OUR REFERENCE: FAIS 06918 and 06467/12-13/ GP 1

13 February 2018

ATTENTION: **Mr Barend Petrus Geldenhuys: Huis van Oranje**

Stephanus Johannes van der Walt: Huis van Oranje Finansiele Dienste BPK

Per email: ben@finkor.net

fanietilly@gmail.com

Dear Mr van der Walt,

Ms Anna Elizabeth Johanna Pieterse (both in her personal and official capacity as Executrix of the Late Estate Mrs A E J Rosslee) v Huis van Oranje Finansiele Dienste BPK (first respondent), and Stephanus Johannes van der Walt (second respondent): RECOMMENDATION IN TERMS OF SECTION 27 (5) (C) OF THE FAIS ACT, (ACT 37 OF 2002)

A. INTRODUCTION

1. There were two investments, one for the late Mrs Anna Elizabeth Johanna Rosslee and Anna Elizabeth Johanna Pieterse, being mother and daughter, respectively. The complaints were brought by the daughter, Mrs Pieterse (then recorded as the first complainant) against respondents. Mrs Rosslee, (originally the second complainant) met her demise while the complaint was still pending before this Office. At the time of advice Mrs Rosslee had already retired while Mrs Pieterse was 55 and working. Both complaints are now pursued by Mrs Pieterse in her personal and official capacities[1].

[1] As Executrix of Estate Late Anna Elizabeth Johanna Rosslee, in terms of the letters of Executorship issued by the Master of the High Court numbered (006039/2017) and dated 17 August 2017.

2. The first respondent is Huis Van Oranje Finansiele Dienste BPK, (Huis van Oranje), a company duly incorporated and registered in terms of South African laws. First respondent's address is recorded in the papers furnished by respondents as TLU Gebou, James Rylaan 194, Silverton, 0127, Gauteng. First respondent is represented by Mr Barend Petrus Geldenhuys, an adult male, key individual and authorised representative of first respondent in terms of the FAIS Act.

3. The registrar's records confirm that first respondent's licence lapsed in July 2011.

4. Second respondent is Stephanus Johannes van der Walt, an adult male and authorised representative of first respondent (as provided for in the FAIS Act) at the time material hereto. Second respondent is now a representative of FNB Financial Advisory FSP 3075, with its principal place of business at FNB Century City Shop, 139 Canal Walk Shopping Centre, Century City, Cape Town, 8001.

5. The investments were both made on 7 September 2009 on the advice of second respondent. I refer to both first and second respondents simply as respondent. Where necessary, I specify which respondent is being referred to.

Delays in finalising this complaint

6. I find it important to address the delay in finalising this complaint. Sometime in September 2011, after the Office had issued the Barnes determination[2], the respondent in that matter brought an urgent application to set aside the determination[3]. Before the fate of the application could be known, the respondents sought an undertaking from this Office that it would not determine any other property-syndication-related complaints involving them.

[2] See E Barnes v D Risk Insurance Consultants FAIS-06793-10/11 GP 1

[3] Respondent claimed that section 27 of the FAIS Act was unconstitutional

7. Since the respondents had not provided any legal basis for their demands, the Office proceeded to determine further property-related complaints involving the respondents. In turn, the respondents launched an urgent application for an interdict to stop the Office from filing the determinations in court, as well as issuing further determinations regarding property-syndication-related complaints. The decision, which favoured the FAIS Ombud, was finally delivered in July 2012. See in this regard *Deeb Risk v FAIS Ombud & Others*[4].

8. In the wake of the pronouncement by the Court, the Office continued to determine complaints involving property syndications. However, in 2013 following the Siegrist and Bekker determinations[5] and the subsequent appeal, a decision was taken by the Office to halt processing property-syndication-related complaints. The decision was not taken lightly, but was a necessary risk management step. In the two determinations, the Office had for the first time sought to hold the directors of property syndication schemes liable for complainants' losses. The said appeal was finally decided on 10 April 2015, after which the Office resumed to process complaints involving property syndications and paid due regard to the decision of the Appeal Board. As many as 2000 complaints had to be shelved pending the decision of the Appeal Board.

B. THE COMPLAINT

9. The complainant alleged that she first heard about an investment in Realcor from Radio Pretoria. Subsequently, she invited second respondent to her home where the late mother, Mrs Rosslee, complainant's husband, and their accountant, amongst others, were invited. Complainant felt this was an important decision to make and had to have the aforementioned people present during the discussions.

[4] Gauteng High Court Division, case number 50027/2014

[5] See in this regard FAIS-00039-11/12 and FAIS-06661-10/11

10. In the presence of the family members, second respondent advised that the investment was to be in Realcor's Blaauwberg Strand Hotel and referred to it as the best investment. He is alleged to have also informed the complainants that the investment was guaranteed.

11. The guarantee of the capital was important to the complainants, in particular for Mrs Rosslee who was at the time, 88 years.

12. Complainants were informed by second respondent that the commission attracted by both investments would be paid from the scheme's coffers and not from their capital.

Completion of the paper work

13. Following the completion of the forms by second respondent, complainants were handed the forms to sign. Mrs Pieterse invested R120 000 and Mrs Rosslee, R1 030 000 (proof of deposits supplied).

14. The investments were placed with Grey Haven Riches 11 and the return was said to be 12% per annum on the invested amounts with income payable on a monthly basis. The income payable for the first month to Mrs Pieterse was R970 and to Mrs Rosslee R7896 which was said to be pro-rated for the month of September. For the subsequent months, the full income would be R1200 and R10 300 for the first and second complainant respectively, and payable monthly.

15. The complainants were advised they could withdraw their capital after one year.

16. There was never any reference to risk during their discussion with respondent, according to the complainants.

The beginning of problems

17. At the end of September 2010, the complainants' monthly income was not paid. Attempts to obtain an explanation from second respondent proved futile. Complainants then asked for their capital to be paid out but were told by Van der Walt that their capital cannot be paid. Complainants contacted Realcor offices in Cape Town and were advised again that the capital cannot be paid.

18. By this point, Mrs Rosslee, who was already at advanced age and dependent on the Realcor investment for sustenance, experienced severe health challenges. With bills to pay and no income, Pieterse and her husband brought her mother to live in their home and built a small flat for her. Pieterse then took early retirement to look after her ailing mother. Mrs Roslee eventually passed on, on 27 June 2017.

19. Further attempts to access their capital bore no fruit until van der Walt advised them that they may expect news in January 2011. January 2011 became March and then April and there was still no news. In November 2012 complainants lodged the present complaint against van der Walt and first respondent asking for the repayment of their capital.

20. Complainants asked that the Office order the respondents to repay their capital for failing to appropriately advise them.

21. In respect of Mrs Rosslee's investment, she agreed[6] to abandon the amount in excess of R800 000 to bring the claim within the jurisdiction of this Office.

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[6] The executrix agreed to the abandonment.

C. INVESTIGATION OF THE COMPLAINT

22. The respondents were notified of the complaint and requested to resolve it in terms of rule 6 of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers on 27 November 2012.

23. On 29 November 2012 second respondent replied advising that the investment went sour not because of any wrong doing on his part or that of Realcor but because of the intervention of the South African Reserve Bank (SARB). He further advised that he was no longer with first respondent and that all the necessary paper work was with first respondent.

24. On 8 January 2013, first respondent through one Anneke Geldenhuys provided copies of certain documents, ie FICA compliance form, risk analysis, Realcor application forms and records of advice. I shall return to the documents shortly.

25. Notices in terms of section 27 (4) of the FAIS Act were sent to respondents wherein they were informed that the complaints had not been resolved. Respondents were invited to provide their full response to the complaints, explain the basis of their recommendation to the complainants and provide all documents at their disposal to make their case. There was no response received.

D. ANALYSIS OF THE RESPONDENTS' PAPER WORK

26. The documents submitted by the respondents can be analysed as follows:

    26.1 Both records of advice provide no information. Both are standard documents with a line that suggests that the clients, (complainants) refused to provide information that would assist in the analysis of their needs. There is no reference to what products were

considered and why this particular product had any place in the circumstances of both complainants.

26.2 The Realcor application forms and agreement however, state that both clients wanted the highest possible return. The application forms further convey that the funds were to be deposited into the account of Purple Rain Properties 15 (Pty) Ltd and the type of account is labelled as 'trust' with ABSA bank. I mention at this stage that the regulations contained in Notice 459 of Government Gazette 28690 dictate that the funds be deposited into a registered trust account of an attorney, chartered accountant or estate agent and further mandates that the funds are not to be paid out prior to registration of transfer into the property syndication vehicle. The FAIS Ombud has already established from ABSA bank that the account was not a registered trust account but an ordinary savings account.

26.3 The application forms further indicate that commission of 7 % was payable to van der Walt while 1 to 3% referral commission <u>may be payable to institutions and individuals</u>. (There is no indication from the paper work of whether anyone was paid a referral fee in respect of both transactions. From a risk point of view however, the door was already opened to pay unidentified individuals).

26.4 The application forms further confirm that the product comes with no guarantees and that the investor carries all the risk, while the risk analysis on the other is silent and provides no useful information as to whether the complainants' circumstances were suitably matched with the risk inherent in this product as the General Code of Conduct demands in section 8 (1) (c).

E. ANALYSIS AND RECOMMENDATION

27. 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 of Government Gazette 28690, hereinafter referred to as the Notice. With the summaries, I demonstrate that respondent had absolutely no legal basis to recommend this investment to his clients and his conduct in recommending same was offensive to the General Code of Conduct, (the Code) and amounts to breach of his contractual duty to appropriately advise complainant.

Grey Haven 9 and 11/ Iprobrite[7]

28. The pervasive role of Purple Rain is made clear - in the disclosure documents of the three entities - that it is 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, Purple Rain had to negotiate the operator agreement with third parties on behalf of MSI.

29. There is no evidence that investors were ever represented at any decision making body of Realcor.

30. There is no evidence that there was ever an independent board of directors throughout the Realcor group of companies, nor audit, risk, and remuneration committees.

31. It is plain from respondent's version that he had never seen a set of audited financial statements for Realcor.

[7] The provisions were essentially the same throughout the three disclosure documents

32. Respondent had never had sight of the property valuation and it appears from his own version that he paid no attention to whether the property had ever been independently valued, when it was valued and what that valuation told him in view of the risk to investors and the demands of Notice 459.

33. Investors were invited to invest their funds directly into the account of the promoter and not into a registered trust account as the Notice demands. This was a direct affront to the legislative measure that is meant to protect investors. In spite of the heightened risk, respondent still advised complainants to invest.

34. After the funds were paid, as much as 50 % would be held back by the investment companies (see annexure) to pay undisclosed parties undisclosed amounts.

35. The syndication vehicle is deliberately not clearly identified in the disclosure documents. Investors are informed they will ultimately acquire an interest in the MSI (the hotel) for their full investment.

36. None of the debtors (the investment companies) had ever traded and had no assets. The investment companies existed for one purpose; to raise funds.

37. Respondent also failed to explain how it was possible for Realcor to pay 15% 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 face of there being no evidence of any independent source of income, how was it possible for Realcor to sustain these payments and pay for development other than from the investors own funds. This risk too eluded respondent.

38. None of the risks involved in this product were ever drawn to complainant's attention. I conclude in that case that respondent could not have appropriately advised complainant, in breach of the Code. The application forms signed by complainants cannot assist respondent. I mention in this regard that nowhere in the forms are the illegalities dealt with.

39. Respondent submitted that Realcor failed because of the intervention of SARB but he does not explain how such intervention brought down the entity.

40. It is a proven fact that there is no prospect that complainants will recover any funds from Realcor nor from any of its subsidiaries. Realcor was finally liquidated and the partly developed property sold in liquidation in and around 2012.

F. CONCLUSION

41. There is no question that between complainants and respondent, there existed a contractual relationship to render financial advice. In discharging his obligations towards complainant, respondent was duty bound to observe the FAIS Act and the General Code, (the Code) and align the standard of such service to the Code. As has been mentioned, respondent's conduct violated the Code which amounts to a breach of the contract.

G. THE LOSS

42. On Respondents' own version he caused complainant's loss. This loss, quite clearly, flows from respondent's breach of his contractual duties. See in this regard the payment of the monies into Purple Rain's account instead of a registered trust account which quite literally meant that investors had been stripped of legal protection. The respondents being aware of the law, had no reason

whatsoever to recommend this investment. I also refer to the glaring corporate governance red flags that were evidenced by the disclosure documents and the Reserve Bank intervention, which respondent ought to have been aware of when he advised complainant to invest in this product in 2009. The SARB inspected Realcor during 2008. All the while, respondent knew that his clients had no capacity to risk their savings. He also knew that complainants would rely on his advice in making the investments.

43. On the facts of this case, respondent's conduct caused complainant the loss. Such loss was foreseeable at the time of advising complainant. This was a breach of respondent's contractual duty.

H. RECOMMENDATION

44. The FAIS Ombud recommends that respondents pay complainants' loss as follows:

44. 1 An amount of R120 000 is to be paid to the complainant in respect of her own investment; and

44. 2 An amount of R800 000 is to be paid to the complainant in her capacity as executor of the late Mrs Rosslee's estate.

44. 3 The respondents are invited to revert to this Office within TEN (10) working days with their response to this recommendation. Failure to respond with cogent reasons will result in a determination as provided for in Section 28 (1) of the FAIS Act[8].

Yours sincerely,

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[8] "*The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include-*
(a) the dismissal of the complaint; or
(b) the upholding of the complaint, wholly or partially…."

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NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS