

**IN THE OFFICE OF THE OM BUD FOR FINANCIAL SERVICES PROVIDERS**

**PRETORIA**

**CASE NO: FAIS 05347/12-13/ NC 1**

In the matter between:

**HENDRIK FREDERIK du PLESSIS**

**1<sup>st</sup> Complainant**

**ERNA ELIZABETH du PLESSIS**

**2<sup>nd</sup> 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 1<sup>st</sup> Complainant is Mr Hendrik Frederik du Plessis, an adult male whose full contact details are on file with the Office.

[2] The 2<sup>nd</sup> Complainant is Erna Elizabeth du Plessis, an adult female married out of community of property to the 1<sup>st</sup> Complainant.

[3] The 1<sup>st</sup> respondent is Impact Financial Consultants CC, a close corporation and authorised financial services provider, number FSP 4274, and carrying on

business at 5<sup>th</sup> Floor, The Cliffs, Niagara Road, Tyger Falls Belville.

- [4] The 2<sup>nd</sup> respondent is Michal Johannes 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**

- [5] The complaint pertains to investments of R1, 600 000.00 (1.6 million) each, made by complainants into RVAF. Acting on the advice of respondents, the investments were made in equal amounts on the 5<sup>th</sup> and 7<sup>th</sup> March 2008.
- [6] The main interaction occurred between the respondents represented by Calitz and 1<sup>st</sup> complainant who principally handled the couple's financials.
- [7] The source of the funds was a disinvestment of the 1<sup>st</sup> and 2<sup>nd</sup> complainants' Sanlam Glacier investment plans which the respondent had advised on in July of 2006. The funds comprised a substantial part of the couple's savings.
- [8] In 2008 and in need of increased income, 1<sup>st</sup> complainant sought respondents' advice. In so doing 1<sup>st</sup> complainant made mention of RVAF to respondents who in turn and after asking questions about complainants' circumstances confirmed RVAF as an investment suitable to provide the increased income.
- [9] Whilst excluded from this complaint, the 1<sup>st</sup> complainant had come to know about RVAF in that in July of 2006, and on the recommendation of a friend he made an investment of R350 000.00 directly with RVAF.

- [10] He stated that he had limited his investment to R350 00,00 as he was initially sceptical of RAAF; subsequent thereto he attended two or three of Pretorius's presentations, which on his understanding conveyed that the fund was trading in shares to make a profit, quite simply it was buying low and selling high.
- [11] Similarly he contends that respondent confirmed that RAAF was involved in share trading on the JSE and that whilst an investment in shares always carries a slight risk, the growth was good.
- [12] 1<sup>st</sup> Complainant states that he visited respondent frequently to discuss RAAF and was always assured that his investment was secure. Additionally and just to make sure as he puts it, 1<sup>st</sup> complainant also visited the RAAF offices.
- [13] In fact these assurances from both respondents and Pretorius led him to later invest an additional R100 000.00 directly with RAAF. As with the first R350 000, 00, complainants concede that this amount does not form part of the complaint against respondents.
- [14] 1<sup>st</sup> Complainant denies that he understood that he was investing in a hedge fund or even knowing what a hedge fund is. Complainant was a retiree who had previously ran a shoe factory, a position, which at an advanced stage of his life he was compelled to return to upon the loss of the funds. Complainant describes himself as someone who has no investment experience.
- [15] Whist complainants made certain withdrawals during the course of the investment to fund their income, the capital balance on both investments well exceeded the R800 000,00 jurisdictional limit of this Office. In this regard both complainants abandon their claim in so far as it exceeds the jurisdictional limit of

the office.

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

[16] Having already made investments in RVAF the complainants were referred to Calitz by Pretorius. It is noted that complainants' version differs from respondents' on who referred them, but this is not material.

[17] Initial discussions with complainants centred around the need to secure capital growth and income over the long term. Options such as fixed deposits, money market instruments as well as fixed term guaranteed plans with insurance companies were discussed.

[18] Additionally an investment plan through an acknowledged platform such as Sanlam Personal Portfolios (SPP), Alan Gray or Investec was considered. The different options having been explained, complainants decided to invest R1 500 000.00 each with SPP (Sanlam Glacier). The underlying 4i Asset Management funds selected on the platform were the stable fund and absolute return funds. These were divided equally between the stable fund comprising a maximum equity component of 40% and the balance in cash, property, bonds and an offshore component; and the absolute return fund.

[19] In 2008 complainants questioned respondent as to why RVAF had been able to outperform the 4i Asset Management funds. In his reply respondent explained the workings of a hedge fund and the fact that it can be market neutral.

[20] Thereafter 1<sup>st</sup> complainant enquired as to whether it was possible to withdraw

their Sanlam investment, to which respondent replied in the affirmative. Respondent goes on to state that 1<sup>st</sup> complainant then visited Abante's office in order to invest the Sanlam funds, which respondent assisted in withdrawing.

[21] Confirmatory letters from RVAF dated 5<sup>th</sup> and 7<sup>th</sup> March 2008 reflect investments of R1,6 million in each complainants names.

[22] Respondent states that 1<sup>st</sup> complainant had invested with RVAF prior to their meeting and in fact had actually visited the offices of RVAF and attended seminars by Pretorius. As such respondent contends that he did not advise him on the fund; instead they had discussions about hedge funds and the workings of RVAF.

[23] It must be pointed out that whatever the interaction between complainants and RVAF may have been, the complaint at hand relates to monies managed by respondent in his capacity as financial adviser, a role for which he was remunerated by way of the commission, which he received from RVAF. Commission which I might add, was not properly disclosed in any record furnished to this Office.

[24] It is this role that required him to act with due skill care and diligence in terms of the FAIS Act and Code. In terms of this role he had a duty to disclose the risks associated with investing in RVAF. In fact, he had a duty to counsel his clients against investing in an entity such as RVAF. For this Office to believe respondents' version that no recommendation or guidance was rendered with respect to the investment of such a large sum would be to stretch the bounds of credulity. That respondent has failed to provide documentation recording his

interaction with complainant does not assist him. Particularly notable by its absence is what is commonly referred to as a replacement advice record as required in terms of section 8(d) of the Code, in particular 8(d) (v), which requires disclosure of the differences in risk between the replacement product and the terminated product.

#### **D. DETERMINATION**

[25] Reference is made to the determination of *Inch vs Calitz*<sup>1</sup> 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.

[26] 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.

[27] 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.

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

[28] 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.

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

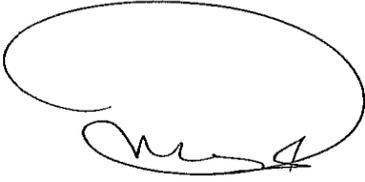
[30] For the reasons set out in the Inch determination, complainant's complaint must succeed.

#### **E. ORDER**

[31] Accordingly the following order is made:

1. The complaint is upheld;
1. The Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to 1<sup>st</sup> complainant the amount of R800 000.00 and 2<sup>nd</sup> complainant the amount of R800 000.00.
2. Interest on the aforesaid amount at the rate of 9%, per annum seven (7) days from the date of this order to date of final payment.

**DATED AT PRETORIA ON THIS THE 6<sup>th</sup> DAY OF AUGUST 2014.**

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

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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**