

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 03103/14-15/ WC 1

In the matter between:

MARTHA HENDRINA CARSTENS

Complainant

and

IMPACT FINANCIAL CONSULTANTS CC

1st Respondent

MICHAL JOHANNES CALITZ

2nd Respondent

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

A. THE PARTIES

- [1] The Complainant is Martha Hendrina Carstens, an adult female, whose full contact details are on file with the office.
- [2] The 1st respondent is Impact Financial Consultants CC, a close corporation and authorised financial services provider, number FSP 4274, and carrying on business at 5th Floor, The Cliffs, Niagara Road, Tyger Falls Belville.
- [3] The 2nd respondent is Michal Calitz, key individual and member of 1st respondent, and residing at 123 Mauritius Singel, Stellenberg 7550. Calitz at all material times rendered financial advice to complainant on behalf of 1st respondent. In this

determination respondent or respondents are used interchangeably.

B. THE COMPLAINT

[4] During the period August 2008 to May 2012 the complainant invested various sums in RVAF. These investments detailed below 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 the early 1990's.

[5] Intending to save for retirement, complainant had over time invested with both Sanlam Glacier and Allan Gray. In discussing her retirement plans with respondent she was introduced to the RVAF trust. According to complainant she was advised by respondent that the RVAF fund would yield better returns for more or less the same risk as her then existing investments and therefore it suited her circumstances. Respondent went on to advise that she cash in her current investments and invest all her monies with RVAF.

[6] Complainant as part of her complaint takes issue with certain aspects of the advice. These are as follows:

6.1. Neither the risk exposure or even the meaning of an en-comandite partnership were explained to her;

6.2. As to risk, complainant contends that she was risk averse, heading towards retirement and yet advised that the RVAF presented the same risk as her then existing portfolio with Glacier and Allan Gray; this, despite the RVAF not being registered with the FSB, a fact of which she was not made aware;

6.3. Complainant was also advised to invest all her retirement savings in one

investment, which means respondent paid no attention to the risk brought about by the lack of diversification;

6.4. The lack of proper documentation and a failure to evaluate her risk profile.

[7] Accordingly, complainant states that 'due to the lack of care taken by Michal Calitz, in the capacity as my financial advisor, and his breaching of our service level agreement as well as the breaching of the FSB's regulations, I have lost a capital amount of R1 649 500.

[8] This sum comprises a substantial amount of complainant's retirement savings, which means she must face her imminent retirement with insufficient capital. This places her under severe stress, a position aggravated by the fact that he husband was similarly invested.

[9] Complainant invested the sum total of R1 649 500.00 (one million six hundred and forty nine thousand and five hundred rand) in RVAF as follows:

- 9.1. R500 000.00 in August 2008;
- 9.2. R565 500.00 in October 2008;
- 9.3. R14 000.00 in January 2009;
- 9.4. R130 000.00 in April 2009;
- 9.5. R15 000.00 in March 2009;
- 9.6. R15 000.00 in March 2009;
- 9.7. R15 000.00 in September 2009;
- 9.8. R15 000.00 in September 2009;
- 9.9. R10 000.00 in September 2009;
- 9.10. R15 000.00 in December 2009;

- 9.11. R170 000.00 in March 2010;
- 9.12. R15 000.00 in June 2010;
- 9.13. R15 000.00 in June 2010;
- 9.14. R55 000.00 in September 2010;
- 9.15. R15 000.00 in December 2010;
- 9.16. R15 000.00 in March 2011;
- 9.17. R10 000.00 in July 2011;
- 9.18. R10 000.00 in July 2011;
- 9.19. R15 000.00 in May 2012;
- 9.20. R5 000.00 in May 2012;
- 9.21. R15 000.00 in May 2012;
- 9.22. R15 000.00 in May 2012.

C. RESPONDENTS' REPLY

[10] 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's husband, in turn leading to a request that complainant's funds be transferred across to Abante Capital. Given that these were discretionary funds, this was allowable.

[11] Complainant's husband attended several presentations where the product was explained. 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.

[12] Respondent additionally 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 itself registered as an investment manager with the Financial Services Board. Accordingly, the RVAF was recommended.

[13] 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

[14] Reference is made to the determination of *Inch vs Calitz*¹ where this Office dealt with the key issues, which pertain to the rendering of advice to invest in RVAF. 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.

[15] 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.

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

[16] 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 in the contractual documentation, which further reinforces the fact that Calitz himself failed to understand the contracting entity.

[17] 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.

[18] 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.

[19] As with most of respondent's RVAF matters before the Office there is a notable lack of compliance documentation.

[20] 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; or any disclosure of appropriate information, in particular the material terms including risk as required by section 7 of the Code.

[21] There is not a single disclosure of the actual fees charged as required by section 3.(1) (vii) of the Code or even so much as a hint of the potential duplication of costs. This is because complainant had already been charged fees on the initial Glacier investment; once again she was going to be charged for investing these same funds with RVAF.

[22] The basic risk mitigation principle 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.

[23] 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.

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

E. QUANTUM

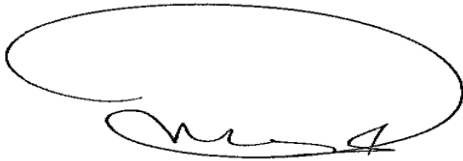
[25] Whilst complainant invested the sum total of R1 649 500.00 (one million six hundred and forty nine thousand and five hundred rand) in RAAF, the investments were comprised of smaller amounts spread out over a number of years. Accordingly they comprise separate and distinct causes of action on their own.

F. ORDER

[27] 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 649 500, 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 19th DAY OF NOVEMBER 2014

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a series of connected strokes that form the name 'Noluntu N Bam'. The signature is written on a white background.

**NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS**