IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA **CASE NO: FAIS 03795/12-13/ EC 1**

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF
JOHNNIE PRINGLE INVESTMENT TRUST IT1280/2004 **Complainant**

and

VAIDRO 173 CC t/a Vaidro Investments **1st Respondent**

ANDREA MOOLMAN **2nd 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 respondent as a licensed financial service provider, failed in her duty to appropriately advise him 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 his money, which he had earmarked for a new business venture.

[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 quintessence of respondent's response simply renounces liability for any violations of the FAIS Act, sets out a full account of the due diligence she carried out and defends her actions to have been in the interests of her clients.

B. THE PARTIES

[5] The Complainants are the trustees for the time being of Johnnie Pringle Investment Trust IT1280/2004, duly authorised by the Master of the High Court in terms of the letters of authority dated 10th December 2004.

[6] First respondent is VAIDRO 173 CC t/a Vaidro Investments, a close corporation duly incorporated in terms of South African laws with its principal place of business being 42 Elkie Drive, Wilro Park, Roodepoort. First respondent is an authorised financial services provider, FSP number 38693 in terms of the FAIS Act.

[7] Second respondent is Andrea Fredericka Moolman, key individual and sole member of first respondent who shares the same address as first respondent. Second respondent is authorised to represent first respondent in this matter. At all material times second respondent rendered advice to complainant whilst

acting on behalf of First respondent.

C. THE COMPLAINT

[8] Over the period September 2008 to February 2012 and whilst acting on the advice of second respondent; complainant represented by Mr Pringle made various investments in RVAF which in total amounted to R664 205.00. Against this must be offset an amount of R379 199.00 being the proceeds of a disinvestment which complainant made in May/June of 2010. Accordingly and with the collapse of RVAF, complainant is actually out of pocket in the amount of R285 006.

[9] 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.

[10] In essence, complainant claims:

10.1. He was advised that the risk involved in the investment was medium to high; however, given that RVAF traded with the top 70 companies on the JSE it was safe in that if these companies were to go insolvent then the whole country would be in trouble. Accordingly complainant claims he regarded this investment as akin to blue chip shares, with the understanding that whilst the value of the share can drop, it can also recover. In addition, complainant, in common with all complainants before the office was advised, not only that RVAF had won a top award in 2008 but that it was a part of another FSP known as ABANTE Capital and had been in existence for many years. In reality, ABANTE Capital

was a separate legal entity and was licensed as a financial services provider by the Financial Services Board, while RVAF was not;

10.2. Complainant claims he had a careful and conservative attitude towards risk, which respondent was well aware of, only taking, as Mr Pringle called it, totally calculated gambles. As a matter of fact, complainant claims he mentioned to respondent that he would require the funds to finance a new business venture;

10.3. The intended purpose of the investment was for savings and not income. Fortunately as complainant puts it, RVAF was not complainant's only investment;

10.4. In November of 2011, complainant received communication from another financial adviser warning about RVAF and its lack of transparency. Complainant took this up with respondent, requesting that 'she play open cards' and stating that the investment was vital for the beneficiaries' future. Respondent in turn countered that RVAF had weathered the recession without a problem as they had a method of trading in all sorts of markets.

10.5. With respect to the preceding paragraph complainant attached an e-mail from respondent dated 2nd December 2011. Attached thereto was a copy of the Symmetry multi-manager; South African Hedge Fund Survey for November 2009. This survey is pertinent, in that despite it being forwarded to complainant to substantiate the advice; RVAF was conspicuously absent. This from what was after all a 'South African Hedge Fund Survey.' All these claims by respondent placated

complainant when in reality the investment was unsafe right from the start.

10.6. In summing up, complainant states that the complaint is about being advised to invest in a scheme that was clearly not above board. In addition, and despite numerous conversations with respondent wherein concerns were expressed regarding RVAF, complainant was assured that these concerns were unfounded.

10.7. Complainant therefore requests a refund of the lost capital, being in the amount of R285 006.

D. RESPONDENTS' REPLY

[11] 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. 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.

[12] In turn and with the necessary references to individual complainants, respondent provided a comprehensive reply applicable to all its matters before this Office. The response is summarised in the following paragraphs:

[13] Respondent states that complainant is a successful business owner with a diverse asset portfolio of residential property, commercial buildings held in different trusts, shares, Motor Industry Pension fund, and retirement annuities.

The RVAF investment represented 4.98% of his total portfolio.

[14] Respondent states the risks inherent in this product were explained by her in plain language and the record of advice states that no forms were signed which were not fully completed.

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

[16] With regard to the due diligence she conducted, respondent advised that after she had been introduced to Abante Capital, (Abante) she visited its premises where Herman Pretorius explained the strategies and how the risk was managed. After meeting the trading team, respondent then ascertained whether Abante was registered with the FSB. In addition, respondent confirmed with Momentum and Old Mutual and spoke to their fund managers about Abante and their use of the fund in their portfolios. Investments however, were made into the bank account of RVAF and not Abante.

[17] She goes on to state that having a reasonable knowledge of Hedge Funds, she concluded that the strategy as explained to her by Pretorius was sound given that mostly top 40 JSE companies were invested into this fund. According to respondent, Mr Pretorius explained that the way that this fund was managed kept the risks relatively low.

[18] Respondent contends that she was satisfied that persons investing in the fund were fully appreciative and aware of the risks involved; she said that they attended presentations by Herman Pretorius and further, that she had explained the process and operation of the fund to complainant as she understood it. In this

regard, respondent maintained that a written explanation of Board Notice 571[1] was provided and explained to each client.

[19] As to the basis upon which respondent deemed RVAF to be a suitable investment for her client's circumstances, respondent advised as follows:

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

19.2. Given the various market crises, hedge funds could both act as a defensive strategy and outperform traditional investments in a downturn;

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

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

[20] Respondent further reported that the portfolio was explained to clients as a hedge fund, which invested in shares on the JSE. It was explained that as in any investment involving shares the risk is of a high nature; however, historically the loss in downside markets is lessened when hedge trading strategies are used.

[21] In this regard respondent states that hedge funds may actually be a lower risk than traditional investments as the target is to protect capital, increase defensive

1 This is a Hedge Fund FSP Risk Disclosure Notice, see paragraph 41 in this regard.

strategies and obtain absolute returns under all market conditions as explained by Herman Pretorius.

[22] When asked about her disclosure of commission she stood to receive on the transaction, respondent advised that this was 7.5% but with no trail commission.

E. DETERMINATION

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

Comprehensively dealt with in the determination of Inch vs Calitz[2], (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 she was exposing her clients when she advised them to invest therein.

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

[24] 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*:

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

24.2 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;

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

24.4 What you understood the underlying fund investments to be;

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

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

[25] 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.

[26] 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;’

[27] 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. There was no separate 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

[28] 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.'

[29] 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.

[30] 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.

[31] 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 Abante, nor any other license was displayed. This should have immediately alerted respondent to the fact that she should make further enquiries. There is no evidence that this occurred and accordingly such conduct is indicative of respondent's ignorance of t 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.

[32] Yet respondent has strongly contended that she dealt throughout with Abante Capital (Pty) Ltd, a licensed financial services provider in terms of section 8 of the FAIS Act. 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:

[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] In spite of the clear requirements of section 4, the application form provided to the complainant fails to adequately reflect these requirements. In fact it is identical to that provided in the Inch matter; and other than the fact that the complainant is investing capital as a limited partner in the **Relative Value Arbitrage Fund**, it is impossible to ascertain who or what exactly complainant is dealing with. There is not so much as a name or telephone number on the form. Once again no reference is made to Abante Capital (Pty) Ltd.

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

[35] 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 Abante Capital (Pty) Ltd in any such documentation.

[36] 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.

[37] 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.

[38] 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.

[39] *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) ……;'

[40] Nowhere is there a signed mandate in compliance with section 5 and certainly, not with Abante Capital (Pty) Ltd. I particularly point out that it does not 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.

[41] 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;

[42] 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.

[43] 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

[44] 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.

[45] 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.

[46] Whilst respondent has provided a risk disclosure notice, which appears to largely follow the prescripts of the board notice, respondent, as mentioned is still required to ensure that clients understand the risk disclosure. An example of this is that paragraph 1.9 of the risk disclosure states that 'the prime broker or custodian may default.' Now given that in respect of RVAF no prime broker existed, one must ask the question as to just how respondent could have explained this to her client without alerting herself to this very omission. The same question could be asked of all respondents failings detailed throughout this determination, in so far as they pertained to the risks that her client faced.

[47] Likewise and without any mention of a nominee company and in contravention of section 8[3] of the Discretionary Code, monies were directly paid over to, and controlled by, RVAF. In fact, 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. 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.

[48] When queried by this Office as to the fact that there was no nominee company as the registered custodian and holder of the clients investments, respondent stated that clients paid their money directly into a Nedbank account in the name of the RVAF. Respondent went on to state that as an FSP1 one is bound by the General Code and not the discretionary code, and that to this end the RE1 and RE5 regulatory exams exclude knowledge of the Discretionary Code.

[49] It is relevant to note that respondent's qualifications as contained in her disclosure notice to complainant at the time advise that having started in the industry on the 1st November 2005 she had an NQF level 5 qualification. This is a higher certificate or to put it another way a level just above Matric.

3. 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.

[50] Yet respondent saw herself as fit to both conduct a due diligence, and then render advice in an area that was demonstrably way out of her reach.

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)

[51] 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*.'

[52] 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.

[53] Respondents provided a comprehensive reply detailing the due diligence which they contend they had conducted on Abante. It is important to note that respondent has chosen to be vague about the connexion between Abante and RVAF. She does not explain why after having advised complainant to invest in RVAF, she would chose to enquire about another entity, Abante. As has been mentioned already, Abante, featured nowhere on the documentation provided by respondent.

[54] In the detail provided, Respondent makes mention of verbal discussions and presentations involving the late Pretorius, 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. With this in mind I point to the glaring lack of a set of financials and even something as basic as a fund fact sheet[4]. There is not even an enquiry with the regulator as to the license status of RVAF.

[55] Respondent mentions having visited the premises where Herman Pretorius explained the strategy.

[56] Yet when queried on the letter from the joint trustees which stated that it appeared that no proper books or records were kept and that no financial statements were ever compiled, respondent stated that whilst she could not comment on this other than to state that Mr Pretorius operated from proper offices where a fully operational back office was in place, she knew that Pretorius had displayed the Abante License for which annual statutory returns including audited financial statements were submitted to the FSB.

[57] The very document that respondent offers up as evidence, namely an e-mail from Symmetry multi-manager, refers to the Abante Statistical Arbitrage fund winning the market neutral 2008 hedge fund award. Quite simply, it is noted that RVAF was not the winner and attempts by respondent to conflate the identity of the two entities merely serves to affirm a lack of understanding of their disparate nature.

4. 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

[58] Likewise the November 2009 Symmetry multi-manager; South African Hedge Fund Survey, which respondent provided to complainant in terms of an e-mail dated 2nd December 2011 makes no mention of RVAF.

[59] This document is of particular concern in that it was provided by respondent to assuage complainant's concerns, which were raised with respondent about RVAF. The 2nd December e-mail states 'this is Old Mutual's Symmetry fund which makes use of different hedge fund managers and strategies over different market cycles. You will see that Abante is listed as well, as Allan Grey Optimal Fund ….in other categories you will notice other big boys, Investec, Sanlam Omnigsa (old Mutual) etc.'

[60] RVAF is nowhere to be seen in the very document which was supposedly a survey of South African Hedge Funds.

[61] Respondent was specifically asked to explain this glaring anomaly. In fact it was put to respondent that this document evidences the fact that RVAF did not exist as a hedge fund. In reply respondent again relied on Abante as the fund manager whilst failing to explain the absence of RVAF amongst the listed funds.

[62] Respondent additionally states that she spoke to Old Mutual and Momentum about Abante Capital and their use of the fund in the portfolio and was provided with the fund fact sheets of the Abante Capital Relative Arbitrage Strategy fund. Here once again respondent turns a blind eye to fact that the very fund, which she promoted to her client was conspicuous by its absence.

[63] In addition to a clear failure to exercise due skill, care and diligence; the above

is also 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.

[64] Which leads me onto the fact that the RVAF application form refers to a partnership agreement, yet no such document 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 of which we have section 7 (1) (b) which requires that the provider whenever possible provide to the client any material contractual information…..'

[65] I should also point 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

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

[67] 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.

[68] Yet respondent either ignored, or was unaware of the legislative requirements. Instead she appears to have blindly accepted whatever she was told about RVAF without any attempt to verify such information. The simple fact is that respondent was out of her depth.

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

[70] Accordingly the 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.

[71] That respondent failed in her 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.

[72] In a nutshell, respondent as a financial services provider failed to meet the requisite requirements as set out in the FAIS Act.

[73] 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".

[74] 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".*

[75] 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."

[76] 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.

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

G. ORDER

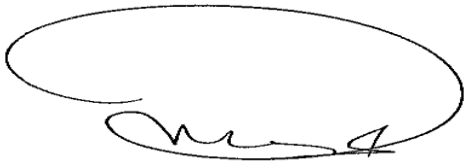
[78] Accordingly the following order is made:

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 R285 006.00.

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 11th DAY OF MARCH 2015.



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