

**IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS
PRETORIA**

Case Number: FAIS 09622/12-13/ GP 1

In the matter between

BETTIE SUSANNA BLOEM

Complainant

and

JOHAN POTGIETER

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 determination follows from a recommendation made in respect of section 27 (5) (c) of the Act on 18 December 2017. The respondent did not reply to the recommendation. This determination shall therefore be read in conjunction with the recommendation, and shall form part of it.

B. THE PARTIES

[2] The complainant is Mrs Bettie Susanna Bloem, an adult female pensioner whose particulars are on file with the Office.

[3] 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 licensed¹ as the key individual and representative of AJG Brokers CC, with license number 14209. The license lapsed in June 2011.

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

C. FINDINGS

[5] Having regard to the information provided in the recommendation, it follows that the respondent's advice was inappropriate. The respondent had a duty to inform the complainant of the inherent risks of the Realcor investment, including that she could lose her capital.

[6] There is nothing in the file of papers before this Office which indicates that the complainant had an appetite for high risk investments. Nor is there evidence that she had the capacity to absorb high risk. The complainant at the time was unemployed and utilized her life savings to make the investment. What attracted the complainant to the investment was the high income offered. In this regard, the respondent had to comply with section 7 (1) of the Code which provides that representations and information provided to a client must be adequate and appropriate to assist a client in making an informed decision. There is no indication why the complainant's needs could only be satisfied by means of the Realcor property syndication product.

¹ 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

D. CAUSATION

[7] The principles of causation were explained in *Muller v Mutual and Federal Insurance Co Ltd*²:

“.....the problem of causation in delict involves two distinct enquiries. The first is whether the defendant’s wrongful act was a cause of the plaintiff’s loss (factual causation); the second is whether the wrongful act is linked sufficiently close to the loss for legal liability to ensue (legal causation or remoteness)”.

[8] In the matter of *Smit v Abrahams*³ two tests were identified: the direct consequences test and the reasonable foresight test. The former was explained as follows⁴:

“The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act”.

Farlam AJ pointed out in the *Smit* case that the principle upheld in the matter of *Overseas Tankship (UK) Ltd v Morts Docks & Engineering Co Ltd*⁵ is subject to two qualifications. As long as the “kind of damage” is foreseeable, the extent

² 1994 (2) SA 425 (C)

³ 1992 (3) SA 158 (C)

⁴ See also in this regard *Foundational Principles of South African Medical Law* Carstens P and Pearmain D (2007), pages 509 – 515 in respect of causation

⁵ 1961 AC 388 (PC); 1961 1 All ER 404

need not be. Furthermore, the precise manner of occurrence need not be foreseeable.

[9] Had the respondent truly appreciated what he was advising the complainant to invest in, he would have noted the high risk in the Realcor investment and sought appropriate alternatives. Not only was the loss to investors reasonably foreseeable, it was inevitable. The violations of Notice 459 and the poor governance practices meant that investors would have no protection from director misconduct and these were evident from the disclosure documents.

[10] The complainant's loss was caused by the respondent's inappropriate advice. The respondent knew that the complainant would rely on him for advice.

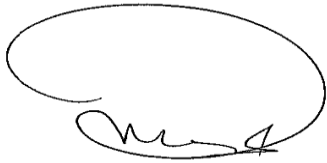
[11] The findings made in the recommendation letter are hereby confirmed.

E. THE ORDER

[12] In the result, I make the following order:

1. The complaint is upheld.
2. The respondent is ordered to pay the complainant the amount of R100 000.
3. Interest on this amount at a rate of 10.25% per annum from the date of determination to date of final payment.

DATED AT PRETORIA ON THIS THE 2nd DAY OF FEBRUARY 2018.

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a cursive 'BAM'. The signature is enclosed within a hand-drawn oval.

NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS