IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 00947/11-12/ UN1

In the matter between:

ABDOL FARO	**Complainant**
and	
GROENLAND INSURANCE BROKERS CC	**First Respondent**
PETRUS SWART	**Second Respondent**

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

A. PARTIES

[1] Complainant is Abdol Faro, an adult male whose details are on file in this Office.

[2] First Respondent is Groenland Insurance Brokers CC, a close corporation duly incorporated in terms of South African laws, with its principal place of business situated at Elgin Fruitgrowers Business Park, Main Road, Grabouw, 7160, Western Cape.

[3] Second Respondent is Petrus Swart, an adult male key individual and representative of first respondent who resides at 7 Gordon Villas, Dennehof Weg, Gordon's Bay, Western Cape.

[4] The regulator's records indicate that first respondent was authorised as a financial services provider on 22 December 2004 with license number 17265. The license is still valid.

[5] It is further apparent from the regulator's records that respondent was not licensed to render financial services in relation to product categories 1.8 (securities and instruments: shares) and 1.10 (debentures and securitised debt) at the time.

[6] At all material times hereto, complainant dealt with second respondent in purchasing this investment.

[7] For ease of reading, I shall refer to first and second respondents collectively as respondent. Where appropriate, I specify which respondent.

B. BACKGROUND TO REALCOR

[8] Realcor Cape (Realcor) was an authorised financial services provider registered with the Financial Services Board 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[1] ("MSI"), owned the immovable property on which the hotel was being constructed.

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[1] Registration number 2007/01927/06

[9] The businesses of most of the companies within the Realcor group was conducted under the directorship of Ms Deonette De Ridder, (De Ridder) and Mr WB Nortje, (Wimpie Nortje). De Ridder however, appeared to have been the driving force behind the three subsidiaries mentioned in paragraph 8 of this determination.

[10] The Realcor subsidiaries raised money by issuing the investing public with one (1) year and five (5) year debentures and various classes of shares. In that way the group[2] was able to raise amounts in excess of R600 million from the public, funds, which were said to have been earmarked for the construction of the hotel.

[11] The debentures and shares were marketed as attractive on the basis that investors would receive monthly interest payments and dividends both, before and after the construction of the hotel. The target market was mostly the elderly and adult persons who were mainly concerned with making provision for post-retirement income.

[12] Whilst an ordinary bank savings account would fetch a single digit interest per annum at the time, Realcor investors were promised more than 10% interest per annum. In the absence of legitimate economic activity that would generate cash inflows, it was not clear how this return was to be achieved.

[13] Meanwhile the investments were marketed as safe and guaranteed, with minimal risk of loss of capital as the investment was in "property" such as the hotel.

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[2] The Realcor group

[14] Pursuant to concerns and allegations raised by members of the public, on 21 April 2008 the South African Reserve Bank (SARB) appointed PricewaterhouseCoopers ("PwC") initially as inspectors in terms of section 11 of the South African Reserve Bank Act,[3] into the affairs of the Realcor Group, and subsequently, as managers in terms of section 84[4] of the Banks Act[5].

[15] Following the report of the inspectors, (PwC), the Registrar of SARB (Registrar) concluded that the activities of Realcor, in raising funds from the public, offended the Bank's Act. Thus, Realcor was ordered to return the funds unlawfully collected from investors. Consequently, the developer was unable to complete the construction of the hotel with the construction activities having come to a rapid halt[6].

[16] The hotel was eventually sold for approximately R50 million; the majority of which is likely to have been paid to FNB as one of the secured creditors, thereby reducing the chances of a dividend to unsecured investors.

[17] Iprobite was liquidated on 25 October 2011, following the granting of a voluntary order by the High Court.

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3 90 of 1989

4 *"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."*

5 94 of 1990

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

[18] In light of the liquidation, many of Realcor investors approached this Office for assistance in order to claim their investment capital from the brokers who intermediated the investments.

[19] In the meantime, it has transpired that some brokers who sold the Realcor investments have tried to avoid their responsibilities (towards their clients) under the FAIS Act by contending, *inter alia*, that the Reserve Bank's intervention in Realcor was the cause of the Realcor collapse. Using this reasoning, the brokers applied to Court for an order indemnifying them from their clients' claims. They (brokers) asked the Court for an order to hold PwC liable for the investors' losses, on the basis that the investments were sold to the public whilst PwC were managers and in charge of Realcor. In pursuing the relief sought, the brokers argued that the report of the inspectors (PwC) had neither been placed before a competent court nor published and that Realcor itself had never had the opportunity to interrogate the report.

[20] The Western Cape High Court[7] (the court) rejected the brokers' case and confirmed that PwC only supervised Realcor and did not take control of its daily operations; such control remained in the hands of Realcor's directors until it was liquidated[8]. The Court further held that PwC was bound by confidentiality provisions and could not have disclosed the report to the brokers, Realcor, nor the investing public. The brokers' application was dismissed with costs.

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7 Judgement delivered on 7 October 2014: *Willem Van Zyl & Deon Pienaar v PricewaterhouseCoopers & Others* HC WC Case No.: 12511/2013. Mr Van Zyl and Pienaar were amongst the brokers who had sold the Realcor product to members of the public. Their application came in the wake of investors who sued Realcor brokers for losses of their investments after its collapse. They unsuccessfully argued that they should be indemnified from these claims as Realcor collapsed while in the hands of PwC and not in Realcor directors' hands.

8 It appears that PWC's mandate continued until Realcor was liquidated when the liquidators took control thereof.

[21] The judgement of the Western Cape High Court implies and supports the intention of the legislature that providers of financial services cannot avoid their clients' losses where such losses arise out of the provider's failure to comply with the FAIS Act and its subordinate legislation.

[22] Before I go any further, it is important to first highlight the multiple roles played by Realcor within the Realcor group of companies:

22. 1 As mentioned in paragraph 8 (of this determination) Purple Rain Properties 15 (Pty) Ltd traded as Realcor.

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

22.3 Realcor is also the collective name used to refer to the subsidiary companies that were used to raise funds from the public, namely, Grey Haven Riches 9 Ltd, Grey Haven Riches Ltd 11, and Iprobite Ltd.

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

[23] In as far as possible and wherever reference is made to Realcor, the role will be highlighted.

C. COMPLAINT

[24] On or about 25 June 2010 and following respondent's advice, complainant concluded an agreement with Iprobrite Ltd, a public company with registration number 2009/007170/06. The agreement was in connection with the purchase

of shares in the amount of R120 000 in the Blaauwberg Beach Hotel, Erf 19390[9]. Realcor promoted the offer to the public.

[25] Complainant states that he was referred to respondent by an acquaintance who had used the services of respondent. Complainant recalls respondent's statement during their interaction that Realcor was worth about R1.2 billion and was by far the best investment option with no risks. Impressed by respondent's pitch, complainant informed respondent that he wanted to invest to generate monthly income but he was not willing to take on risks. In response, respondent advised complainant that Realcor was suitable for conservative investors.

[26] At the time of effecting the investment complainant was 66 years of age and spent his time preaching. Prior to complainant becoming a preacher, he was a factory worker. In the main, his work consisted of making furniture. Complainant had a sum of R128 000 which made up his entire life savings. The funds came from his retirement pay-out, after leaving the factory. In support of his claim, complainant has submitted a copy of the unsecured debenture certificate which confirms that complainant made an investment of R120 000 into Iprobrite on 25 June 2010.

[27] Complainant's version is that he received income from the investment for only three months, after which it stopped. With no answers as to the possibility of restoring the income payments, complainant concluded that he had lost his investment and lodged the present complaint against respondent.

D. RELIEF SOUGHT

[9] Noted in the deeds office of Cape Town as Erf 19390, Milnerton

[28] Complainant seeks payment of his capital in the amount of R120 000.

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

E. RESPONDENT'S VERSION

[30] The complaint was first directed to respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office on 25 May 2011 with the response due on 22 June 2011. The response forwarded to the Office did not deal with the complaint. Thus, on 23 December 2011, the Office directed a further e-mail to respondent advising that his response did not deal with the complaint. There is no evidence that respondent ever provided a response to the letter of 23 December 2011.

[31] On 3 May 2016, a notice in terms of section 27 (4) was sent to respondent. The notice, *inter alia*, invited respondent to provide this Office with his case, including supporting documents. The notice further warned respondent that he is viewed as a respondent and could be held liable in the event the complaint is upheld. There is no evidence that respondent replied to the notice, apart from redirecting the Office to the earlier documentation sent.

F. DETERMINATION

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

Justiciability of the complaint

[33] In terms of Rule 4 (a) a complaint is justiciable if four conditions are met, namely:

(i) the complaint falls within the ambit of the FAIS Act and the Rules;

(ii) the person against whom the complaint lies is subject to the provisions of the FAIS Act;

(iii) the conduct complained of occurred at a time when the Rules were in force; and

(iv) the person against whom the complaint lies has failed to address the complaint satisfactorily within six weeks.

[34] The complaint, according to complainant remains unresolved. With the requirements of Rule 4 (a) having been met, the complaint became justiciable.

Whether the jurisdictional requirements set out in section 27 (4) of the FAIS Act were fulfilled by this Office

[35] Respondent, through the section 27 (4) notice, was informed of the complaint and afforded sufficient time to put his case before this Office. Respondent was further warned, *inter alia*, that:

(i) this Office considers him as a respondent;

(ii) in the event the complaint was upheld, he could be held liable; and

(iii) upon receipt of his version, the Office would determine the complaint without further reference to him.

Accordingly, the jurisdictional grounds set out in section 27 (4) of the FAIS Act have been met.

[36] The issues to be determined are:

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

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

36.3 Quantum.

Substance of the offer made by the Realcor companies to the public

[37] I have carefully considered the substance of the offer made to the public by the Realcor subsidiaries. The ineluctable conclusion is that the offer made by Realcor falls squarely within the meaning of a property syndication as described in Notice 459 published in Government Gazette 28690, hereinafter referred to as Notice 459 or simply, the Notice. It is apparent from a proper examination of the prospectus that the brains behind the scheme had carefully crafted the prospectus in such a way that words such as, 'property syndication' and 'rental', do not feature anywhere in the prospectus. I have considered the following:

37.1 Investors were invited to make their investments through the subsidiaries, namely, Grey Haven Riches 9, and 11, as well as Iprobrite. The subsidiaries had no trading history prior to their establishment, no assets, and existed for only one purpose, to raise funds for the completion of the hotel.

37.2 The only form of security that investors had for their investments was the hotel. Investors were told they were going to acquire shares in the hotel.

37.3 MSI had no other asset other than the hotel.

37.4 Investors were informed[10] that the Rezidor Hotel APS (Denmark), hereinafter referred to as (Rezidor) had signed an operator agreement with MSI represented by its authorised representative, Realcor. In terms of the agreement Rezidor had to operate and manage the hotel for a period 20 years, with an option to renew for a further period of five years[11].

37.5 Investors were advised that the estimated hand over date to Rezidor was '..... *30 September 2010.*'

37.6 Unless Rezidor was meant to run the hotel for the benefit of MSI, which is not suggested in the prospectus, it follows logically (though the prospectus is economical with the details) that the only source of revenue for MSI arising out of the operator agreement was some form of fee or rental, or a combination of the two, payable by Rezidor. It is from such fee/rental that the investors would share the profits and losses.

[38] The courts have consistently upheld the substance over form doctrine. The common law principle encapsulated in the maxim *plus valet quod agitur quam quod simulate concipitur,* which in essence means '*what is actually done is more important than that which seems to have been done*', has always given our courts room to champion legal substance of a transaction over its form, where the nature of a transaction is in dispute.

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10 Page 6 of the Iprobrite prospectus, under "Salient Features"

11 Note: The operator agreement was not annexed to the prospectus but was said to be available at the promoter's business premises.

[39] In *Zandberg v Van Zyl*[12] the court's constant advocation for substance over form was made clear in these words of Innes JA:

"Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is: not what in form it purports to be".

[40] The doctrine was further entrenched in: *Commissioner for the South African Revenue Service v NWK Ltd*[13], where the court stated that there is something wrong with dressing up or disguising a transaction to make it appear to be something that it is not. In this particular case, Lewis JA held that a court would not be deceived by the form of a transaction, but would examine its true nature and substance in considering whether simulation was present. His Lordship further stated that the test should go to the extent of requiring an examination of the commercial sense of the transaction; its real substance and purpose[14].

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12 1910 AD 302 at 309

13 (27/10) [2010] ZASCA 168, paragraph 42

14 Paragraph 55

See also, *CIR v Conhage*[15] where Hefer JA found that sale and leaseback agreements, which had unusual terms but which made good business sense, were honestly intended to have the effect contended for by the parties.

[41] In *The Commissioner for the SARS v Bosch & McClelland*[16], the court per Wallis JA[17] stated:

".....simulation is a question of the genuineness of the transaction under consideration. If it is genuine then it is not simulated, and if it is simulated then it is a dishonest transaction, whatever the motives of those who concluded the transaction. The true position is that, the court examines the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated.....".

[42] Complainant's funds according to the prospectus issued by Iprobrite were mainly for the construction of the hotel and in return complainant would have benefited as holder of the combined unit from the returns made by MSI from the operator agreement.

[43] It follows that the offer made to investors falls within the meaning of a property syndication as described in Notice 459. Consequently, the prospectus issued by Realcor had to comply with the provisions of Notice 459.

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15 1999 (4) SA 1149 (SCA).

16 (394/2013) [2014] ZASCA 171 (19 November 2014)

17 Paragraph 40

Infractions of Notice 459

[44] On 30 March 2006, the Minister of Trade and Industry, acting in terms of section 12 (6) of the Business Practices Act (Act 71 of 2008) published Notice 459 of 2006 (the Notice) in Government Gazette No 28690, in which two 'business practices', as defined in the Notice, were declared unlawful with effect from 30 March 2006. Persons were directed to (a) refrain from applying the unfair business practices and (b) refrain at any time from applying the unfair business practices.

[45] The business practice relevant in this case is:

'the business practice whereby the prescribed information, in part or otherwise, as stipulated in annexure "A" is withheld by promoters or their representatives from investors or potential investors in public property syndication schemes'[18]*;*

[46] A 'public property syndication scheme' is defined in the Notice as-

'the assembly of a group of investors invited, by word of mouth or through the use of electronic and print media, inter alia, radio, television, telephone, newspaper and magazine advertising, brochures and direct mail, to participate in such schemes by investing in entities, which could be companies, close corporations, trusts, partnerships or individuals, whose sole asset(s) are commercial, retail, industrial or residential properties, and where investors share in the profits and losses in these properties and or enjoy the benefits of net rental growth therefrom through proportionate share of income';

[47] The 'prescribed information' means:

'the prescribed information as stipulated in annexure marked "A".'

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[18] Annexure A forms part of the Notice.

[48] A 'promoter' includes a company and its directors and all other persons who were actively involved in the forming and establishment of a public property syndication scheme. The Notice directs that promoters must make available in a disclosure document the prescribed information (the details of which are set out in annexure 'A') to investors who invest in or intend to invest in public property syndication schemes. The Notice also provides that any person who does not comply with the requirements of the Notice commits a criminal offence, and would be liable on conviction to a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years, or to both that fine and imprisonment.

[49] In this discussion, I do not mention all the violations of the Notice. There is a multiplicity of violations that such an attempt to mention them all would be counterproductive. In terms of Annexure A, the promoter (Realcor Cape), had to disclose the details pertaining to investor protection. Section 1(b) states that: *"Investors shall be informed in writing that:*

(i) public property syndication is a long-term investment, usually not less than five years;

(ii) there is a substantial risk, in that the investor may not be able to sell his shares should he wish to do so in the future;

(iii) it is not the function of the promoter to find a buyer should the investor wish to sell his shares; and

that it is the investor's responsibility to find his own buyer."

[50] The prospectuses issued by the Realcor subsidiaries failed to comply fully with the Notice. There is reference to risk to the investors, which appears in some

pages of the prospectuses. It therefore cannot be said that the full warning aimed at by section 1 (b) was communicated to the investors.

[51] In terms of section 2 (a), investors ought to have been directed to pay their funds into a registered trust account of an attorney or chartered accountant or estate agent with the name of the trust account appropriately spelt out. Section 2 (b) stipulates that investor funds could only be withdrawn in the event of registration of transfer of the immovable property into the name of the syndication vehicle or underwriting, with the details of the underwriter properly disclosed, or repayment to an investor in the event of the syndication not proceeding. In defiance of the Notice however, investor funds were paid into Realcor's account and were thereafter disbursed as intercompany loans to sister companies, prior to registration of transfer. See in this regard the remarks of Eloff J[19]:

"Of importance is the fact that Purple Rain apparently acted as the banker in the Realcor group. Various funds were channeled through Purple Rain between the companies in the Realcor group. Ultimately, Purple Rain's accounting records were said to reflect positive balances in respect of various intercompany loans that were relied upon in its own business rescue application, as constituting its major asset. However, such assets were plainly valueless because the intercompany loans were irrecoverable. A proper set of financial statements for Purple Rain would have probably reflected a complete impairment of such suggested assets".

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[19] Southern Palace Investments 265 Ltd, footnote 4 supra paragraph.

[52] The prospectus had to provide a valuation of the immovable property by a valuer, not older than three months as at date of the offer. This too was not provided and not even alluded to in the prospectus.

[53] Section 3 (c) of the Notice states:

"The disclosure document, which is to be dated and signed by the promoter, shall contain a statement of proper due diligence (commercially and legally) with regard to the property and its tenants prior to the unconditional purchase thereof and he/she shall state that this was done and that he/she is satisfied with the results thereof."

[54] The prospectus contains no details of the due diligence conducted by the promoter.

Appropriateness of advice

[55] Respondent was invited to demonstrate that he had conducted due diligence on Realcor, prior to advising complainant. Since no evidence to this effect was presented, I conclude that respondent conducted no due diligence whatsoever on Realcor.

[56] Had respondent conducted due diligence and bearing in mind that complainant made his investment in June 2010, respondent would have learnt of the 2008 inspection by SARB. Respondent ought to have realised there and then that Realcor was not a proper investment and directed his client elsewhere.

[57] Although the prospectus gives detail in compliance with section 2 (d) of the Notice, respondent provides no information as to his reasons for concluding that the product was appropriate for complainant, in the face of the overlapping

interests in respect of the directors of the promoter, the investment companies, and the property holding company, I cannot find any evidence that complainant was advised of the conflict of interest involving the promoters.

[58] I find that there was no information whatsoever which could have led any competent financial advisor to conclude that this was a sound investment, much less an investment suitable for conservative investors at a pensionable age. Below, I set out some of the provisions of the Iprobrite prospectus that should have alerted respondent to the lurking danger that his client was facing, as a result of poor governance practices within the business of Realcor.

58.1 At least 50% of the funds raised will be retained by Iprobrite to cover undisclosed amounts in respect of corporate secretarial fees, professional advisory fees, and '*any other professional bodies*'. The remainder will go to Midnight for the completion of the hotel[20].

Considering that there was neither an independent board of directors, nor audit, risk and remuneration committees, the undisclosed amounts that were aimed at paying amongst others, 'any professional bodies', must have set the scene for self-help on the part of those controlling investors' funds.

58.2 Iprobrite is to be managed by the Promoter[21] (also the property developer). This means that investors' funds will be managed by the developer of the immovable property, Realcor. From a plain reading of the prospectus, there was no respect for good governance in the Realcor

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20 Paragraph 5.2.2 of the prospectus

21 Carstens v Bartman 09068/10-11/ WC 1

group. This particular provision of the prospectus reinforces the same conclusion.

58.3 The directors of Iprobrite and Midnight have unlimited powers to borrow money[22].

58.4 At least three of the four directors are common in the Property Holding Company, the Promoter/Property developer, and the investment Companies, (Iprobrite, Grey Haven Riches 9 and 11). Ms Deonette De Ridder, who appears to have been the most dominant spirit behind the Realcor Empire even had her family trust - the Deonette Trust - involved in the Realcor business[23]. The question that should have crossed respondent's mind should have been, given the real conflict of interest, which these four directors were bound to face in their daily decision making, who would mind the investors' interests? Investors had no chance in Realcor.

58.5 Ms De Ridder, in her capacity as managing director of the Promoter/Developer, is responsible for the overall management of construction of the hotel, administration of the investments companies, and has been instrumental in the procurement of Radisson Hotel as the operator to operate and manage Radisson Blu Hotel.

58.6 The prospectus states that Realcor Developments is in the process of becoming 100% shareholder of issued share capital in the Property

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22 Paragraph 9.10 page 25 of the prospectus

23 See page 25 of the prospectus.

Holding Company. There is no evidence that respondent was concerned about Realcor Developments' acquisition of Midnight and what the consequences of this acquisition were for the investors' security. There is no mention that respondent took any steps to establish who was behind Realcor Developments and what the acquisition meant for investors' security.

[59] Before I conclude, I noted from the prospectus that investors were charged a premium of R99.99 per share. Respondent has not provided any information to this Office regarding his reasons for concluding that the premium was justified. One might remember that this prospectus opened long after the South African Reserve Bank's investigation into Realcor, which saw SARB prohibiting Realcor from further collecting investor funds. Notwithstanding, Realcor continued to collect funds from the public, aided by the likes of respondent and even added a premium to its shares. Respondent gambled what complainants could not afford to lose.

What the law requires of respondent when rendering financial services to a client

[60] Although respondent was invited to go through the Notice in terms of section 27 (4) to provide a record demonstrating just why this investment was considered appropriate in view of the clients' circumstances; no response was received.

[61] What is available on file though, is a document entitled "Adviesrekord van 'n Onderlinge Ooreenkoms"[24]. This document supposedly demonstrates compliance with section 9 of the Code.

[62] Furthermore, the following documents are on file and were signed by complainant:

62.1 Pages 1 – 2, the "Disclosure of information"[25] which provided information about Realcor and its primary business. It is noted in the document that respondent is registered as a representative of Realcor and that his services are not rendered under supervision.

62.2 Pages 3 – 4 deal with the "Service Level Agreement" (SLA) which indicated that complainant's instruction was for a specific service, namely, the purchase of debentures. The SLA further contained the following important remarks:

a. The advisor would not do a proper financial analysis;

b. The client undertakes to provide appropriate information in order for the advisor to determine client's needs;

c. The advisor would make recommendations and solutions based on the information provided by the client;

d. There could be restrictions on the appropriateness of the advice and the client should take steps to determine whether the advice

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[24] Translated to mean Record of Advice of an Underlying Agreement

[25] Translated from Afrikaans

is appropriate, taking into account his goals, financial situation and needs;

e. The client would not hold the advisor liable for any specific financial needs that had not been declared to him by the client.

62.3 Page 5 is entitled "Financial Information" and contained information about an investment to the value of R8 000 as well as the investment in Realcor to the value of R120 000. Total assets were noted as R128 000 with nil liabilities. In addition, it is indicated that complainant's income from his pension is an amount of R900.

62.4 Pages 6 – 9 is the "needs and risk analysis". Complainant's goal is noted as, - income according to choice with moderate capital growth over 60 months. Complainant was promised a monthly income of 14.5% of the total investment over a short term.

62.5 The risk profile analysis concluded that complainant was a **conservative** investor. One of the questions answered by complainant specifically stated that complainant did not believe that he had sufficient funds to realise his goal, thus he could not afford to lose what he owns.

[63] The SLA was a standard pre-typed document which respondent asked complainant to sign. Ironically, the document does not state that respondent obtained any information from complainant for the purpose of conducting an analysis as required by section 8 (1) of the Code. The only instances in which a provider is allowed to deviate from the requirements of section 8 (1) are set out in section 8 (4) (a) and they are: (i) and (ii).

[64] It follows that there was no basis for respondent not to conduct the required analysis in order to provide complainant with appropriate advice. Respondent's conduct as evidenced above was a clear attempt to disregard the Code. Section 8 (1) is clear in its instruction and it says, a provider **must** prior to providing advice, take reasonable steps to seek appropriate and available information from the client, conduct an analysis and identify suitable products (own emphasis). In simple language, it was respondent's duty to determine the suitability of the investment, not complainant's and respondent had no basis to transfer that duty to complainant.

[65] Section 8 (2) provides that the provider **must** take reasonable steps to ensure that the client understands the advice and is in a position to make an informed decision. The SLA is nothing but a lame attempt by respondent to contract out of his negligent conduct.

[66] In the absence of a proper record of advice, it is not clear what made respondent conclude that complainant's needs could only be addressed by means of property syndication products. The information contained in this document is limited. Equally, there is no evidence that respondent considered other types of investments with less risk than property syndications.

[67] There is further no information evidencing that respondent was concerned with complainant's capacity to absorb high risk. I refer in this regard to needs and risk analysis on file, which concluded that complainant was a conservative investor. I conclude that respondent failed to recommend a product/s that were suitable to complainant's risk profile and capacity.

[68] It seems reasonable to conclude that respondent intended to sell the Realcor investment whether or not complainant's circumstances were suited to it, in violation of section 8 (1) (c) of the Code.

[69] It is improbable that complainant would have, on his own accord, elected to make an investment in Realcor without being encouraged by respondent. I concluded that respondent had no regard for the law and only recommended the investment in Realcor for his own gain.

[70] Even if complainant wanted to invest in Realcor, respondent had a duty to state in no equivocal terms that:

70.1 Realcor had been directed by the Reserve Bank not to collect investor funds, following the inspection;

70.2 information provided in the prospectus was conclusive that investors carried all the risk; and that the prospectus undermined Notice 459;

70.3 the product was high risk and not suitable for complainant; and

70.4 complainant could lose his capital.

Had these statements been made clear, the probability that complainant would have gone ahead with the investment is nil.

[71] I conclude that respondent could not have appropriately apprised complainant of the risks involved, in violation of section 7 (1) of the Code. The section 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***.

[72] A responsible provider acting in terms of the law would have been more cautious with his client's money. By investing complainant's funds in a high risk product, despite complainant's personal circumstances, respondent failed to act in the interest of his client, in violation of section 2 of the Code.

G. CAUSATION

[73] Based on the cumulative information before this Office, the investment in Realcor was as a result of respondent's advice. This means, had it not been for respondent's advice, complainant would not have made the investment in Realcor. This answers the test for factual causation.

[74] The next step is to establish whether, as a matter of public and legal policy, it is reasonable to impose legal responsibility on respondent for the failure of the investment. In other words, could respondent have reasonably foreseen the collapse of Realcor.

[75] The reasonable foreseeability test did 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 complainant and the general manner of the harm occurring was reasonably foreseeable.

[76] Had respondent done his work according to the Act and the Code, no investment in Realcor would have been made, bearing in mind that respondent could not comply with the requirements of section 8 (1) (c) owing to his lack of

understanding of the Realcor product. It is easy and convenient to impute loss to director mismanagement or other commercial causes. In this case however, complainant's loss was not caused by management failure at Realcor but respondent's inappropriate advice.

[77] The loss suffered by complainant as a result of respondents' inappropriate advice was reasonably foreseeable by respondent. I refer in this regard to *Standard Chartered Bank of Canada v Nedperm Bank Ltd*[26] where the Court held 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."

[78] Respondent failed to investigate the myriad of companies involved in the Realcor scheme of arrangement and paid no attention to the real conflict of interest in respect of a number of individuals involved in managing the Realcor companies.

[79] Had respondent followed the law, first by satisfying himself of complainant's risk profile and conducting due diligence on Realcor, he would have understood that the investment was unsafe and posed a risk complainant had no capacity to absorb.

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[26] 1994 (4) SA 747 (AD)

[80] It was respondent's insistence in selling this investment to complainant, regardless of his circumstances, that saw respondent violate his duty to act in the interest of his client and the integrity of the financial services industry. Taking into consideration that at the time of investment complainant was 66 years of age, unemployed and in all probability, had no means to access capital, respondent was negligent.

H. FINDINGS

[81] Based on the facts before me I make the following findings:

81.1 Respondent failed to conduct due diligence, which was in direct contravention with section 2 of the Code.

81.2 Owing to the fact that respondent had failed to conduct due diligence, he had no appreciation of the risks involved in the Realcor offer and could not have been in a position to advise complainant.

81.3 Respondent failed to acquaint himself with the regulations pertaining to property syndication environments. He could not see that the prospectus issued by Realcor violated Notice 459.

81.4 In light of the above, it is plain that respondent's conduct caused the complainant's financial loss.

I. QUANTUM

[82] Complainant invested R120 000 in Realcor.

[83] Accordingly, an order will be made that respondent pay the amount of R120 000 plus interest.

J. ORDER

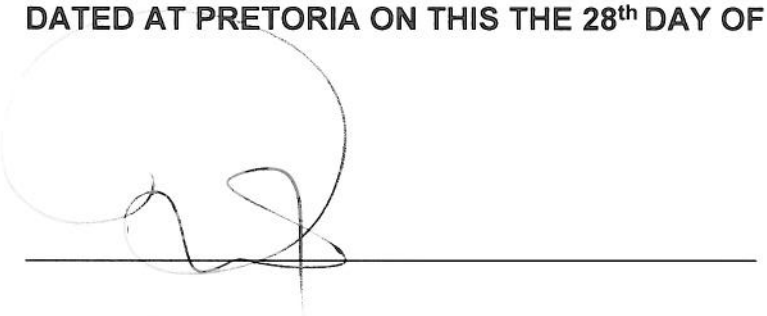
[84] In the premises, the following order is made:

1. The complaint is upheld.

2. Respondents are ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the amount of R120 000.

3. Interest at a rate of 10, 25 %, from a date seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 28th DAY OF MARCH 2017



NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS