

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

CASE NUMBER: FAIS 03500/ 11-12/ GP 1

In the matter between:

ESTA FOURIE

Complainant

and

HUIS VAN ORANJE FINANSIËLE DIENSTE BPK

First Respondent

BAREND PETRUS GELDENHUYS

Second Respondent

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

A. THE PARTIES

[1] Complainant is Ms Esta Fourie, an adult female whose details are on file with the office.

[2] First respondent is Huis van Oranje Finansiële Dienste Bpk (hereinafter referred to as the respondent), a public company duly incorporated in terms of South African Law, registration number 1995/006025/06, with its principal place of business at 1421 Collins Avenue, Moregloed, Pretoria. First respondent was authorised as a financial services provider in terms of the FAIS Act with license number, 687 which licence lapsed on 11 July 2011.

[3] Second respondent is Barend Petrus Geldenhuys, an adult male and representative of first respondent in terms of the FAIS Act. At all material times complainant dealt with second respondent.

[4] I refer to first and second respondents as respondent. Where appropriate I specify.

B. FACTUAL BACKGROUND

[5] On or about 2 June 2010 complainant concluded an agreement with Iprobrite (Pty) Ltd, a public company with registration number 2009/007170/06, represented by Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape with registration number 1997/004873/07.

[6] The agreement constituted an application to purchase shares to the value of R112 000 in the Blaauwberg Beach Hotel on Erf 19390.

[7] Realcor was an authorised financial services provider registered with the Financial Services Board, under license number 31351. Realcor used various subsidiary companies for purposes of obtaining funding from the public for its development projects.

[8] These companies included Midnight Storm Investments (“MSI”), which owned the Blaauwberg Beach Hotel (hereinafter, the hotel), Grey Haven Riches 9 Ltd and Grey Haven Riches 11 Ltd and Iprobrite Ltd (hereinafter, collectively referred to as “Realcor”). It is not clear whether Realcor had employees and assets, except the property on which the hotel was built. At all material times, MSI, the property holding company with registration number 2007/019270/06, was noted as the registered owner of the hotel.

- [9] Realcor subsidiaries raised money from the public by issuing the investing public with one (1) year debentures, five (5) year debentures and various classes of shares¹. In this way Realcor was able to raise substantial amounts of money from the public, funds which were mainly earmarked for the construction of the hotel.
- [10] The debentures and shares were marketed as attractive on the basis that investors would receive monthly interest payments and dividends before and after the construction of the hotel. The target market for the Realcor shares and debentures were mainly the elderly or adult persons making provision for post-retirement income. Whilst an ordinary bank savings account would fetch a single digit interest per annum, Realcor investors were promised more than 10% interest per annum. In the absence of legitimate economic activity that would generate cash inflows, it is not clear how this return was to be achieved.
- [11] Meanwhile the investment was marketed as safe and guaranteed, with minimal risk of loss of capital as the investment was in “property” such as the hotel.
- [12] Pursuant to concerns and allegations raised by members of the public that Realcor was obtaining money from the public unlawfully, on 21 April 2008, the South African Reserve Bank (hereinafter, the “Reserve Bank”) conducted an inspection through PricewaterhouseCoopers (“PWC”) on Realcor in terms of Section 12 of the South African Reserve Bank Act².

¹ The capital structure involved a combination of a share and a debenture/loan and conversion of debentures into shares. Whilst a debenture earns interest, a shareholder is entitled to a dividend provided they are declared and there is profit available for distribution.

² Act No 90 of 1989

- [13] Through this the Reserve Bank found that by obtaining funds from the public, Realcor had conducted the business of a bank without being registered or authorised to operate as such. Realcor was thereafter placed under supervision and on or about 28 August 2008, the Reserve Bank appointed PWC as managers of Realcor.
- [14] Subsequently thereafter the Reserve Bank prohibited Realcor from obtaining further deposits of money from the public, and took steps, by appointing PWC, to ensure that investors' money and any accrued bank interest is repaid.
- [15] According to the prospectus, the owner of the hotel, MSI, received loans from three companies namely: Grey Haven Riches 9, Grey Haven Riches 11 and Iprobrite (Pty) Ltd. Grey Haven Riches 9 and 11 in turn, raised the funds to make the said loans by issuing prospectuses to investors, who acquired ordinary shares and / or debentures in the above noted companies. Complainant in this instance contracted with Iprobrite.
- [16] Iprobrite was liquidated on 25 October 2011, following the granting of a voluntary order by the High Court.
- [17] The application for liquidation of MSI proceeded on 16 August 2012 and during May 2013 the hotel was sold for R50 million, dashing any hopes of investors to recoup their investments.
- [18] At the time of the conclusion of the agreement on 2 June 2010, complainant was unemployed.

[19] Complainant signed an advice record in accordance with Section 8(4) of the General Code of Conduct (the Code) at the time of the conclusion of the above agreement.

[20] Complainant states that she never received any payment in terms of the agreement. Despite several attempts from her side, the matter remained unresolved.

C. THE COMPLAINT

[21] From the foregoing factual background, complainant is aggrieved with the conduct of respondent. Complainant relied on respondent's representations that the investment was safe. Owing to a back problem, complainant is not employed anymore. She relied heavily on the monthly income that she was promised.

D. RELIEF SOUGHT

[22] Complainant seeks payment of the invested amount of R112 000.

E. RESPONDENT'S RESPONSE

[23] During October 2011, the complaint was, referred to respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, to resolve it with complainant. No response to the aforesaid letter was received.

[24] On the 24th of June 2015, a notice in terms of Section 27(4) was issued to the respondent. In response to the aforesaid notice, respondent referred the office to correspondence supposedly sent on 8 August 2012. Attached to this mail was a

copy of the application form to purchase shares, as well as a record of advice. Respondent did not reply to any of the questions raised in the said notice.

[25] A further notice in terms of Section 27 (4) was sent on 27 May 2016, advising respondent that the Office had accepted the matter for investigation and further informing respondent to provide all documents and or recordings that would support their case. The notice further indicated to respondents that in the event the complaint was upheld, they could face liability. No response was received to this letter either.

F. DETERMINATION

[26] The issues for determination are:

26.1. Whether respondent, in rendering financial services to complainant, violated the Code and the FAIS Act in any way. Specifically, the question is whether complainant was appropriately advised, as demanded by the Code;

26.2. In the event it is found that respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of, and the amount of the damage or financial prejudice.

G. LEGISLATIVE FRAMEWORK

[27] I deem it necessary to first isolate the applicable provisions of the FAIS Act and General Code of Conduct, (the Code) which are relevant in this matter:

[28] Section 16 (1) of the FAIS Act provides that:

*“A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that **their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, of such code to-***

- a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;*
- b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;*
- c) seek from client appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required; (emphasis supplied)*

Subsection 2 further states that:

“A code of conduct must in particular contain provisions relating to-

- a) the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;*
- b) adequate and appropriate record-keeping;*

Whether complainant was properly advised as required by the Code?

H. GENERAL CODE OF CONDUCT

[29] Section 2, of Part II of the General Code provides:

“A provider must at all times render financial services honestly, fairly with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.”

[30] Section 8 (1) of the General Code of Conduct provides that a provider must, prior to providing a client with advice:

- (a) *‘Take reasonable steps to seek from the client appropriate and available information regarding the client’s financial situation, financial product experience and objectives to enable the provider to provide the client with appropriate advice;*
- (b) *Conduct an analysis, for purposes of the advice, based on the information obtained;*
- (c) *Identify the financial product or products that will be appropriate to the client’s risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement;’*

[31] Section 8 (2) further provides that a provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision.

[32] Section 8 (4) (a) of the Code stipulates that where a client has not provided all the information requested by a provider for the purposes of furnishing advice, the provider must fully inform the client thereof and ensure that the client understands that –

- (i) A full analysis could not be undertaken;
- (ii) There may be limitations on the appropriateness of the advice provided; and

- (iii) The client should take particular care to consider on its own whether the advice is appropriate considering the client's objectives, financial situation and particular needs.

I. RESPONDENT'S RECORD OF ADVICE

[33] Respondent provided a document entitled "Adviesrekord ingevolge artikel 8(4) van die Algemene Kode" which translates to the Record of Advice as required in Section 8(4) of the Code. This document was allegedly completed at the time the investment was made and is supposedly proof of compliance with the aforesaid section of the Code.

[34] Part three of the said record of advice contains the following question and answer:

Question: *Reason as to why needs analysis was not conducted?*

Answer: *The client did not want to provide all the necessary information, which would have enabled me to conduct a detailed needs analysis.*

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

[36] Part four of the record advice notes the following information:

Client's financial information:

- *An analysis of the client's financial position was not conducted*
- *The client did his own analysis*

Client's risk profile:

- *The client manages his own investment portfolio*

Client's needs and objectives:

- *To earn the highest return on his investments as fast as possible*

[37] On further inspection of the document, it is evident that the above information was already inserted on the document prior to the signature thereof. This is further confirmed by the fact that complainant is referred to as 'he' and not 'she'. The particular section of the form was pre-printed and could not have been a proper response completed in accordance with complainant's circumstances at the time. In other words, the complainant was requested to sign pre-completed documentation in contravention of the Code³, conveying a clear intention by respondent to disregard the law.

[38] The respondent failed to assess the risk capacity and profile of complainant prior to recommending the said investment. There is no relevant information relating to complainants' circumstances. How respondent was able to appreciate complainant's capacity for risk is therefore unclear. What the Code contemplates in section 8 (1) is that a provider take into account necessary and available information for the purpose of conducting an analysis. At the time of the investment complainant was unemployed. Complainant suffered from a medical condition which hampered her employment and required the monthly income to sustain herself. There is no evidence that respondent properly considered other investments suitable to complainants' circumstances and in particular, whether complainant would be in a position to recoup any loss she suffers. What is evident,

³ Section 7(2) of the Code

is that respondent sold complainant the Realcor investment outside of any analysis of her needs or risk profile, in violation of section 8 (1) (c) of the Code.

[39] It cannot be accepted that the said record is a proper record of advice as envisaged by the Code. The document is nothing more than a failed attempt to create the impression that the Code had been adhered to.

[40] Moving to a document entitled “Adviesrekord van ‘n Onderlinge Ooreenkoms”, translated to mean Record of Advice of an Underlying Agreement, the following is noted⁴:

‘The share class productive investment is considered as a venture capital investment and seeing that unlisted shares are not readily marketable, Realcor Cape and the representative undertakes to assist the shareholders to sell their shares at market related commission should such a need arise.

It is noted that potential fluctuations because of market conditions associated with property and prime lending rate could have a negative impact on the value of the investment portfolio. It is thus not possible to guarantee the investment capital or the target return and Realcor Cape cannot be held responsible for any losses in this regard. It is confirmed that the client understands and accepts the underlying market risks.’

[41] In contrast to what is noted above, complainant was advised that it was a safe investment. There is no indication that complainant was alerted to the inherent risks. On a balance of probabilities, it is unlikely that complainant would have

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Translated from Afrikaans

continued with the investment had she been aware of the true state of affairs, specifically, that the capital is not guaranteed.

Did respondent's conduct cause the loss complained of?

[42] Based on complainant's version, the investment in the hotel was as a result of the respondent's advice. Thus, absent the respondent's advice, there would be no investment and therefore no loss.

[43] Outside of complainant's version, there is no evidence pointing to respondent's adherence to the law. Information at this office's disposal points to the following conclusions:

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

43.2 There is no indication that respondent conducted due diligence on the entities involved;

43.3 Respondent cannot deny that at the time he advised complainant, there were no apparent means to protect complainant against director misconduct or mismanagement;

43.4 It is not difficult to conclude that had respondent adhered to the Code, he would have realised that complainant's circumstances are unsuitable to this type of investment;

43.5 Respondent was oblivious to the risks involved in the investment;

43.6 Respondent could not have been acting in his client's interests when he recommended this investment.

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

J. QUANTUM

[45] Complainant invested an amount of R112 000. There are no prospects of ever recovering the money from the hotel.

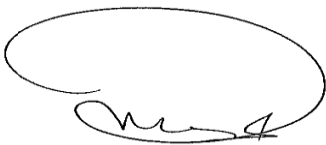
[46] Accordingly, an order will be made that respondents pay to complainant an amount of R112 000 plus interest.

K. ORDER

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

1. The complaint is upheld.
2. Respondents are ordered to pay complainant, jointly and severally, the one paying the other to be absolved, the amount of R112 000;
3. Interest on the amount of R112 000 at the rate of 10.25%, seven days from the date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 18th DAY OF JULY 2016



**NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS**