IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NO: FAIS 04971-12/13-MP 1**

In the matter between:

CRAIG STEWART INCH **Complainant**

and

IMPACT FINANCIAL CONSULTANTS CC **1st Respondent**

MICHAL JOHANNES CALITZ **2nd Respondent**

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

A. THE PARTIES

[1] The Complainant is Craig Inch, an adult male whose full contact details are on file with the office.

[2] The 1st respondent is Impact Financial Consultants CC, a close corporation and authorised financial services provider, number FSP 4274, and carrying on business at 5th Floor, The Cliffs, Niagara Road, Tyger Falls, Belville.

[3] The 2nd respondent is Michal Johannes Calitz, key individual and member of 1st respondent, and residing at 123 Mauritius Singel, Stellenberg 7550. Calitz at all material times rendered financial advice to complainant on behalf of 1st respondent.

B. THE COMPLAINT

[4] Complainant seeks the reimbursement of his investment in the Relative Value Arbitrage Fund 'RVAF'; as well as the growth thereon as reflected in his last quarterly statement dated 1st August 2012.

[5] The highly publicised collapse of the RVAF fund followed the suicide of Herman Pretorius in July of 2012. Pretorius was by all accounts the principal behind RVAF.

[6] The RVAF is currently in liquidation; initial reports emanating from the joint trustees indicate that for the most part, some (or most), if not all, investors' funds have been lost.

[7] Respondents in a letter dated 14th November 2012, authored by Calitz, essentially concur as evidenced by the statement, 'it is presumed that Dr Inch's funds are lost although no definite finding has been made by the liquidators.'

C. COMPLAINANT'S VERSION

[8] Complainant's version is principally contained in a document headed 'The Background Story to my Investment in RVAF with Mr Michal Calitz'.

[9] In early 2010, having built up his savings over a number of years in a private dental practice, complainant on the referral of a colleague arranged a meeting with Calitz to discuss the investment in question. Being basically complainant's entire savings up to that point, the funds were held in a money market account.

[10] Having initially discussed a range of unit trusts, which complainant undertook to look into, a follow up meeting was arranged. At this next meeting complainant made mention of a hedge fund that the same colleague and client of Calitz had spoken of. Supposedly the fund was doing well and complainant asked Calitz whether he knew of either this fund or others of similar ilk, to which Calitz replied that he did and mentioned the RVAF.

[11] Not willing to entertain the possibility of investing in a high risk fund which would place his hard earned capital at risk and not knowing much about hedge funds other than that they can be risky, complainant then asked Calitz to explain the fund, to which Calitz replied that the fund manager is a gentleman he knows very well and that the fund itself uses a technique involving long/short strategies. Calitz went on to explain that this meant that the manager takes up long positions in stocks that are expected to increase in value and a short position in stocks that are expected to decrease in value.

[12] Complainant enquired as to the risks of losing capital due to poor long/short decision making by the fund manager to which Calitz replied that although this is possible, the fund has consistently done very, very well in its track record; in fact it had performed in the region of 20% per annum without much deviation at all.

[13] Calitz further explained that hedge funds do not have the exact same regulation

as a unit trust portfolio, but that this fund (RVAF) has all the correct paperwork/documentation. As will become clear RVAF had no paperwork by way of registration or license whatsoever, and in that regard RVAF was conducting their business illegally.

[14] With respect to fee structure, complainant was advised (as he remembers it) that he paid no fee and instead the fund took 20% of the profits generated.

[15] With all his savings in a money market fund and not willing to entertain the possibility of investing his hard earned capital with a high risk of loss, complainant enquired from Calitz as to how much he should invest and showed him the money market statement which at that time reflected R600 000,00. Complainant then on his own accord suggested R500 000, 00, an amount to which Calitz agreed. For the record complainant had never invested in any hedge fund before.

[16] It was at this point that the complainant received further assurance about the stability of the fund, which *inter alia* included that the fund was not influenced by market fluctuations, which Calitz said was a good thing in the current economic climate such that he (Calitz) had not only many of his clients invest therein but also his own money. So assured, complainant deposited R500 000,00 on the 30th March 2010 into the RVAF's bank Account.

[17] On the 26th July 2012 and upon wishing to withdraw R600 000,00[1] from the fund, complainant emailed a letter with his instructions to respondents, only to hear on the following morning of the 'death of Mr Herman Pretorius, fund manager and trustee of RVAF.'

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1 Statement as at the 1st June 2012 reflected a closing balance of R756 960,00.

[18] Contained within his complaint, under the heading '*Important Points*' complainant had the following to say:

'*I had trust in Mr Calitz as he was correctly registered as a certified financial planner. He was a member of the FPI. His company Impact Financial Consultants was FSB licensed correctly.*

I would never have invested my money into any investment platform by not doing it through a registered financial services provider/certified financial planner.

The fact that he is a registered financial services provider makes it certain in my mind that whatever investment platform he would be investing my money in would be:

- *legal*
- *correctly registered*
- *have all the necessary due diligence performed by himself*
- *the fund manager (of RVAF) would be FSB licensed*
- *there would be third-party verification of returns*
- *there would be valid financial statements*
- *the fund would be correctly audited*

*This, I understand, is not the case at all. I am dismayed that none of the above 7 points were fulfilled and I declare that Mr Calitz acted unethically by investing my money in this "hedge fund". **I would never have invested a cent of my money into this fund had I known this information**'(own italics).*

D. RESPONDENTS' VERSION

[19] The initial response to the complainant is contained in respondents' letter of the 14th November 2012. The letter is authored by Calitz.

[20] How the investment came about is explained by Calitz wherein he states:

20.1. '*My initial appointment with Dr Inch was to discuss his annuity investment with Sanlam and a possible Section 14 switch to Alan Gray. I did a proposal for Dr Inch confirming the costs and he was to revert to me on whether he wanted to proceed. This was never done*'

20.2. '*Dr Inch then enquired about the RVAF investment on referral by Dr Kruger. As is clear from Dr Inch's complaint, I fully explained the workings of a hedge fund and specifically that it is not regulated. I am not elaborating on this as Dr Inch has accounted our discussion in detail.*'

Before continuing with respondents' version, complainant denies that Calitz mentioned to him that the fund was not regulated. In addition, it must be stated that there is also no record in support of this disclosure.

[21] Calitz goes on to state that:

21.1 He '*became aware of possible problems as a result of Money Web's article on 14th June 2012 after which I contacted Mr Pretorius to further investigate the matter. Mr Pretorius advised me in a meeting at his office that the FSB had visited him and found nothing untoward. A second article appeared on Money Web on 5th July 2012 after which I decided to withdraw all my client's investments.*'

It is worth noting that respondent does not state what made him decide

to withdraw his clients' funds from RVAF following the Moneyweb article. As a provider who had carried out due diligence prior to investing his clients' funds, he should place on record what occasioned this disquiet, leading to the decision to withdraw his clients' funds.

21.2 *'The option to invest in hedge funds was explained to Dr Inch and was not in contradiction of his risk profile'*. Complainant in a later retort disputes this and states, *'my response to that is to ask for a copy of Mr Calitz's risk profile for me and when it was done'*.

21.3 Respondent further adds that he cannot accept responsibility for what seems to be one person's deliberate intention to defraud investors, in this regard he makes mention of agreeing with Dr Inch's statement that he would not have invested a cent of his money into the fund had he known the information.

[22] The irony of complainant's statement is clearly lost on Calitz; for here Dr inch is referring to the failure to fulfil the very obligations which vested upon Calitz as a provider; namely to conduct due diligence into the financial and legal integrity of the entity into which he was investing his clients' funds.

[23] Save for the issue around the risk profile, the circumstances surrounding the investment are essentially not in dispute; leaving what are essentially allegations as to failure to comply with the FAIS Act, amongst which can be included questions of due diligence, appropriateness of advice, licensing and disclosures relating thereto, and whether the respondent acted in the interests of his client and the integrity of the financial services industry.

[24] The complaint could not be resolved and so a notice to respondents in terms of section 27(4) of the FAIS Act was issued. This notice required the respondents to revert with a statement in terms of section 27(4) of the FAIS Act together with all documentation that would support their case. Additionally the notice contained relevant questions. Reference will be made to excerpts from this section 27 (4) notice as progress is made through the determination.

E. DETERMINATION

a) The duty to identify the client's needs

[25] Complainant states; '*looking back on it now, I do not recall any financial needs analysis been done on/for me by Mr Calitz. And if there was ever anything done, it was done in such a way that I certainly did not see it nor receive a copy of it for my records. I never saw nor received any written fund fact sheet information nor brochures. I never received a letter of introduction/written letter of engagement from his offices beforehand.*'

[26] A needs analysis is a requirement in terms of section 8 of the General Code for Authorised Financial Services Providers and Representatives (the Code). In this regard there is no evidence whatsoever that any needs analysis was conducted. It must be emphasised that there does not appear anywhere in respondents' papers any justification as to why complainant should be investing the majority of his savings in a hedge fund, which is high risk, when it is objectively clear from complainant's savings history that he had never invested in a fund of this nature. Of importance is the failure to state the need that was identified which required this kind of investment as a suitable solution.

[27] Certainly as required by section 9 of the Code, no record of advice was maintained to explain what other financial products were considered and why the selected product was likely to satisfy the client's identified needs and objects. Section 8(1) (c) specifically requires that the provider identify the financial product or products that will be appropriate to the client's risk profile and financial needs.

[28] Indeed a decision to place the majority of complainant's savings into such a high risk investment without any diversification defies logic, particularly given complainant's savings experience. It is emphasised that the Code in section 3 requires that the provider take into account the client's experience with financial products.

F. STATUTORY NOTICE

b) Disclosures in terms of section 4 and 5 of the Code

[29] Part IV, section 5 of the General Code makes provision for what is commonly referred to as the Statutory Notice or Disclosure Document. Similar in purpose to part III section 4 of the Code, its *raison d'etre* is to ensure that the client knows exactly who he is dealing with. To this end it requires that a provider, in this instance the respondents, provide, *inter alia,* the following information in writing within 30 days:

29.1 full and complete contact details of the relevant business, including physical location, name and trade name, registration number (if any), postal and telephonic, as well as the names and contact details of

appropriate contact persons;

29.2 concise details of the legal and contractual status of the provider including details as regards the relevant product supplier, to be provided in a manner which can reasonably be expected to make it clear to the client which entity accepts responsibility for the actions of the provider or representative in the rendering of the financial service involved and the extent to which the client will have to accept such responsibility;

29.3 the contact details of the relevant compliance department or, in the case of a representative, such detail concerning the provider to which the representative is contracted;

29.4 details of the financial services which the provider is authorised to provide in terms of the relevant license and of any conditions or restrictions applicable thereto; and,

29.5 whether the provider holds guarantees or professional indemnity or fidelity insurance cover or not.

[30] In so far as a letter of engagement is concerned, respondents have provided a note titled, 'PERMISSION TO REQUEST INFORMATION/APPOINTMENT AS ADVISER' form. Only the permission to request information section thereof is signed. In terms thereof, Impact Financial Consultants CC (represented by Michal J Calitz) is granted permission to access information with financial institutions.

[31] This notice however contains no contact details, a fact which leads to the conclusion that the requirements in terms of section 5 were completely ignored by respondents. This is borne out in that no other document which could conform

to section 5 has been provided.

[32] Likewise, and as demonstrated hereunder there was similar non-compliance with part III, section 4 of the Code. It is these very requirements that go to the heart of the matter.

c) Information on product supplier

[33] 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:

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

33.2 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;'

33.3 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;'

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

33.5 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.'

[34] An e-mail from respondents to complainant dated 30th March 2010 contains what is termed the 'application form'. The application form is annexed hereto marked 'A'.

[35] That it lacks substance or form is self-evident from the document. Other than the fact that the complainant is investing capital of R500 000,00 as a limited partner in the **Relative Value Arbitrage Fund *En Commandite* Partnership**, it is impossible to ascertain who or what he is dealing with. There is not so much as a name or telephone number on the form.

[36] At this point it is also noted that it makes no reference to Abante Capital (Pty) Ltd, an aspect which will be dealt with further on in this determination.

[37] This aforementioned application form makes reference to a partnership agreement yet no such document was attached, or referred to by any of the parties in their dealings with this Office. Complainant denies having sight thereof. This Office has seen no evidence in respondent's papers that he explained to complainant what the legal meaning of a 'partner *in commandite*' (own italics) is. Neither is there evidence indicating that respondent disclosed the legal consequences of investing in this entity as a partner. Respondents has further failed to provide a basis for selecting this type of contractual arrangement as an appropriate mode to address his client's needs.

[38] Of additional concern is that the bank details provided by respondents 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.

[39] Alarmingly bank records reflect payment as having been made on the 30th March 2010 yet the supposed agreement was only signed on the 7th April of the same year. In simple terms, on the advice of respondent, complainant's R500 000. 00 was transferred into another person's bank account without any contractual obligation on that person or corresponding rights to complainant whatsoever.

[40] Even more alarming, payment was made directly into the RVAF Trust and not a nominee account as one would expect given the provisions of sections 5.1(d) and 8 of the Code of Conduct for Administrative and Discretionary FSP's.

[41] It is perplexing that a Certified Financial Planner such as Calitz was not alive to all these anomalies.

[42] The first apparent document evidencing any address is a letter dated 8th April 2010 from an Eduard Brand 'for and on behalf of RVAF EN COMMANDITE PARTNERSHIP'. None of the partners are listed in the letter as required by law. It is rational to conclude that neither complainant nor respondent knew who complainant was actually contracting with. Subsequent statements make no further reference to the Trust.

[43] Before proceeding to the following point, it is important to point out that not only

was RVAF promoted as a hedge fund, but in addition the fund directly accepted and accounted for clients' funds, which accounting included, *inter alia,* the provision of regular statements and the processing of clients' withdrawals. Further, and without any supporting agreement or client mandate containing limits on the manner or method of investment, the RVAF exercised complete discretionary control over a client's funds.

[44] To clarify, in simple terms, there was no separate distinction between the fund manager and, as one would normally expect, a separate entity providing the administrative functions. Effectively therefore, it was the RVAF that itself engaged in the provision of intermediary services on a discretionary basis, thereby falling within the definition of a Hedge Fund FSP as defined.

[45] 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;'

[46] Whilst the RVAF was nothing short of a scam, the simple fact is that it was

promoted as a hedge fund; accordingly and in terms of what has already been discussed in preceding paragraphs it would have been expected to at least see compliance with the relevant sections of the Discretionary Code.

d) The Code of Conduct for Discretionary Financial Services Providers

[47] Calitz, as if he had not made enough mistakes, contended, as a last bastion of his case, that he dealt throughout with Abante Capital (Pty) Ltd., a licensed financial services provider in terms of section 8 of the FAIS Act. This is clearly an afterthought that should not be entertained as made clear below:

i) Sections 5 and 8A of the Discretionary FSPs 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 Abante Captial (Pty) Ltd in any such documentation.

ii) 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.

iii) 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.

iv) 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.

v) 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) …………..;'

[48] Nowhere is there a signed mandate in compliance with section 5 and certainly not with Abante Capital (Pty) Ltd. As previously detailed, without any mention of a nominee company and in contravention of section 8[2] of the Discretionary Code, monies were paid over directly to RVAF. The requirement that funds be deposited into a nominee account is a safety mechanism to distinguish investors' funds from those of the service provider. A failure to pay into 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.

2 Section 8 requires that a nominee company be utilised by the discretionary FSP.

e) Risk and hedge fund strategies disclosure as required by the discretionary code

[49] 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 be 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.

[50] In particular section 8A (4) requires that the mandate from the client 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;

[51] Having examined the documentation and in particular annexure A, 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.

[52] In fact and despite having requested a copy of all documentation, no document detailing the strategies employed by the RVAF was provided; it was only upon noticing that paragraph 4 of annexure A, referred to a 'Risk Disclosure Statement under Appendix 5' that this Office enquired from Calitz as to the missing documents. In response Calitz provided documents headed 'APPENDIX 3 RELATIVE VALUE ARBITRAGE FUND CHARTER' and 'APPENDIX 5 RISK DISCLOSURE STATEMENT.'

[53] As already mentioned these documents did not form part of respondents' comprehensive response, and neither were they a part of the application form, appended as annexure A. They contain no marking, initials or signatures which would even indicate that they were originally a part of annexure A, something which complainant denies. Certainly annexure A makes no reference to either appendix 3 or FUND CHARTER.

[54] It must be reiterated that section 8A (4) specifically requires complainant's approval of *inter alia* the fund strategies and risk management principles.

[55] 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 (4) d, specifically requires written confirmation of receipt of such written disclosure.

[56] 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.

[57] In terms of paragraph 4 of annexure A the following statement is noted, 'we have read the Risk Disclosure Statement under Appendix 5 of the partnership agreement.'

[58] Whilst the structure of appendix 5 appears to be largely in line with Board Notice 571 of 2008, it has already been mentioned that complainant denies having received this document (Annexure A); whilst complainant is to be criticised for signing a document prior to properly reading same, his version is supported by the objective evidence. In this regard not only was the document not part of the original set of papers but in addition thereto and despite supposedly being part of the original set of documents there is no highlighting, underlining, initials or additional writing on the document that would indicate that the document had ever been seen by or explained to the complainant.

[59] As to the explanation, the reader is reminded that Board Notice 571 of 2008 specifically requires that Hedge Fund FSP's both provide and ensure that clients understand the risk disclosure.

[60] Hedge funds are complex instruments which can be very risky; as noted in point 1.3 of the Hedge Fund FSP Risk Disclosures Notice, which states in black and white 'short selling can lead to significant losses.'

[61] This Office is quite simply unable to find any evidence that the real risks inherent in this product were explained to complainant, despite the requirements of section 3 (2) (a) (i) of the Code that a record be kept of verbal and written communications in addition to the record of advice required in section 9 of the Code. Certainly respondents have not explained just how a hedge fund was appropriate to the complainants risk profile and financial needs (see 8(1) (c) of the Code).

[62] It bears emphasis that that the investment was made before any forms were signed, which in itself is a clear breach of the Act.

[63] Complainant specifically states that 'I don't know much about hedge funds just that they can be risky and would certainly not entertain the possibility of investing my hard earned capital with a high risk of losses'

[64] In reality complainant was instead incorrectly reassured both that the fund had all the correct paperwork/documentation and that it had performed in the region of 20% per annum without a lot of deviation and, that whilst it was possible to lose capital, the fund had done very, very well in its track record.

[65] There can be no question that complainant was not placed in a position to understand the risks he faced.

f) Authorisation to conduct business as a financial services provider

[66] Section 7(1) of the FAIS Act 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.'

[67] 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.

[68] 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.

[69] Section 8 (b) clearly 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. Yet there is not so much as a single reference on any documentation to the effect that Herman Pretorius, the RVAF or any other entity were so licensed.

[70] In this respect Calitz should have known that there was non-compliance with the Act, yet he proceeded nonetheless.

[71] In fact he went further and according to complainant explained that hedge funds do not have the exact same regulation as a unit trust portfolio, but that this fund has all the correct paperwork/documentation.

[72] Calitz attempted to evade the issue of a lack of license by stating in his defence that he had conducted due diligence on Abante Capital (Pty) Ltd, the entity which he believed to hold the requisite authorization. In support thereof Calitz attached

Abante Capital's FSB license as well as what he termed 'presentations done by Abante Capital'. This afterthought has already been dismissed.

[73] Yet, and despite the detailed requirements of the FAIS Act and Code (both General and Discretionary) as already canvassed, there is not a single mention of Abante Capital (Pty) Ltd anywhere in the documentation. As for the presentations, the complainant denies having sight of them, and is supported by the objective evidence.

g) Calitz response to the section 27(4) notice

[74] Key questions were put to Calitz in terms of the notice in terms of section 27(4) of the FAIS Act; they were inter alia:

74.1 The basis on which you deemed the RVAF to be a suitable investment for your client;

74.2 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;

74.3 Details of what led you to believe you were investing in a legitimate business enterprise.

[75] Throughout his defence, Calitz relies heavily on his supposed dealings with, and due diligence conducted on, Abante Capital (Pty). This response has already been dismissed.

[76] As to due diligence, it is common cause that no proper books and records were kept by the late Herman Pretorius; a crucial issue that Calitz fails to explain in

terms of whatever due diligence he supposedly conducted.

[77] Likewise had Calitz merely looked at the RVAF deed and its requirement of three trustees in terms of clause 7.2 of the deed, as opposed to only two having been duly authorised, he would have immediately been placed on his guard.

[78] As to the basis upon which Calitz deemed this to be a suitable investment for his client, Calitz made mention of Abante presentations, indicating that the RVAF was a market neutral fund which took long and short positions, did pair trading and achieved diversification of a client's portfolio.

[79] Clearly Calitz blindly accepted whatever he was told about the RVAF as he certainly never bothered to enquire as to the non-existent financials. By implication therefore, Calitz could never have understood the economic activity that generated the returns or the sustainability of the investment. In reality he knew nothing about the underlying investments other than what he rather gullibly believed.

[80] Calitz further fails to explain just why he invested all his client's money in what is clearly a high risk fund. Even if this Office ignored the lack of registration, placing all your eggs in one basket as has occurred here is not diversification as is borne out by the very extract from Money Marketing Financial Advisors Directory 2006, which Calitz himself proffers in support of his case.

[81] It is an inescapable conclusion that respondents' conduct evidenced lack of legal knowledge in terms of the required registration of hedge funds. Respondents further failed to conduct even the simplest of check in violation of the FAIS Act.

[82] Calitz attempts to make the point that even if all the applicable compliance measures were in place and enforced, investors would not have been protected against fraud by Pretorius. What this means is, that Calitz has failed to accept that it was his actions in ignoring the very legislation designed to protect his client, which directly led to the complainant's loss.

[83] Had Calitz done what he was supposed to do in the first place, his client's money would not have been in this investment.

[84] The substantial sums in commissions received by Calitz can simply not be justified when considering the poor quality of advice that was offered to complainant. Such commissions, despite both a request from this Office and the requirements of the FAIS Act were simply not disclosed. The extent of these commissions was only revealed in a report to creditors dated the 13th June 2013 by the trustees of the insolvent estate of the RVAF, as well as a letter addressed on their behalf to attorneys acting for Calitz. A letter dated 15th August 2013 reads, '*For the record we confirm that your client conceded that he received so-called profit share in an amount of approximately R8,440,000.00*.' Yet on the objective evidence Calitz could never have conducted even the most basic of due diligences on the RVAF. It was Calitz who placed the funds in a scheme which did not have so much as an FSP number, nominee account or even audited financials. Schemes such as the RVAF cannot exist without professionals such as Calitz turning a blind eye to legislative requirements.

[85] Calitz further states, '*If the FSB with all its investigative means to its disposal was not able to detect improper "hedge fund" activities by Pretorius, it surely cannot be expect of me to have done so.*' Supplementary to his argument, Calitz

attaches a copy of an e-mail from a Tefo Moatshe to another adviser dated the 11th May 2009 which states that:

'*Hedge funds are currently not regulated in South Africa we only regulate a person who manages a hedge fund portfolio. This means that a person who renders financial services to a client to invest in hedge fund is not a financial services provider and not required to be licensed*.'

[86] It has already been made clear that the Discretionary Code requires registration of a Hedge Fund FSP as defined; the RVAF in consequence of its conduct and activities would normally have fallen squarely within the parameters of that definition. In addition respondents, in relying on Abante as the registered FSP *de facto*, acknowledge that a licensed entity was required.

[87] It is neither considered necessary nor appropriate of this Office to comment on the allegation that the FSB failed to pick up contraventions despite, according to Calitz, the FSB having investigated the business activities of Pretorius on more than one occasion.

[88] Whatever the alleged failure on the part of the Financial Services Board, (no opinion is expressed by this Office on this allegation), Calitz' failure to conduct even the most basic due diligence is inexcusable. Even more so given that not only was Calitz directly and regularly interacting with Pretorius and the RVAF, but as discussed hereunder, Calitz was more than amply qualified to pick up on any irregularities.

h) Calitz' Qualifications

[89] The 2nd respondent holds a Post Graduate Diploma in Financial Planning and is

a 'CERTIFIED FINANCIAL PLANNER®' and a professional member of the Financial Planning Institute of Southern Africa ('FPI'), having been so certified since January 1999.

[90] Under the heading 'Background' on the FPI website the institute describes itself as the *'leading independent professional body for financial planners in South Africa.*' It further states inter alia that '*the CFP® mark asserts that the financial planning professional has met stringent qualification and competency requirements and adheres to an uncompromising code of ethics and professional standards*.'

[91] The Code of Ethics requires that the 2nd respondent undertake to act in a manner that displays exemplary professional conduct and maintain the abilities, skills and knowledge necessary to provide professional services competently.

[92] In short the 2nd respondent was certified to a standard above and beyond that of the average financial adviser and must be held to this standard.

[93] In the light of these findings it is reasonable to conclude that Calitz failed to uphold these standards; accordingly this Office finds it necessary to refer this determination to Financial Planning Institute, (FPI).

i) The General Code of Conduct for Authorised Service Providers and Representatives

[94] 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*.'

[95] As already mentioned, whilst Calitz supposedly had the necessary qualifications and experience, he either failed to properly understand what he was dealing with or more worryingly, intentionally turned a blind eye in favour of the evidently lucrative commissions, which he received from the RVAF. Even if a charitable position is taken and the former rather than the latter is assumed, this in no way absolves Calitz of his conduct.

[96] In *Durr vs ABSA Bank Ltd and Another 1997 (3) SA 448 (SCA),* 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".*

[97] 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".

[98] 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."

j) Commission

[99] Calitz talks about having being paid commission **by Pretorius personally** (own emphasis) from his future profit share in Abante and was not deducted for the particular client's investment. In fact his representations to complainant when specifically asked by complainant were that he (complainant) pays no commission but that there is an 80/20 split where 80% profit is for the investor and 20% for the company.

[100] It is noted that no mention was ever made of how much of this 20% was payable to Calitz and to date Calitz has never disclosed the commission he earned from complainant's investment; this despite the requirements of section 3 (vii) of the

Code, which requires that commissions be reflected in specific monetary terms or, if not reasonably pre-determinable, its basis of calculation be adequately described.

[101] To date not a single document either sets out the commission, method of calculation or the actual amount which respondents received.

G. CONCLUSION

[102] As part of the introduction to Calitz' defence, he makes mention of having dealt with Abante Capital (Pty) in his personal capacity and not as a representative of Impact Financial Consultants CC. Yet in accordance with complainant's understanding, all documentation including e-mails between Calitz and complainant were on an Impact Financial Consultants CC letterhead.

[103] Even the initial correspondence with this Office was on an Impact Financial Consultants CC letterhead; leaving no doubt that complainant's understanding that he was dealing with Impact Financial Consultants CC through Calitz was correct.

[104] There are so many areas where Calitz was clearly remiss and in direct contravention of the FAIS Act that it is difficult to recap without repeating all that has already been discussed. At its simplest, had Calitz just requested a set of properly audited financials, the scam would have been revealed. This would have been part of basic due diligence. Yet not only was this most elementary of steps clearly omitted, but similarly, deficiencies are evident in the complete lack of any form of proper due diligence into the investment vehicle, underlying investments or their structure.

[105] Complainant puts it rather well when he states '*Mr Calitz's responsibility as a financial services provider is to make sure all the necessary due diligence is performed before taking responsibility of investing a client's money into an investment platform. This was not done and his negligence and lack of diligence has cost me the majority of my life savings.*'

[106] With the Bernie Madoff hedge fund scam still very much in our minds, it is apt to quote the following from the noted author Aldous Huxley

> "That men do not learn very much from the lessons of history is the most important of all the lessons of history."[3]

H. ORDER

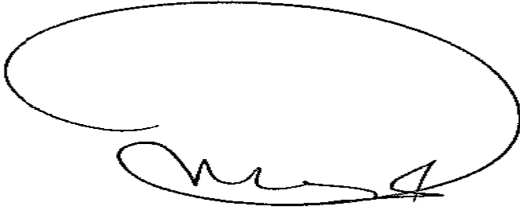
[107] For all the reasons detailed in this determination it is necessary that to hold the respondents liable jointly and severally, the one paying the other to be absolved.

In the premises, the following order is made;

1. The Respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to complainant the amount of R500 000, 00.
2. Interest on the aforesaid amount at the rate of 15.5%, per annum seven (7) days from the date of this order to date of final payment.

3.http://www.theguardian.com/books/2008/jun/13/aldous.huxley

DATED AT PRETORIA ON THIS THE 19th DAY OF JUNE 2014



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