

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 03794/12-13/ WC 1

In the matter between:

JOHANNES ENOCH HARTSHORNE

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 Mr Johannes Enoch Hartshorne, an adult male 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] Calitz has been complainant's financial adviser since 2006 or 2007, engaging with him at least once a year or on an ad hoc basis as required. The complaint pertains to two investments in RVAF, namely, an amount of R360 000, 00 in November of 2011 and a second amount of R100 000, 00 in February 2012 totalling R460 000, 00.
- [5] The investments followed a telephone enquiry from complainant's wife to enquire from Calitz as to the performance of RVAF.
- [6] Complainant states that he was not advised by Mr Calitz that neither the RVAF nor Herman Pretorius were registered with the FSB and hence that there could be potential risks with this investment. On the contrary Calitz had told his wife during the telephone enquiry that Pretorius was a person with integrity, and that RVAF was still performing well.
- [7] Complainant knew about RVAF as he had previously been advised by Calitz on a 2007 investment, which had subsequently been withdrawn in 2008.
- [8] With respect to the complaint at hand complainant obtained an application from Calitz' office where after completion of said form it was facsimiled to Calitz' office along with proof of payment directly into the RVAF bank account.
- [9] Complainant contends that as confirmed by his wife with respondents' office it was standard procedure for investors to pay RVAF directly, with all the

administration and filing taking place at respondents' office.

[10] During the two weeks preceding Pretorius death, Calitz phoned and advised that he was feeling uncomfortable with the situation around RVAF; accordingly Calitz was advising his clients that they could either withdraw or attend a personal meeting with Pretorius at his offices. Complainant opted to withdraw but by that stage it was already too late.

[11] Complainant contends it was the inadequate due diligence conducted by Calitz on RVAF and in the person of Pretorius which failed to ensure what he calls, arm's length transparency and sound advice relating to the RVAF.

[12] Complainant further contends that he has no background knowledge on the nature and workings of hedge funds and that even though Calitz tried to explain this he still does not understand it. Instead he totally relied on Calitz' expertise to provide the best investment advice.

[13] No risk assessment exercise was conducted or even mentioned claims complainant.

[14] A rather insightful document which complainant provided to this Office, was a letter dated 8th August 2012. This letter which was issued by 4i Asset Management (Pty) Ltd, an entity of which Calitz was then a director, was e-mailed to complainant from Calitz office.

[15] This letter is revealing in that it contains the following statement:

'The board of 4i Asset Management wishes to confirm that 4i Asset Management currently manages 4 FSB regulated unit trust funds, all which

are managed in full compliance with all relevant legislation including FAIS and the Collective Investment Schemes Act (“CISA”). None of our unit trust funds had any, or will ever have, any exposure to unregulated investment schemes (e.g Herman Pretorius’ schemes/funds)..’

C. RESPONDENTS’ REPLY

[16] Respondent had been involved with complainant’s initial investment back in 2007. This investment had subsequently been redeemed in July 2008. Respondent further claim they had briefly explained the workings of a hedge fund to complainant and that these instruments were not regulated; however, he explained that Abante Capital was registered as an investment manager with the Financial Services Board. Complainant thereafter decided to invest with RVAF.

[17] Complainant was invited to information sessions and presentations by Pretorius, which would have further educated him on the nature of hedge funds. Complainant however declined the invite as he was happy with the investment.

[18] Then round October or November 2011 complainant’s wife on her own initiative enquired about Abante Capital. In response thereto respondent confirmed from the information at his disposal that the investments were still performing well. Complainant’s wife then contacted respondents’ office and obtained application forms that she completed and returned.

[19] He states that the said enquiries were not as a result of his (respondents’) recommendation or marketing. Respondent went on to state that he believed that any investor or client could direct a request on a specific product and as long as there are no negative references they could obtain the product. Respondent went

on to state that his role as adviser is to make sure that the other FSP with which the business is done is registered with the FSB.

[20] Specifically questioned on the commission respondent stated that the commission was 7.5% of the capital but that the client got 100% investment allocation. Further, he stated that there was a profit share of 80/20 and that Abante Capital would pay respondent either out of the profit share or out of their own funds.

[21] Respondent further added that the option to invest in hedge funds was not in contradiction with complainant's risk profile as the long and short positions make these investments market neutral if managed correctly.

D. THE DETERMINATION

[22] 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.

[23] Evident therein are the material deficiencies in the application forms; 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.

[24] In attempting to support his version, Calitz stated that he enclosed as part of his

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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.

[25] Quite simply, no financial service provider would have advised that this product was a suitable component of any investment portfolio had they so exercised the required due skill care and diligence.

[26] In the matter at hand, the investment was initiated by the complainant through his wife contacting Calitz to enquire as to how RVAF was performing; after a positive affirmation from Calitz, the funds were deposited and the paperwork forwarded to respondents office for processing. Certainly letters acknowledging receipt of the investments were thereafter received from RVAF, and the investments were added to respondents' books for commission purposes.

[27] Calitz attempts to distance himself with the statement; '*all investments made after 4 July 2008 was not on my advice, but directly done with Dr Hartshorne's wife.*' Whilst Calitz admittedly did not initiate the initial contact, complainant was an established client to whom Calitz had previously recommended the very same product.

[28] Certainly if he had any doubts that he had rendered advice; namely guidance in respect of the investment or purchase of a financial product these would have been dispelled when the paperwork was returned for processing. Perhaps had

he distanced himself at this point either by declining to process the applications and advising his client of the material facts relevant to risk and license or, refusing the commission, there would be some merit in his submission but, the simple inescapable fact is that this was treated as a normal investment by an established client for which he was entitled to commission. Quite simply this is advice as defined.

[29] Complainant as a client of a registered financial adviser, relied on Calitz' advice when he made 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.

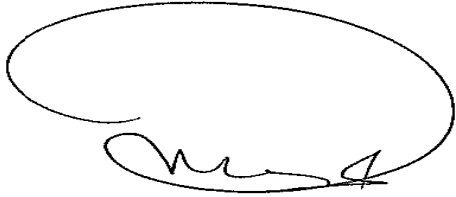
[30] For the reasons set out in the Inch determination, complainant's complaint must succeed.

E. ORDER

[31] Accordingly the following order is made:

1. The Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R460 000, 00.
2. Interest on the aforesaid amount at the rate of 15.5%, per annum seven (7) days from the date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 9th DAY OF JULY 2014.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, enclosed within a large, hand-drawn oval.

NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS