

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

**PRETORIA**

**CASE NUMBER: FAIS 06635/12-13/ WC 1**

In the matter between:

**JACQUES GERHARD DE WET**

**First Complainant**

**MARLENE SUSAN DE WET**

**Second Complainant**

and

**CATWALK INVESTMENTS 592 (PTY) LTD t/a My 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<sup>1</sup> 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. Complainants' claim against Respondent is based on the latter's failure to appropriately

<sup>1</sup> Complainant and complainants are used interchangeably. I do likewise to respondents.

disclose the risks involved in investing in the scheme, which Complainants' 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 Complainants and as a result, seeks recourse against Respondent for the full payment of the invested capital. Complainants claim, had they known the truth about the fund, they 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 Respondents' response is that they made the necessary enquiries which led them to believe that they were dealing with a registered financial services provider, and that 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 First Complainant is Jacques Gerhard De Wet an adult male pensioner, whose full details are on file with the Office.
- [6] The Second Complainant is Marlene Susan De Wet an adult female pensioner, married to the First Complainant, whose details are likewise on file with the

Office.

- [7] First Respondent is Catwalk Investments 592, a private company duly registered in accordance with the laws of South Africa<sup>2</sup>. First respondent was at all relevant times a licensed Financial Services Provider (FSP nr:5485)<sup>3</sup> with its registered business being 1 De Villiers Drive, Valmary Park, Durbanville, Western Cape.
- [8] 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.
- [9] 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.
- [10] At all material times hereto, Second and Third Respondent rendered advice to Complainants 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**

- [11] On the 1<sup>st</sup> April 2009, whilst acting on the advice of Respondent, the First and Second Complainant, each invested R350 000 in RVAF for a total of R700 000.
- [12] Over the period April 2010 to June 2012 the First Complainant made withdrawals totalling R126 000 leaving the balance of his capital of R224 000 in the Fund.

2 A search on the CIPC website at the time of writing reflects 'Enterprise Status' as 'Deregistration Process'.

3 The FSP license lapsed on the 22nd March 2013.

[13] Complainants state; 'This money was invested into the Abante RVA Fund, which, at the death of Herman Pretorius, proved never to have existed..... I am therefore holding "My Pinnacle" responsible for the loss and claiming the lost money from them.'

[14] Further details of the complaint are encapsulated in an e-mail, and complaint, from the First Complainant to the Second Respondent dated the 24<sup>th</sup> October 2012. This complaint was annexed as part of the main complaint to this Office. It states as follows:

14.1. 'I approached "My Pinnacle," on the recommendation of a friend, to invest an amount of R700, 000 through this financial advisory institution, at the best possible rate, so that I would be able to draw earnings from this investment, to substitute my income as a pensioner, Your Me. Carol Louw, promised to discuss it with you, and the outcome was that the money was to be invested in the Abante RVA Fund. At a later stage you confirmed to me in person, that this was what your organization was going to be doing, and Me. Louw requested me to deposit the total amount directly into Abante's bank account,'

14.2. 'All went well until Mr Herman Pretorius of Abante, shot and killed himself earlier this year.....It was then that it was found that the Abante RVA Fund was in fact a pyramid scheme, and we now stand to lose all our investments. We feel that, as a reputable investment adviser, you should have taken better care of our funds.'

14.3. 'We trusted your institution, as professionals, with the only money we had, and find ourselves now in a situation where we are going to have to sell our home, to try and make ends meet. You have failed our trust and lost our investment, and we now want your institution, through which the money was lost, to make good the loss of R700, 000, failing which the matter would be referred to the Ombud for resolution.

[15] Supplementing the above, are First Complainant's reply to additional queries posed to the Complainants by the Office. In response thereto the First Complainant's advised as follows:

15.1. He was advised to invest in RAAF as this fund offered the best returns. Having been invited to a presentation by Herman Pretorius, at which the returns were represented as being 20% per annum, he was impressed;

15.2. He was advised that the fund was high risk, but that the returns were excellent and the Abante was trustworthy;

15.3. The RAAF made up 82.35% of the couple's total investments. The funds were derived from two sources, namely, a savings account, and the sale of Complainants' then home, in order to move to smaller unit;

15.4. Complainants have now been forced to sell this smaller residence in order to live off the proceeds. In this regard the First Complainant makes reference to his advanced age.

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

[16] Before dealing with the respondent's 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 Respondent to reply to the complaints by furnishing all documents and any other material that may support Respondents' case.

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

[18] This reply is comprehensively laid out in the determination of Freddy vs Catwalk Investments<sup>4</sup> (Freddy). In that the Freddy determination details not only the reply, but determines the applicable key issues, it is necessary that they 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>5</sup>

[19] 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:

19.1. 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'.

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

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

- 19.2. For diversification purposes, RVAF was recommended as a third option alongside property and equity investments. The attractiveness of RVAF being that it limited risk to 6% of capital<sup>6</sup>.
- 19.3. Clients attended RVAF presentations, where the relative arbitrage strategy employed by the RVAF hedge fund was clarified. According to the presentation, the strategy was on the low end of the risk spectrum for hedge funds.
- 19.4. *'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'*
- 19.5. *'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.'*
- 19.6. 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.
- 19.7. 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.

<sup>6</sup> As per a questions and answers document provided to respondents' clients on the 2<sup>nd</sup> August 2012.

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 complainants were fully aware of this model.

## **E. DETERMINATION**

[20] I earlier mentioned the Inch determination. The main concerns regarding investments in RVAF were comprehensively dealt with therein. The same key issues from Inch applied equally to the Freddy determination. Essentially, 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.

[21] The Respondents' reply having 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*.

[22] They are as follows:

22.1. 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;

22.2. 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;

22.3 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.

22.4 As with Freddy, the contractual documentation failed to satisfy the requirements as detailed in section 4<sup>7</sup> of the General Code. In fact there is no evidence that any contractual documentation was ever provided. Certainly Respondents in their file of papers have not produced any such documentation.

22.5 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>8</sup>.

22.6 Similarly there is no evidence of written disclosure of hedge fund risks, as required in terms of section 8A(2)<sup>9</sup>. I find no documentation which makes any reference to risk. Complainant states that he was advised that the fund was high risk, but that the returns were excellent and Abante was trustworthy;

7 See Freddy at paragraphs 31-32.

8 See paragraphs 28-36 of Freddy.

9 See Freddy at paragraphs 37 to 39.

- 22.7 However, as expected, nothing in the file makes mention of RAAF being an unregistered fund; further there is no explanation as to why it was appropriate<sup>10</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, more so given complainants age and retirement needs.
- 22.8 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.
- 22.9 Respondents' further failed to ensure that Complainant's investment was secured by a nominee account; a requirement of section 8<sup>11</sup> of the Discretionary Code.
- 22.10 All of the failures mentioned in this determination evidence Respondents' breach of 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.'*

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

12 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.

22.11 The above is further supported by Respondents' failure to conduct any proper due diligence<sup>13</sup>.

22.12 The investment documentation itself refers to a 'RVAF EN COMMANDITE PARTNERSHIP;'. Neither the partnership agreement was produced nor the evidence that the legal implications of investing as a partner *en commandite* were 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... Respondents further breached section 7 (1) (b) of the General Code, which requires that the provider whenever possible provide to the client any material contractual information.....'

## **F. CONCLUSION**

[23] This complaint is about being advised to invest in a scheme that was not above board.

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

[25] Yet Respondents either ignored or were unaware of the legislative requirements. Instead they appear to have blindly accepted whatever they were

<sup>13</sup> See paragraphs 49 to 51 of Freddy.

told about RVAF without any attempt to verify such information; which information they then conveyed to their client. The simple fact is that Respondents were out of their depth.

[26] Respondents could not have had any understanding of the economic activity that generated the returns, or the sustainability of the investment.

[27] 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.

[28] That Respondents failed in their duties in this regard is clear. Without Complainants 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 Complainants made an informed choice as required by section 8 (2) of the general code.

[29] In a nutshell, Respondents as registered financial services providers failed to meet the requisite requirements as set out in the FAIS Act.

[30] For the reasons set out in this determination, the Inch and the Freddy determinations, complainants' complainant must succeed.

## **G. 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 the First Complainant the amount of R224 000 and the Second Complainant the amount of R350 000 .

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> 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**