

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

**CASE NUMBER: FAIS 01417/13-14/ GP 1**

**In the matter between:**

**EDUARD WIUM MOSTERT**

**Complainant**

**and**

**HUIS VAN ORANJE FINANSIËLE DIENSTE BPK**

**First Respondent**

**STEPHANUS JOHANNES VAN DER WALT**

**Second Respondent**

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

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**A. THE PARTIES**

- [1] Complainant is Mr Eduard Mostert, 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 is an authorised financial services provider in terms of the FAIS Act with license number 687, which lapsed on 11 July 2011.

- [3] Second respondent is Stephanus J van der Walt, 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 simply as respondent. Where appropriate I specify.

## **B. FACTUAL BACKGROUND**

- [5] On or about 2 December 2009, complainant concluded an agreement with Grey Haven Riches 11 (Pty) Ltd, a public company with registration number 2007/025464/06 (the investment company), 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 R267 000 in the Blaauwberg Beach Hotel on Erf 19390. 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. After the completion of the hotel, the shares would be purchased by the investment company for the benefit of the investor.
- [7] Complainant indicated that he heard about the investment opportunity on a local Radio Station, "Radio Pretoria" where respondent presented a program promoting the purchase of shares in the Blaauwberg Beach Hotel. He duly contacted second respondent who advised complainant that it was a good, safe investment with a healthy interest rate, in which there could be no losers.

- [8] Complainant had various discussions with second respondent about the proposed investment and was assured that there is no risk, and that it was safe as respondent himself had purchased a substantial amount of shares in the hotel.
- [9] At the time of the signing the sale documentation, complainant also signed an advice record in accordance with Section 8 (4) of the General Code of Conduct (the Code). I will deal with this document later in the determination.
- [10] Following conclusion of the agreement on 2 December 2009, complainant continued to receive his monthly dividend, until approximately October 2010 when the payments suddenly stopped. Having made various enquiries, complainant was assured that the delay in payment was due to an administrative problem and that payments would resume shortly. However, complainant subsequently learned via the same radio show that the investment scheme was experiencing financial trouble.
- [11] During November 2010 Price Waterhouse Coopers released a statement to brokers who represented a group referred to as the “12 month debenture holders” and shareholders in Grey Haven Riches 9 (Pty) Ltd and Grey Haven Riches 11 (Pty) Ltd<sup>1</sup>. It was noted, following an inspection conducted under Section 12 of the South African Reserve Bank Act<sup>2</sup>, that the Registrar of Banks had concluded that Realcor Cape and / or related individuals, obtained money by conducting the business of a bank without being registered as a bank. The entity was directed to repay all monies<sup>3</sup> so obtained.

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<sup>1</sup> Grey Haven 11 is the company with whom the complainant held shares

<sup>2</sup> 90 of 1989

<sup>3</sup> 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.

[12] 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.

[13] 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. A total of R616 million was lost<sup>4</sup>.

### **C. THE COMPLAINT**

[14] From the foregoing factual background, complainant is aggrieved with the conduct of respondent. He states he was misled about the investment and that despite the then on-going financial struggle of the company, respondent wrongly assured him that his capital was safe.

### **D. RELIEF SOUGHT**

[15] Complainant seeks payment of the invested amount of R267 000 as well as interest<sup>5</sup> from November 2010.

### **E. RESPONDENT'S RESPONSE**

[16] During June 2013, 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 its

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<sup>4</sup> "Realcor hotel's R50m tag dashes dreams" [www.fin24.com](http://www.fin24.com), 23 May 2013

<sup>5</sup> Calculated at the rate at which he agreed to in the contract. The contract stipulates dividend income at 12% per annum.

response to the office and, relevant for the purposes of this determination, the respondent advised<sup>6</sup> that:

16.1 Following the Realcor Cape debacle and the financial impact thereof, that Huis van Oranje Finansiële Dienste Bpk had no other choice but to close its doors;

16.2 Second respondent who at the time was older than 60, had also invested in Realcor for his own retirement. In light of the aforesaid he is now unemployed and also awaiting resolution of the hotel-saga in order to finalise his retirement;

16.3 Second respondent utilized the services of Moonstone, a compliance specialist to ensure that they comply with all the requirements set out by the Financial Services Board. Moonstone duly conducted regular inspections. The Financial Services Board itself conducted an inspection at respondent's offices and found no fault in the manner in which he conducted his business.

[17] On the 24<sup>th</sup> of June 2015, a notice in terms of Section 27 (4) was issued to respondent. In response to the aforesaid notice, the office was merely referred to correspondence that was sent on 30 July 2013. 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**

[18] The issues for determination are:

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<sup>6</sup> Translated from Afrikaans

- 18.1 Whether respondent, in rendering financial services to complainant, violated the Code and the FAIS Act in any way. In specific terms, the question is whether complainant was appropriately advised, as demanded by the Code;
- 18.2 In the event it is found that respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of;
- 18.3 The amount of the damage or financial prejudice.

***Whether complainant was appropriately advised by respondent?***

[19] In essence, complainant invested after being assured by respondent that there was no risk involved in the investment; that it was a good investment which would ensure healthy returns for its investors. 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**

[20] 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:

[21] 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**

[22] 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.”*

[23] 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; ‘*

[24] 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.

[25] 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**

[26] In support of its response, 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.

[27] 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.*

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

[29] 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*

[30] 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 response to the circumstances at the time. In other words, the complainant was requested to sign pre-completed documentation in contravention of the Code<sup>7</sup>, conveying a clear intention by respondent to disregard the law. Furthermore, relevant information was not completed, for example, 'confirmation of which transaction was recommended and why' was left open.

[31] At the time the investment was made, complainant was 53 years of age. He was married and had minor children who were still at school. According to the information provided to this office, complainant had a mortgage loan at the time. The money utilised to make the investment was obtained from life insurance policies, which complainant decided to cancel in order to invest into these companies.

[32] The aforesaid information does not appear on the record of advice. It is complainant's version that respondent was aware that complainant had to cancel an investment with a life company in order to effect the investment. There is no indication that the implications of the replacement had been discussed with the complainant as no replacement advice record has been provided by respondent.

[33] Regrettably it cannot be accepted that the said record is a proper record of advice as envisaged by the Code. In a word, the document is nothing more than a failed attempt to create the impression that the Code had been adhered to.

[34] This brings me to a document entitled "Adviesrekord van 'n Onderlinge Ooreenkoms", translated to mean Record of Advice of an Underlying Agreement. In

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<sup>7</sup> Section 7(2) of the Code

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, marked D1 and D2, where the following is noted<sup>8</sup>:

*'D1: 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.*

*D2: 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.'*

[35] The real question that respondent has not answered here is his compliance with section 8 (1) of the Code. Exactly what respondent had identified in complainant's circumstances which warranted this high risk investment has not been explained by respondent.

[36] It is thus disingenuous of respondent to hide behind this document as proof that he had advised complainant of the risk. Respondent was duty bound in terms of the Code to first collect appropriate and available information from complainant prior to advising him. In this regard, complainant had a bond to service and minor children

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<sup>8</sup> Translated from Afrikaans

to take care of. This information was always available and necessary but respondent chose not to adhere to the code, preferring to hide behind his sham record 8 (4).

[37] In the matter of *Weideman v Huis van Oranje Beherend Beperk*<sup>9</sup>, previously determined by this office, it was pointed out that the mere fact that the building was not completed while investors continued to receive the so-called income, should have raised suspicion on the part of respondent. Further that the probability that the income was actually investment from new entrants to the scheme was overwhelming, hence when the Reserve Bank stepped in, income paid to investors ceased. The fact that respondent was unable to identify these risks is a clear indication that he sold a product he did not understand. Respondents could therefore not have acted in the interest of his client, as required by Section 2 of the Code.

***Did respondent's conduct cause the loss complained of?***

[38] 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.

[39] 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:

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

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<sup>9</sup> November 2012, paragraph 37-38

- 39.2 Respondent has provided no evidence that he had conducted due diligence on the entities involved;
- 39.3 Respondent cannot deny that at the time he advised complainant, there were no apparent means to protect complainant against director misconduct or mismanagement;
- 39.4 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;
- 39.5 The respondent had no clue of the risks involved in the investment;
- 39.6 Respondent could not have been acting in his client's interests when he recommended this investment.

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

## **J. FINDINGS**

[41] In the circumstances, I make following findings:

- 41.1 I accept complainant's version;
- 41.2 Respondent advised complainant to make the investment without first assessing the financial needs and determining the risk profile of the complainant, thereby contravening Section 8 (1) (a), (b) and (c) of Part VII of the General Code of Conduct;

41.3 Respondent failed to render financial service honestly, fairly with due skill, care and diligence and in the interest of the client and the integrity of the financial services industry thereby contravening Section 2 of Part II of the General Code of Conduct;

41.4 Respondent failed to maintain his records of advice as required by Section 9 of the Code.

#### **K. QUANTUM**

[42] The complainant invested an amount of R 267 000. There are no prospects of ever recovering the money from the Blaauwberg Beach Hotel.

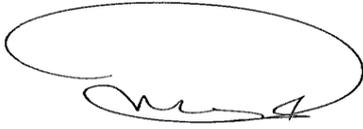
[43] Accordingly, an order will be made that Respondents pay to complainant an amount of R267 000 plus interest.

#### **L. ORDER**

[44] 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 R267 000;
3. Interest on the amount of R267 000 at the rate of 10.25% per annum, seven (7) days from the date of this order to date of final payment.

**DATED AT PRETORIA ON THIS THE 11<sup>th</sup> DAY OF MAY 2016.**

A handwritten signature in black ink, consisting of a large, loopy initial 'N' followed by a series of connected strokes, all contained within a hand-drawn oval.

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**NOLUNTU N BAM**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**