo the amount in excess thereof in order to bring the claim within this Office's jurisdiction.

**F. QUANTUM**

[31] Complainant made five separate and distinct investments over a several years.

As already mentioned one of these, namely the R1 935 000, 00 invested in March 2008 exceeds the jurisdictional limit and accordingly is limited to R800 000, 00.

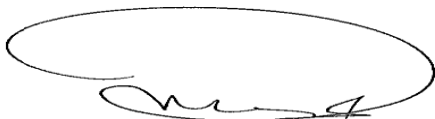
[32] Adding the four remaining investments to the amount of R800 000, 00 gives a total of R1 190 000, 00 for the total quantum.

**G. ORDER**

[33] Accordingly the following order is made:

1. The complaint is upheld;
2. The Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R1 190 000, 00.
3. Interest at the rate of 9 %, per annum, seven (7) days from date of this order to date of final payment.

**DATED AT PRETORIA ON THIS THE 14<sup>TH</sup> DAY OF OCTOBER 2014**



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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**