

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 03187-14/15- WC 1

In the matter between:

JOHANNA PETRONELLA 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 Mrs Johanna Petronella 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 October 2008 to July 2010 the complainant invested an amount of R140 000, 00 in RAAF. The investments were made in consequence of advice furnished by the respondent, who interacted with complainant's son, a Mr J P Carstens.

[5] An amount of R27 000 was withdrawn during the period 8th October 2010 to 8th June 2012.

[6] On the 10th July 2012 complainant submitted a request via respondent to withdraw her entire investment from the RAAF. This was unsuccessful; the scheme was at that stage already in trouble and Herman Pretorius killed himself on the 26th July 2012.

[7] The funds invested by complainant in RAAF were transferred from an Allan Gray fund following respondent's recommendation. Allegedly, the benefit in the move was that RAAF would 'yield big returns for very little risk' and that it was suitable for a person of complainant's advanced age and limited means.

[8] Complainant makes the following points in her complaint:

8.1. Neither the risk, nor the potential implication of investing in an en-

comandite partnership was explained to either her or her son;

- 8.2. The investment exposed almost her entire saving to a single risky entity, this despite her being risk averse;
- 8.3. The respondent failed to reveal that the RVAF was not registered with the FSB;
- 8.4. The respondent received commission from the RVAF, yet failed to exhibit the necessary care resulting in a capital loss of R113 000.

C. RESPONDENTS' REPLY

- [9] Respondent states that he never had a conversation with the complainant but only with her son, Mr H J Carstens. Respondent claims Mr Carstens had attended several presentations at Abante's offices, where the product and risk controls were explained.
- [10] 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.
- [11] Respondent additionally referred to his replies in the other RVAF matters before the Office. In 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. It is on that basis that the RVAF was recommended.

D. DETERMINATION

[12] 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.

[13] 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.

[14] 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.

[15] 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.

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

[16] Complainant as a client of a registered financial adviser, relied on Calitz' advice when making this investment. That the advice was rendered to her directly or via her son changes nothing in this regard.

When rendering financial services to clients, the FSP is required to act in accordance with the FAIS Act. Calitz failed in this regard.

[17] As with most of respondent's RVAF matters before the Office there is a notable lack of compliance documentation. The fact that respondent principally dealt with complainant's son in no way excuses this.

[18] 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 or other risks as required by section 7 of the code.

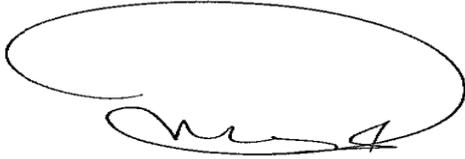
[19] For the reasons set out in the Inch determination, complainant's complaint must succeed.

E. ORDER

[20] 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 R113 000, 00.
2. 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 20th DAY OF OCTOBER 2014.

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a cursive 'BAM'. The signature is enclosed within a hand-drawn oval shape.

NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS