

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

CASE NUMBER: FAIS 05147/12-13/ GP 1

In the matter between:

CHRISTIAAN HERMANUS BOTHA

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 Mr Christiaan H Botha, an adult male residing in Gauteng at the time of the investment.
- [2] First respondent is Huis van Oranje Finansiële Dienste Bpk (hereinafter referred to as the respondent), 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 licence lapsed on 11 July 2011.

- [3] Second respondent is Barend Petrus Geldenhuys, an adult male and representative of first respondent in terms of the FAIS Act. At all material times complainant dealt with second respondent.
- [4] I refer to first and second respondents as respondent. Where appropriate I specify.

B. FACTUAL BACKGROUND

- [5] On or about 23 June 2010 complainant concluded an agreement with Iprobrite (Pty) Ltd, a public company with registration number 2009/007170/06, represented by Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape with registration number 1997/004873/07.
- [6] The agreement constituted an application to purchase shares to the value of R300 000 in the Blaauwberg Beach Hotel on Erf 19390. At all material times, Midnight Storm Investments 386 (Pty) Ltd, hereinafter referred to as the property holding company with registration number 2007/019270/06, was noted as the registered owner of the hotel.
- [7] The Blaauwberg Hotel was funded through the sale of debentures and / or shares. The debentures were meant to pay a return of 15%. This generous yield attracted R616 million from about 3 000 investors, many of them elderly.
- [8] According to the prospectus, the owner of the hotel, Midnight Storm Investments 386, received loans from three companies namely: Grey Haven Riches 9, Grey Haven Riches 11 and Iprobrite (Pty) Ltd. Grey Haven Riches 9 and Grey Haven Riches 11 in turn, raised the funds to make the said loans by issuing prospectuses

to investors, who acquired ordinary shares and / or debentures in the above noted companies. Complainant in this instance contracted with Iprobrite. Iprobrite was nevertheless liquidated on 25 October 2011, following granting of a voluntary order by the High Court.

[9] At the time of the conclusion of the agreement on 23 June 2010, complainant was a pensioner aged 68. He responded to an advertisement on a local radio station, “Radio Pretoria”, about the investment and utilized some of his pension money to purchase the shares.

[10] Complainant further signed an advice record in accordance with Section 8(4) of the General Code of Conduct (the Code) at the time of the conclusion of the above agreement.

[11] Following conclusion of the agreement on 23 June 2010, complainant continued to receive his monthly dividend, until approximately October 2010 when the payments suddenly stopped. Having made enquiries with respondents, complainant was assured that the delay in payment was due to an administrative problem and that payments would resume shortly.

[12] Complainant was further informed by respondents that the hotel would be sold by December 2010 to an American company.

[13] During November 2010 it came to light, following an inspection conducted under Section 12 of the South African Reserve Bank Act¹, that the Registrar of Banks had concluded that Realcor Cape and / or related individuals, obtained money by

¹ 90 of 1989

conducting the business of a bank without being registered as a bank. The entity was directed to repay all monies² so obtained.

[14] It became evident that the liquidation of the hotel was a real possibility and investors were required to vote to either proceed with the liquidation, or embark on a business rescue attempt. At this point various interested parties filed liquidation applications. Subsequently, the business rescue applications were dismissed by the High Court with costs.

[15] The application for liquidation of Midnight Storm (the owner of the hotel) 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

[16] From the foregoing factual background, complainant is aggrieved with the conduct of respondent. He states he was advised that it is a safe investment. Even after the company started experiencing financial difficulties, complainant was still assured that the problem is temporary and that he would receive his money in due course.

D. RELIEF SOUGHT

[17] Complainant seeks payment of the invested amount of R300 000 (three hundred thousand rand).

E. RESPONDENT'S RESPONSE

[18] During October 2012, the complaint was, referred to respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, to resolve it with complainant. In his

² The money referred to is the proceeds on the sale of 12 month debentures issued in Grey Haven Riches 9 (Pty) Ltd and Grey Haven Riches 11 (Pty) Ltd.

response to the office, to which he had attached copies of relevant documentation, respondent advised³ that:

- 18.1. Complainant had been a client of Realcor Cape since June 2010 when the investment in the amount of R300 000 was made.
- 18.2. A needs analysis was conducted.
- 18.3. Complainant signed a record of advice.
- 18.4. A risk analysis was done advising complainant of the three property syndication products respondent was marketing, namely PIC, Sharemax and Realcor Cape.
- 18.5. The general terms and conditions were explained to complainant and he signed the said document.

[19] On the 24th of June 2015, a notice in terms of Section 27(4) was issued to the respondent. In response to the aforesaid notice, respondent merely referred to the Rule 6(b) response dated 26 November 2012. No additional information was provided. Subsequently, respondent was notified in a letter dated 13 July 2015 that the matter will now be referred for determination.

F. DETERMINATION

[20] The issues for determination are:

- 20.1. 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;

³ Translated from Afrikaans

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

20.3. The amount of the damage or financial prejudice.

Whether complainant was appropriately advised by respondent?

[21] In essence, complainant invested after being assured by respondent that there was no risk involved in the investment and that it was a good investment. Even when the company was in financial trouble, complainant was still assured that the problem pertained to an administrative issue and that complainant would not lose his money.

G. LEGISLATIVE FRAMEWORK

[22] I deem it necessary to first isolate the applicable provisions of the FAIS Act and General Code of Conduct, (the Code) which are relevant in this matter:

[23] Section 16 (1) of the FAIS Act provides that:

*“A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that **their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, of such code to-***

a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;

b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;

- c) *seek from client appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required; (own underlining)*

Subsection 2 further states that:

“A code of conduct must in particular contain provisions relating to-

- a) *the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;*
- b) *adequate and appropriate record-keeping;*

H. GENERAL CODE OF CONDUCT

[24] Section 2, of Part II of the General Code provides:

“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.”

[25] 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; ‘

[26] Section 8 (2) further provides that a 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.

[27] Section 8 (4) (a) of the Code stipulates that where a client has not provided all the information requested by a provider for the purposes of furnishing advice, the provider must fully inform the client thereof and ensure that the client understands that –

- (i) A full analysis could not be undertaken;
- (ii) There may be limitations on the appropriateness of the advice provided; and
- (iii) The client should take particular care to consider on its own whether the advice is appropriate considering the client's objectives, financial situation and particular needs.

I. RESPONDENT'S RECORD OF ADVICE

[28] In support of its response dated 26 November 2012, respondent provided a document entitled "Adviesrekord ingevolge artikel 8(4) van die Algemene Kode" which translates to the Record of Advice as required in Section 8(4) of the Code. This document was allegedly completed at the time the investment was made and is supposedly proof of compliance with the aforesaid section of the Code.

[29] Part three of the said record of advice contains the following question and answer:

Question: Reason as to why needs analysis was not conducted?

Answer: The client did not want to provide all the necessary information, which would have enabled me to conduct a detailed needs analysis.

[30] There is neither indication that the information was in fact requested of complainant, nor an attempt to convey to complainant the consequences of not carrying out the required analysis.

[31] Part four of the record advice notes the following information:

Client's financial information:

- *An analysis of the client's financial position was not conducted*
- *The client did his own analysis*

Client's risk profile:

- *The client manages his own investment portfolio*

Client's needs and objectives:

- *To earn the highest return on his investments as fast as possible*

[32] On further inspection of the document, it is evident that the above information was already inserted on the document prior to the signature thereof. The particular section of the form was pre-printed and could not have been a proper response completed in accordance with complainant's circumstances at the time. In other words, the complainant was requested to sign pre-completed documentation in contravention of the Code⁴, conveying a clear intention by respondent to disregard the law.

⁴ Section 7(2) of the Code

[33] The respondent failed to assess the risk capacity and profile of complainant prior to recommending the said investment. There is no relevant information relating to complainants' circumstances. How respondent was able to appreciate complainant's capacity for risk is unclear. What the Code contemplates in section 8 (1) is that a provider take into account necessary and available information for the purpose of conducting an analysis. At the time of the investment complainant was 68 years of age. He utilized savings he had accumulated, combined with pension funds to purchase the investment. There is no suggestion that respondent properly considered other investments suitable to complainants' circumstances and in particular, whether complainant would be in a position to recoup any loss he suffers. What is evident, is that respondent sold complainant the Realcor investment outside of any analysis of his needs or risk profile, in violation of section 8 (1) (c) of the Code.

[34] Regrettably it can therefore not be accepted that the said record is a proper record of advice as envisaged by the Code. The document is nothing more than a failed attempt to create the impression that the Code had been adhered to.

[35] This brings me to a document entitled "Adviesrekord van 'n Onderlinge Ooreenkoms", translated to mean Record of Advice of an Underlying Agreement. In his response, respondent noted that disclosures about the risk attendant to the investment were indeed made to complainant. In this regard, respondent referred to Attachment A, where the following is noted⁵:

'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

⁵ Translated from Afrikaans

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.'

[36] It is thus disingenuous of respondent to hide behind this document as proof that he had advised complainant of the risk. The available information indicates that complainant was advised that it is a safe investment. Notwithstanding, respondent contends that he alerted complainant to the risks. It is unlikely that complainant would have continued with the investment had he been aware of the true state of affairs, specifically, that the capital is not guaranteed.

Did respondent's conduct cause the loss complained of?

[37] Based on complainant's version, the investment in the Blaauwberg Beach Hotel was as a result of the respondent's advice. Thus, absent the respondent's advice, there would be no investment and therefore no loss.

[38] Outside of complainant's version, there is no evidence pointing to respondent's adherence to the law. Information at this office's disposal points to the following conclusions:

- 38.1 Respondent was not alive to the confusing and complicated structure of the investment, which had the effect of denying investors security;
- 38.2 Respondent has provided no evidence that he had conducted due diligence on the entities involved;
- 38.3 Respondent cannot deny that at the time he advised complainant, there were no apparent means to protect complainant against director misconduct or mismanagement;
- 38.4 It is not difficult to conclude that had respondent adhered to the Code, he would have realised that complainant's circumstances are unsuitable to this type of investment;
- 38.5 The respondent had no clue of the risks involved in the investment;
- 38.6 Respondent could not have been acting in his client's interests when he recommended this investment.

[39] The respondent's conduct caused the complainant's loss.

J. QUANTUM

[40] Complainant invested an amount of R300 000. There are no prospects of ever recovering the money from the Blaauwberg Beach Hotel.

[41] Accordingly, an order will be made that respondents pay to complainant an amount of R300 000 plus interest.


K. ORDER

[42] 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 R300 000;
3. Interest on the amount of R300 000 at the rate of 10.25%, seven (7) days from the date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 19th DAY OF MAY 2016



NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS