THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS
PRETORIA

CASE NUMBER: FAIS 09310/10-11/ GP 1

In the matter between:

MAGDALENA CV SWANEPOEL — **Complainant**

and

HUIS VAN ORANJE FINANSIËLE DIENSTE BPK — **First Respondent**

BAREND PETRUS GELDENHUYS — **Second Respondent**

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

A. THE PARTIES

[1] Complainant is Mrs Magdalena CV Swanepoel, an adult female pensioner whose particulars are on file with the Office.

[2] First respondent is Huis van Oranje Finansiële Dienste Bpk, a public company duly incorporated in terms of South African Law, registration number 1995/006025/06, with its principal place of business at 1421 Collins Avenue, Moregloed, Pretoria. First respondent was authorised as a financial services provider in terms of the FAIS Act, with license number 687, which lapsed on 11 July 2011.

[3] Second respondent is Barend Petrus Geldenhuys, an adult male, key individual and representative of first respondent, in terms of the FAIS Act. According to the

regulator's records, second respondent's current address is 5G Wakis Street, Kleinfontein, Rayton.

[4] At all material times second respondent rendered financial services to complainant.

[5] I refer to first and second respondents as respondent. Where appropriate I specify.

B. FACTUAL BACKGROUND

[6] On 27 August 2010 complainant concluded an agreement with Grey Haven Riches 11 Limited, a public company with registration number 2007/025464/06.

[7] The agreement was in connection with the purchase of shares in the amount of R25 000 in the Blaauwberg Beach Hotel, Erf 19390[1].

[8] Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape with registration number 1997/004873/07, promoted the offer to the public.

About Realcor

[9] Realcor was an authorised financial services provider registered with the Financial Services Board, under license number 31351. Realcor used various subsidiary companies for purposes of obtaining funding from the public for its development projects, which included Grey Haven Riches 9 Ltd, Grey Haven Riches 11 Ltd, and Iprobrite Ltd (hereinafter, collectively referred to as "Realcor").

[10] Midnight Storm Investments 386 Limited[2] ("MSI"), was a public company which owned the immovable property on which the hotel was being constructed.

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[1] Noted in the deeds office of Cape Town as Erf 19390, Milnerton

[2] Registration number 2007/01927/06

[11] Realcor subsidiaries raised money by issuing the investing public with one (1) and five (5) year debentures and various classes of shares[3]. In this way Realcor was able to raise substantial amounts of money from the public, funds which were mainly earmarked for the construction of the hotel.

[12] The debentures and shares were marketed as attractive on the basis that investors would receive monthly interest payments and dividends, before and after the construction of the hotel. The target market was mainly the elderly or adult persons making provision for post-retirement income. Whilst an ordinary bank savings account would fetch a single digit interest per annum at the time, Realcor investors were promised more than 10% interest per annum. In the absence of legitimate economic activity that would generate cash inflows, it was not clear how this return was to be achieved.

[13] Meanwhile the investment was marketed as safe and guaranteed, with minimal risk of loss of capital as the investment was in "property" such as the hotel.

[14] Pursuant to concerns and allegations raised by members of the public that Realcor was obtaining money from the public unlawfully, the South African Reserve Bank (hereinafter, the "Reserve Bank"), on 21 April 2008, conducted an inspection of Realcor's affairs through PricewaterhouseCoopers ("PwC") in terms of Section 12 of the South African Reserve Bank Act[4].

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[3] The capital structure involved a combination of a share and a debenture/loan and conversion of debentures into shares. Whilst a debenture earns interest, a shareholder is entitled to a dividend provided they are declared and there is profit available for distribution.

[4] Act No 90 of 1989

[15] Through the inspection, the Reserve Bank found that Realcor had conducted the business of a bank without being registered or authorised to operate as such. Realcor was thereafter placed under supervision and on or about 28 August 2008, the Reserve Bank appointed PwC as managers of Realcor. The Reserve Bank further prohibited Realcor from obtaining further deposits from the public, and took steps, by appointing PwC, to ensure that investors' money was repaid.

[16] The application for liquidation of MSI proceeded on 16 August 2012 and during May 2013 the hotel was sold for R50 million, dashing any hopes of investors to recoup their investments.

C. THE COMPLAINT

[17] Complainant states that following advertisements on "Radio Pretoria" about Realcor, she contacted respondent about the proposed investment. Second respondent, together with one Mr Fanie van der Walt[5], visited complainant. Complainant was advised that it was a good investment and that her money would be safe. At the time, complainant was not advised of any risks inherent in the investment. Upon advice of respondent, complainant agreed to make the investment, and handed R25 000 in cash to second respondent.

[18] Three days after meeting respondents, complainant received all the documentation that she was required to sign. After reading the said documentation, complainant was very concerned about the safety of the investment, and informed respondent that she wished to cancel the agreement. Instead, respondent continued to persuade complainant that it was a lucrative investment. According to respondent,

[5] Mr van der Walt was a director of Huis van Oranje at the time.

the hotel was almost finished and ready to be sold. Complainant, upon receiving this advice, continued with investment.

[19] Despite the fact that complainant was promised a monthly income of 12% per annum, she never received a cent. To this day, complainant's capital remains unpaid.

[20] From the foregoing factual background, complainant is aggrieved by the conduct of respondent. The basis of complainant's claim against respondent is the latter's failure to render financial services in line with the FAIS Act and the General Code, which includes respondent's failure to appropriately advise complainant and disclose the risk involved with the Realcor investment.

D. RELIEF SOUGHT

[21] Complainant seeks payment of the invested amount of R25 000.

E. RESPONDENT'S RESPONSE

[22] During July 2016, the complaint was referred to respondent to resolve it with complainant, in terms of Rule 6 (b) of the Rules on Proceedings of this Office.

[23] On 30 November 2016, a notice in terms of section 27 (4) was issued to respondent advising that the Office had accepted the matter for investigation and further informing respondent to provide all documents and or recordings that would support their case, so the Office can begin with its investigation. The notice further indicated to respondent that in the event the complaint was upheld; they could face liability.

[24] Despite the FAIS Ombud's best efforts, no response to the aforesaid letters has been received from respondent. Respondents were furthermore afforded ample opportunity to give their response to the complaint.

F. DETERMINATION

[25] Having received neither the requested response nor the supporting documentation, the matter is determined on the basis of complainant's version and the documents she provided.

[26] The issues for determination are:

26.1 whether respondent, in rendering financial services to complainant, violated the Code and the FAIS Act in any way. Specifically, the question is whether complainant was appropriately advised, as demanded by the Code;

26.2 in the event it is found that respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of; and

26.3 the amount of the damage or financial prejudice.

G. LEGISLATIVE FRAMEWORK

[27] I deem it necessary to first isolate the legislative framework relevant to this matter:

27.1 Sections 13 (2) (b); 16 (1) and (2) of the FAIS Act;

27.2 The General Code of Conduct for Authorised Financial Services Providers and Representatives, in particular, Sections 2, 8 (1) (a) to (c); 8 (2); 8 (4) (a); and 7; and;

27.3 Government Notice 459 (published by means of Government Gazette 28690 of 2006), ("the Notice").

Whether the complaint is directed at the appropriate party

[28] The essence of complainant's complaint, is respondent's failure to appropriately advise her about the inherent risks in the investment.

[29] Respondent acted as an authorised representative of Realcor Cape. As to whether respondent may be held liable for the financial services rendered whilst acting in his capacity as representative of Realcor, attention should be given to the definition of a representative[6]. The definition of a representative assumes that a person acting as such has to exercise the relevant final judgment, decision making and deliberate action inherent in the rendering of a financial service to a client[7].

[30] In *Moore versus Black*[8], the Appeal Board stated as follows:

"In effect a "representative" executes the very same acts as are expected from the provider when operating alone with the exception of when a representative either:

1. acts on behalf of the provider;

2. Subject to the provider concerned taking responsibility for these acts.

Apart from these two (2) qualifications, a representative acts as if it were a provider.

…The provider is directly regulated by the FAIS Act and by the Registrar. But representatives are, apart from being regulated by the FAIS Act, in effect regulated

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6 According to Section 1 of the FAIS Act 37 of 2002, a 'representative 'means any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial service provider, in terms of conditions of employment or any mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in subsidiary or subordinate capacity…

7 Nell v Jordaan FAIS 05505-12/13 GP 1

8 In the Appeal Board of the Financial Services Board, John Alexander Moore and Johnsure Investments CC / Gerald Edward Black, 15 January 2013 at para 59 and 61

by the overseeing provider rather than by the Registrar. Such provider clearly has a discretion on how precisely to exercise responsibility over a representative but should ensure in the agreements with the representative that the responsibility covers all aspects, including those duties and obligations imposed by the FAIS Act and the Regulations pertaining to them. The fact that the representative "acts on behalf of" the provider also means that in law, the provider may be held accountable for the acts and omissions of his representative and thus should be regarded as a co-respondent in the event of negligence on the part of the representative."

[31] The question of whether a representative [and not the provider] should be held liable in this context was again dealt with by the Board of Appeal in the second *Black v Moore* Appeal[9]. Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lay not with the appellant as a representative but rested solely with the financial services provider. In dismissing the argument, the Board concluded, *'the effect of the Exemption Notice thus allows a representative (due to his minimum experience) to market products subject to a supervisor's guidance. Apart from this exemption, he has to comply with the Code of Conduct.*'

[32] Section 13(2)(b) of the Act[10] states:

*"An authorised financial services provider must take such steps as may be reasonable in the circumstances to **ensure that representatives comply with any applicable code of conduct** as well as with other applicable laws on conduct of business*." (My emphasis).

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[9] Decision handed down on 14 November 2014, paragraphs 18 to 23

[10] Financial Advisory and Intermediary Services Act 37 of 2002

It is clear that there is a duty imposed not only on the provider but also the representative to comply with the provisions of the FAIS Act and Code of Conduct. The complaint is thus directed against the correct parties, one of whom is respondent.

Whether complainant was appropriately advised as required by the Code

[33] Respondent was invited to demonstrate that he had conducted due diligence on Realcor, prior to advising complainant. Since no evidence to this effect was presented, I conclude that respondent conducted no due diligence whatsoever on Realcor.

[34] Had respondent conducted due diligence, he would have learnt of the 2008 inspection by the Reserve Bank. The outcome of which, pointed to Realcor's illegal conduct of running the business of a bank without a license. Respondent would have realised there and then that Realcor was not an investment and directed his client elsewhere.

[35] Respondent had a duty to familiarise himself with the regulatory environment around property syndications. In order to get a better appreciation of the risks associated with property syndications and the kind of disclosures that should have been made by respondent in order to appropriately advise complainant, one has to refer to the statutory disclosures contained in the Government Notice 459 published in Government Gazette 28690 in 2006, hereinafter referred to as 'the Notice'.

[36] The Notice contains minimum mandatory disclosures, which must be made by promoters of property syndicates. The disclosures must form part of the disclosure

document or prospectus, which must be issued by the promoter. By extension, any provider who recommends this type of investment to clients, must be aware of the Notice and is obliged to deal with the disclosures when advising their client. The aim, as set out in the Gazette, is to protect the public. Some of the most pertinent provisions of Notice 459 are highlighted below:

a) Section 1 (a) states as follows:

"Underlying principles regarding the disclosure document:

Statements, presentations and descriptions shall not convey false or misleading information about public property syndication schemes and/or omit material information during the public offer of shares. Material information is information which an investor needs in order to make an informed decision".

b) Section 1 (b) states that:

"Investors shall be informed in writing that:

(i) public property syndication is a long-term investment, usually not less than five years;

(ii) there is a substantial risk, in that the investor may not be able to sell his shares should he wish to do so in the future;

(iii) it is not the function of the promoter to find a buyer should the investor wish to sell his shares and that it is the investor's responsibility to find his own buyer."

c) Section 2 (a) requires that investors be informed that funds received from them prior to transfer will be held in an attorney's trust account. But more importantly, section 2 (b) states as follows:

"Funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle; or underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding."

[37] Information available to this Office points to investors' funds being paid directly into the account of Purple Rain Properties 15 (Pty) Ltd, trading as Realcor, in contravention of section 2 (b) of the Notice. Investors were invited to pay money into the account of Realcor[11]. Respondent could not have been aware of the existence of the Notice. If respondent had knowledge of the Notice, he would have realised that Realcor's prospectus undermined its provisions. The aforesaid is further confirmation that respondent had not conducted any due diligence on Realcor.

[38] It is clear from the prospectus that there were no financial statements available, since the company was a start-up. What was available, was nothing more than a set of management accounts for a respective period. The management accounts dealt with the issuance of debentures, shares and related costs. It is not clear how the management accounts alone would have assisted respondent in concluding that the investment was sound.

About Grey Haven Riches 9' and 11's prospectuses

[39] A mere perusal of the prospectuses reveal that any capable financial advisor would have seen the red flags and prevented their clients from investing with Realcor:

[11] See in this regard clause 5.10 of the Iprobite prospectus which indicates that money is payable as set out in the application form.

39.1 The promoter of the offer, the companies raising funds [*investment companies- Grey Haven Riches 9 and 11*], the builder that was constructing the hotel; and the property- owning company [*where the hotel was to be built*] were essentially controlled by one and the same person. **The question is, what steps did respondent take to satisfy himself that the interests of his client were protected against director misconduct, given the conflict of interest.**

39.2 There are two directors in Grey Haven Riches 11. Similarly, there were two directors in Grey Haven 9[12]. The Grey Haven 11 prospectus provides that:

39.2.1 Their terms and and conditions of service will be determined by (the company), **in other words the two directors themselves**, at a general meeting, the date of which is unknown.

39.2.2 The two directors have the power to nominate any person to act as an alternative director.

39.2.3 The two may appoint one or more of their body to the position of managing director and decide on remuneration **'as they see fit'**.

39.2.4 Directors' remuneration is to be decided by them at a general meeting but the two directors will decide on the remuneration of the managing director.

39.2.5 The two directors have '**unlimited borrowing powers'**.

39.2.6 The offer is not underwritten.

[12] Both Grey Haven and 9's prospectuses contain the same arrangements.

[40] The following would have set the scene for self help by the directors from investors' funds: Page 14 of the Grey Haven 11 prospectus: **Interest of Directors:**

40.1 The promoter specialises in construction and development of real estate and marketing of financial products. The property holding company has contracted the promoter at a market related fee to:

40.1.1 Develop and construct the Blaauwberg Beach Hotel on the immovable property.

40.1.2 Procure a suitable international operator to manage the hotel.

40.1.3 Administer and manage the business of the investment company after the completion and opening of the Blaauwberg Beach Hotel until date of transfer of shares to the investment company.

40.2 De Ridder, in her capacity as managing director of the promoter is responsible for:

40.2.1 Overall management of the development and construction of the hotel.

40.2.2 Procurement of a suitable operator to manage the hotel.

40.2.3 The administration of the investment of individual shareholders and shareholders of the investment company.

40.2.4 She is entitled to a salary paid by the promoter and also shares in the profits of the investment company.

[41] This was not an investment by any stretch of the imagination, yet respondent advised his client to invest in this cesspit.

[42] The fundamental flaw in respondent's conduct was his decision to promote this product to his clients, even though he knew that he had not carried any work whatsoever in order to understand the risk inherent therein.

Suitability

[43] Turning to respondent's duties in terms of the FAIS Act, section 8 (1) of the General Code of Conduct provides that a provider must, prior to providing a client with advice:

(a) *'Take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;*

(b) *Conduct an analysis, for purposes of the advice, based on the information obtained;*

(c) *Identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement;'*

[44] Complainant provided a document entitled "Adviesrekord van 'n Onderlinge Ooreenkoms"[13] for the investment. This supposedly demonstrated compliance by respondent with section 8 (1). This document states:

[13] Translated to mean Record of Advice of an Underlying Agreement

'The share class productive investment is considered as a venture capital investment and seeing that unlisted shares are not readily marketable, Realcor Cape and the representative undertakes to assist the shareholders to sell their shares at market related commission should such a need arise.

It is noted that potential fluctuations because of market conditions associated with property and prime lending rate could have a negative impact on the value of the investment portfolio. It is thus not possible to guarantee the investment capital or the target return and Realcor Cape cannot be held responsible for any losses in this regard. It is confirmed that the client understands and accepts the underlying market risks.'

[45] The product sold is described as *'a venture capital investment'.* This is notwithstanding that Realcor had been ordered by the Reserve Bank, as far back as 2008, to desist from collecting funds from investors.

[46] Having said this, venture capitalists are wealthy experienced individuals, who agree to support start-up companies, in anticipation of superior returns. They (venture capitalists) are fully cognisant of the high risk involved in the venture capital market. They may choose to support a new company either with capital or managerial experience. The point to stress here is, venture capitalists have the capacity to deal with the high risk involved in this type of investment. At the very least, assuming that Realcor had no challenges with the law in any way, I would expect a provider who advises a client on this type of investment to take steps to satisfy themselves that the investor's profile is suitable to it, as required by section 8 (1). To expect anything less would be undermining the Code. Thus, I find it

disturbing that respondent, after luring complainant to this ‘safe investment’, found it appropriate to hide behind this record. This is nothing short of trickery.

[47] In the absence of a proper record of advice, it is not clear what moved respondent to the conclusion that complainant’s needs could only be addressed by means of property syndication products. There is no information evidencing that respondent was concerned with complainant’s capacity to absorb high risk. I conclude that respondent failed to assess the risk capacity and profile of complainant prior to recommending the said investment.

[48] Complainant was a pensioner aged 82 at the time. Complainant was a housewife and therefore never received an income. She does not own any valuable assets, like property. She relied on the income that was meant to be generated from this investment. Her only other source of income is a state pension amounting to R1500 per month, as well as her late husband’s pension, which does not even cover her medical aid contribution. This is relevant information relating to complainant’s circumstances, which respondent should have considered and noted in his records.

[49] What the Code contemplates in section 8 (1) is that a provider takes into account necessary and available information for the purpose of conducting an analysis. There is no evidence that respondent carried out an analysis at all, nor did he consider any other investments that may have been suitable to complainant’s circumstances. It seems reasonable to conclude that respondent intended to sell the Realcor investment whether or not complainant’s circumstances were suited to it, in violation of section 8 (1) (c) of the Code.

[50] Even if complainant wanted to invest in Realcor, respondent had a duty to state in no equivocal terms that:

50.1 Realcor had been directed by the Reserve Bank not to collect investor funds, following the inspection;

50.2 information provided in the prospectus was conclusive that investors carried all the risk; and, certain provisions of the prospectus undermined Notice 459;

50.3 the product was high risk and not suitable for complainant; and

50.4 complainant could lose her capital.

Had these statements been made clear, the probabilities that complainant would have gone ahead with the investments is zero.

[51] It appears from the surrounding circumstances of this case that respondent had taken no time to satisfy himself that complainant understood the advice, in violation of section 8 (2). The provision states that a provider must take reasonable steps to ensure that the client understands the advice and is in a position to make an informed decision.

[52] I conclude that respondent was completely out of his depth and could not have appropriately apprised complainant of the risks involved, in violation of sections 7 (1) of the Code. The section calls upon providers other than direct marketers to provide (a) '*reasonable and appropriate general explanation* of ***the nature and material terms of the relevant contract*** or transaction to a client, ***and generally***

make full and frank disclosure of any information ***that would reasonably be expected to enable the client to make an informed decision***.

Did respondent's conduct cause complainant's loss?

[53] Based on complainant's version, the investment in the hotel was as a result of the respondent's advice. I have already mentioned that based on the outcome of the inspection by the Reserve Bank and the violations of Notice 459, respondent should have never recommended the product to anyone. But for respondent's advice, there would be no investment in Realcor. This makes respondent's advice the primary cause of complainant's loss. The next enquiry deals with legal causation. The question is whether, as a matter of public and legal policy, it is reasonable, to saddle respondent with liability for the consequences of the failure of the investment. In simple terms, can it be said that respondent, in giving advice that was inappropriate in terms of the Act and the Code, should have foreseen the resultant collapse of the investment.

[54] It is easy and convenient to impute loss of investors' money to director mismanagement or other commercial causes. In this case however, complainant's loss was not caused by management failure or other commercial influences. If respondent had done his work according to the Act and the Code, no investment in Realcor would have been made, bearing in mind complainant's tolerance for risk. On the strength of the outcome of the Reserve Bank's inspection, respondent should have known that this is not an investment but an illegal venture. Had respondent read the prospectus or disclosure document, he would have realised that the directors of Realcor had no intention of conducting themselves within the law; yet another reason to keep his client's money away from Realcor.

[55] Respondent should have inferred from the overall failure to comply with the Notice, on the part of the promoters of the scheme, that this was not an investment. Had respondent been acting within the law, he would have refused to promote an investment he could not understand. He ought to have been aware that he, owing to his lack of understanding of the product, was in no positon to advise a client of the risks involved. In short, the cause of loss was the inappropriate advice provided by respondent.

[56] That the risk actually materialized, for whatever reason, is not the cause of the loss. Otherwise the whole purpose of the Act and the Code would be defeated. Every FSP would ignore the Act and Code in providing financial services to their clients and hope that the investment does not fail. Then when the risk materializes and loss occurs they hide behind unforeseeable conduct of the directors. This will fly in the face of public and legal policy and the provisions of the Act and Code.

[57] The reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered be foreseeable: it was sufficient that the general nature of the harm suffered by complainant and the general manner of the harm occurring was reasonably foreseeable. I refer in this regard to the matter of S*tandard Chartered Bank of Canada v Nedperm Bank Ltd*[14] where the Court held that:

"as to the issues of loss and causation, that although the untrue report issued by the respondent had been a factual cause of the appellant's loss, the test to be applied to the question whether the furnishing of the untrue report had been linked

[14] 1994 (4) SA 747 (AD)

sufficiently closely or directly to the loss for legal liability to ensue was a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all played a part."

H. FINDINGS

[58] Information at this Office's disposal points to the following conclusions:

58.1 Respondent failed to note that Realcor's prospectus undermined the law.

58.2 Respondent failed to conduct due diligence on Realcor. Had he done so, he would have been aware of the outcome of the Reserve Bank's inspection in 2008.

58.3 It is an undisputed fact that respondent, prior to advising complainant, had not carried out any work to acquaint himself with the legal environment in which property syndications operate.

58.4 Respondent had no means to evaluate the financial viability of the business proposal, yet he concluded that the investment was safe.

58.5 Respondent failed to advise complainant that by investing in what he described 'venture capital share', he was gambling with her investment.

58.6 Had respondent adhered to the Code, he would have realised that complainant's circumstances were unsuitable to invest in Realcor.

58.7 It was respondent's insistence on selling this investment to complainant, regardless of the surrounding circumstances, that saw respondent violate

his duty to act in the interests of his client and the integrity of the financial services.

[59] I find that, in advising complainant to invest in Realcor, respondent contravened sections 2; 7 (1) and 7 (2); 8 (1) 8 (2); and 9 of the Code. I also find that respondent's conduct caused complainant's loss.

I. QUANTUM

[60] Complainant invested an amount of R25 000. There are no prospects of ever recovering the money from the hotel.

[61] Accordingly, an order will be made that respondents pay to complainant an amount of R25 000 plus interest.

J. ORDER

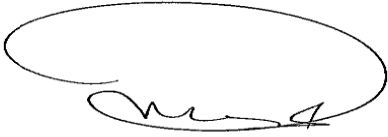
[62] In the premises, I make the following order:

1. The complaint is upheld.

2. Respondents are ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the amount of R25 000;

3. Interest on the amount of R25 000 at the rate of 10.25%, seven days from the date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 31st DAY OF JANUARY 2017



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS