

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

**PRETORIA**

**CASE NUMBER: FAIS 05245/12-13/ WC 1**

In the matter between:

**THE TRUSTEES FOR THE TIME BEING OF  
THE BALLIN FAMILY TRUST IT2187/2002**

**Complainant**

and

**CATWALK INVESTMENTS 592 (PTY) LTD t/a Pinnacle**

**First Respondent**

**SIMON MORTON**

**Second Respondent**

**CAROL MAY LOUW**

**Third 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. INTRODUCTION**

[1] This is a complaint arising from a failed investment made by Complainant in the now defunct Relative Value Arbitrage Fund, hereinafter referred to as RVAF, a fund that was managed and operated as a hedge fund - by one Herman Pretorius, (now deceased) with no license of its own. Complainant's claim against Respondent is based on the latter's failure to appropriately disclose the risks involved in investing in the scheme, which complainant believed at the time was totally legitimate.

- [2] Following the death of Herman Pretorius and negative publicity about the fund, Complainant claims Respondents as authorised financial service providers, failed in their duty to appropriately advise him and as a result, complainant seeks recourse against respondents for the full payment of the invested capital. Complainant claims, had he known the truth about the fund, he would have never invested in RVAF.
- [3] Given the number of complaints implicating Respondent for advising clients to invest in RVAF, Respondent chose to send this Office one response which set out the necessary references to each complaint, occasionally highlighting what is necessary for each particular complaint.
- [4] The essence of Respondent's response is that they made the necessary enquiries which led them to believe that they were dealing with a registered financial services provider. Respondents state that they gave 'advice that was fair and sound, based on the information we had on hand, and suitable for our clients requests/needs'.

## **B. THE PARTIES**

- [5] The Complainants are the trustees for the time being of the Ballin Family Trust IT2187/2002, duly authorised by the Master of the High Court in terms of the letters of authority dated 20<sup>th</sup> August 2002.
- [6] First Respondent is Catwalk Investments 592, a private company duly registered in accordance with the laws of South Africa<sup>1</sup>. First Respondent was at all relevant

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<sup>1</sup> A search on the CIPC website at the time of writing reflects 'Enterprise Status' as: 'Deregistration Process'

times a licensed Financial Services Provider (FSP nr:5485)<sup>2</sup> with its registered business being 1 De Villiers Drive, Valmary Park, Durbanville, Western Cape.

- [7] Second Respondent is Simon Morton, an adult male director, and key individual of the First Respondent who resides at 59 Kesteven Ave, Glendowie, Auckland, New Zealand, 1072. Second respondent is cited in his capacity as Key Individual of first respondent at the time.
- [8] The Third Respondent is Carol May Louw, an adult female and key individual of the First Respondent who resides at 14 Zonneweelde Crescent, Goedemoed, Cape Town, 7550. Third respondent is cited in her capacity as Key Individual of first respondent at the time.
- [9] At all material times hereto, Second and Third Respondent rendered advice to Complainant whilst acting on behalf of the First Respondent. Respondent or Respondents must be read to mean the same person in this determination.

### **C. THE COMPLAINT**

- [10] During the period July 2006 to June 2011, Complainant invested a total of R1 635 525.00 (One Million Six Hundred and Thirty-Five Thousand, Five Hundred and Twenty-Five Rand) in RVAF.
- [11] Comprising separate causes of action, the investment was made up as follows:
- 11.1. R50 000 on the 6<sup>th</sup> July 2006;
- 11.2. R50 000 on the 21<sup>st</sup> July 2006;

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<sup>2</sup> The FSP license lapsed on the 22nd March 2013.

11.3. R380 000 on the 19<sup>th</sup> January 2009;

11.4. R305 525 on the 1<sup>st</sup> June 2009;

11.5. R700 000 on the 18<sup>th</sup> August 2009;

11.6. R150 000 on the 29<sup>th</sup> June 2011.

[12] Complainant contends that the above investments were made on the advice of the Second and Third Respondent; who in turn represented the First Respondent.

[13] The complainant states as follows:

13.1. 'The complaint relates to the fact that a registered and approved Financial Advisor gave bad financial advice which resulted in the loss of a significant portion of retirement investment funds';

13.2. In particular the Complainant mentions the failure by the Respondent to consider and advise on the real risks associated with an investment in the RVAF. The particular concern is that a large portion of the investments was intended to cater for the Complainant's beneficiaries' retirement needs. This is a fact that Respondent was aware of, given respondents' relationship with the complainant, such that Respondent was both kept informed and consulted about all Complainant's financial affairs;

13.3. Complainant states that they were not advised on the risks of investing in an unregulated environment;

- 13.4. Post the failure of RVAF, Complainant who had never been provided with a risk disclosure made enquiries with Respondent in the form of their 'Risk Administrators', 'to obtain a copy of the RVAF "Risk Disclosure Statement" (referenced in Appendix 5 on the investment application form<sup>3</sup>). In turn Complainant learnt that this was never part of the investment application documentation. Complainant referenced an e-mail from the Third Respondent dated 6<sup>th</sup> September 2012 to support Complainant's assertion.
- 13.5. Respondents at all times assured Complainant that the investments were secure. To this end Complainant states that Respondent compared the nature and security of RVAF to the likes of Allan Gray. Complainant also references correspondence<sup>4</sup> with the Second and Third Respondent just shortly before the collapse of RVAF. In a nutshell these assured Complainant that the funds are safe; RVAF having had a full audit by the FSB, which it passed with flying colours.
- 13.6. At no stage did Respondent advise Complainant of the following:
- 13.6.1. That RVAF was an unregulated fund;
  - 13.6.2. That there was no third party administration;
  - 13.6.3. No audited financial statements existed;
  - 13.6.4. That there was no independent custodian;

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<sup>3</sup> Applicable to the R700 000 investment made on the 18<sup>th</sup> August 2009

<sup>4</sup> E-mails dated the 19<sup>th</sup> July 2012 from the Third Respondent and 5<sup>th</sup> July from the Second Respondent

- 13.6.5. That there was no verification of assets;
- 13.6.6. That there were no independent trustees;
- 13.6.7. That the number of trustees managing the fund did not comply with the requirements of the trust deed.
- 13.7. Had Complainant been alerted by Respondent to these risks, the investments would not have been made.
- 13.8. Complainant goes on to state that Respondent did not conduct the most basic of due diligences, namely, calling for audited financial statements. Instead, Complainant asserts that Respondent instead relied on his personal relationship with Pretorius as opposed to independent verification of RVAF.
- 13.9. Complainant essentially concludes by stating that having consulted with an FSB approved financial advisor, Complainant expected that Respondent would use their expertise, honesty and integrity to place these funds in a secure environment. Instead Respondent did not perform the necessary due diligence and as such rendered inappropriate advice for which Complainant holds Respondent accountable.

#### **D. RESPONDENTS' REPLY**

[14] Before dealing with the Respondents' reply, it should be noted that this Office has received a number of complaints involving both RVAF, and the same Respondents. The key issues throughout are identical. Accordingly, and in respect of each complaint, this Office forwarded to Respondents similar notices

in terms of section 27(4) of the FAIS Act and invited Respondents to reply to the complaints by furnishing all documents and any other material that may support Respondents' case.

[15] In turn, and aside from the necessary documentation and applicable reference to individual complainants; Respondent provided a comprehensive reply applicable to all its matters before this Office.

[16] This reply is comprehensively laid out in the determination of Freddy vs Catwalk Investments<sup>5</sup> (Freddy). In that the Freddy determination details not only the reply, but determines the applicable key issues, it is necessary that the two determinations be read together, the findings in the Freddy matter applying *mutatis mutandis*. The Freddy determination in turn flows from the determination of Inch vs Calitz,<sup>6</sup> which I make reference to in the determinations section hereof.

[17] Not wishing to duplicate Respondents' reply in the Freddy matter and in the interests of brevity, I detail only the key points raised therein. These are as follows:

17.1. After completing a full financial needs analysis, Respondent gave 'advice that was fair and sound, based on the information we had on hand, and suitable for our clients requests/needs'.

17.2. For diversification purposes, RVAF was recommended as a third option alongside property and equity investments. The attractiveness of RVAF

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5 Nigel Andrew Freddy and Catwalk Investments 592 (PTY) LTD t/ Pinnacle; Simon Morton and Carol May Louw FAIS 0519 -12/13/WC1

6 Graig Stewart Inch v Impact Financial Consultants cc and Michal Johannes Calitz,FAIS 0497/12-13/MP1

being that it limited risk to 6% of capital<sup>7</sup>.

- 17.3. Clients attended RVAF presentations, where it was clarified that the strategy employed by the RVAF hedge fund; namely the relative value arbitrage strategy was on the low end of the risk spectrum for hedge funds.
- 17.4. *'The traders who manage the funds that are traded on the JSE need to be registered with the FSB under a particular license.....Polus Capital is the entity that is responsible for trading the funds on behalf of RVAF and they have an FSB number. They are registered FSP's'*
- 17.5. *'Eduard Brand is the person doing the administration of the RVAF via Abante Group which is a separate company to the RVAF (although it shares the same owner.'*
- 17.6. Respondent makes mention of regularly checking the FSB website, in order to confirm that the licenses of Abante and Polus Capital were still valid. Further, Respondent contends that during the presentation by Pretorius it was represented that RVAF was registered with the FSB.
- 17.7. Turning to the fees, respondent states that they received 5% of the profits that were generated. There was an 80/20 split whereby the clients received 80% of the growth and RVAF the balance. The 5% *"profit share"* came out of the 20% portion. This was the case from 2000 to 2006 at which point they were given a referral fee for investments passed onto RVAF. Respondent states that complainant was fully aware of this

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<sup>7</sup> As per a questions and answers document provided to respondents clients on the 2<sup>nd</sup> August 2012



model.

## **E. DETERMINATION**

[18] I earlier mentioned the Inch determination. The main concerns regarding investments in RVAF were comprehensively dealt with therein. In turn and as mentioned earlier, these key issues applied equally to the Freddy determination. These pertain to the Respondents' failure to understand the entity (RVAF), and the risks to which Respondent was exposing their clients whilst advising them to invest in RVAF.

[19] In that these issues, along with Respondents' reply have already been comprehensively interrogated in the Freddy matter; only a summary of the key findings are detailed hereunder. The findings in the Freddy determination apply to this case *mutatis mutandis*.

[20] They are as follows:

20.1. Without any form of licensed intermediary or administrator, the RVAF fund as it was promoted and purported to operate, fell within the definition of a Hedge fund FSP as defined by the Registrar of Financial Service Providers in Board notice 89 of 2007. In consequence thereof, the requirements of the FAIS Act become applicable;

20.2. In that neither Pretorius nor the RVAF was licensed in any way, this breached section 7(1) of the FAIS Act, which requires that a person may not act as a financial services provider unless such person has been issued with a license under section 8. Respondents' breached section

7(3) of the FAIS Act in that they conducted financial services related business with a person not so authorised;

- 20.3. Respondents' warning bells should have gone off as none of the RVAF documents contained any license details as required by (8) (b) of the FAIS Act. The section requires that not only documents but all advertisements and promotional material carry license details.
- 20.4. As with Inch and Freddy, the contractual documentation failed to satisfy the requirements of section 4 of the General Code. I specifically make mention of Inch, in that in respect of the R700 000<sup>8</sup> investment there was identical and likewise non-compliant contractual documentation<sup>9</sup>. The balance of the investments, as with Freddy, lack documentation that could conform to the requirements of section 4.
- 20.5. Likewise and as detailed in Freddy, there was no compliance with sections 5 and 8A of the Discretionary FSP's Code which relate to the mandate and duties of Hedge fund FSP's<sup>10</sup>.
- 20.6. Similarly there is no evidence of written disclosure of hedge fund risks, as required in terms of section 8A(2)<sup>11</sup>. On the contrary it would appear that Respondents' assured Complainant as to the safety and security of the RVAF; even referring to it as 'your stable growth fund' in a presentation dated 11<sup>th</sup> June 2009.

8 Paragraph 11.5.

9 See paragraphs 33-35 of Inch.

10 See paragraphs 28-36 of Freddy.

11 See Freddy at paragraphs 37 to 39.

Additional correspondence referenced in the complaint to the office likewise refers to the safety of the investment.

- 20.7. Certainly nothing in the file makes mention of RVAF being an unregistered fund; further there is no explanation as to why it was appropriate<sup>12</sup> to place a large portion of Complainant's investment in an unregistered hedge fund; one without a set of financials, or even a fund fact sheet. Respondent's conduct is incomprehensible given that the previously mentioned presentation of the 11<sup>th</sup> June evidences that at least a portion of the RVAF investment was intended for retirement. This leads one to question whether respondents were minding their own interests or those of the complainant as required by the General Code.
- 20.8. In misrepresenting the real risks to Complainant; Respondents' violated the specific duties of a provider, as requires in terms of section 3 (1) (a) (I) and (ii) of the Code; namely that representations made to the client must be both factually correct and avoid uncertainty or confusion and must not be misleading.
- 20.9. Respondents' further failed to ensure that Complainant's investment was secured by a nominee account; a requirement of section 8<sup>13</sup> of the Discretionary Code.
- 20.10. All of the failures cited in the determination section simply evidence Respondents' failure to comply with section 2 of the General Code which requires that '*a provider must at all times render financial services*

12 Section 8 (1) (c) of the general code

13 Section 8 requires that a nominee company be utilised by the discretionary FSP with the main object of being the registered holder and custodian of the investments of clients.

*honestly, fairly, with due skill, care and diligence, and in the interests of the clients and the integrity of the financial services industry.'*

20.11. The above is further supported by Respondents' failure to conduct any proper due diligence<sup>14</sup>.

20.12. The investment documentation refers to a 'RVAF EN COMMANDITE PARTNERSHIP;' this partnership agreement was neither produced, nor is there any evidence of it being explained to Complainant. This is a breach of section 7(1) (a) of the General Code which requires that the provider 'provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transactions to a client... Similarly, section 7 (1) (b) which requires that the provider whenever possible provide to the client any material contractual information.....' was breached.

## **F. CONCLUSION**

[21] This complaint is about being advised to invest in a scheme that was not above board. At the heart of this complaint is respondents' failure to appropriately disclose to the complainant the risk that was involved in investing in RVAF.

[22] The scheme purported to act as a legitimate hedge fund; a fact which would have made it subject to the provisions already detailed within this determination.

14 See paragraphs 49 to 51 of Freddy

[23] Yet Respondents either ignored, or were unaware of the legislative requirements. Instead they appear to have blindly accepted whatever they were told about RVAF without any proper attempt to verify such information; which information they then conveyed to their client. The inescapable conclusion is that Respondents were out of their depth.

[24] Therefore they could not have understood the economic activity that supposedly generated the returns, or the sustainability of the investment.

[25] Accordingly the Second and Third respondent could not have properly apprised the complainant as to the material investment or other risks associated with the product, as required in terms of section 7 (1) (c) (xii) of the General Code.

[26] That Respondents failed in their duties in this regard is clear. Without Complainant being advised that they were investing in an unregulated and unregistered entity without so much as a set of financials it cannot be said that Complainant made an informed choice as required by section 8 (2) of the General Code.

[27] In a nutshell, Respondents as registered financial services providers failed to meet the duties as set out in the FAIS Act and the General Code.

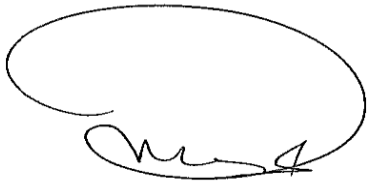
[28] For the reasons both set out in this determination, the Inch and the Freddy determinations, the Complainant's complainant must succeed.

## **G. ORDER**

[29] 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 R1 635 525.00.
3. Interest at the rate of 9 %, per annum, seven (7) days from date of this order to date of final payment.

**DATED AT PRETORIA ON THIS THE 30<sup>th</sup> DAY OF JUNE 2015.**

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**