THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NUMBERS: FAIS 01457/13-14/EC 1

In the matter between:

HESTER HENDRINA VAN DER SPUY **Complainant**

AND

LOUIS ANDRIES GROVE t/a

GROVE FINANCIAL PLANNERS **Respondent**

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

A. INTRODUCTION

[1] This is a complaint against a financial services provider (FSP) who advised complainant to invest in PIC Investments; Highveld syndications 19 and 21 (PIC Investments).

Complainant invested R150 000 in HS19 and R400 000 in HS21. The scheme collapsed and went into business rescue and complainant's monthly interest was first reduced and then came to a halt. Complainant believes that her investment is lost.

[2] The parties were unable to settle the matter and complainant filed a complaint in this office. The complaint and supporting documents were delivered to respondent. After being given sufficient time to consider the complaint and after a request for respondent's records were made by this office, respondent filed a comprehensive response supported by his documentation.

B. THE PARTIES

[3] Complainant is a pensioner whose full personal information is on record. She is a pensioner and was 73 years old when the investment was made. She is currently 84 years old.

[4] Respondent is a licensed FSP who, at the time of advising complainant to invest, was operating under FSP 23369. This licence lapsed on the 13 June 2013. Complainant is currently a shareholder, director and key individual of Grove Financial Solutions (Pty) Ltd licensed under FSP 44410. Respondent is based in Pellissier Bloemfontein.

C. THE COMPLAINT

[5] Complainant submitted a comprehensive and well-motivated complaint. I will set out the most important submissions which support the allegations against respondent concerning his conduct and the appropriateness of his advice to complainant to invest in a high-risk property syndication.

[6] It is not in dispute that complainant and respondent knew each other for many years as the latter had acted as the formers FSP. Respondent also advised other members of complainant's family. In January 2007 complainant received a telephone call from respondent advising that funds invested with Old Mutual Fairburn Capital had matured. Respondent wanted to move her funds "into something safe". In this conversation he stated that he wanted to move complainant's funds to Pickvest as it was "a safe and guaranteed" investment. Respondent stated that it was urgent and he required a decision from complainant immediately. It is worth noting that complainant was in Port Elizabeth and respondent in Bloemfontein.

[7] When respondent advised complainant to invest in Pickvest, this was done telephonically and complainant had not been provided with a prospectus. Complainant stated that respondent did not explain the nature of the investment to her nor did he explain the risks in the investment. Complainant was pressurised to make a decision and give respondent the go-ahead to move her funds to Picvest.

[8] Complainant states that, at the time of giving advice, respondent failed to exercise reasonable care and representations made by him were not factually correct. In particular he failed to advise that the investment was high risk and was illiquid and complainant will not be able to realise her funds in an emergency.

[9] Respondent was aware of complainants needs and failed to disclose the business model behind the PIC investment as the investment was certainly not suitable for complainants needs. Respondent was also aware of complainant's risk profile, having been her FSP over a period of time. Complainant points out that she was a conservative investor and had no appetite for risk. This investment was not suitable for her needs. Complainant

states that it was “highly irresponsible” of respondent to take her funds from a conservative investment and invest it in a high-risk property syndication.

[10] Respondent failed to disclose the commission he was going to earn. A significant factor is that complainant believed that respondent was employed or was a representative of Old Mutual. Respondent was in fact with Old Mutual and had advised complainant previously to invest in a conservative Old Mutual backed product. Respondent refused to give complainant a clear answer as to whether or not this was an Old Mutual approved investment. Respondent deliberately created an impression that he was still with Old Mutual. It turned out that when he sold the PIC investment to complainant, he was not a representative of Old Mutual.

[11] Complainant complains that respondent failed to comply with the General Code of Conduct for FSPs (the Code) relating to replacement products. Complainant believed that respondent moved her funds from Fairburn Capital fixed investment to PIC.

[12] Complainant points out that the investment product recommended was not suitable for the needs of a person of her advanced age.

[13] Significantly, complainant states that on respondent’s instructions, she signed a blank form authorising the investment. This was contrary to the Code. He also failed to explain the “important information” in the forms signed by complainant. This is a relevant and important statement and I will deal with it in more detail below.

[14] A further complaint is that respondent failed to carry out basic due diligence into the investment that went beyond what Picvest itself said about its product. Respondent failed

to explain how income was to be paid by PIC and how it was guaranteed. According to complainant, had respondent carried out basic inquiries he would have found out just how high a risk this investment represented.

[15] The investment sold to complainant was the Pickvest Investment Highveld Syndications 19 and 21 and the amount invested was R550 000. Significantly, complainant states that at no time did respondent explain that she was investing in linked units of R1 000 each and that R999 of each such amount comprised a loan and only R1 was allotted to the purchase of the share. Respondent did not explain the legal implications of an unsecured floating rate investment nor did he explain that Pickvest shares were unlisted and as such represented a capital risk and that complainant could lose all her funds. Complainant is adamant that had this been explained to her, she would not have invested.

[16] Complainant alleges that respondent failed to carry out an investigation of the financial model used by PIC before selling it to her. Further, respondent did not explain the underlying economic activity that PIC undertook to sustain the projected income promised to investors. Complainant states that it was manifest that the extravagant promised income to investors was not possible. Respondent failed to apply his mind to this.

[17] A further complaint is that respondent himself had profiled complainant as conservative in regard to risk. Had respondent explained the risks or appreciated them himself, complainant would not have invested in PIC. She was highly risk averse as her investments were to provide her with an income for her retirement years.

[18] At no stage, neither in writing nor orally, did respondent explain that complainant could lose her capital of R550 000. In complainants view an FSP acting in the best interests of client would not put such a large portion of client's capital at risk. If respondent did not understand the product he was selling, then it was highly irresponsible of him to recommend it to complainant.

[19] According to complainant, respondent failed to provide her with a prospectus and a record of advice.

[20] Complainant concluded as follows:

a) That it was respondent's intention to "peddle" the investment regardless of her needs and objectives;
b) That he failed to take reasonable steps to ensure that she was in a position to make an informed decision; and
c) That he failed to act with due skill, care and diligence in her interests and in the interests of the integrity of the financial services industry.

Complainant believes that she has lost her investment as a result of respondent's inappropriate advice.

[21] Complainant instructed her attorneys to write a letter of demand to respondent. The latter refused to answer the allegations in the letter and chose to reserve his rights. Complainant did not instruct her attorneys to proceed with legal action against respondent due to the costs. Instead she lodged a complaint with this office.

Complainant's Documents

[22] In support of her complaint, complainant forwarded copies of the documentation she had. I deem it relevant to briefly deal with these documents.

[23] The first document is **a faxed letter** sent to complainant by respondent on the 18 January 2007. This letter was accompanied by other documents of which there were 15 pages. I will refer to these documents below. However, the accompanying letter is significant and I quote it below (in English):

"MESSAGE: DOCUMENTATION FOR MATURITY AND NEW INVESTMENT AS DISCUSSED THIS MORNING.

*There are 15 crosses where you must please place your full signature**. Do not fill in anything else.** You can fax the documents back to me at: 015-5052505 and the Cheque can be posted to me. Should you have any questions please call me. Please fax all the pages back including a copy of your ID, proof of banking account and proof of residential address."* (emphasis added).

[24] Complainant kept a copy of the documents sent to her by respondent and sent copies to this office with her complaint. As stated in this letter, there were 15 pages of documents with crosses indicating where complainant had to sign. Most of the rest of the documents were left blank and, in some instances, details were filled in by respondent. This letter supports complainant's version that she signed the documents in blank on respondent's instructions. This letter states that complainant must merely sign and leave the rest of the documents blank, to be filled in by respondent.

[25] The second document is an **"Application for withdrawal".** It is an Old Mutual document meant to release the matured funds to complainant. The document requests release of

the full amount of the matured funds. This part of the document, being the first page was filled in by respondent and only signed by complainant as instructed. The rest of the document, two more pages, were signed by complainant but the rest of the document was left blank.

[26] The next document is an **"Old Mutual Client Record of Advice".** This is a two-page document where respondent marked with a cross where complainant must sign. The first page contains a policy number, 12938609, being the policy that matured. Then respondent wrote in manuscript the following: *"Pay contract 12938609 out into my bank account as attached".* Immediately below these words there is a cross and a line drawn by respondent where complainant was expected to sign. The rest of the page was blank.

[27] The second page of this document is significant as it contains a client questionnaire designed to ensure that client was properly advised. This section of the document specifically requires the client to read and understand the questions and to ensure that the answers correctly reflect the true position. Then follows a series of eight questions with the client having to tick off a chosen "yes" or "no" answer. This part of the document is left blank. Ironically, the fourth question reads as follows: "*I confirm that the application form and any other form was filled in completely by me before signature".* Respondent still advised complainant to sign in blank.

[28] Of further importance is what appears on page 3 of this document. Save for complainant's signature, next to the cross, the rest of this page was left blank by complainant as instructed by respondent. Of significance is "Section 6" on this page. This section has a heading as follows: *"*IDENTIFICATION *(Request will not be processed if this section is not filled in)".* The importance of this section is then emphasised by the form stating on the

next line that "*This is a requirement of Old Mutual and is intended to protect the legal owner and must be signed by the owner in the presence of an Old Mutual official or a commissioner of oaths."* The document then provides for the owner's identification number, the place and date where the owner signed, the full name of the person identifying the owner, the signature of the owner and the person identifying the owner and the official title of the person before whom the owner appeared. There is also a space for the official's official stamp. All of this was left blank.

[29] On the same page and in "Section 7" there appears a space for the place and date when the investor signed the document. This was also left blank. Below this appears a cross, next to which complainant signed.

The significance of this page appears below when I discuss the documents received from respondent's records.

[30] Then follows an important **document "Application Form for Shares Highveld Syndication No 19 Ltd".** This document was faxed to complainant who was instructed to merely sign where indicated by a cross. I make the following relevant observations:

a) This application form is attached to the prospectus. However, it was removed from the prospectus and faxed to complainant by respondent. The transmission record of the fax clearly shows that the whole prospectus was not faxed at the same time. It was intended that an investor should first read and understand the prospectus before signing the application form. This supports complainant's version that she did not receive the prospectus but merely followed respondent's instructions for her to sign next to the crosses and fax it back to him in Bloemfontein. He had been her FSP as well as that of her brother, she trusted respondent to act in her best interests knowing

what her financial profile entailed. What I will show is that PIC flagrantly contravened the provisions of Notice 459.

b) Paragraph 2 on the first page of the application form is significant. On respondent's version, complainant had to read and understand this before signing the application form. Logic dictates that respondent must have read and understood the prospectus before he advised complainant to invest. Besides it is not his version that *he* did not read and understand the prospectus. This paragraph deals with the funds paid by the investor. The funds had to be paid by the investor into an attorney's trust account, Eugene Kruger and company. This much amounts to compliance with Notice 459. But that is where any semblance of compliance ends.

c) Paragraph 2.1 provides that the parties agree that the "Promoter" may instruct the attorneys to invest the funds according to Section 78 (2A) of the Attorneys Act, on behalf of the "Promoter". The funds were intended to be invested for the benefit of the investor, not the promoter.

d) Paragraph 2.2 is even worse. This provides that the funds will be retained in trust until the company (PIC) takes **"occupation"** of the property. It further gives the promoter a discretion to use part of the funds to pay for the property and to pay for various expenses.

Section 2 (b) of notice 459 provides as follows:

"*Funds shall only be withdrawn from the trust account* ***in the event of registration of transfer of the property into the syndication vehicle;*** *or underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding."* (My emphasis)

Notice 459 does not provide for the trust money to be withdrawn on **"occupation"** of the property, what is required is **"transfer"** of the property. In this respect the prospectus did not comply with Notice 459. Respondent did not query this and failed to disclose this to his client.

e) Ironically, the prospectus contains the following declaration by the directors of PIC:

"*PIC Syndications supports the regulation of the property syndication industry. PIC complies with all of the requirements stated in the Government Gazette of 30 March 2006."* (Notice 459)

As appears in the paragraphs above, nothing could be further from the truth. Once the investors funds were paid into an attorney's trust account, the investor did not enjoy the protection of a trust fund as PIC merely helped itself to the funds contrary to Notice 459. Respondent was under a duty, as a reasonably competent FSP, to disclose this risk to complainant. There is absolutely no record that he did so.

f) The hard truth is that the investors did not get ownership of the properties they contracted for and their funds were diverted elsewhere with reckless disregard for the provisions of Notice 459. Investors' funds were paid over to PIC without the knowledge of the investors and in contravention of Notice 459.

The investment in HS19 and HS21 was meant to provide an income, yet it had no trading history and no assets. It had no income from which to pay investors. The inference is irresistible that HS19 and HS21 paid investors from their own funds. The duty was on respondent, as a reasonably competent FSP, to disclose this to his client. There is no record that he did so.

[31] Then follows another important document; “Client Advice Record”. This document was not filled in by complainant; it was filled in by respondent in his manuscript in the absence of complainant. The following relevant information emerges:

a) Section A of the document is “a summary of information used”. Here the client had to answer yes or no to two questions. Firstly, that client saw the attached schedules. Respondent circled “yes”. But this is not true as the whole of the prospectus was not faxed to complainant. Secondly, that a needs analysis was used. Respondent marked with a circle, “yes”. This is equally false as on respondent’s own version a needs analysis was not done. However, it is equally undisputed that respondent served as complainant’s FSP for a number of years and already had a sound understanding of her financial needs and risk profile.

b) Section B of the document contains a summary of client’s needs. This is what respondent filled in; “R150 000 Income and Capital growth”. Respondent, on his own version, knew that complainant wanted capital growth. Respondent does not explain why he put complainant’s funds in an investment where capital was at risk.

c) Section D of the document contains details of the advice and motivation. The following is written in manuscript by respondent: “Conservative investor” requiring “income and capital growth” also wants “guarantee from PIC Syndication number 19 – 8% Interest plus 8.5% escalation and 7% capital growth “guaranteed”. The following is significant:

i) Respondent wrote, in his own manuscript, that complainant is a conservative investor. Yet he does not give a rational explanation as to why he advised her to invest in a high-risk property syndication, not suitable for complainants needs and risk tolerance.

ii) Respondent noted that complainant wanted income and capital growth to be guaranteed. PIC gave no such guarantee and even warned that capital could be lost;

iii) Nor did PIC guarantee the returns noted by respondent. If respondent was aware that complainant wanted her capital to be guaranteed, then respondent chose an investment that was not suitable for her needs.

[32] Then came a risk analysis which was filled in by respondent in the absence of complainant. This document is in the form of a questionnaire where complainant had to respond to a number of questions, where each question was allocated a score. The total score will indicate the risk profile of the client. The following appears:

a) Complainant's primary investment objective is described as "protection of capital";
b) The type of risk profile, after scoring, was determined as "conservative". In fact, respondent requested complainant to place her signature next to the word "conservative".
c) Ironically this document also records as follows; "All client's needs in section B identified and addressed, and advice given thereon".

[33] Respondent made a mockery of his own forms, filled in by him. Firstly, there can be no dispute that complainant was a conservative investor with no tolerance for risk. But respondent advised her to invest in a high-risk investment which actually warned that neither the income nor capital was guaranteed. Secondly, respondent ignored his own assessment of complainants needs and tolerance for risk. She was found to be "conservative", the PIC syndication, by any account, is not for conservative investors who want capital protection and growth. As a reasonably qualified FSP, respondent knew this but nevertheless chose to advise the trusting complainant to put her money at risk.

[34] The next document is titled "Risk Assessment with reference to Product Information". This document was again filled in by respondent in the absence of complainant. Yet the very

first paragraph of this document provides that this document must be filled in by the investor in the presence of the advisor. In this document, respondent filled in that complainant acknowledges he had provided her with a registered prospectus or an information brochure. This is not true; fax records show that the 15 pages of documents were faxed and did not include the prospectus. In fact, the application form and the documents mentioned above were actually part of the prospectus but were removed and faxed to complainant.

[35] On the second page of this document, respondent circled “yes” to a statement; “I confirm that all relevant documentation was fully completed before I signed it.” This is factually incorrect as complainant signed in Blank on respondent’s specific instructions.

Finally, the documents are either not dated and the place of signature is left blank or Respondent filled in “Signed at Bloemfontein on the 5 day of February 2007”. It is not in dispute that at all material times, complainant was in Port Elizabeth and respondent in Bloemfontein.

Modus Operandi

[36] It is not disputed that complainant made an investment of R150 000 in PIC HS19 and R 400 000 in PIC HS21. Each of these investments were made using separate application forms at different times. Complainant’s exposure in PIC Syndications amounted to R550 000. On each occasion respondent sent complainant a set of blank forms for her to sign where indicated with a cross. On each occasion the faxed documents were accompanied by a letter instructing complainant how to sign. Complainant had to merely sign where there was a cross and was not to fill any details on the forms. Complainant trusted her FSP of many years and did as instructed.

[37] Complainant kept copies of the documents as they were faxed to her and kept copies of the documents after she signed and faxed them back to respondent. It is clear that she signed the documents in blank. Respondent disputes this and provided this office with his documents. They were compared to the documents faxed to complainant and clearly, they were now completed and filled in. The writing is in manuscript and is not that of complainant. There is compelling proof that complainant did sign blank documents on respondent's written instructions. Important documents such as application form, risk analysis and client advice records were signed in blank.

D. RESPONDENTS RESPONSE

[38] Respondent responded to the complaint by submitting a comprehensive written statement supported by documents forming part of his records. I will set out his main submissions and provide my analysis based on the facts on record. I point out that all the facts relied on were known to respondent.

Legal Action Commenced

[39] The first defence raised is that complainant had already commenced legal action against respondent and therefore this office cannot register this complaint. Complainant had instructed her attorney to send a letter of demand to respondent claiming payment of her investment of R550 000. However, it is not disputed that complainant, due to costs, did not instruct her attorneys to commence action against respondent. Instead, she chose to file a complaint against respondent with this office. A letter of demand does not constitute legal action as contemplated in the Act. This office is therefore not precluded from dealing with this complaint.

Moonstone Compliance

[40] It is with a sense of regret that I am compelled to write this paragraph. After respondent received a letter of demand, he consulted with Moonstone Compliance, in particular Mr Gideon Potgieter, for advice. Potgieter in his written advice firstly advised respondent not to answer complainant's allegations and to merely reserve his rights. Secondly, Potgieter advised him as follows:

"Let the time run out and then they can follow the route of the ombud. That will buy time and will take months to work its way through the Ombuds system." (English translation)

[41] This advice is inappropriate as it is regrettable. I note as follows:

a) Moonstone is a compliance service provider to FSPs. It is registered as compliance officers and their services are widely used within the financial services industry.

b) Potgieter, instead of advising respondent to contact complainant and try to settle the dispute or resolve it, advised him to "buy time", respondent was advised to cause delay and not to deal with the substance of the allegation that he had acted negligently and gave unsuitable advice;

c) But more inappropriate was the advice that respondent can buy even more time if complainant filed a complaint with this office. The clear inference is that Potgieter advised respondent that this office's systems are such that it will take months to deal with the complaint. The clear implication is that respondent can take advantage of the fact that this office is inefficient and does not resolve disputes within a reasonable time and it is better for respondent if complainant did not go to court but filed a complaint with this office;

d) This office plays an important role within the financial services industry and should enjoy the support of the stakeholders within the financial services industry, including registered compliance officers;

e) In terms of Section 17 (1) (b) of the Act Potgieter had to comply with the “fit and proper” standard. This means that he had to act fairly, professionally and in the interests of the financial services industry. Instead, he failed to comply with this standard by deliberately undermining the integrity of this office within the financial services industry.

[42] I am therefore going to report Potgieter’s and Moonstone’s conduct to the Registrar for further investigation and possibly disciplinary action.

The Circumstances

[43] Respondent states that complainant was his client since 1995. It is undisputed that respondent provided financial services to complainant as well as other members of the complainant’s family over many years. It must therefore be the case that respondent was well aware of complainant’s financial needs and risk profile.

[44] Complainant had instructed respondent to invest her funds with Old Mutual Fairburn Capital. Two investments were made through respondent. It is not disputed that this is a conservative investment suitable for investors with no tolerance for risk. During January 2007 respondent informed complainant that her investment had matured and that her funds were available. Complainant stated that she no longer wanted to invest in Fairburn Capital as the interest rate was too low and she wanted a better return on her monthly income. Fairburn Capital offered 6% per annum.

[45] According to respondent he informed complainant that the “only investment he had knowledge of” that provided more income was property syndication investments with Highveld Syndication Companies. Their yield was about 9% per annum. It is improbable that respondent only knew of one investment that performed better than Fairburn. Respondent was an experienced FSP who was licensed under code 1.08 and 1.10; which means he was highly qualified. But on his own version he only offered complainant an investment in PIC, Highveld Syndications. It is undisputed that apart from knowing the complainant and her financial needs for many years, respondent had carried out a risk analysis on complainant and found her to be a “conservative” investor. Her previous investment history is consistent with this analysis. Yet respondent chose to advise her to invest in a product not suitable for conservative investors. On his own version he knew that complainant was a pensioner and wanted capital preservation. Yet respondent put her investment in a high-risk investment where the investor was warned that capital and income was at risk.

Blank Documents

[46] Respondent proceeds to explain that complainant was interested in the PIC investment and requested more information and application forms. According to respondent he explained the “investment type” and gave complainant “factual information”. Respondent is being deliberately vague. He does not state what is meant by “investment type” and nor does he state what “factual information” he provided.

[47] But significantly respondent claims to have faxed information about the product to client and faxed the application forms as well. He states as follows: *“Please take note that all documentation had been filled in properly and only required a signature from the*

complainant if she wanted to continue with the investment. ***At no stage was any blank documentation sent."*** (emphasis added)

[48] There is a dispute of fact as to whether or not respondent got complainant to sign in Blank. Her version is that respondent sent blank forms with a written instruction to only sign and not fill in any other details. As stated above, complainant kept copies of the documents she signed and faxed to respondent. Her copies were certainly signed in blank. But the same documents were delivered to this office by respondent as part of his records. Only this time all the blank spaces were filled in. The documentary evidence before this office does not support respondent's version. I am persuaded to make a finding that complainant's version is true and it is supported by all the available documentation. I must add that a reasonably qualified FSP will not indulge in the illegal and unfair practice of getting clients to sign, life changing documents, in blank.

Not a Replacement Investment

[49] Complainant complained that her investments in PIC were replacement investments, replacements for her investments in Fairburn Capital. She then states that respondent failed to comply with Section 8(1)(d) of the General Code.

[50] On the records before me, complainant's investments in Fairburn Capital had matured and funds became available. Complainant, on the advice of respondent, instructed Old Mutual to pay out the funds into her bank account. This was done by Old Mutual. These funds were then invested from complainant's account into the PIC investments. Accordingly, respondent submits that the investments were not replacement products intended to replace existing financial products held by client. I agree with respondent and find that he did not have to comply with Section 8 of The Code.

Product Information

[51] Respondent gave his version of how the investments in PIC came about. It is not disputed, that at all material times, complainant was residing in Port Elizabeth and respondent worked and resided in Bloemfontein. It is equally not disputed that the parties communicated via telephone and fax machine.

[52] Respondent admits that he introduced complainant to the PIC investment. Complainant showed an interest in this type of investment and respondent informed her "that the investments were performing well and that there was no problem that I had knowledge of". Respondent claims to have told complainant about the product and "thus providing her with factual information regarding the product". However, respondent gave no details as to how he concluded that the investment was "performing well". The investment is in unlisted shares and he was obliged to explain to complainant how he satisfied himself that it was performing well.

[53] Respondent then made a significant statement which I quote in full:

"I told complainant that I will send information regarding the product to her and that she should enlighten herself with the type of product, features and possible risks. At that stage ***complainant indicated that she trusted my judgment*** *and that I should send her the necessary documentation to finalise the transaction. I specifically told complainant that she should acquaint herself with the information and only when satisfied make an informed decision. Complainant accepted this as she had known me for many years and knew* ***that I will never place her capital in jeopardy."*** (emphasis added)

[54] This statement is important for the following reasons:

a) It confirms complainant's version that she trusted respondent and therefore agreed to accept his advice. Respondent also confirms that he knew that complainant trusted him not to take risks with her funds;

b) Respondent states that he furnished complainant with information so she could make an informed decision. That he sent her the information as well. Firstly, respondent does not say what factual information he gave complainant about the product; secondly, he does not say what information was sent to complainant so that she could assess the possible risks in the product. Complainant kept a copy of all the documents she received from respondent and none of it contained relevant information about the product type and risks therein. What she received were the application forms and documents authorising Old Mutual to pay out her available funds. The application forms were in the prospectus, but respondent removed the pages and only faxed the forms not the prospectus itself. Again, the documents in complainant's possession do not support respondent's version;

c) It is not likely that respondent gave factual information on the telephone. The parties were in different parts of the country and respondent never met with complainant to take her through the prospectus. Respondent instead relies on complainant's own reading of the information, whatever that might be, to satisfy herself that she can make an informed decision. The respondent was under a duty to ensure that he made a full disclosure of the nature and type of product he intends to sell to complainant. It is not enough for him to rely on his pensioner client to read and understand a fairly complex investment product riddled with risks and likely to cause loss of her capital.

d) On his own version, respondent does not detail what factual information he provided and if this included the risks inherent in an investment in property syndication. Complainant's version is that respondent merely assured her that it was a safe investment and did not explain the risks.

e) Respondent was aware of complainant's financial needs and tolerance for risk. He also knew that complainant trusted him not to place her savings in harm's way. Yet, respondent does not provide a rational reason as to why he chose to invest her money in a high-risk investment; the PIC investment, it cannot be disputed, was not suitable for conservative pensioners with no tolerance for risk. This was nothing more than a complete betrayal of complainant's trust.

The Prospectus

[55] Respondent repeatedly points out that complainant received the prospectus and even signed a document confirming receipt of the prospectus. The document where complainant acknowledged receipt was merely signed in blank on respondent's written instructions. Complainant states that she did not receive a copy of the prospectus. She supports this by referring to the documents faxed by respondent to her. There is no record nor copy of the prospectus. Respondent is unable to provide proof that he sent complainant the prospectus.

[56] Besides, to merely send a prospectus to an aging lay client is not compliance with the Code. Respondent was obliged to take respondent through the prospectus explaining the nature of the investment and drawing her attention to the risks and that neither capital nor income was guaranteed. It is an undisputed fact that this did not happen. It is not respondent's version that he took complainant through the prospectus, he merely relied on her own reading and understanding of this lengthy and complex, jargon riddled document. I note that respondent never personally met with complainant to explain this investment and only spoke to her on the telephone. If he took her through the prospectus it had to be via a telephone call, it would then be an extraordinarily lengthy call and respondent would have provided this office with his telephone records. He did not.

Besides, it is certainly not his version that he took her through the prospectus over a telephone conversation.

[57] Respondent sarcastically points out “that complainant is not a minor child and of sound mind and understanding”. This matter is not about complainant’s capacity to enter into a contract. It is about her capacity to understand the complexities and risks in this investment. On respondent’s own version, complainant signed the application forms in his absence and simply trusted him to carry out his obligations as a licensed FSP.

[58] Respondent also states that complainant had “about two weeks to scrutinize the proposal from HS19 Company and make an informed decision”. Exactly what “proposal” respondent is talking about is not clear. If it means the prospectus, then complainant did not receive it. Complainant states that she was under pressure to immediately sign the documents and fax them back to respondent in Bloemfontein. The dates support complainant’s version and she certainly did not have two weeks to consider the investment. Respondent, provides no chronology to support his submission that he gave complainant two weeks to consider the investment.

Not Guaranteed

[59] Respondent states that he never sold the product as a guaranteed product. It is not disputed that complainant wanted capital preservation and a guaranteed income. As stated above, respondent noted this in his own writing. The point being made is that, on his own version, he knew complainant was a conservative investor and he told her that the product was guaranteed, in writing. Yet he also knew that the product providers promised no such guarantee and even warned about possible loss of capital. Respondent’s version must be rejected.

[60] Respondent admits he told complainant that growth was guaranteed through a Head Lease Agreement. However, respondent does not provide any details. Certainly, the prospectus informs that the properties were secured by a head lease. But respondent was under a duty to, at least, call for a copy of the head lease and to check if the lessee was financially capable of honouring its obligations in terms of the lease. If respondent did so, he would have noticed that the head lease agreement was nothing more than a three-page sham document. A copy was obtained by this office. Nor did the lessee provide any financial statements to show that they were capable of making payment. It must come as no surprise that there was a breach of the head lease and the whole scheme collapsed.

Respondent failed to obtain relevant information about the investment and was not in a position to make a full and frank disclosure to complainant.

Other Investments

[61] Respondent relies on the fact that complainant, in November/December 2007, invested in another PIC syndication, HS20, with a different advisor in the Eastern Cape. He then concludes that she must have had all the information to make an informed decision to invest in the HS product and understood the risks involved.

Firstly, on respondent's own version he was not aware of these previous investments, he had to assume that she did not have enough knowledge about the product and he was obliged to carry out his obligations in terms of the Code.

Secondly, the fact that complainant made other investments in the past does not mean that she had the information on HS19 and HS21, and in particular, that she knew of the risks involved. On the probabilities, had she known about the risks, she would never have invested.

There is no substance to this defence.

Business Rescue and Non-performance

[62] Respondent relies on the fact that complainant voted in favour of Business Rescue in respect of HS19, HS20 and HS21. This cannot possibly absolve respondent of all liability. It is well known that hundreds of HS investors were requested to support business rescue as a possible means of recovering some of their capital. We know now that investors did not receive any payment of even a part of their capital and the HS companies, Nic Georgiou and some investors are currently engaged in time consuming litigation not likely to result in payments to investors.

That complainant supported business rescue is of no assistance to respondent.

[63] Respondent points out that he cannot "be held responsible for the non-performance of the contractual parties to the agreements". He also relies on the business rescue practitioner's statement that the down turn in the economy adversely affected the companies and that tenants had cancelled their leases.

[64] At all material times respondent was aware that he was investing complainant's funds in property syndication. What is stated by the business practitioner and the fact there was non-performance by some of the parties, is precisely the risks inherent in property syndication. Respondent knew this at the time of advising complainant. That is why such investments are regarded as high risk, risk capital investments. As a reasonably competent FSP, respondent was obliged to identify these risks and explain them to his client. He should also have known that this type of investment was entirely unsuitable for complainant's financial needs and risk profile. There is no record that respondent explained the risks and notwithstanding such explanation, complainant chose to invest in

the HS products. Respondent can only rely on the warning of risks in the prospectus which he expected complainant to read and understand herself.

It appears, on respondent's own version that he merely faxed the forms and prospectus to complainant and left it to her to read and understand what he was recommending. For this effort respondent pocketed a 6% commission amounting to R33 000.

Not Liquid

[65] Complainant submitted that she was unaware that her investment was not liquid and will be tied in for 5 years; and even after 5 years they were not easily cashed out. Respondent's explanation is that complainant knew she was investing in unlisted shares, because he explained it to her and she read the prospectus. There is no record from respondent that he explained to complainant exactly what she was investing in. Complainant thought that she was investing in property which she considered to be safe. Respondent did not explain that the investment was not in property and only 1% of her investment went towards the purchase of shares and the rest went into a loan to the developer (debentures). Complainant did not receive a prospectus and even if she did, she did not have the capacity to read and understand it.

[66] At complainant's age (73 years old at the time) she needed access to her funds. A reasonably competent FSP would know this. Respondent ought reasonably to have known that complainant needed liquidity, yet he chose to put her funds where they will be inaccessible and at risk of being lost.

[67] Respondent makes a startling admission as follows:

"The product was never sold as a product where the investor had instant access to his/her capital."

It is clear from respondent's own version that he advised complainant to place her funds in an investment which was not suitable for her needs. How can a five-year fixed term investment be in the best interests of a 73-year-old?

General Response

[68] As pointed out above, complainant made a well-motivated complaint against respondent. The latter repeatedly relies on the same submission; that complainant was furnished with the prospectus and read and understood it. To quote from respondent:

"Her signature to the Prospectus confirms her knowledge as I was not present at time of signature thus not being able to unduly influence complainant in any manner. All the issues raised by complainant was addressed in the Prospectus (risk, type of product, liquidity)."

In the circumstances of this matter, it was inappropriate for respondent to rely on complainant's own reading of the prospectus. This conduct is inconsistent with the Code.

Commission

[69] Respondent is indignant that complainant should complain about how his commission was paid. He points out that complainant did not pay his commission and her full amount was invested. This is not true. The properties invested in were still not completed and still not fully occupied by tenants. Just where did respondent believe PIC was going to find the funds to pay commissions and monthly returns to investors? It is a fact that investors funds were not held in the safety of a trust account. Instead, the funds were illegally paid out of trust to PIC. The inference is inescapable that PIC paid commissions and interest out of investors own funds. A reasonably competent FSP in respondent's position would have worked this out and informed his client accordingly.

Capital Still Available

[70] According to respondent, complainant's capital is still available and she has not suffered any loss. The truth is that first, PIC, without notice reduced the monthly interest paid to investors. Thereafter the companies went into business rescue and all payments to investors ended. Since then, the whole matter has become embroiled in lengthy litigation with no prospect of investors receiving any part of their capital. For all practical purposes, complainant lost her capital as well as her accumulated interest.

Review of Respondent's Documents

[71] Here I will briefly review certain relevant documents relied on by respondent. As I have stated above, there is documentary proof that respondent instructed complainant to sign blank documents. A fact which respondent consistently denies. However, the same documents have been disclosed by respondent, except that they are now filled in; and not in complainant's writing.

Application for Withdrawal of Matured Funds

[72] Respondent attached this document to his response and it is the same document he faxed to complainant; except that it is now filled in. All the blank spaces from the document signed and faxed by complainant are now filled in. The first thing to notice is that the date and place of signature is filled in. The place where complainant signed is filled in as "Bloemfontein". It is an undisputed fact that complainant, in signing these papers, was never in Bloemfontein, when she signed, she was in Port Elizabeth.

[73] On page three of this document, section 6 is now filled in. It is complete with a stamp from a commissioner of oaths. This was blank when complainant received it. Note that

complainant was supposed to appear before the commissioner of oaths. She did not, she was in Port Elizabeth and the commissioner of oaths in Bloemfontein.

Undated Letter

[74] Amongst respondent's documents was an undated letter from respondent to complainant. From the content of the letter, it must have been dated after 26 February 2009. The first paragraph reads as follows:

"Attached is the maturity payment forms for the above policy as well as the PIC application as discussed telephonically with Andre Grove on the 26 February 2009. ***Please sign on every form next to the cross."*** (emphasis added) This is consistent with a previous letter only this one did not instruct complainant not to fill in anything else. Complainant's version is consistent, she followed instructions and merely signed next to the cross and did not fill in anything else. This is confirmed in respondent's documents where all necessary detail is filled in, in manuscript by someone other than complainant, most probably respondent.

[75] The fourth paragraph of this letter contains the following:

"Included is also information about the PIC investment."

Significantly, the letter does not say what information. On respondent's version it must have been the prospectus. However, complainant denies receiving a prospectus and no prospectus was found amongst the documents faxed by respondent to complainant.

Quotation

[76] Respondent included the quotation he gave complainant for the second investment of R400 000 in HS21. The complainant was offered 12.5% per annum interest from inception of the investment and paid out monthly. This is an extraordinary rate bearing in mind what

was available on the market. Nowhere in his response does respondent explain how and from what funds or income stream PIC intended to make this payment to investors. This was relevant information that respondent was obliged to establish for the benefit of his clients.

[77] The quotation also promises three things:

a) That the public company has entered into a head lease which secures the income for the duration of the investment;

b) That the monthly income is paid from interest in the loan account; and

c) That the capital value is assured through a guaranteed share buyback scheme at the end of five years.

[78] The head lease was a Sham and respondent certainly did not read it. The monthly income was paid out of the loan account; in other words, out of the investors' own funds. The share buyback scheme certainly did not guarantee the value of the capital invested.

The quotation was completely misleading and respondent was under a duty to explain the quotation to complainant. Respondent gave no explanation.

Client Requirement

[79] As part of the application form, complainant was required to state the purpose of the investment. In the space provided, respondent filled in: "Maximum Income" and "Capital preservation".

Respondent knew this to be complainant's purpose and need in the investment, yet he places her funds in a highly risky investment not suitable for her needs. Respondent does not explain this.

[80] On the 8 February 2007 respondent wrote a letter to complainant thanking her for making an investment in PIC HS19. In that letter he assures her that the investment is safe with outstanding income and growth. This was anything but a safe investment, respondent misled complainant.

Single Investment

[81] Respondent points out that he did not carry out a full needs analysis as complainant did not want to furnish him with all her financial information. However, respondent admits that he was her FSP for 17 years. He did not need a full needs analysis; he does not dispute that he knew complainant's financial circumstances and her appetite for risk. Complainant disputes that she refused to provide her financial information. She accepted that as her long-standing FSP, respondent was familiar with it and trusted him to act in her best interests.

The Guarantees

[82] It is undisputed that complainant, in writing, informed respondent that her needs were capital preservation and income. Respondent does not dispute that he assured her that there was capital preservation. However, in truth, when one considers the prospectus:

a) The capital is not guaranteed as it is based on the performance of a future buy-back agreement;
b) The income is not guaranteed as it is based on the future performance of the head lease; and
c) The promoters had no control over how these contracts will perform and therefore gave no guarantees.

[83] In short, this product was not appropriate for complainant's needs. There is no record anywhere that the possibility of reduced income and loss of capital were mentioned as possible risks. Respondent, in breach of section 2 of the Code, recommended the PIC product.

[84] Respondent further submits that complainant's capital was not lost and the company will recover from business rescue. He provides no evidence to support this contention. The record shows that in September 2011 HS21 went into business rescue and was subsequently liquidated. There is no prospect that complainant will recover her capital.

Causation

[85] Respondent avers that his advice to invest in PIC was not the cause of complainant's loss. Respondent states that he could not reasonably have foreseen that the PIC investment would fail as a result of contractual breach between the promoters and the parties to the head lease and buy-back agreement and on that basis the requirement of legal causation was not met.

[86] On the respondent's own version factual causation was established. But for respondent's advice, complainant would not have invested in a high-risk entity such as PIC and her capital would not have been lost.

[87] The issue of legal causation based on the question of indeterminate liability for FSPs for pure economic loss has to be addressed (the remoteness question).

I do not believe that the loss of complainant's funds falls under the realm of delictual "pure economic loss". The respondents' conduct resulted in direct loss of the complainant's capital or property. In this regard see:

Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)

'Pure economic loss' in this context connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses or the diminution in the value of property.

In the event that I am incorrect (and I do not concede this) in finding that the complainant's loss is not "pure economic loss"; I deal with legal causation in the paragraphs that follow.

[88] Respondent did not pertinently deal with the issue of legal causation fully. He merely suggests that it was not his conduct that "caused" loss to complainant. Significantly, the respondent failed to deal with the law and merely relies on a possible factual finding that the PIC collapse was not reasonably foreseeable and that the cause of the collapse is unknown.

[89] Had the respondent acted according to his own risk analysis and considered the prospectus carefully, he would have realised, as a reasonably competent FSP, that this was a risky investment not suitable for the complainant's needs and that there were insufficient safeguards against director misconduct or mismanagement. Particularly due to the fact that the prospectus did not comply with notice 459. The test here is not whether or not a collapse, for whatever reason, was foreseeable; but whether or not the investment was appropriate for the complainant, bearing in mind her needs and tolerance for risk.

[90] The enquiry is whether, as a matter of public and legal policy, it is reasonable, fair and just to impose legal responsibility for the consequences that resulted from the conduct of the respondents in giving advice that was inappropriate in terms of the Act and the Code.

[91] It is easy and convenient to impute loss to director mismanagement or other commercial causes. The complainant's loss was not caused by management failure or other commercial influences. If the respondent did his work according to the Act and code, no investment in PIC would have been made, bearing in mind complainant's needs and tolerance for risk. The cause of loss was the inappropriate advice to invest in a risky product. That the risk actually materialized, for whatever reason, is not the cause of the loss. Otherwise, the whole purpose of the Act and Code will be defeated. Every FSP can ignore the Act and Code in providing services to their clients and hope that the investment does not fail. Then when the risk materializes and loss occurs, they can hide behind unforeseeable conduct on the part of product providers. This will fly in the face of public and legal policy and the provisions of the Act and Code.

[92] The reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result: it was sufficient if the general nature of the harm suffered by the complainant and the general manner of the harm occurring was reasonably foreseeable. A skilled and responsible FSP, acting according to the Act and the Code, would not have advised complainant to invest in PIC. The loss suffered by complainant as a result of respondents' inappropriate advice was reasonably foreseeable by the respondent. See:

STANDARD CHARTERED BANK OF CANADA v NEDPERM BANK LTD 1994 (4) SA 747 (AD).

[93] It was also held in the above case that:

"as to the issues of loss and causation, that although the untrue report issued by the respondent had been a factual cause of the appellant's loss, the test to be applied to the

question whether the furnishing of the untrue report had been linked sufficiently closely or directly to the loss for legal liability to ensue was a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all played a part."

[94] It is appropriate to point out that in addition to these factors one has to take into account, in the circumstances of this case, there is the Act and Code which all FSPs are bound to comply with as well as legal and public policy. All of which factors, when taken into account in this case, show that there is a sufficiently close connection between the respondents' advice and the loss of complainant's capital.

See:

LIVING HANDS (PTY) LTD AND ANOTHER v DITZ AND OTHERS 2013 (2) SA 368 (GSJ).

LEE v MINISTER FOR CORRECTIONAL SERVICES 2013 (2) SA 144 (CC).

STELLENBOSCH FARMERS' WINERY LTD v VLACHOS t/a THE LIQUOR DEN 2001 (3) SA 597 (SCA).

SMIT v ABRAHAMS 1994 (4) SA 1 (A).

Negligence

[95] A reasonably competent FSP, at the time of providing financial advice to client, can be expected to do the following:

a) ensure that he read and understood the Code;

b) understand that he is obliged to comply with the Code in providing financial advice;

c) understand the nature of the financial product/s he is recommending to client;

d) understand the product so that he is in a position to explain it to client in plain language;

e) accept that he is obliged to make a full and frank disclosure of all the available information about the product;

f) understand that he is obliged to ensure that his client will be in a position to make an informed decision; and

g) accept that he must recommend a product that is suitable for client bearing in mind the latter's financial circumstances and tolerance for risk.

[96] Respondent states that he explained the risks in the PIC product to complainant, however he is extremely vague about the details. There is no record of advice that documents the risks explained to complainant.

[97] Respondents conduct in not explaining the risks is exacerbated by the fact that he had received training in the products and had even read and understood the prospectuses. Yet he failed to tell complainant the following:

a) Neither her capital nor her monthly returns were guaranteed;

b) That the investments were considered risk capital;

c) That in fact she was not investing in property, PIC did not own any property and she was investing in debentures;

d) Her funds were not going to enjoy the safety of a trust account, but were going to be paid out to the promoters who could use it at their discretion;

e) That PIC did not comply with the requirements of Notice 459;

f) That PIC did not have independent financial resources from which to pay agents commission and interest on the capital; and

g) That her interest was going to be paid from her own capital and from the investments of other investors.

[98] None of the above was a secret, this information appears in the prospectus and was available to respondent at the time when he gave complainant advice to invest. Respondent admits to have read the prospectus. There can be no doubt that had this information been disclosed to complainant, she would not have invested. Respondent failed to comply with the Code and negligently advised complainant to invest her modest savings in PIC.

Application of Law

[99] Bearing in mind the facts found to be proved and the conclusions to be drawn from them, the following findings can be made:

a) Respondent failed to act honestly, fairly, with due skill, care and diligence;
b) Respondent failed to act in the interests of his client and by his conduct compromised the integrity of the financial services industry. Respondent contravened section 2 of The Code;
c) Respondent failed to provide full and frank disclosure of all the material information about the PIC products;
d) Respondent failed to enable complainant to make an informed decision. Respondent contravened section 7 (1) (a) of The Code; and
e) Respondent failed to seek relevant information from complainant and failed to provide appropriate advice. Respondent failed to identify a product that was appropriate to complainant's risk profile and financial needs. Respondent contravened section 8 (1) (a), (b) and (c) of The Code.

[100] The fact that respondent was in breach of the Act and The Code does not mean that he is therefore liable for complainant's loss. There is a breach of contract as well as a claim in delict.

[101] Further, this office as well as the Board of Appeal has consistently found that there existed a contract between FSP and client. It was an express, alternatively implied term of the contract that Respondent, in carrying out his obligations, will comply with the provisions of the Act and The Code. For reasons already stated, respondent was in breach of this term. A consequence of this breach was the loss of complainant's capital.

[102] In a number of recent judgements in the high court, it was found that complainants claim is one in delict based on negligence. Once it is established that the respondent gave financial advice, two questions arise:

a) did the respondent comply with his legal duties towards the client; and
b) whether in terms thereof the respondent acted wrongfully and negligently.

[103] A reasonably competent FSP in the position of respondent would have done the following:

a) Carried out diligent research to become familiar with the nature of the PIC products he intended to sell;
b) As a basic step he was expected to read and understand the prospectuses and the annexures thereto and explain it to complainant in plain language;
c) Made a point of understanding how PIC intended to pay his commission and investors returns bearing in mind that the latter owned no assets and enjoyed no trading history and did not have any independent means of making these payments (these facts are stated in the prospectus). Significantly, respondent had a duty to explain this to complainant;
d) Would have noticed that contrary to what was initially stated in the prospectus, it then informs that investor funds will not be kept in trust but will be paid out to the promoter;

e) Would have noticed that the shares will not be easy to dispose of, the promoter offered no assistance in disposing of the shares and the onus was placed on the investor to find a buyer (also stated in the prospectuses).

Clearly by failing to draw complainant's attention to the above information, respondent failed in his legal duties to his client.

[104] The respondent also acted wrongfully and negligently; he was under a legal duty to make a disclosure of these facts to complainant. Respondent acted negligently in not making full and frank disclosure thereby depriving complainant of the right to make an informed decision.

[105] Respondent must be judged by the standard of a reasonably competent FSP in the same circumstances. Then the inquiry must progress to the next question: would a reasonably competent FSP have advised complainant differently. It is overwhelmingly clear that a reasonably competent FSP would have read and understood the prospectus and would not have advised a 73-year-old pensioner to invest her available funds in a manifestly high-risk investment where there was a prospect of losing all the capital. The SCA in **Durr v ABSA Bank**, Schutz JA stated as follows:

"The reasonable person has no special skills and lack of skill or knowledge is not per se negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity."

"Liability *in delict arises from wrongful and negligent acts or omissions. In the final analysis the true criterion for determining negligence is whether in the particular circumstances of the conduct complained of falls short of the standard of the reasonable person."*

Respondent's conduct fell short of this standard and was the factual and legal cause of complainant's loss.

[106] Accordingly, and in the circumstances, the respondent was under a legal duty of care to comply with his obligations. An omission to comply, in the circumstances, amounts to a negligent breach of the duty of care. A reasonably competent FSP, at the time of providing advice, should reasonably be expected to foresee that in the event of a breach of the aforesaid legal duty of care client will suffer harm. That harm will be the possible loss of client's capital. The precise or exact manner in which the harm occurred need not be foreseeable, the general manner of its occurrence had to be reasonably foreseeable. For example, advice to invest in a risky investment must result in a reasonable foreseeability that the investment could be lost in the near future. It is not a question of performance of the product but the realisation of existing risks in the product. The reasonable foreseeability must become even more clear where the product provider actually warns the FSP of the risks in the product. As in this matter, the prospectus and disclosure documents stated the risks in the PIC. The respondent was aware of these risks; but nevertheless, advised complainant to invest her funds.

[107] Respondent's conduct fell short of a reasonably competent FSP and Respondent was the factual and legal cause of complainant's loss.

See **Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another 2000 (1) SA 827 (SCA).**

I refer to the following decisions:

OOSTHUIZEN v CASTRO AND ANOTHER 2018 (2) SA 529 (FS).

CENTRIQ INSURANCE COMPANY LTD v OOSTHUIZEN AND ANOTHER 2019 (3) SA 387 (SCA) – approved of the Castro judgement.

ATWEALTH (PTY) LTD AND OTHERS v KERNICK AND OTHERS 2019 (4) SA 420 (SCA) at p529.

[108] For all of the reasons stated above, I find that respondent acted negligently and such negligence was the cause of complainant's loss.

I accordingly conclude that, based on the peculiar facts of this case, both factual and legal causation was established.

E. CONCLUSION

[109] For reasons set out above, I find that, in advising complainant to invest in PIC, respondents contravened sections 2, 3(1) (a)(i), 7 (1) and (2) and 8 (1) and (2) of the Code. I also find that this conduct was the negligent cause of complainant's loss.

F. QUANTUM

[110] It is common cause that complainant did not invest for capital gain. She wanted an income and capital preservation. Her income was reduced from 12.5% down to 2% and there is now absolutely no prospect that any investor will buy her shares. Accordingly, she wants a refund of her capital. As stated above, there is now no prospect that investors will get any part of their capital back.

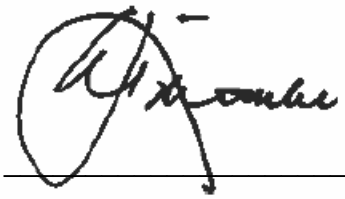
[111] I find that it will be appropriate to order respondent to pay to complainant the capital amount of R550 000 – 00.

G. THE ORDER

[112] In the premises, I make the following order:

1. The complaint is upheld;
2. Respondent is ordered to pay to complainant the amount of R550 000 – 00;
3. Interest on this amount at the rate of 7% from a date 14 days from date hereof to date of payment.
4. Any party aggrieved by this decision is entitled to apply for its reconsideration by the Financial Services Tribunal in terms of section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 11th DAY OF AUGUST 2021



ADV NONKU TSHOMBE
OMBUD FOR FINANCIAL SERVICES PROVIDERS