

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

CASE NUMBER: FAIS 03248/12-13/ GP 1

In the matter between:

ALETTA JOHANNA HATTINGH

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 Aletta Johanna Hattingh, a female pensioner whose details 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 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 July 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, (hereinafter referred to as Realcor) with registration number 1997/004873/07.

[6] The agreement constituted an application to purchase shares to the value of R420 000 in the Blaauwberg Beach Hotel on Erf 19390.

[7] 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.

[8] These companies included Midnight Storm Investments (“MSI”), which owned the Blaauwberg Beach Hotel (hereinafter referred to as “the hotel”), Grey Haven Riches 9 Ltd and Grey Haven Riches 11 Ltd and Iprobrite Ltd (hereinafter, collectively referred to as “Realcor”).

- [9] Realcor subsidiaries raised money by issuing the investing public with one (1) year and five (5) year debentures including various classes of shares¹. In this way Realcor was able to raise substantial amounts of money from the public, which was mainly earmarked for the construction of the hotel.
- [10] 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 for the Realcor shares and debentures were 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, Realcor investors were promised more than 10% interest per annum. In the absence of legitimate economic activity that would generate cash inflows, it is not clear how this return was to be achieved.
- [11] 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.
- [12] 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 through PriceWaterhouseCoopers (“PWC”) on Realcor in terms of Section 12 of the South African Reserve Bank Act².

¹ 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.

² Act No 90 of 1989

- [13] Through this the Reserve Bank found that by obtaining funds from the public, 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.
- [14] Subsequently thereafter the Reserve Bank prohibited Realcor from obtaining further deposits from the public and took steps by appointing PWC to ensure that investors' money was repaid.
- [15] Iprobite was liquidated on 25 October 2011, following the granting of a voluntary order by the High Court.
- [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. For more details on Realcor, refer to the determination of Peens³. It follows that the two determinations must be read together.
- [17] At the time of the conclusion of the agreement on 23 July 2010, complainant was a pensioner. Complainant and her husband learned about Realcor Cape following advertisements on the radio. Prior to complainants' retirement, they were employed with Eskom. Their monthly income was derived from their respective pensions and other investments. In light of the attractive interest rates offered by Realcor as opposed to the normal bank interest rates they were earning, complainants wanted to supplement their monthly income by utilising some of their savings to invest in Realcor. In this regard, they approached respondent for advice.

³ FAIS 04376-12/13 GP 1

Complainants received the monthly interest payments as agreed, until October 2010 when interest payments stopped. It is now five years since complainants last received their income. Their capital has also not been refunded. Complainants are of the view that they have lost their capital.

[18] At the time of the conclusion of the above agreement, complainant signed an advice record in accordance with Section 8(4) of the General Code of Conduct (the Code). I deal with this record in detail later in the determination.

C. THE COMPLAINT

[19] From the foregoing factual background, complainant is aggrieved by the conduct of respondent. Complainant claims that respondent failed to disclose the real risk involved in the investment. She says she trusted respondent's advice that her investment was safe and that the capital was guaranteed. Complainant is of the view that she has lost her capital as a result of respondent's advice.

D. RELIEF SOUGHT

[20] Complainant seeks payment of the invested amount of R420 000.

E. RESPONDENT'S RESPONSE

[21] During August 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. There is no record of any response from respondent.

[22] On 1 July 2016 a notice in terms of Section 27(4) was issued to the 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, in order for the office to begin its investigation. The notice further indicated to respondents that in the event the complaint was upheld, they could face liability. Again, no response was received from respondents.

F. DETERMINATION

[23] Having not received respondent's response, the matter is determined on the basis of complainant's version and supporting documentation.

[24] The issues for determination are:

24.1 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;

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

24.3 the amount of the damage or financial prejudice.

G. LEGISLATIVE FRAMEWORK

[25] 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:

[26] 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; (emphasis supplied)*

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;*

Whether complainant was properly advised as required by the Code?

H. GENERAL CODE OF CONDUCT

[27] 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.”

[28] 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;’*

[29] 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.

[30] 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

[31] 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.

[32] 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.

[33] There is no indication that respondent conveyed to complainant the consequences of not carrying out the required analysis as required by section 8 (4) (a).

[34] 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*

- [35] On further inspection of the document, it is evident that certain sections of the form already contained answers that were pre-printed. They were not sought from complainant to reflect her true circumstances at the time.
- [36] Respondent failed to assess the risk capacity and profile of complainant prior to recommending the said investment. There is no information relating to complainants' financial position at the time, including assets, liabilities, income and expenditure. How respondent was able to appreciate complainant's capacity for risk is therefore unclear.
- [37] 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 complainants were pensioners. There is no evidence that respondent properly considered other investments suitable to complainants' circumstances and in particular, whether complainants had any other means of survival. What is evident, is that respondent sold complainant the Realcor investment outside of any analysis of her needs or risk profile, in violation of section 8 (1) (c) of the Code.
- [38] I have also applied my mind to the purported record of advice and conclude that the record is nothing more than a sham. Simply put, the record is a failed attempt to create the impression that the Code had been adhered to.

[39] Moving on to a document entitled “Adviesrekord van ‘n Onderlinge Ooreenkoms”, translated to mean Record of Advice of an Underlying Agreement, the following is noted⁴:

‘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.’

[40] In contrast to what is noted above, complainant was advised that the investment was safe and that the capital was guaranteed and respondent has not denied that he advised the complainants of such. There is no indication that complainant was alerted to the risk inherent in this investment. In fact, complainant indicated that respondent assured her that there were virtually no risks associated with the investment, since the building she were investing in was fully paid. Had complainant been aware of the true state of affairs, it is highly unlikely she would have opted to go with this investment, compared to other investments.

⁴

Translated from Afrikaans

[41] Respondent had a duty in terms of section 8 (1) (c) to identify products that would be appropriate to his client's risk profile and financial needs, regardless of what complainant thought would have been in her best interest. The record of advice deals with three types of products that were considered namely, Realcor Cape, PIC and Sharemax. All of the aforementioned are property syndications. There is no indication that other investment types were considered. The recommendation to invest in Realcor was on the basis that it offered the highest return. This much was noted on the advice record. Quite why complainant's circumstances could only be addressed by investments in property syndications has not been explained by respondent. The market consists of a large variety of financial products, some of which are offered by large reputable financial houses with track records. Considering that these were not considered by respondent, it appears reasonable to conclude that respondent was intent on selling a property syndication investment to complainant, regardless of her circumstances.

Did respondent's conduct cause the loss complained of?

[42] Based on complainant's version, the investment in the hotel was as a result of the respondent's advice. Thus, absent the respondent's advice, no investment would have been made in Realcor.

[43] 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:

43.1 respondent was not alive to the confusing and complicated structure of the investment, which had the effect of denying security to investors;

- 43.2 respondent has provided no evidence that he conducted due diligence on the investment;
- 43.3 respondent cannot deny that at the time he advised complainant, there were no apparent means to protect complainant against director misconduct or mismanagement in Realcor;
- 43.4 given that this is a property syndication investment, respondent ought to have been concerned and satisfied himself that the offer made by Realcor did not flout the provisions of Government Notice 485 as contained in Government Gazette 28690. There is no evidence that he was concerned with his client's protection. I refer in this regard to section 2 of the Notice, which requires that the syndication disclosure document disclose who will be in control of the funds, once they are placed in the trust account of an attorney. There is no indication that respondent considered this and advised complainant of the implications;
- 43.5 It is not difficult to conclude that had respondent adhered to the Code, he would have realised that complainant's circumstances were unsuitable to this type of investment; and
- 43.6 given the circumstances of this case, it is not unreasonable to conclude that respondent failed to align his conduct with the duty to act in the interests of his client when rendering financial services.

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

J. QUANTUM

[45] Complainant invested an amount of R420 000. There are no prospects of ever recovering the money from the hotel.

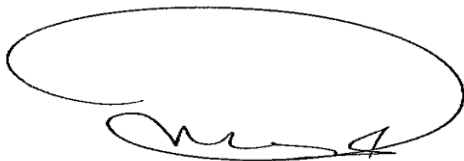
[46] Accordingly, an order will be made that respondents pay to complainant an amount of R420 000 plus interest.

K. ORDER

[47] 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 R420 000.
3. Interest on the amount of R420 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 23rd DAY OF AUGUST 2016



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