

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

**PRETORIA**

**Case Number: FAIS 03384/12-13/ GP 1**

**In the matter between:**

**HESTER JOCINA STEYN**

**Complainant**

**and**

**HUIS VAN ORANJE FINANSIËLE DIENSTE BPK**

**First Respondent**

**BAREND PETRUS GELDENHUYS**

**Second Respondent**

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**DETERMINATION IN TERMS OF SECTION 28 (1) OF THE FINANCIAL ADVISORY AND  
INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS ACT')**

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**A. INTRODUCTION**

- [1] The complainant, on advice of the respondents concluded an agreement to purchase shares and debentures to the value of R290 000 in the Blaauwberg Beach Hotel, a supposed safe and guaranteed investment with minimal risk of loss of capital as the investment was in "property".
- [2] Following a liquidation application, the hotel was sold at a loss, dashing the hope of any investors to recoup their invested capital.

**B. THE PARTIES**

- [3] The complainant is Mrs Hester Jocina Steyn, an adult female whose particulars are on file with the Office.
- [4] The 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 last known address as 1421 Collins Avenue, Moregloed, Pretoria. The 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.

- [5] The second respondent is Barend Petrus Geldenhuys, an adult male, key individual and representative of first respondent in terms of the FAIS Act. According to the regulator's records, the second respondent's last known address is Plot 5G, Wakis Street, Kleinfontein, Rayton.

### **C. BACKGROUND TO REALCOR CAPE**

- [6] Realcor Cape (Realcor) was an authorised financial services provider registered with the Financial Sector Conduct Authority (FSCA) 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 (hereinafter, collectively referred to as "Realcor"). Midnight Storm Investments 386 Limited<sup>1</sup> ("MSI"), owned the immovable property on which the hotel was being constructed.
- [7] Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape with registration number 1997/004873/07, promoted the offer to the public. The businesses of most of the companies within the Realcor group was conducted under the directorship of Ms Deonette De Ridder and Mr WB Nortje.
- [8] The Realcor subsidiaries raised money by issuing the investing public with one year and five year debentures, and various classes of shares. In that way the Realcor group was able to raise amounts in excess of R600 million from the public which were supposedly earmarked for the construction of the hotel.

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<sup>1</sup> Registration number 2007/01927/06

- [9] The debentures and shares were marketed on the basis that investors would receive monthly interest payments and dividends both before and after the construction of the hotel. Realcor investors were promised more than 10% interest per annum on their investments.
- [10] Following concerns and allegations raised by members of the public, the South African Reserve Bank (SARB) appointed PricewaterhouseCoopers (PwC) on 21 April 2008, initially as inspectors in terms of section 11 of the South African Reserve Bank Act<sup>2</sup> to investigate the affairs of the Realcor Group, and subsequently as managers in terms of section 84<sup>3</sup> of the Banks Act<sup>4</sup>.
- [11] The report of the inspectors concluded that the activities of Realcor, in raising funds from the public, offended the Bank's Act. Realcor was ordered to return the funds unlawfully collected from investors. Consequently, the developer was unable to complete the construction of the hotel<sup>5</sup>.
- [12] Grey Haven Riches 11 was placed under business rescue on 14 June 2011. The hotel was eventually sold for approximately R50 million; the majority of which was paid to secured creditors, thereby reducing the chances of a dividend to unsecured investors.
- [13] The Office received many complaints from Realcor investors for assistance in order to claim their investment capital from the brokers who intermediated the investments.
- [14] Realcor played multiple roles within the Realcor group of companies:
- 14.1 Purple Rain Properties 15 (Pty) Ltd traded as Realcor.

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<sup>2</sup> 90 of 1989

<sup>3</sup> *"Simultaneously with the issuing of a direction under section 83(1), or as soon thereafter as may be practicable, the Registrar shall by letter of appointment signed by him or her appoint a person (hereinafter in this section referred to as the manager) to manage and control the repayment of money in compliance with the direction by the person subject thereto."*

<sup>4</sup> 94 of 1990

<sup>5</sup> *Southern Palace Investments 265 Ltd v Midnight Storm Investments 386 Ltd & O*, Western Cape HC, Case No: 15155/2011, paragraph 13

14.2 Realcor was the Promoter, the property developer and authorised agent of MSI (the owner of the land on which the hotel is constructed).

14.3 Realcor further played the role of manager of investor funds.

#### **D. THE COMPLAINT**

[15] The complainant learned of the Blaauwberg Hotel to through a local radio station, Radio Pretoria, where the respondents were actively marketing the investment to listeners. The money utilized for the investments came from proceeds of the sale of a property the complainant inherited from her late father.

[16] During August 2009, the complainant consulted with the respondent and on his advice, purchased class B shares to the value of R190 000 in the Blaauwberg Beach Hotel with Grey Haven Riches 11 Ltd, a public company with registration number 2007/025464/06. The complainant also acquired unsecured debentures to the value of R100 000 with Grey Haven 11.

[17] The complainant stated that the respondent assured her that it is a safe investment and that she could withdraw her investments after a year. At the end of this year she requested a withdrawal of her funds, however, despite various requests the money was not forthcoming. It was then that the complainant realized that there was a problem with the investments.

[18] The complainant wrote a letter to Realcor Cape during December 2011, expressing her dissatisfaction with the investment, as well as the poor and inappropriate advice she received from the respondent. The complainant indicated that numerous enquiries had been made about the status of her investments, to no avail.

#### **E. RELIEF SOUGHT**

[19] The complainant seeks repayment of the capital amount totaling R290 000 from the respondent.

[20] The basis of the complainant's claim against the respondent is the latter's failure to render financial services in line with the FAIS Act and the General Code of Conduct, which includes the respondent's failure to appropriately advise the complainant and disclose the risk involved in the Realcor investments.

#### **F. THE RESPONDENT'S REPLY**

[21] During August 2012, a notice in terms of rule 6 (b) was issued, referring the complaint to the respondent to resolve it with his client. The respondent replied on 25 September 2012, confirming that the complainant had been a client of them since August 2009. The letter referred to various attachments, however, same was never sent to the Office.

[22] Notices in terms of Section 27 (4) of the FAIS Act was issued during February 2017 and August 2018 respectively, informing the respondent that the complaint had not been resolved and that this Office had intention 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. The respondent was also requested to answer specific questions regarding the advice rendered to this client. No reply to these letters were received.

#### **G. DETERMINATION**

[23] Having received neither the requested response nor the supporting documents, the matter is determined on the basis of complainant's version and her documentation.

[24] The issues to be determined are:

24.1 Whether respondent in advising complainant violated the FAIS Act and the General Code in any way. The issue is whether the complainant was appropriately advised prior to concluding the investments.

24.2 If it is found that the respondent's conduct violated the Act and the General Code, whether such conduct caused the loss now complained of; and

24.3 Quantum.

## ***The Code***

- [25] The respondent had an agreement with the complainant in terms of which he rendered financial services to her. The specific form of financial service that the complaint is concerned with, is advice<sup>6</sup>. This advice had to meet the standard prescribed in the General Code of Conduct. The complainant acted on this advice.
- [26] Section 2, 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.
- [27] Section 3 (1) (a) of the Code states that when a provider renders a financial service, that representations made and information provided to a client by the provider must be factually correct; provided in plain language to avoid uncertainty or confusion and should not be misleading. The information must further be adequate and appropriate in the circumstances, taking into account the factually established or reasonably assumed level of knowledge of the client.
- [28] 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.
- [29] Section 8 (1) (a) to (d) of the Code also 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;*

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<sup>6</sup> The definition of a financial service in section 1 includes an intermediary service.

(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...*"

[30] 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 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).*

**Grey Haven 9 and 11 / Iprobrite<sup>7</sup>**

[31] I refer to the attached Annexure which summarizes the disclosure documents pertaining to the investment companies, Grey Haven 9 and 11 and Iprobrite on the one hand, and on the other, Notice 459<sup>8</sup>. Had the respondent considered the content of these documents, he would have realised that the investments were not suitable for his client.

[32] There was a lack of proper governance, in that Realcor played the role of the property developer, the promoter of the property syndication scheme, the manager of investor funds, and the representative of MSI, the owner of the hotel. In this last role, Realcor had to negotiate the operator agreement with third parties on behalf of MSI.

[33] There is no evidence that investors were ever represented at any decision making body of Realcor. There is also no evidence that there was ever an independent board of directors throughout the Realcor group of companies, nor audit, risk, and remuneration committees.

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<sup>7</sup> The provisions were essentially the same throughout the three disclosure documents

<sup>8</sup> An explanation of this GG notice is contained in the annexure

- [34] There is no indication that the respondent had seen a set of audited financial statements for Realcor.
- [35] Investors were invited to invest their funds directly into the account of the promoter, and not into a registered trust account as Notice 459 demands. This was a direct affront to the legislative measure that was meant to protect investors. Regardless of this risk, the respondent still advised the complainant to invest.
- [36] None of the debtors (the investment companies) had ever traded and had no assets. The investment companies existed for one purpose, and that is to raise funds.
- [37] The respondent also failed to explain how it was possible for Realcor to pay 12% interest (much higher than market related rates); 7% commission (also much higher than markets); pay fees to Realcor (firstly as the agent of MSI, secondly, as manager of investor funds) and fund the development of the hotel. In the absence of an independent source of income, it is not clear how it was possible for Realcor to sustain these payments and pay for the development, other than from the investors own funds. This risk too eluded the respondent.
- [38] There is no prospect that the complainant will recover any funds from Realcor, nor from any of its subsidiaries. Realcor was finally liquidated and the partly developed property sold in liquidation during 2011.

## **H. FINDINGS**

- [39] In the absence of a proper record of advice or any other substantiating documentation, it is not clear what made the respondent conclude that the complainant's needs could only be addressed by means of property syndication products. The letter received from the respondent confirms that only three property syndication products were considered as investment options for the complainant.
- [40] There is no information that would indicate that the respondent was concerned with the complainant's capacity to absorb high risk. At the time that the investment was made, she



was employed at her local church, receiving a small stipend. The complainant could not afford to lose the funds she had available to provide for her retirement. As it stands, the complainant's health is deteriorating and she earns a state pension. I conclude that the respondent failed to recommend a product that were suitable to the complainant's risk profile and capacity.

[41] It seems reasonable to conclude that the respondent intended to sell the Realcor investments, whether or not it was appropriate for the complainant's circumstances were, in contravention of section 8 (1) (c) of the Code. Had it not been for the respondent encouraging investments in Realcor, it is unlikely that the complainant would have risked her money.

[42] Even if the complainant wanted to invest in Realcor, the respondent had a duty to inform the complainant that:

42.1 Realcor had been directed by the Reserve Bank not to collect investor funds, following the inspection in 2008. The investments were made during 2009.

42.2 Information provided in the prospectus was conclusive that investors carried all the risk, and the prospectus undermined the provisions of Notice 459.

42.3 The product was high risk and not suitable for the complainant; and

42.4 The complainant could lose all her capital.

[43] The respondent accordingly failed to comply with section 7 (1) of the Code. By investing the complainant's funds in a high risk product and disregarding the complainant's personal circumstances, the respondent failed to act in the interest of his client, in violation of section 2 of the Code.

## **I. CAUSATION**

[44] The question that has to be answered, is whether the non-compliance of a provision of the Code can give rise to legal liability, whether in contract or delict.

[45] I refer in this regard to the decision of the former Appeals Board in the matter of *J&G Financial Service Assurance Brokers (Pty) Ltd and another v RL Prigge*<sup>9</sup>. The Board noted the following:

*“The liability of a provider to a client is usually based on a breach of contract. The contract requires of a provider to give advice with the appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and that it caused loss. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.”*<sup>3</sup>

*In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.*

*In both instances the breach must be the cause of the loss.....”*

[46] As for legal causation, I refer to the determination in *ACS Financial Management vs Coetzee*<sup>10</sup>.

## **J. THE ORDER**

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

1. The complaint is upheld.

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<sup>9</sup> FAB 8/2016, paragraphs 41 – 44

<sup>10</sup> FAIS-00943-10/11 GP 1

2. The respondent is ordered to pay the complainant, jointly and severally, the one paying the other to be absolved, the amount of R290 000 as stipulated in paragraph 16 of this determination.
  3. Interest on this amount at a rate of 10% per annum from the date of determination to date of final payment.
  4. The complainant is to cede her rights in respect of any further claims to these investments to the respondent.
- [48] Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

**DATED AT PRETORIA ON THIS THE 29<sup>th</sup> DAY OF MARCH 2019.**



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**NARESH S TULSIE**

**OMBUD FOR FINANCIAL SERVICES PROVIDERS**