

IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 04267/12-13/ WC 1

In the matter between:

**RALIE JOHANNA BLIGNAUT and
JACOB STEPHANUS NEETHLING**

(In their capacity as co- executors of the estate late
Virginia Barbara Neethling in terms of letters of executorship
issued by the Master of the High Court in July of 2012

Complainants

and

VAIDRO 173 CC t/a Vaidro Investments

First Respondent

ANDREA MOOLMAN

Second 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] Complainants are Ralie Johanna Blignaut and Jacob Stephanus Neethling in their capacity as co- executors of Estate Late Virginia Barbara Neethling in terms of letters of executorship issued by the Master of the High Court in July of 2012.

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

[3] Second respondent is Andrea Fredericka Moolman, key individual, sole member and authorised representative of first respondent who shares the same address as first respondent. At all material times hereto, second respondent represented first respondent. Respondent or respondents must be read to mean the same person in this determination.

B. THE COMPLAINT

[4] Complainants allege that in July and November 2011, the late Mrs Neethling invested R123 500, 00 and R20 000, 00 respectively in the now defunct Relative Value Arbitrage Fund, (RVAF). These investments were made in consequence of the recommendation and advice of the respondent who acted as the deceased's financial adviser.

[5] Following the demise of RVAF¹ and the death of Herman Pretorius, complainants claim the invested capital has been lost, which has led to the present complaint.

[6] The complaint states as follows:

6.1. The respondent did not supply the investor, who was 70 years old at the time of the investment, with sufficient information regarding the product and the risks involved;

6.2. A high risk investment was made without the investor's knowledge of these risks;

¹ A fund that was managed and operated as a hedge fund – by one Herman Pretorius, (now deceased) – with no license of its own.

6.3. The investment represented 4% of the investors total investment portfolio.

[7] Mrs Neethling passed away in May 2012, a few months before the collapse of RVAF became public knowledge.

C. RESPONDENTS' REPLY

[8] This Office has received a number of complaints from several investors who were advised to invest in the RVAF product by the respondents. The complainants in those complaints had raised identical key concerns, as a result, similar notices in terms of section 27(4) of the FAIS Act were forwarded to respondents in respect of each complaint. In turn, and with the necessary references to individual complainants, respondent provided a comprehensive reply applicable to all its matters before this office.

[9] Commencing first with the aspects pertaining to the late Mrs Neethling, respondent had the following to say:

9.1. A family member introduced Mrs Neethling to the second respondent. Mrs Neethling's son had himself invested in RVAF through respondent;

9.2. Mrs Neethling indicated during a meeting with respondent around the 6th July 2011 that she was looking for income and growth from her investments.

9.3. No financial analysis was conducted as respondent treated this as a single need. A risk analysis however, was conducted, which established that Mrs Neethling must invest in a stable fund;

9.4. Respondent advised Mrs Neethling not to invest in a high risk investment;

- 9.5. Respondent further contends that Mrs Neethling did not want any further advice, only asking the respondent to perform an intermediary service by placing the money in RVAF;
- 9.6. Respondent however, warned Mrs Neethling about the high risk of the product as well as the fact that her capital could be reduced if the investment strategy did not pay off.
- 9.7. Further, it was explained to Mrs Neethling that this kind of product makes use of a partnership agreement, which falls outside the jurisdiction of the FSB.
- 9.8. Lastly, the investment in RVAF only comprised 4% of Mrs Neethling's assets.

[10] In summary respondent's version is that Mrs Neethling, having been properly apprised of the high risks, made an informed decision; a fact which respondent contends is supported by her records.

[11] In this regard documentation pertaining to the complainant was also provided and from which the following was extracted:

- 11.1 The risk profile puts her as a moderate investor;
- 11.2 A risk disclosure on hedge funds states that *'I hereby acknowledge that Andrea Moolman provided me with factual information only on Hedge funds and did not give any advice to me and therefore at my sole responsibility and at my own discretion I requested said Financial Advisor to assist me in investing my funds in the Relative Value Arbitrage Fund held at Abante Capital'*.

11.3 Supplemental thereto the following is noted, *'I specifically requested: High income required off capital, above what is achievable through stable balanced fund investments;'*

11.4 The notes go on to state that; *'the client wants above average income (high income) from insufficient funds. This points to investing in high return, higher risk investments to yield these income requirements. RVAF is a hedge fund, market neutral strategy, to reduce volatility of market returns. Ideally client should invest more conservatively, however she does not have sufficient capital to meet needs. Client accepts that this is a high risk investment'.*

[12] Proceeding on to the general response, respondent states that in terms of the record of advice the risks attached to this product are explained in plain language and that the record states that no forms were signed which were not fully completed.

[13] 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.

[14] Specifically questioned as to the due diligence she conducted, respondent advised that having been introduced to Abante Capital she visited the premises where Herman Pretorius explained the strategies and how the risk was managed. Having been introduced to the trading team respondent then proceeded to ascertain whether Abante Capital was registered with the FSB. In addition thereto respondent confirmed with Momentum and Old Mutual and

spoke to their fund managers about Abante Capital and their use of the fund in their portfolios.

[15] Respondent goes on to state that having a reasonable knowledge of Hedge Funds respondent concluded that the strategy and the fund were sound because most of the top 40 JSE companies are invested therein. According to respondent, Mr Pretorius explained that the way that this fund operated kept the risks relatively low.

[16] Respondent reasons that she was satisfied that persons investing in the fund were fully appreciative and aware of the risks involved, both in that they attended presentations by Herman Pretorius but also in that respondent further explained the process and operation of the fund as she understood it. In this regard a written explanation of Board Notice 571² was provided and explained to each client.

[17] As to the basis upon which respondent deemed RVAF to be a suitable investment for her clients, she advised as follows:

17.1 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;

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

² Hedge Fund FSP Risk Disclosures Notice

17.3 Researching the different hedge funds available in the country respondents research showed that Abante Capital was one of three hedge funds in South Africa;

17.4 In 2008 Abante Capital 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.'

[18] 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.

[19] In this regard respondent states that Herman Pretorius had explained to her that hedge funds may actually be of lower risk than traditional investments as the target is to protect capital, increase defensive strategies, and obtain absolute returns under all market conditions.

[20] As to commission respondent advised that this was 7.5% but with no trail commission. This does not appear to have been disclosed to the client as required in terms of section 3.(1) (vii) of the Code.

D. DETERMINATION

[21] Reference is made to the determinations of *Inch vs Calitz*³ and that of *The*

3 *Graig Stewart Inch v Impact Financial Consultants CC and Michal Johannes Calitz FAIS 0497/12- 13/MP1.*

Trustees of Johnnie Pringle Investment Trust vs Vaidro/Moolman⁴ where this Office dealt with the key issues, which pertain to the rendering of advice to invest in RVAF by respondent. Principally, the exact same issues which pertain to the respondent's failure to understand the entity, (RVAF) and the risks to which she was exposing her clients whilst advising them to invest therein are repeated in this determination.

[22] Evident therein are the material deficiencies in the application forms. Identical to those in the Inch determination, these likewise fail to reflect the requirements of section 4 of the General Code⁵. 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. Yet in spite of these failings, funds were transferred directly into RVAF without even the protection afforded by a nominee account.

[23] In attempting to support her version, respondent contends that they were shown an FSP license no 874 in the name of Abante Capital (Pty) Ltd and accordingly they were satisfied that Abante, with whom they had an intermediary agreement, was correctly licensed. Yet there is not so much as a single mention of Abante or its license number⁶ within the contractual documentation. This points to respondent having failed to understand the contracting entity.

4. The Trustees of the Johnnie Pringle Investment Trust IT1280/2004 v Vaidro 173 CC t/a Vaidro Investments and Andrea Moolman FAIS 0379512 – 12/13 EC 1.

5 Requires full contact details of the product provider, see paragraphs 29 and 30 of the Johnnie Pringle Investment Trust determination.

6 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.

[24] Furthermore there were no financials or even so much as a fund sheet. Respondent claimed that the fund invested in mostly the top 40 companies on the JSE, yet provided no documentation supporting such a belief. Ergo, without the financials or so much as a fund fact sheet respondent could not have understood the economic activity that generated the returns.

[25] Furthermore respondent was unable to explain to the office just why RVAF was nowhere to be found in the very documentation which respondent used in support of recommendations she made to invest in RVAF⁷. I refer here to the Symmetry multi-manager South African Hedge Fund Survey which, as its name suggests, lists numerous hedge funds including those of Abante. RVAF though, is conspicuous by its absence.

[26] The inescapable conclusion is that respondent knew nothing about the fund or its underlying investment and accordingly was in no position to advise her clients to invest in it or even, as she contends in this instance, to provide factual information.

[27] As referred to in both the Inch and Pringle Investment Trust determinations, the case of *Durr vs ABSA Bank Ltd and Another 1997 (3) SA 448 (SCA)* is instructive. In this regard 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:

⁷ See paragraphs 54 to 57 of the Johnnie Pringle Investment Trust determination

‘The reasonable person has no special skills and lack of skill or knowledge is not, per se, 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.’

[28] In light of what I have stated in the preceding paragraphs respondent has breached section 2 of the General Code which requires that ‘a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of the clients and the integrity of the financial services industry.’

[29] In this regard the client was in no position to understand the ‘any material investment or other risks associated with the product’ as required by section 7. (1) (c) (xii) of the Code.

[30] Quite simply the client did not make an informed decision as required by section 8 (2)⁸ of the Code.

[31] There is nothing in the documents provided by respondent that suggests that the 70 year old Mrs Neethling knew anything about RVAF. For a person of her circumstances, whose past investment experience provides no history of ever investing in a fund of this nature, it is improbable that she would have gone to respondent and advocated for this investment.

[32] The mere fact that she agreed to sign the document which states she, on her

⁸ Section 8 (2) The provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision.

own volition chose the RVAF products simply points to the fact that she did not understand what she was signing. This cannot absolve respondent.

[33] On respondent's version she contends that only factual information was given; yet evident therein was a failure to mention the lack of regulatory oversight and the implications thereof, including the fact that RVAF was not authorised to operate the kind of business they were running, namely the business of a Hedge Fund. Respondent states that it was explained to Mrs Neethling that this kind of product makes use of a partnership agreement which falls outside the jurisdiction of the FSB; yet offers neither evidence to support the conclusion that Mrs Neethling would have appreciated what it is that would make the product fall outside the FSB nor what the meaning of the exclusion was.

[34] Whilst this office does not have the investor's version, what it has established is that the information provided by respondent was both incorrect and insufficient. As fully set out in the determination, with respondent's narrative of the steps she took to conduct due diligence and what she believed about the company's association with Abante and the latter's alleged winning of the fund manager of the year award, complainant had no chance of appreciating the real risk she was confronted with. In her notes respondent talks to high risk, past performance and trading strategies that could result in a loss of capital. Apart from the common knowledge that there was no activity that could equate to the proper running of a fund in RVAF, complainant at the very least needed to know that:-

34.1 she was investing in an unregulated entity;

34.2 in a partnership where she would become a partner in *commandite* and

the legal implications of that;

34.3 she stood the risk of losing her capital as there was no regulatory body to which Pretorius and his team were accounting to;

34.4 that there were no financials, fund fact sheets or even a license number on any of the documentation.

[35] RAAF therefore was more than high risk and certainly not the kind of product Mrs Neethling could have asked for without the aid of respondent's advice. Quite clearly as evidenced from the notes, discussions took place around this fund. This is advice in the form of guidance and not simply filling in paperwork.

[36] No sensible person having been given the correct information would have invested in RAAF.

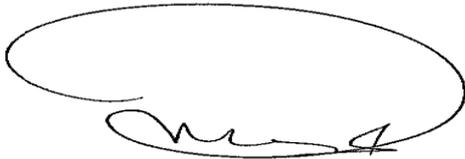
[37] There is a world of difference between a fund that is high risk fund and a Ponzi scheme in which the paperwork did not tie up. Whatever needs Mrs Neethling may have had in terms of income, she was in no position at her age to take on this risk. It was respondent's duty to properly advise Mrs Neethling, record such advice and in the event Mrs Neethling went against respondent's advice as respondent claims, record that as required by section 8 (4) (b) of the General Code, and furnish Neethling with a copy of the advice record in terms of section 9 of the Code. None of that appears to have been done.

E. ORDER

[38] For the reasons set out above 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 R143 500.00
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 25th DAY OF MARCH 2015.

A handwritten signature in black ink, enclosed within a large, hand-drawn oval. The signature appears to be 'Noluntu N Bam'.

**NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS**