IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NO: FAIS 05019/12-13/ WC 1**

In the matter between:

NIGEL ANDREW FREDDY **Complainant**

and

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

SIMON MORTON **Second Respondent**

CAROL MAY LOUW **Third Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS Act')

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 complainant and as a result, seeks recourse against respondent for the full payment of his 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 respondents 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 quintessence of respondent's response is that they understood that they were dealing with a registered financial services provider. Further that they accordingly gave 'advice that was fair and sound; based on the information they had on hand; and as such suitable for their clients requests/needs.

B. THE PARTIES

[5] The complainant is Nigel Andrew Freddy, an adult male, whose full contact details are on file with the Office.

[6] First respondent is Catwalk Investments 592, (Pty) Ltd t/a Pinnacle, a private company duly registered in accordance with the laws of South Africa[1] with its registered business address being 1 De Villiers Drive, Valmary Park, Durbanville, Western Cape. First respondent was at all relevant times a licensed Financial

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

Services Provider (FSP nr:5485)[2] .

[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.

[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.

[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] Complainant aptly sums up the complaint as follows:

'The RVAF trust investment administered by Herman Pretorius was sold to me by Simon Morton as a safe hedge fund with minimum risk.

This trust has now been deemed to be insolvent and sequestrated and my complaint is that Simon Morton did not do the necessary due diligence on this fund prior to instructing me to invest in it. He was also allegedly not licensed to advise on this type of fund/

He knew that I wanted to safe guard my money and suggested this fund. I was not informed that was an unregulated fund and that the administrators of the fund

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

were not FSB approved.' (copied verbatim)

[11] It is important that I point out that, whilst Complainant specifically makes mention of the Second Respondent; as evidenced by paragraphs 45 and 46 of this determination, the Third Respondent and key individual, was integral to the rendering of this advice.

[12] Complainant invested two amounts in RVAF namely R150 000 on the 26th October 2009 and R450 000 on the 11th October 2010. In total R600 000 was invested in RVAF. These funds comprised most of his investable assets.

[13] Proof of the latter investment was contained in a letter from *'RVAF EN COMMANDITE PARTNERSHIP'* dated 11th October 2010.

[14] With respect to the R450 000 investment, complainant states that he wished to invest this amount in Allan Gray but was persuaded otherwise by the second respondent. As pointed out by the complainant, e-mail correspondence at the time evidences that complainant made enquiries about the Cadiz Ladder Fund[3], a fund available on the Allan Gray platform; to which the second respondent's e-mail of the 5th October 2010 states that *'this fund is too conservative for his profile. Abante is less risk and better returns over the same period*.' Complainant states that he was told that RVAF was designed to preserve capital.

[15] Further and whilst pointing to a risk profile assessment conducted on the 26th October 2009, complainant states that he was only prepared to risk 25% of his capital[4].

3 The fund fact sheet investor profile describes this as a medium to long term investment for an investor with a moderate risk profile who wants unlimited exposure to positive equity growth, with protection on the downside.
4 In answer to the question, 'Are you prepared to take the risk in order to achieve higher returns?' complainant ticked C being 'Prepared to risk 25% of capital.'

[16] In short, complaint believed that he was receiving appropriate advice, to invest in a safe fund, with minimal risk. Complainant was not advised that this was an unregulated fund with the attendant risks.

D. RESPONDENTS' REPLY

[17] Before detailing the respondent's reply, it should be noted that this Office has received a number of complaints regarding RVAF against the Respondents. The key issues in all the complaints were identical. Accordingly this Office forwarded to Respondents similar notices in terms of section 27(4) of the FAIS Act in respect of each complaint and invited respondent to respond to the complaints by furnishing all documents and any other material that may support respondent's case.

[18] In turn and with the necessary references to individual complainants, respondent provided a comprehensive reply applicable to all its matters before this Office. This is supplemented by various additional communications/documentation[5] on file. Thus respondent's version, may be summarised in the following paragraphs:

18.1. Respondent contends he gave 'advice that was fair and sound, based on the information we had on hand, and suitable for our client's requests/needs'.

18.2. Prior to making any recommendations, Respondent always completed a full, financial needs analysis to determine the client's position.

5 Including correspondence both from respondent as well as respondent's attorneys. Respondent also provided an explanatory note to its clients after the collapse of RVAF.

18.3. Respondent also reviewed the forecasts of various asset management companies in order to ensure that client's funds were allocated in such a manner as to outperform money market funds.

18.4. The various asset classes and the diversification thereof were discussed with clients. These included the risks of investing in the unit trust market in equity, balanced, money market and bonds. 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[6].

18.5. Respondent explained that the majority of clients needed to build investments for retirement and as a result had to outperform inflation. Accordingly the second respondent would advise clients that they had access to a hedge fund.

18.6. Arrangements were then made for the clients to attend RVAF trust presentation in order to ensure that they were exposed first hand to the workings of the investment fund. In the presentation it was clarified that the strategy employed by the hedge fund; namely the relative value arbitrage strategy was on the low end of the risk spectrum for hedge funds. This was explained by means of a graph, which respondent used to show clients at a separate opportunity.

18.7. Respondent in addressing the Office makes mention of the fact that RVAF was investing in the top 70 shares listed on the JSE and that it

6 As per a questions and answers document provided to respondents clients on the 2nd August 2012

was audited by Price Waterhouse Coopers.

18.8. As to licensing, and in particular the fact that as RVAF dealt directly with clients funds, the Office put it to respondent that RVAF should have been licensed as a hedge fund FSP. In turn respondent stated that the license displayed in the offices of both Abante and Polus Capital were those of Cat II FSP's. Respondents' attorneys in fact state *'The complainant was informed that the RVA Fund is a hedge fund being managed by Polus Capital, which entity is registered with the Financial Services Board.'*

18.9. Elaborating thereon respondent states that with the introduction of regulations by the FSB, RVAF complied in this regard in that whilst Mr Eduard Brand[7] took care of the reporting and administration, Polus Capital handled the investment/trading side of the transactions.

18.10. Post the demise of RVAF; in a questions and answers document provided to clients by the Second Respondent on the 2nd August 2012, the following points are made:

'Hedge funds are not regulated by the FSB. The structure of the fund needs to be FSB approved'

'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'

7 Correspondence to complainant from RVAF EN COMMANDITE PARTNERSHIP and providing acknowledgment of the investment was signed by Eduard Brand

'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.'

18.11. 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. In this regard I note the inconsistency with respondents' attorneys' version wherein they state that the complainant attended RVAF presentations where it was explained that RVAF was not registered with the FSB.

18.12. 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"* coming 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. This referral fee was on the understanding that if the investor redeemed their fund partially or in full, that there would be a claw back of the amounts paid in the amount of 5% of the profits generated whilst the funds were invested. He states that the clients were fully aware of the 5% model in that it was mentioned in individual meetings and repeated at presentations.

[19] Respondent argues that because complainants attended the presentations and transferred the money to RVAF, there should be a joint responsibility. The quantum whereof; so argues Respondent, can in any event only be determined

upon finalization of the matter by the independent trustees. Respondents' attorneys however also take the point that, given that it appears that there was in fact misappropriation of funds, their client cannot be held liable for losses caused as a result of fraud within the fund.

19.1. In concluding the Second Respondent makes the point that it never occurred to him to check with Polus Capital as to whether they were indeed managing the funds that Eduard Brand was reporting on. He makes the point that similarly how does one know that the funds which one is investing with conventional asset managers are indeed put into the market.

E. DETERMINATION

[20] It is noted that the main concerns regarding investments in RVAF were

Comprehensively dealt with in the determination of Inch vs Calitz[8], (Inch) where this Office dealt with the key issues. Principally these issues pertain to the respondent's failure to understand the entity (RVAF), and the risks to which respondent was exposing their clients whilst advising them to invest in RVAF.

Thus, the findings in the Inch determination apply to this case *mutatis mutandis*.

[21] As with Inch, an identical set of key questions were put to respondent by means of a notice in terms of section 27(4) of the FAIS Act; they were inter *alia*:

21.1 The basis on which you deemed the RVAF Fund to be a suitable

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

investment for your client;

21.2 Details of the due diligence you conducted, (if any); and what actually led you to conclude that the risk inherent in this product was suitable to your client's risk tolerance;

21.3 Details of what led you to believe you were investing in a legitimate business enterprise;

21.4 What you understood the underlying fund investments to be;

21.5 What steps you took to understand the economic activity that generated the high returns and the potential future sustainability thereof.

[22] Key to being able to answer these questions is an understanding of the legal requirements governing the rendering of advice in particular in respect of a hedge fund. Accordingly it is appropriate that I commence with those.

[23] The Registrar of Financial Service Providers, in Board notice 89 of 2007 defined a hedge fund FSP as follows:

''**Hedge fund FSP**' means a financial services provider-

(a) that renders intermediary services of a discretionary nature in relation to a particular hedge fund or fund of hedge funds in connection with a **particular financial product** (own emphasis) referred to in the definition of 'administrative FSP' in subsection 2.1 of section 2 of Chapter 1 of this Schedule; and

(b) acting for that purpose specifically in accordance with the provisions of the respective codes set out in this Chapter III of this Schedule read with the Act, the General Code of Conduct for Authorised Financial Services

Providers, /2002 (where applicable), and any other applicable law;'

[24] RVAF was promoted and sold as a hedge fund. The fund itself not only exercised complete control over client's monies, but additionally itself, carried out all administrative/intermediary services. In this regard I note that the fund statements were on the letterhead of 'RVAF Trust IT 932/2004.' There was no separate licensed administrator. Accordingly the RVAF fund, as it purported to operate, fell squarely within the above definition. As will now be demonstrated there are legal requirements that flow from this conduct.

Authorisation to conduct business as a financial services provider

[25] I commence with section 7(1) of the FAIS Act which requires that; 'With effect from a date determined by the Minister by notice in the Gazette, a person may not act or offer to act as a financial services provider unless such person has been issued with a license under section 8.'

[26] In terms of section 7(3) an authorised financial services provider may only conduct financial services related business with a person rendering financial services if that person has, where lawfully required, been issued with a license for the rendering of such financial services.

[27] Neither Pretorius nor the RVAF itself was licensed in any way. There was thus a clear contravention of section 7(1), which led to respondents' contravention of section 7(3) in conducting financial services related business with a person not so authorised.

[28] Yet 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. Neither that of Polus Capital, nor Abante, nor any other license was displayed in any documentation provided to this office. This despite Respondents' version as to the role played by Abante and Polus Capital. Given the definition of a 'Hedge fund FSP'; for this version to have any credibility one would expect to see the requisite FSP numbers and applicable supporting documentation. In fact there appears to have been no contractual documentation at all. Complainant was only able to provide a document headed Abante Holdings, with company registration number 2011/002115/07. Whilst relating to a later RVAF investment that was not proceeded with, I make mention of the fact that a companies' search of the registration number revealed it to be ASARJA (Pty) Ltd and not Abante. Respondents' themselves have not provided any contractual documentation.

[29] All of this should have immediately alerted respondent to the fact that they should make further enquiries. There is no evidence that this occurred and accordingly such conduct is indicative of respondent's ignorance of the basic legislative requirements. It is specifically noted that there is no indication that any of the section 45 exemptions, such as those applicable to a unit trust Management Companies are applicable in this instance.

Relevant information required to be provided within the product providers documentation.

[30] As already evident, respondents strongly contended that *'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' whilst *'Eduard Brand is the person doing the administration of the RVAF via Abante Group'* Aside from the fact that as already mentioned no license number appears on the documentation this is clearly an afterthought that should not be entertained as further made clear below:

[31] In order to ensure a client's understanding of the provider with which they are contracting, section 4 of the General Code requires, *inter alia*, that full particulars of the following requirements be provided in writing by the provider:

31.1. Section 4(1) (a) 'Name, physical location, and postal and telephone contact details of the product supplier;'

31.2. Section 4(1) (b) (i) 'the contractual relationship with the product supplier (if any), and whether the provider has contractual relationships with other product suppliers;'

31.3. Section 4(1) (c) 'the existence of any conditions or restrictions imposed by the product supplier with regard to the type of financial products or services that may be provided or rendered by the provider;'

31.4. Section 4(1) (b) (ii) 'names and contact details of the relevant compliance and complaints departments of the product supplier;'

31.5. Section 4 (1) (d) 'Where applicable, the fact that the provider-

(i) directly or indirectly holds more than 10% of the relevant product supplier's shares, or has any equivalent substantial financial interest in the product supplier;

(ii) during the preceding 12 months received more than 30% of the total remuneration, including commission, from the product supplier, and the provider must convey any changes thereafter in regard to such

information at the earliest opportunity to the client.'

[32] In spite of the clear requirements of section 4, there does not appear to be any documentation on file which in any way shape or form complies with these requirements. Whilst it may seem hard to fathom; on complainant's version he was instructed to place the funds in an RVAF Trust account without any contractual documentation. Proof of the second investment was received in the form of a letter from *'RVAF EN COMMANDITE PARTNERSHIP'* dated 11th October 2010. Nowhere is Polus Capital or Abante Capital as respondent claims; part of this undocumented contractual arrangement. It is impossible to ascertain who the product provider is, as required in terms of this section, let alone the additional details required therein.

Necessary contractual documentation, or mandate required to enter into an agreement with a hedge fund

[33] Additionally sections 5 and 8A of the Discretionary FSP's Code which relate to the mandates and duties of hedge fund FSP's, detail the necessary documents to enter into an agreement with a hedge fund service provider and, despite these requirements, there is not a single mention of Polus Capital or Abante in any such documentation.

[34] For example, section 8A (3) requires that: A hedge fund FSP must, after having complied with subsection 8A (2) with the introductory provisions of subsection 5.1 and with subsection 5.2, and before rendering any intermediary services to the client, obtain an additional signed mandate from the client, in accordance with the proviso to the introductory provisions of subsection 5.1 and subsection

5.2, which apply with the necessary changes.

[35] Subsection 5.1 is particularly important in that it requires a signed mandate which records the arrangements made between the parties, whilst setting out necessary details to be contained therein.

[36] For example section 5.1 (a) authorises the discretionary FSP to act on behalf of the client, and indicating whether the authorisation is given with full or specific limited mandate.

[37] *Section 5.1 (d) thereof requires that the agreement must 'stipulate in whose name the financial products are to be registered and whether they are, for example, to be registered in the name of-*

(i) The client or a nominee company nominated by the client;

(ii) The nominee company of the discretionary FSP or a nominee company within the group of the companies of which the discretionary FSP forms part;

(iii) The nominee company of a product supplier;

(iv) ……;'

[38] Nowhere is there a signed mandate in compliance with section 5 and certainly, not with Polus Capital or Abante. I particularly point out that the mandate is required to deal with the client's investment objectives; which not only need to be contained in this document but again confirmed in terms of the requirements of the section dealt with hereunder. The lack of a nominee company is also conspicuously absent.

The requirement that there be an additional signed mandate confirming the contents of the first.

[39] Following on from the requirements of section 5(1) we have section 8A (4) which requires an additional mandate from the client which must confirm that the client-

(a) approves of—

(i) the clients investment objectives, guidelines and trading philosophy of the hedge fund FSP, as disclosed and stated in the mandate;

utilisation by the hedge fund FSP of the process to be implemented in the form of strategies or positions (including leverage and/or net short positions, borrowing limits and risk management principles to be applied to mitigate interest rate, liquidity, and credit and derivative risk), risk profile and risk management (for instance a sensitivity analysis), as disclosed and stated in the mandate;

[40] What is clearly evident from a reading of the Code is that that the legislature has made every effort to require not only that the client be appropriately apprised as to the risks inherent in, and processes and strategies followed by the hedge fund but importantly that the client actually confirms such disclosure having taken place.

[41] Having examined the documentation, this Office is satisfied that nowhere is any mention made of either the client's investment objectives or his approval of the guidelines and trading philosophy of the hedge fund in the manner as required in terms of section 8A (4).

Written disclosure of hedge fund risks

[42] Now section 8A (4) is further reinforced by section 8A (2) which requires that a hedge fund FSP must before rendering any intermediary services to a client that requires such intermediary services in respect of a financial product governed by the Act, provide a written disclosure to the client in the format determined by the registrar, of the risks involved in a hedge fund. Section 8A (2)(b), specifically requires written confirmation of receipt of such written disclosure.

[43] The format as determined by the registrar is contained within the Notice on Hedge Fund FSP disclosures, 2008 as promulgated in Board Notice 571 of 14th July 2008. This notice requires not only the disclosure of all risks involved in investing in a particular hedge fund portfolio, but, moreover specifies that hedge fund FSP's must ensure that clients understand the risk disclosures.

[44] Respondent has provided no evidence of proper compliance with this section. Quite simply there is neither the required risk disclosure nor as it naturally follows, evidence that clients understood such disclosure. This despite the requirements of Board Notice 571.

[45] On the contrary, and to put it politely it would appear that respondent misunderstood the risks and accordingly could not have conveyed these to complainant. Evidence thereof is second respondent's e-mail of the 5th October 2010 wherein the second respondent in response to queries which complainant made about a Cadiz fund, stated that *'this fund is too conservative for his profile. Abante is less risk and better returns over the same period*.' This error is further evident in the questions and answers document provided to clients on the 2nd August 2012. Therein respondent stated that the attractiveness of RVAF is that

it limited risk to 6% of capital. This would tend to support complainant's version that he was told that the hedge fund was designed to preserve capital.

[46] Complainant additionally referenced e-mail correspondence from the third respondent wherein he was assured that his investment was safe. The first e-mail dated the 6th October 2010 confirms the details of a meeting between the two parties. In so doing it makes mention of the fact that the funds to be invested were the proceeds from the sale of a house and that a decision had been made to invest the full amount *'with the Abante Hedge Fund'.* The third respondent goes on to state to complainant that '*You were concerned about "putting all your eggs in one basket", but I reassured you that for the last 5 years we have only had positive returns from Abante Capital…'* I note from the e-mail that the only options on the table both appear to have been a variation of the '*Abante Hedge Fund.*'[9]

[47] In another email to addressed to the complainant, and dated 19th July 2012; just days before the scheme collapsed the Third Respondent stated that the following:

'*this fund has had a full audit by the FSB, post publishing of the article on Moneyweb, and were found 100% above board and they passed with flying colors.* (quoted verbatim)

Your funds are safe

The returns are real, and although they are regarded as above average, we

9 Relevant in terms of section 8(1) (c) of the General Code in that no other suitable option appear to have been provided to the complainant

can confirm that this is due to good management and certain procedures that have been put in place, that have given you, the investor, enjoyment of the best returns for this hedge fund'

[48] In the above e-mail, the Third Respondent went on to 're-affirm our strategy for investment of funds' being lumps sums into 'Abante Hedge Fund' and debit orders into Allan Gray.'

[49] Nothing in the correspondence make mention of RVAF being an unregistered fund; further nothing on file explains to the client just why it was appropriate[10] to place the majority of his investment in an unregistered hedge fund. More so, one without a set of financials, or even a fund fact sheet. That it was supposedly low risk is meaningless in the face of a glaring lack of documentation evidencing a lack of compliance with the FAIS Act.

[50] The above paragraphs evidence a clear violation of the specific duties of a provider which requires in terms of section 3 (1) (a) (I) and (ii) of the Code that representations made to the client must be both factually correct and avoid uncertainly or confusion and must not be misleading.

Nominee Account

[51] Likewise and without any mention of a nominee company and in contravention of section 8[11] of the Discretionary Code, monies were directly paid over to, and controlled by, RVAF. In fact, without any supporting agreement or client mandate

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

containing limits on the manner or method of investment, the RVAF exercised complete discretionary control over a client's funds. In simple terms there was no separate distinction between the fund manager and the administrative functions. The requirement that the investment be held by a nominee account is a safety mechanism to distinguish investors' funds from those of the service provider. A failure to ensure that the investment is secured by a nominee account as occurred here robs the investors of this protection and potentially, allows the product provider to use the funds for their own ends. This is a clear breach of the Discretionary Code.

[52] This omission was pointed out to Respondents'; however the reply thereto failed in any way to explain the lack of compliance in this regard.

General duty of an advise to render advice with due skill, care and diligence in terms of section 2 of the General Code of Conduct for Authorised Service Providers and Representatives, (the Code)

[53] This leads onto section 2 of the General Code; a provision which can be seen to draw together the more specific sections of the General and Discretionary codes. Section 2 of the General Code 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*.'

[54] Of relevance to this matter, I would expect that the respondent be sufficiently skilled, such that they diligently ensure that they invest their client's money in a reputable entity. To put it another way, that they look after the interests of their

client by checking that the fund is actually what it purports to be. From what follows it will become evident that the respondent failed in this regard.

[55] Respondent was specifically questioned on the due diligence which they conducted on RVAF which led to them deeming RVAF to be a suitable investment for their client. In reply, respondent made mention of the license displayed at the office of both Abante and Polus Capital. Respondent went on to mention having met with the traders in the trading rooms where the investment strategies and models were explained clearly and could be seen in action on the trading desk. Respondent went on to state that there appeared to be clear implementation of FSB regulations and the separation of entities which respondent described as legitimate. It is important to note that respondent has chosen to be vague in his response. At no point do they deal with the glaring lack of documentation amongst which is the fact that whilst on complainant's version, Polus Capital was supposedly managing the RVAF investments, there was not so much as a single scrap of paper on file supporting such assertions.

[56] Instead respondent makes mention of verbal discussions and presentations involving the late Pretorius, and checks on websites, yet no supporting documents are presented. There is not so much as an email or other proper written enquiries referencing and or encompassing verifiable documentation. I again point to the glaring lack of a set of financials and even something as basic as a fund fact sheet[12]. The lack of financials were pointed out to respondent to which they replied that it was represented to them in RVAF presentations that,

12 Usually a one to two page document containing important key information about the fund, namely asset allocation, market performance, top holdings as well as the fund management company

RVAF was registered with the FSB, FSA and AIMA. Lacking however; is evidence of an enquiry with the regulator as to the license status of RVAF.

[57] This leads me onto the fact that the RVAF acknowledgment of proof of the investment dated 11th October 2011 is headed 'RVAF EN COMMANDITE PARTNERSHIP;' yet no partnership agreement, was attached or referred to by any of the parties in their dealings with this Office. This Office has seen no evidence in respondent's papers that the legal meaning of a 'partner e*n commandite*' (own italics) was explained to complainant. Nor is there evidence indicating that respondent disclosed the legal consequences of investing in this entity as a partner. Respondent has further failed to provide a basis for selecting this type of contractual arrangement as an appropriate mode to address the client's needs. This despite the provisions 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… Alongside which there is section 7 (1) (b) which requires that the provider whenever possible provide to the client any material contractual information…..'

[58] It should also be pointed out that of additional concern is the fact that the bank details utilised are those of 'RVAF Trust'. A trust is an entirely different legal entity from a partnership and yet complainant's proof of payment reflects payment into this Trust. Again, respondents saw no need to explain their actions to complainant in this regard. At this point, it is reasonable to conclude that respondents were themselves ignorant of the legal implications.

F. CONCLUSION

[59] As mentioned previously, this complaint is about being advised to invest in a scheme that was not above board.

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

[61] 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 recklessly conveyed to their client. The simple fact is that Respondents were out of their depth.

[62] Therefore they could have had no understanding about the economic activity that generated the returns, or the sustainability of the investment.

[63] 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.

[64] 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.

[65] In a nutshell, Respondents as registered financial services providers failed to meet the requisite requirements as set out in the FAIS Act. They cannot therefore expect to apportion a part of the blame onto the Complainant.

[66] In many ways the matter at hand mirrors that of the case of *Durr vs ABSA Bank Ltd and Another 1997 (3) SA 448 (SCA),* wherein the Supreme Court of Appeal had occasion to consider the duties of a broker. At 463 the following is instructive:
"The important issue is that even if the adviser himself does not have the personal competence to make the enquiries, I believe it is incumbent upon him to harness whatever resources are available to him or if necessary to ask for professional, legal or accounting opinion before committing his client's funds to such an investment".

[67] In the words of Schutz JA in the above-mentioned Durr matter, at 466 his lordship sounded the following timely warning:
'*One of the first requirements of a professional is to know when he may be getting out of his depth, so that I do not think that that is sufficient excuse. I am not able to say exactly what Stuart should have done. But I would suggest that there was a point at which he should have walked down the passage or across the street, or lifted the telephone, or activated the fax, and said to a lawyer, or accountant, or banker, none of which he was, in the employ of ABSA something like this: 'Look, I have been introduced to some attractive debentures (preference shares) in a group called Supreme. Would you please tell me quite what debentures (preference shares) are and how secure they are. And also, please tell me how I find out who and what Supreme is and what risk attaches to investing in it".*

[68] Similarly, at 468, the words of the learned judge of appeal on what constitutes negligence are instructive. 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 say 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."

[69] 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 (section 2 of the General Code). Complainant as a client of a registered financial adviser relied on Respondent's advice when making this investment. When rendering financial services to clients, the FSP is required to act in accordance with the FAIS Act. Respondent failed in this regard.

[70] For the reasons set out above, complainant's complaint must succeed.

G. ORDER

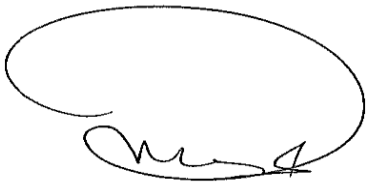
[71] Accordingly the following order is made:

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 R600 000.00.

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 31st DAY OF MARCH 2015.



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NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS