

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

**PRETORIA**

**CASE NO: FAIS 06443/12-13/ WC 1**

In the matter between:

**MARTHA CATHARINA JOOSTE**

**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 Mrs Martha Catharina Jooste, an adult female, 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, number 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] In October 2004, complainant whilst acting on the advice of Calitz invested R165 000, 00 in RAAF.
- [5] Employed as a half day clerk at that time, R165 000, 00 comprising complainant's entire investable capital, was entrusted to Calitz to invest for her retirement. Complainant had contacted Calitz, the family broker of many years standing to enquire as to whether there were better investment options for the funds, which at that stage were sitting in an ABSA money market investment. According to complainant, the investment followed a single meeting at complainants' home wherein Calitz proposed RAAF and persuaded complainant that this was the best option.
- [6] Complainant contends that she was never advised that RAAF was a hedge fund and instead, Calitz assured her that there was no risk and that he had invested some of his own money therein; further that RAAF was managed by professional people with industry experience. Subsequent to that meeting, complainant's husband contacted Calitz several times a year and was again assured that RAAF was a safe investment.
- [7] Complainant's husband contacted Calitz in April 2012 after hearing reports that RAAF was being investigated but was in turn assured by Calitz that this was a normal investigation and that there was no cause for concern. However, in July

2012 Calitz contacted complainant's husband and advised that the investment should be withdrawn. However it was already too late.

**C. RESPONDENTS' REPLY**

[8] According to Calitz, complainant visited his office at which point he (Calitz) briefly explained the workings of a hedge fund and that these instruments were not regulated; however that Abante Capital was registered as an investment manager with the Financial Services Board. Complainant thereafter decided to invest with RVAF. It must be pointed out that nothing in the documentation which respondents are required to retain, persuades this Office that complainant was even aware or could have understood that they (complainant and her late husband) were investing in a hedge fund.

[9] Calitz makes the point that the investment was done in October 2004 just after the inception of the FAIS Act and then not followed up thereafter. Yet Calitz received ongoing commission in this regard as evidenced by an RVAF statement for the period '09/11 to 11/11' reflecting 'Broker Fees (M.J Calitz)' of R3212.00. On his own admission, Calitz did not earn this commission.

[10] Respondent contends that he acted in accordance with the Act in that the requirement was for an investment that was stable and market neutral; further that the particular fund in question was not in contradiction with Mrs Jooste's risk profile as the long and short positions make these investments market neutral if managed correctly. Respondent explained to complainant that this was only possible if one could take long and short positions.

[11] Respondent further contends that he explained that there is a risk but that the

fund had delivered a good return; further that there was no upfront commission but instead profit share of 20% of the return. He additionally advised complainant that the investment was not regulated but that the company had to be registered with the FSB.

[12] Respondent states that he was assured by the fact that Abante Capital was registered and accordingly had to conform to the strict requirements of the FSB. Further, disinvestments were always paid out on time and clients could on invitation even visit the trading room, meet the traders and get printouts of transactions. Respondent himself made contact with Old Mutual and Momentum to confirm that funds were also being managed for them by Abante Capital.

[13] Respondent presses the point about dealing with a company registered with the FSB, which had itself in the past investigated Abante and not found anything wrong.

#### **D. DETERMINATION**

[14] 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.

1. **Graig Stewart Inch v Impact Financial Consultants CC and Michal Johannes Calitz FAIS 04971/12-13/MP1.**

- [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.
- [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 within the contractual documentation, further reinforcing 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] For the reasons set out in the Inch determination<sup>2</sup>, complainant's complaint must succeed.

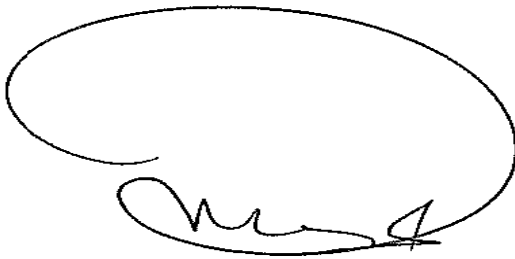
**2. Excluding those provisions which only became applicable post the initial advice in accordance with Board Notice 89 of 29<sup>th</sup> August 2007.**

**E. ORDER**

[20] 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 R165 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 11<sup>th</sup> DAY OF JULY 2014**

A handwritten signature in black ink, enclosed within a large, hand-drawn oval. The signature appears to be 'Noluntu N Bam'.

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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**