

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NO: FAIS 02235/13-14/ GP1

In the matter between:

GARVITTE HERMAN LOMBARD

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 Garvitte Herman Lombard, an adult male of Ferndale, Gauteng.
- [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 Johannes 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.

B. THE COMPLAINT

[4] The complainant's complaint may be summarised as follows:¹

- 4.1. According to the complainant, when his financial advisor was set to retire, his friend Carel Stander ('Standar') recommended that Calitz take over his (complainant's) investment portfolio.

- 4.2. The complainant followed his friend's recommendation and met with Calitz in May 2008. Following complainant's enquiry about an investment which did not have too much risk and which would do better than his current investments, Calitz made reference to RAAF as a potential investment. The complainant told Calitz that he had heard about RAAF from Stander who informed him that RAAF was a closed fund and was not accepting further investments. Calitz allegedly told the complainant that RAAF was not a closed fund and explained that –
 - a. RAAF is a hedge fund and like other hedge funds it is not regulated by the Financial Services Board ('FSB');
 - b. RAAF was properly registered;
 - c. RAAF is a relatively safe investment; fluctuations in returns were normal for hedge funds. Although hedge funds buy/sell in rising/falling markets, they operate in a specific manner and track record is proof of their steady returns;
 - d. Since RAAF's creation in 2004, it had no problems;
 - e. Herman Pretorius ('Pretorius') who was the person in charge of RAAF, was a personal friend of Calitz;
 - f. That he (Calitz) also had a reasonable amount invested in RAAF.

1. The complaint includes submissions made by the complainant in response to further enquiries made by the Office.

- 4.3 The complainant decided to follow Calitz's advice and invested R500 000 in RAAF in February 2009. Calitz requested him to sign a document to effect the investment. The document made reference to a partnership agreement and stipulated that the client had to confirm that he/she had received and read the document. As the complainant had neither received nor read the partnership agreement, he requested Calitz to provide him with a copy thereof. Calitz replied that the partnership agreement was a hefty document which could not leave RAAF's offices as competitors might learn about RAAF's trade secrets. However, the document may be viewed in RAAF's offices. Calitz informed the complainant that he had read and was satisfied with the partnership agreement, which he described as a standard document.
- 4.4 In December 2010, the complainant invested a further R200 000 in RAAF. This investment was made after being assured by Calitz that everything was going well with RAAF as confirmed by its quarterly investment reports. In July 2012 Calitz informed the complainant of Pretorius' death. Although Calitz again assured him that there were no problems with RAAF, he subsequently learnt that RAAF never operated legitimately and appears to have been a pyramid or Ponzi scheme.
- [5] The complainant asserts that Calitz erroneously assumed that another hedge fund company called Abante, which later became Polus managed RAAF. Calitz, he says, failed in his duty to verify all facts and to do proper due diligence on RAAF.

C. RESPONDENTS' REPLY

- [6] Calitz confirms that he took over the complainant's investments which he held at Glacier after the complainant was referred to him by an existing client.
- [7] Calitz asserts that he did not introduce RVPF (Abante Capital) to the complainant. It was during a meeting that the complainant questioned him about RVPF after having been told about the fund by Stander. According to Calitz, he explained to the complainant that RVPF is an unregulated hedge fund, and that the fund manager (Abante Capital) is registered with the FSB.
- [8] As the complainant expressed interest in RVPF, Calitz requested him to sign a 'risk investment profile² and agreement.' The complainant was invited to attend Herman Pretorius' RVPF presentation, but could not due to time constraints. He indicated that as Stander was satisfied with RVPF, the returns were stable and the 'company' is registered, he is happy to invest. The differences between regulated and unregulated products, RVPF's investment strategy as well as the commission that he (Calitz) would be paid were then explained to the complainant. Upon accepting the risks in RVPF, the complainant proceeded to sign an application to invest R500 000.
- [9] Calitz asserts that the complainant received quarterly statements of his investment. The impressive investment returns prompted the complainant to invest a further R200 000 in RVPF during December 2010. As the RVPF continued to perform and investors' withdrawals were executed promptly, Calitz did not envisage any problems with RVPF. However, during 2012 negative allegations were levelled at RVPF.

2. According to the Risk Profile assessment, the complainant is a conservative investor.

Calitz immediately instructed Abante to return his clients' investment funds. Unfortunately, no funds were available to pay his clients.

[10] Calitz contends that the complainant was satisfied with the risk and return of the RVAF. The funds invested constitute approximately 10% of the complainant's portfolio and were placed in RVAF to further diversify his investment portfolio.

D. DETERMINATION

[11] Reference is made to the determination of *Inch vs Calitz*³ 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.

[12] 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.

[13] 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.

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

[14] 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.

[15] 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.

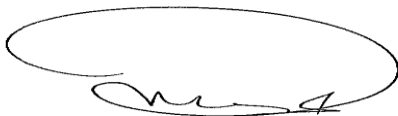
[16] For the reasons set out in the Inch determination⁴, complainant's complaint must succeed.

E. ORDER

[17] 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 R700 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 30th DAY OF JULY 2014.



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4. Excluding those provisions which only became applicable post the initial advice in accordance with Board Notice 89 of 29th August 2007.