

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

**PRETORIA**

**CASE NO: FAIS 05938/13-14/ EC 1**

In the matter between:

**LEON VAN DER WALT**

**Complainant**

and

**VAIDRO 173 CC t/a Vaidro Investments**

**1<sup>st</sup> Respondent**

**ANDREA MOOLMAN**

**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 Mr Leon Van Der Walt an adult male whose full details are on file with the office.
- [2] First respondent is VAIDRO 173 CC t/a Vaidro Investments, a close corporation duly authorised in terms of South African laws and an authorised financial services provider, number FSP 38693. First respondent carries on business at 42 Elkie Drive, Wilro Park, Roodepoort.
- [3] Second respondent is Andrea Fredericka Moolman, key individual and sole member of first respondent who shares the same address as First respondent.

At all material times Second respondent rendered financial services to complainant whilst acting on behalf of First respondent.

## **B. THE COMPLAINT**

[4] In August of 2011 complainant invested R206 000.00 into the Relative Value Arbitrage Fund, (RVAF), an licensed fund which purported to be a Hedge Fund operating under the now deceased Herman Pretorius, (Pretorius). In so doing complainant acted under advice of respondent.

[5] RVAF came into the public spot light following the death of Pretorius and several media articles pointing to lack of transparency and RVAF's lack of license. Since then this Office has received several complaints involving RVAF.

[6] Complainant states as follows:

6.1. In July of 2011 he was approached by respondent, who he understood to be the new PPS adviser to his area. In consultations, respondent recommended several changes to his portfolio amongst which were being the retirement of two retirement annuities.

6.2. Complainant was advised that these retirement annuities were old style products which if retired and reinvested in different funds could generate a better return. The idea was being to take the 1/3<sup>rd</sup> portion in cash and reinvest it with RVAF; while the 2/3<sup>rds</sup> had to be allocated to several unit trusts with minimal drawdown being taken.

6.3. With regards to the investment in RVAF, complainant was given to understand that the underlying investment was comprised of shares on the Johannesburg Stock Exchange. To this end and having personally

dabbled a bit in shares he understood that there were risks involved in the investment, chief amongst which was that the share market could go up or down;

- 6.4. However, he adds that, in response to queries which he put to respondent he was also assured that the RVAF investment was very sound with good returns.
- 6.5. Respondent provided him with regular statements supporting the alleged returns;
- 6.6. Complainant contends that he was not informed by respondent that what he was investing in what was actually a pyramid scheme as opposed to a legitimate investment. Had he so known he would never have invested and accordingly holds respondent accountable for his losses.

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

[7] There have been a number of complaints from clients of the respondents who were advised to invest in RVAF. Having gone through these complaints and noted that there identical key concerns in all of them this Office sent similar notices in terms of section 27(4) of the FAIS Act to respondents in respect of each complaint. In turn and with the necessary references to individual complainants, respondent provided a comprehensive reply applicable to all its matters before this Office.

[8] Commencing first with the aspects pertaining to the complainant, respondent had the following to say; 'Mr VD Walt has a degree, and a residential and commercial property portfolio, runs his own consulting practice and trades a share portfolio. He is investment savvy and understands how shares can be traded long and

short for a profit in a bear market’.

[9] Documentation pertaining to the complainant was also provided and from which the following was extracted:

- 9.1. The replacement advice record referred to the RVAF funds as being available within 30 days; that the high risk hedge funds use different strategies which claim to reduce volatility but can lead to high risk. Additionally mention is made of the commission of 7.5% being paid by Abante RVAF but with a 100% allocation on capital. This document also states that the complainant wants to stop his retirement annuity contributions and add these contributions to other unit trusts portfolios;
- 9.2. The ‘*Letter of Advice Recommendation*’ refers under client requirements to an investment of the 1/3<sup>rd</sup> portion into high earning funds as complainant is disappointed with the growth on insurance products; the annuity portion to be reinvested into a unit trust portfolio. Complainant is advised of the risks of the investing in shares in that they will track market performance as linked to the JSE;
- 9.3. In a document which appears to have been signed at the same time as the RVAF application from I note the following; ‘as there are no initial investment fees, I undertake to repay the administrative withdrawal cost incurred by Andrea Moolman of the capital invested, should I require a full or partial disinvestment of my funds before the first 2 year period has expired. I accept responsibility for the recovery fee of 5% and undertake to pay such fee on presentation of invoice by Andrea Moolman.’ Handwritten on the same form is a note that ‘the recovery fee of 5% does

not apply after the 2 year period expires;’

- 9.4. Additional documentation states ‘Abante RVAF Trust has had sound track record with high returns, this means High Risk. Note Capital is not guaranteed, and if trading strategies fail can result in a loss of capital.’

[10] Proceeding on to the general response, respondent states that in terms of the record of advice the risks attached to this product are explained in plain language and that the record states that no forms were signed which were not fully completed.

[11] The point is also made that the application forms signed by complainant explain in plain language that the structure of the investment involved becoming a partner in the RVAF.

[12] Specifically questioned as to the due diligence she conducted, respondent advised that having been introduced to Abante Capital she visited the premises where Herman Pretorius explained the strategies and how the risk was managed. Having been introduced to the trading team respondent then proceeded to ascertain whether Abante Capital was registered with the FSB. In addition thereto respondent confirmed with Momentum and Old Mutual and spoke to their fund managers about Abante Capital and their use of the fund in their portfolios.

[13] Respondent goes on to state that having a reasonable knowledge of Hedge Funds respondent concluded that the strategy is sound and when mostly top 40 JSE companies are invested into, this should be a sound fund. According to respondent, Mr Pretorius explained that the way that this fund operated the risks

are relatively low.

[14] Respondent contends that she was satisfied that persons investing in the fund were fully appreciative and aware of the risks involved, both in that they attended presentations by Herman Pretorius but also in that respondent further explained the process and operation of the fund as she understood it. In this regard a written explanation of Board Notice 571<sup>1</sup> was provided and explained to each client.

[15] As to the basis upon which respondent deemed RAAF to be a suitable basis for her clients respondent advised as follows:

15.1. Many clients need a higher return on their investment to ensure that they reached their investment goals, and as an adviser it was her duty to ensure that all products and all investment avenues are explored on behalf of clients;

15.2. Given the various market crisis's hedge funds could both act as a defensive strategy and outperform traditional investments in a downturn;

15.3. Researching the different hedge funds available in the country respondents research showed that Abante Capital was one of three hedge funds in South Africa;

15.4 In 2008 Abante Capital won a hedge fund award. With regards thereto respondent provided a Symmetry multi manager document showing the market neutral category winner as 'Abante Statistical Arbitrage.'

[16] The portfolio was explained to clients as a hedge fund which invested in shares on the JSE. It was explained that as in any investment involving shares the risk

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<sup>1</sup> Hedge Fund FSP Risk Disclosures Notice

is of a high nature, however historically the loss in downside markets is lessened when hedge trading strategies are used.

[17] In this regard respondent states that hedge funds may actually be a lower risk than traditional investments as the target is to protect capital, increase defensive strategies, and obtain absolute returns under all market conditions as explained by Herman Pretorius.

[18] As to commission respondent advised that this was 7.5% but with no trail commission. This does not appear to have been disclosed to the client as required in terms of section 3.(1) (vii) of the code.

#### **D. DETERMINATION**

[19] Reference is made to the determinations of *Inch vs Calitz*<sup>2</sup> and in particular that of *The Trustees of the Johnnie Pringle Investment Trust vs Vaidro/Moolman*<sup>3</sup> where this Office dealt with the key issues, which pertain to the rendering of advice to invest in RVAF by respondent. Principally the issues pertain to the respondent's failure to understand the entity, (RVAF) and the risks to which she was exposing her clients whilst advising them to invest therein.

[20] 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.

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

3. *The Trustees of the Johnnie Pringle Investment Trust IT1280/2004 v Vaidro 173 CC t/a Vaidro Investments and Andrea Moolman* FAIS 0379512 – 12/13 EC 1.

[21] In attempting to support her version, respondent and as part of the their investigations into the investment vehicle contends that they were shown an FSP license no 874 in the name of Abante Capital (Pty) Ltd and accordingly they were satisfied that Abante with whom they had an intermediary agreement was correctly licensed. Yet there is not so much as a single mention of Abante or its license number<sup>4</sup> within the contractual documentation, which points to respondent having failed to understand the contracting entity.

[22] Furthermore there were no financials or even so much as a fund sheet. Respondent claimed that the fund invested in mostly the top 40 companies on the JSE, yet provided no documentation supporting such a belief. Ergo, without the financials or so much as a fund fact sheet respondent could not have understood the economic activity that generated the returns.

[23] Furthermore respondent was unable to explain to the office just why RAAF was nowhere to be found in the very documentation which respondent used in support of recommendations she made to invest in RAAF. I refer here to the Symmetry multi manager South African Hedge Fund Survey which as its name suggests lists numerous hedge funds including those of Abante. RAAF though, is conspicuous by its absence.

[24] The inescapable conclusion is that respondent knew nothing about the fund or its underlying investment and accordingly was in no position to advise her clients to invest in it.

4. Section 8 (8) (b) of the FAIS Act requires that a licensee must ensure that a reference to the fact that such a license is held is contained in all business documentation, advertisements and other promotional material



[25] As referred to in both the Inch and Pringle Investment Trust determinations, the case of *Durr vs ABSA Bank Ltd and Another 1997 (3) SA 448 (SCA)* is instructive. In this regard the learned judge pertinently stated the following:

*“I come towards my conclusion on the subject of negligence. The basic rule is stated by Joubert (ed) The Law of South Africa First Reissue vol 8.1 para 94, as follows:*

*‘The reasonable person has no special skills and lack of skill or knowledge is not per se negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such activity.’*”

[26] In light of what I have stated in the preceding paragraphs respondent has breached section 2 of the General Code which requires that ‘a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of the clients and the integrity of the financial services industry.’

[27] In this regard the client was in no position to understand the ‘any material investment or other risks associated with the product’ as required by section 7. (1) (c) (xii) of the code. Understanding that this was investment that could go up or down as complainant accepts he did, is a far cry from understanding that you are investing in a ponzi scheme or an investment for which there is not so much as a single financial record.

[28] Quite simply the client did not make an informed decision as required by section 8 (2)<sup>5</sup> of the code.

[29] Perhaps had the complainant been provided with the actual commission figure in rand and cents as is required by the section 3(1) (vii)<sup>6</sup> of the general code he might have been concerned about RVAF's ability to both allocate 100% to capital<sup>7</sup> and then provide the returns which it supposedly did. Failure to do so by the respondent is a breach of section 3(1) (vii) of the code.

[30] For the reasons set out both above and in the Pringle determination, complainant's complaint must succeed.

## **E. ORDER**

[31] Accordingly the following order is made:

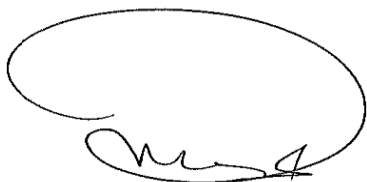
1. The complaint is upheld;
2. The Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R206 000.00.
3. Interest at the rate of 9 %, per annum, seven (7) days from date of this order to date of final payment.

5. Section 8 (2) The provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision.

6. Section 3 (1) (vii) 'must, as regards all amounts, sums, values, charges, fees, remuneration or monetary obligations mentioned or referred to therein and payable to the product supplier or the provider, be reflected in specific monetary term....'

7. See paragraph 8.1 supra

**DATED AT PRETORIA ON THIS THE 31<sup>st</sup> DAY OF MARCH 2015.**

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

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**NOLUNTU N BAM**  
**OMBUD FOR FINANCIAL SERVICES PROVIDERS**