

**OUR REFERENCE: FAIS 09622/12-13/ GP 1**

**18 December 2017**

**MR JOHAN POTGIETER**

Per email: [jppot@absamail.co.za](mailto:jppot@absamail.co.za)

Dear Sir

**BETTIE SUSANNA BLOEM** (complainant) **v** **JOHAN POTGIETER** (respondent)

**RECOMMENDATION IN TERMS OF SECTION 27 (5) (c) OF THE FAIS ACT (37 of 2002)**

**A. INTRODUCTION**

1. During November 2009, the complainant, on advice of the respondent, invested an amount of R100 000 in Grey Haven Riches 11 Limited<sup>1</sup>, a subsidiary company of Realcor Cape. The complainant was advised that she would be investing in the “Blaauwberg Beach Hotel” (correctly referred to as the Radisson Blu Hotel on the Blaauwberg beach front).
2. Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape (Realcor) was an authorised financial services provider registered with the Financial Services Board (FSB) under license number 31351. Realcor used various subsidiary companies for the purpose of obtaining funding from the public for its development projects. The subsidiaries included Grey Haven Riches 9 Ltd, Grey Haven Riches 11 Ltd and Iprobrite Ltd (collectively referred to as “Realcor”). Midnight Storm Investments 386 Limited<sup>2</sup> (MSI), also part of the Realcor group, owned the immovable property on the Blaauwberg beach front on which the Radisson Blu Hotel was being constructed.

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<sup>1</sup> Registration number 2007/025464/06

<sup>2</sup> Registration number 2007/01927/06

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3. After effecting the investment, the complainant received interest payments as agreed until the middle of 2011, when the payments suddenly stopped. The complainant contacted the respondent on several occasions and was assured she had nothing to worry about. As at the time of lodging this complainant, the complainant had not seen a cent of her capital. She considers her capital lost and blames the respondent for the loss.

## **B. THE PARTIES**

4. The complainant is Mrs Bettie Susann Bloem, an adult female pensioner whose full particulars are on file with this Office.
5. The respondent is Johan Potgieter, an adult male financial services provider whose last known address according to the regulator is 8 Esias Grobler Street, Vanderbijlpark, 1911. At the time of rendering the advice, the respondent was licensed<sup>3</sup> as the key individual and representative of AJG Brokers CC, with license number 14209. The license lapsed in June 2011.
6. At all material times the respondent rendered financial services to the complainant.

### ***Delays in finalising this complaint***

7. Given our mandate to resolve complaints expeditiously, it is important that I deal with the delay in finalising this complaint. Sometime in September 2011, after the Office issued the *Barnes* determination<sup>4</sup>, the respondent in that matter brought an urgent application to set it aside<sup>5</sup>. Before the fate of the application could be known, the respondents sought an undertaking from this Office that it would not proceed to determine any other property syndication related complaints involving them.

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<sup>3</sup> The respondent was also licensed under FSP Network (Pty) Ltd, Purple Rain Properties No 15 (Pty) Ltd and Picvest Investments (Pty) Ltd during the same period

<sup>4</sup> See *E Barnes v D Risk Insurance Consultants FAIS-06793-10/11 GP 1*

<sup>5</sup> The respondent claimed that section 27 of the FAIS Act was unconstitutional

8. Since no legal basis existed for the respondent's demands, the Office proceeded to determine further property related complaints, to which the respondents replied with an urgent application for an interdict to stop the Office from filing the determinations in court and issuing further determinations against them. The decision, favouring the FAIS Ombud in the original application was finally delivered in July 2012. See in this regard *Deeb Risk v FAIS Ombud & Others*<sup>6</sup>.
9. The Office continued to determine complaints involving property syndications after the High Court decision<sup>7</sup>. However, in 2013 following the *Siegrist* and *Bekker* determinations<sup>8</sup> and the relevant appeal, a decision was taken by the Office to halt processing property syndication related complaints. The decision was not taken lightly, but was a precautionary and necessary risk-management step, as the Office had for the first time sought to hold the directors of property syndication schemes liable for complainants' losses. The said appeal was finally decided in April 2015<sup>9</sup>, after which the Office resumed processing complaints involving property syndications, with due regard to the *Siegrist and Bekker* decision. As many as 2000 complaints had to be shelved pending the Appeals Board decision.

### **C. THE COMPLAINT**

10. The complainant knew the respondent for a number of years whilst he was employed with Standard Bank. The respondent left the bank to open his own brokerage, which is when the complainant became a client of his. She stated in her complaint that the respondent assisted her with the retirement annuities she held with Sanlam and Old Mutual.
11. At the time of the advice relevant to this complaint, the complainant was 53 years of age and unemployed. She had some retirement annuities and funds in a money market account. The funds invested in Realcor came from the proceeds of a Sanlam retirement annuity and her personal savings.

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<sup>6</sup> Gauteng High Court Division, case number 50027/2014

<sup>7</sup> Referred to in paragraph 6 of this recommendation

<sup>8</sup> See in this regard FAIS-00039-11/12 and FAIS-06661-10/11.

<sup>9</sup> See in this regard the decision of the Appeals Board date 10 April 2015

12. The complainant stated that the respondent had, on several occasions, suggested an investment in Realcor. She finally agreed to invest in 2010 when the respondent suggested that the hotel was almost completed and would allegedly open in time for the World Cup Soccer in 2010.
13. The respondent allegedly advised the complainant that there were no risks, and that the complainant would receive monthly interest in the region of 10 – 15% per annum on the investment. Compared to the interest rates offered by banks, the proposed interest rates were attractive.
14. The income however came to an abrupt halt in 2011 leading to the complainant filing the present complaint. The complainant claims she is reliant on her children for financial assistance. With her health deteriorating, she is in desperate need for her capital to be returned.

**D. THE RESPONDENT'S VERSION**

15. In terms of Rule 6 (b), this Office referred the complaint to the respondent in December 2016 and advised the respondent to resolve the complaint with his client. The respondent did not reply to the complaint.
16. On 6 November 2017 this Office addressed correspondence to the respondent in terms of Section 27 (4) of the FAIS Act, which informed the respondent that the complaint had not been resolved and that the Office intended to investigate the matter. The respondent was invited to provide the Office with his case, including supporting documents, in order for the Office to begin its investigation.
17. To date, no response to the complaint has been received.

**E. ANALYSIS**

18. Having received neither the requested response nor the supporting documentation, the matter is considered on the basis of the complainant's version.
19. It cannot be disputed that the parties had an agreement that the respondent would render financial services to the complainant. The specific form of financial service that this complaint is concerned

with is advice. That advice, without a doubt, had to meet the standard prescribed in the FAIS Act and the General Code.

### ***The Law***

20. Section 2 in part II of the Code states that a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.
21. Section 8 (1) (a) to (c) of the General Code states that:

*A provider other than a direct marketer, 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...*
22. Section 8 (2) states that 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.
23. Section 7 (1) 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.
24. Lastly, section 9 provides for the keeping of a record of advice which must reflect the following:

*“(a) a brief summary of the information and material on which the advice was based;*  
*(b) the financial product [sic] which were considered;*  
*(c) the financial product or products recommended with an explanation of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives; and*

- (d) *where the financial product or products recommended is a replacement product as contemplated in section 8(1)(d) –*
- (aa) *the comparison of fees, charges, special terms and conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided, between the terminated product and the replacement product; and*
- (bb) *the reasons why the replacement product was considered to be more suitable to the client's needs than retaining or modifying the terminated product...”*

***The prospectuses***

25. Having considered the attached summary of the Realcor prospectuses and the provisions of Notice 459, I conclude that the respondent had no legal basis to recommend this investment to his client, regard being had to the complainant's circumstances as an unemployed person who had no more than meagre savings. The risk was extremely high and this was evident from the prospectus. The respondent was aware that the complainant had no tolerance for risk. Accordingly, the advice was in violation of Section 8 (1) (c) of the Code. My reasoning is set out below:
- 25.1 The offer made by Realcor fell within the definition of a property syndication as described in Notice 459. The prospectus, however, was carefully drafted in a way such that words like 'property syndication' and 'rental', did not feature anywhere in the prospectus.
- 25.2 In terms of section 2 (a) of Notice 459, funds collected from investors shall be paid into a registered trust account of an attorney or chartered accountant with the name of the trust account properly spelt out. This section further stipulates that investor funds shall only be withdrawn in the event of registration of transfer of the immovable property into the name of the syndication vehicle or underwriting, with the details of the underwriter properly disclosed, or repayment to an investor in the event of the syndication not proceeding.
- 25.3 Contrary to this provisions however, investor funds were paid into Realcor's account and thereafter disbursed as intercompany loans to sister companies, prior to registration of

transfer. I refer in this regard to Eloff J's remarks in *Southern Palace Investments 265 Ltd v Midnight Storm Investments 386 Ltd* wherein he said :

*"Of importance is the fact that Purple Rain [Realcor] apparently acted as the banker in the Realcor group. Various funds were channelled through Purple Rain between the companies in the Realcor group. Ultimately, Purple Rain's accounting records were said to reflect positive balances in respect of various intercompany loans that were relied upon in its own business rescue application, as constituting its major asset. However, such assets were plainly valueless because the intercompany loans were irrecoverable. A proper set of financial statements for Purple Rain would have probably reflected a complete impairment of such suggested assets".*

- 25.4 Investors were invited to make their investments through the subsidiary companies (Grey Haven Riches 9, 11, as well as Iprobrite). The subsidiaries had no trading history prior to their establishment and no assets. They existed for only one purpose: to raise funds for the completion of the hotel.
- 25.5 The only form of security that investors had for their investments was the hotel in which they were meant to acquire shares. MSI had no other asset other than the hotel.
26. The prospectus itself conveyed the message that Realcor had no interest in conducting its business in line with sound corporate governance practices. I say so for the following reasons:
- 26.1 Iprobrite, Grey Haven 9 and 11 were managed by the promoter (Realcor), which was also the property developer. The directors of Realcor (the promoter) were essentially the same as those of the property developer, together with its subsidiaries. Given that the prospectus gave no indication of the charges levied by each of the Realcor companies, the respondent would not have known what amounts were claimed by each of these companies including the costs of managing investors' funds. Simply put, the directors of Realcor wore too many hats, indicating trouble for investors. A basic knowledge of corporate governance<sup>10</sup> ought to have alerted the respondent to the inherent risks in such an arrangement.

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<sup>10</sup> Reference is drawn to the King II report where one of the seven characteristics of good corporate governance is independence. It is explained as: *"Independence is the extent to which mechanisms have been put in place to minimise or avoid potential conflicts of interest*

- 26.2 The prospectus further provided that the directors of both Iprobrite and MSI had unlimited borrowing powers.<sup>11</sup>
- 26.3 Most importantly, there is no evidence that there was ever an independent board of directors within the entire Realcor group. Thus, it would appear that the directors were accountable to themselves.
- 26.4 The prospectus further provided that the directors of Realcor had the power to decide their own remuneration. Without the existence of an independent board, the directors were free to spend investors' funds as they desired.

### ***The Code***

27. Although the respondent was invited by means of the Notice in terms of section 27 (4) to provide a record demonstrating just why this investment was considered appropriate for his client's circumstances, no response was received. The respondent failed to provide any evidence that he had exercised due diligence.
28. Had the respondent conducted due diligence as demanded by section 2 of the Code, he would have learnt of the 2008 inspection by the South African Reserve Bank (SARB)<sup>12</sup>. The respondent would have realised then that Realcor was not a proper investment and directed his client elsewhere.
29. The respondent's conduct as evidenced above was a clear attempt to disregard the Code. Section 8 (1) is clear in its instruction and it says, a provider **must**, prior to providing advice, take reasonable steps to seek appropriate and available information from the client, conduct an analysis and identify

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*that may exist, such as dominance by a strong chief executive or large shareowner. These mechanisms range from the composition of the board, to appointments to committees of the board, and external parties such as the auditors. The decisions made, and internal processes established, should be objective and not allow for undue influences".*

<sup>11</sup> Paragraph 9.10 page 25 of the prospectus

<sup>12</sup> On 21 April 2008, the South African Reserve Bank (SARB) appointed PricewaterhouseCoopers ("PwC"), initially as inspectors in terms of section 11 of the South African Reserve Bank Act to conduct an inspection into the affairs of the Realcor Group, and subsequently as managers in terms of section 84 of the Banks Act.



suitable products. It was the respondent's duty to determine the suitability of the investment, and not that of the complainant. The respondent had no basis to transfer that duty to the complainant.

30. Section 8 (2) provides that the provider **must** take reasonable steps to ensure that the client understands the advice and is in a position to make an informed decision. The SLA is nothing but an attempt by the respondent to contract out of his negligent conduct.
31. In the absence of a proper record of advice, it is not clear what made the respondent conclude that the complainant's needs could only be addressed by means of a property syndication product. The information contained in this document is limited. There is also no evidence that the respondent considered other types of investments with less risk than property syndications.

#### **F. FINDINGS**

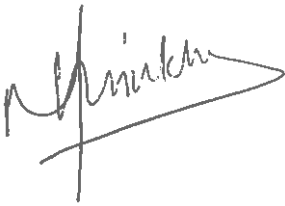
32. In light of the above I can only conclude that the respondent failed to appropriately advise the complainant and apprise her of the risks involved in Realcor, in violation of section 7 (1) of the Code. It follows that the complainant could not have made an informed decision about the Realcor investment.
33. The respondent further violated the Code in terms of sections 2, 8 (1) (a) to (c), 8 (2), and 9.
34. As a consequence of the breach of the Code, the respondent committed a breach of contract by failing to provide suitable advice. The respondent must have known that the complainant would rely on his advice in effecting the investment in Realcor.
35. It follows that respondent caused complainant's loss.

#### **G. RECOMMENDATION**

36. The FAIS Ombud recommends that the respondent pay the complainant's loss in the amount of R100 000.

37. The respondent is invited to revert to this Office within TEN (10) working days with their response to this recommendation. Failure to respond will result in the recommendation becoming a final determination in terms of Section 28 (1) of the FAIS Act<sup>13</sup>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'ADV M Winkler', written over a horizontal line.

**ADV M WINKLER**  
**ASSISTANT OMBUD**

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<sup>13</sup> *“The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include-*  
*(a) the dismissal of the complaint; or*  
*(b) the upholding of the complaint, wholly or partially....”*