IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case number: FAIS 06779/11-12/GP 1

In the matter between:

PATRICIA GODDARD **Complainant**

and

MICHELLE GEORGINA VAN WYK **First Respondent**

FUTURE-SURE BROKERS CC **Second Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO 37 OF 2002 (the Act)

A. INTRODUCTION

[1] This is a complaint about a financial service rendered in respect of an investment in a property syndication promoted by PIC Syndications (Pty) Ltd. Details of the complaint and the response to it are set out in detail below.

B. THE PARTIES

[2] Complainant is Patricia Goddard, a pensioner who is currently 81 years old and whose further details appear on record.

[3] First respondent is Michelle van Wyk (van Wyk) an adult female financial services provider (FSP) of 157 Waggel Street La Montagne Pretoria. Van Wyk is the key individual in second respondent through which she conducts her business.

[4] Second respondent is Future-Sure Brokers CC, registration number 2004/070526/23, a duly registered close corporation in terms of the laws of South Africa, with its principal place of business recorded as, 157 Waggel Street, La Montagne, Pretoria.

[5] Second respondent is a licensed financial services provider as provided for in terms of the FAIS Act, with license number 6340. The license was issued on 15 September 2004 and is still in force.

C. THE COMPLAINT

[6] On the 10th October 2009 complainant made an investment with PIC Syndications (Pty) Ltd (PIC) in an amount of R550 000. The investment was in Highveld syndication No 21 Ltd (HS21) of PIC. Complainant was promised a guaranteed interest of 12.5% per annum, payable monthly.

[7] Complainant's funds came from her late husband's life insurance and she had deposited the funds in a bank account. Complainant found that the interest paid by the bank was inadequate for her needs. As a result,s she called her broker; who she described as "my insurance broker Michelle van Wyk, owner of Future Sure Brokers". She asked her broker if she knew of a better investment.

[8] As a result of that call, van Wyk arrived at complainant's house in the company of Henk Strydom, who she describes as "broker consultant of Picvest". Complainant was offered various alternatives with insurance companies but the best return, of 12.5% was offered by PIC. The investment had to be over a period of 5 years.

[9] Both van Wyk and Strydom stressed the fact that the interest was "guaranteed under a head lease". She was also informed that the investment was in shopping centres which could not possibly go bankrupt. Complainant then entered into a contract and Van Wyk offered to take her to the bank to draw a bank cheque for the amount. Complainant said this was not necessary as she made a transfer of the funds on internet banking.

[10] A needs analysis was done by van Wyk but at no point did she mention that this was a high risk investment; especially considering complainant's age and financial status. Van Wyk even stated she was investing R300 000 of her own money into PIC. Complainant saw this as a good sign; but according to complainant this turned out to be a lie.

[11] Interest payments were received, as promised, until the end of March 2011 when the interest rate was reduced to 6.5%, of which .5% was for admin fees. Effectively, interest was reduced to 6%. Eventually this was reduced further to 2%. Complainant called Van Wyk and requested her money back as she saw the reduction in interest as a breach of contract. Van Wyk called Strydom who informed them that complainant could not get her money out. After complaining about this Van Wyk sent complainant a form to complete. The form made it clear

that Van Wyk will not be selling complainant's shares and all further queries were referred to Strydom. Van Wyk was unhelpful. Complainant makes it very clear that she only invested in PIC because respondents assured her that the income of 12.5% was guaranteed and the company could not possibly fail.

[12] Complainant finds herself in financial trouble as she cannot survive on the reduced interest. She requested that her shares be sold at their original value as soon as possible.

[13] Complainant subsequently found out that she was the only client that Van Wyk placed into PIC. The latter's explanation was that a fellow broker suggested PIC as it promised the income complainant wanted.

[14] Complainant was then advised that the "rescue company" had found new investors but that her investment had to be locked in for a further 5 years instead of the 3 remaining years. The interest however would remain at 6%.

[15] Complainant makes it clear that she does not hold Van Wyk responsible for PIC's failure. She holds van Wyk responsible for not pointing out, at the time of advice, that this was a high risk investment. The complaint is that Van Wyk was aware of her financial circumstances, in particular, that she had no tolerance for risk, and yet advised her to invest in a product that was inappropriate.

[16] I must point out that complainant also made a complaint against PIC. However, for reasons set out below, it will be pointless to investigate a complaint against a company that is in liquidation.

D. RESPONDENTS' RESPONSE.

[17] Notices in terms of section 27 of the Act were sent to respondents and a copy of complainant's file was requested. In response, Van Wyk delivered an affidavit in which she set out her submissions as to why she and her close corporation should not be held liable for complainant's loss. Van Wyk also provided the documentation in respect of the advice and the investment, there were 51 attachments to the affidavit. I set out her submissions below.

[18] Van Wyk admits that she rendered financial services to complainant in respect of an investment in an unlisted syndication company. She further states that she attempted to resolve the matter by meeting with the complainant but her efforts were unsuccessful.

[19] The first point made by the respondents is that this office should not have accepted this complaint. Van Wyk correctly points out that respondents were not licensed to sell this product. She therefore, at all times, acted as a representative of PIC who acknowledged this in writing and further accepted that they were responsible for her actions. Van Wyk reminds this office that when she rendered financial services she was under the "direct supervision of an employee of PIC, Mr. H Strydom" who accompanied her to the meeting with complainant. Her conclusion is that this complaint had to be directed at PIC and not to the respondents. She even assisted complainant to lodge a complaint against PIC with this office.

[20] In response to a question from this office as to why this investment was chosen seeing as it was common cause that complainant could not afford to sustain any losses to her capital, van Wyk stated as follows:

a) She had a history of assisting complainant and her family. She knew them before this investment was recommended. Complainant requested quotations for investments of R1 150 000 – (incidentally, it is now not in dispute that this was an amount that complainant was expecting from her late husband's policies, but it did not materialise. The amount available for investment was R 550 000). Complainant's financial need revolved around income generation. Van Wyk presented numerous investment opportunities to complainant which were rejected on the basis that they produced inadequate income.

b) Van Wyk states that it is a generally accepted planning practice that investments work on "a risk vs. reward basis" and capital guarantees affect income. Van Wyk refers to the Financial Planning Institute. Her submission is that complainant "eventually accepted the principle of risk and reward and acceded to the risk in exchange for income."

c) Van Wyk supports her advice by pointing to the products marketed by most insurance companies being "living annuities" which recognise that capital erosion is inevitable.

d) According to van Wyk, it was only after complainant insisted on more income, that she recommend the PIC investment. Complainant rejected all other proposals.

e) Van Wyk confesses that she had no experience of the PIC product and she did not feel adequately equipped to deal with the matter alone; she therefore required the guidance of a “supervisor”.

f) The submission is then made that this office was wrong in questioning her duty to her client and she denies that she contravened section 2 of the Code.

[21] The next question put to respondents by this office related to compliance with section 7(1) (b) of the Code. The issue being, did respondents place complainant in a position to make an informed decision. The question from this office was that the needs analysis did not give details of the risks attached to the recommended product. Van Wyk responds as follows:

(a) She disputes this and relies on the “risk analysis” as well as quotes from Momentum, Liberty and Stanlib which she provided to complainant. Van Wyk then quotes from the “limited needs analysis” where she deals with why this product was recommended:

“(1) Client decides on PIC as income was 12.5% and other companies were less. (2) Client is aware – has to stick for 5 years otherwise no guarantee and someone has to be found to buy the shares. (3) If client passes away before 5 years, aware daughter can’t cash in but will still get income for remainder of term.”

(b) The limited needs analysis was done at the request of complainant and the only issue was what balance complainant was comfortable with between

capital and income. Respondents conclude that there was compliance with the code.

[22] This office then posed the question that bearing in mind complainant had no experience of investments, her age and financial circumstances, she did not appear to be an investor with an appetite for risk. Van Wyk responds as follows:

a) She points out that this statement is erroneous. Complainant was compelled to adopt a high risk appetite due to her personal circumstances; and

b) This office errs in assuming that complainant had no knowledge and that it is not logical to equate lack of knowledge to risk appetite.

[23] Respondents were then asked to respond to the query that bearing in mind property syndications are inherently high risk, complainant was placed at risk of losing her entire investment. Van Wyk responds as follows:

a) This statement is erroneous as there is inherent risk in all investments. She gives as an example the recent reduction to junk status of Anglo Gold Ashanti; and

b) Respondents note that complainant had not lost her investment. The company is in business rescue and continues to pay a reduced income. There is a prospect that the company will recover.

[24] Respondents had to deal with compliance with section 8(1) (a-c) of the Code. The code requires that based on necessary and available information obtained from the client that the client's risk profile be matched with a corresponding financial product, suitable to the client's circumstances. The response is as follows:

a) Respondents deny that there was no compliance with this section; and

b) Respondents refer to rule 4 (f) of this office and point out that this complaint appears to refer to product performance. In the absence of any allegation of misrepresentation, negligence or maladministration, this office cannot make a finding in this regard.

[25] Respondents deny that they failed to act with due care skill and diligence and in the interests of the client.

[26] On the 16th March 2012, respondents wrote to this office in response to complainant's complaint. Much of this letter was repeated in the affidavit referred to above; however, the following must be considered as well:

a) In January 2008 complainant contacted Van Wyk and requested quotes. As mentioned in the affidavit, quotes were provided from Liberty Life, Old Mutual, Sanlam and Momentum. Complainant decided to invest with Liberty Life; but decided not to proceed with it. At that stage no quotation from PIC was made as respondents did not have a contract with PIC.

b) Van Wyk agrees that complainant made the investment in PIC because an income of 12.5% was guaranteed.

c) Complainant was dissatisfied with the products that were quoted as the income was inadequate. A colleague then recommended PIC. Van Wyk then claims to have carried out "a thorough investigation" of PIC. She acquired a prospectus from PIC regarding HS21 and gave a copy to

complainant. She noted that PIC was registered with the FSB and Department of Trade and Industry.

d) Quotations showed that PIC promised the highest monthly return on an investment amount of R550 000- and income was guaranteed and capital value of the investment is secured by a guaranteed buy back agreement of the shares at the end of the 5th year.

e) Van Wyk agrees that income from the investment was suddenly reduced to 6%. She attributes this to the Reserve Bank intervention which caused the head lease to be cancelled. The company then went into business rescue.

f) Van Wyk states that the reduction of income is a contractual and performance issue between complainant and PIC and this has nothing to do with her. She further points out that she could not have reasonably foreseen the extraordinary circumstances which led to income reduction.

g) Complainant had signed all the PIC documentation and was fully aware of the risks involved at the time of making the investment. Secured products offered by other insurance companies did not provide complainant with the income she required.

h) Respondents conclude by stating that “the thorough completion of all the documentation regarding the investments” read with the notes made by Van Wyk is evidence of compliance with the Act and Code.

[27] As appears from the above summary, for purposes of this determination, I have considered all the facts and submissions made by the respondents.

E. THE ISSUES

[28] The following is not in dispute:

a) At all material times respondents were licensed FSPs, subject to the Act and Code;

b) Complainant made an investment in PIC through financial services rendered by respondents, which investment was made on the 10th October 2009;

c) PIC was introduced to complainant by van Wyk; she had not heard of PIC before this;

d) Complainant's needs, in making an investment, was income generation and capital preservation;

e) Complainant chose the PIC investment as it was the only company that promised a return of 12.5% paid monthly;

f) The return of 12.5% was guaranteed and the capital was preserved by a buy back agreement, provided the investment was made for 5 years;

g) Complainants fund's amounted to R550 000; she had no other funds and intended to live off the interest from this investment; and

h) Complainant was 77 years old and could not afford to lose her capital as she had no means to replace lost capital.

[29] The issues before me are as follows:

a) In giving financial advice, did respondents act in terms of section 2 of the Act and Code?

b) Did respondents contravene other provisions of the Code pertaining to the rendering of financial advice?

c) Did respondents make a full disclosure of all the facts to enable complainant to understand the risks and to make an informed choice.

d) Did respondents' advice cause complainants loss; if so, in what amount?

F. DISCUSSION AND FINDINGS

The Prospectus

[30] Respondents state that they obtained the HS21 prospectus as part of the thorough research carried out by Van Wyk. The latter places much weight on the fact that the prospectus was handed to complainant who read it and acknowledged that she understood it. I take it that as a diligent FSP, van Wyk must have taken complainant through the prospectus and explained it to her. Van Wyk knew the complainant and on the probabilities did not expect a 77 year old with no financial experience to read and understand contents of a prospectus.

[31] It will be convenient for me to deal with the prospectus and disclosures at this stage before I move on to a discussion of the rest of the issues.

[32] In order to get a better appreciation of the risks associated with property syndications and the kind of disclosures that should have been made in order to properly advise complainant in terms of the FAIS Act, one has to refer to the statutory disclosures contained in Government Gazette No. 28690, Notice No. 459 of 2006 (notice 459). These are minimum mandatory disclosures to be made by

promoters of property syndicates. By extension, any provider who carries in his portfolio of investment choices, property syndications as a form of investment and recommends the investment to clients must be aware of these and has an obligation to deal with these when advising his or her client. The aim, as set out in the Gazette, is to assist and protect the public when considering these investments.

[33] The Code requires providers to disclose to their client material information to enable consumers to arrive at an informed decision. Section 7 provides as follows:

"(1) Subject to the provisions of this Code, a provider other than a direct marketer, must-

(a) 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;"

[34] The material information about this investment is contained in the prospectus and disclosure documents. Before I go to these documents it is appropriate for me to high light some of the provisions of notice 459:

a) Section 1(a) provides that:

"Statements, presentations and descriptions shall not convey false or misleading information about public property syndication schemes and/or omit material information during the public offer of shares. Material

information is information which an investor needs in order to make an informed decision."

b) 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."*

c) Section 2 (a) requires that investors must be informed that funds received from them prior to transfer will be held in an attorney's trust account. But more importantly, section 2 (b) states 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."

d) Section 3(c) states that:

"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."

e) Where there is a head lease, as in this case, section 7 provides as follows:

"Full details shall be given of:

(a) any head lease agreement and subleases together with the quantum and location of any vacant space covered by such head lease and subleases. Quantum refers to the square meterage and the value involved.

(b) any gross or net rental guarantees supplied by the vendor of the property.

(c) actual leases concluded with full details of space let, duration of leases, rentals, escalation rates for the leases, tenant names and security for leases, expenses recovered from tenants, lease renewal options, rental review periods and vacant space."

[35] Bearing this in mind, I now turn to the prospectus in HS21. The following appears from the prospectus:

a) In the "Directors Prologue" the following is highlighted in a prominent, coloured box:

"***HEAD LEASE AGREEMENT***

From the investment date, and for five years until the buyback of the investor's shares, the income is secured by a head lease agreement. The income is fixed, providing peace of mind for the investor."

*"**BUY-BACK AGREEMENT***

The guaranteed buy-back agreement ensures that the shares will be bought back from the investors five years from the investment date."

The only way in which this was intended to be read is that the income of 12.5% is guaranteed and the capital is safe, provided the investor remains in the investment for five years. Accordingly, it is unlikely that respondents informed complainant that this is a high risk investment where there is a risk of loss of capital. The prospectus does not say this nor is there a disclosure document that explains this risk.

Respondents can provide no evidence to contradict complainant when she states that the risk of loss was not explained and that the income was guaranteed. On the probabilities van Wyk and Strydom were not likely to contradict what appears in the prospectus.

b) In fact, in a paragraph titled "Risk Statement" the following appears:

"The registrar of companies does not express a view on the risk for investors or the price of the shares. However, the attention of the public is drawn to the fact that the shares on offer are unlisted and should be considered a business enterprise capital investment. Investors should take notice that there is a possibility that the shares can trade at a lower value than the purchase price, should the company not perform as expected."

The warning prescribed in section 1 of notice 459 is not clearly set out. The impression being created is that the only risk is that the shares are less marketable but may be sold by the investor; to this end the company will

assist shareholders to sell their shares. The prospectus does, however, state that it is not the responsibility of the promoter to find a buyer and that there is a risk that the shareholder may not be able to find a buyer in future. There is no evidence that this risk was explained to complainant.

c) Under the heading "HIGHVELD SYNDICATION No. 21 Ltd" the following appears in bold writing:

"**Opening Date of Offer: 9 February 2009**

Closing Date of Offer: 8 May 2009"

In paragraph 19) under the heading "Time and date of the opening and of the closing of the offer" the following appears:

"a) The offer opens at 9h00 on Monday 9 February 2009 and closes at 17h00 on Friday 8 May 2009."

Attached to the prospectus, as annexure K, is a letter from the Companies and Intellectual Property Registration Office dated 9 February 2009 which is addressed to HS21 and reads as follows:

"HIGHVELD SYNDICATION NO 21 LIMITED (2005/027601/06)

PROSPECTUS

You are hereby informed that the offer of shares in terms of section 146 of the Companies Act, 1973 (Act 61 of 1973), dated ***10 December 2008*** *lodged by you in respect of the above company, has this day been duly registered.*

Opening date of the Offer: 09 February 2009

Closing date of the Offer: 08 May 2009

The prospectus repeatedly points out, as it should, that the offer in respect of HS21 closes on the 8th May 2009. It is not in dispute that respondents sold this investment to complainant on the 10th October 2009 almost 6 months after the offer closed. This is illegal. The prospectus presented to complainant, after diligent research by Van Wyk, had actually expired. Respondents tender no explanation for this.

d) The whole scheme, and in particular the promised return of 12.5%, was firmly based on the head lease. This lease agreement is annexed to the prospectus as "C"; this lease is just three pages long with extravagant spacing and can only be described as an excuse for a lease agreement. It is lacking in material information and does not contain the information required by section 7 of notice 459.

- There is no proper description of the properties being leased;
- How much space is being leased and at what price per square meter is not there;
- The date of commencement is merely stated as "the 3rd month after the registration of the prospectus". This office knows that the prospectus was registered on the 9th February 2009 and the lease was signed on the 2nd October 2008. There is no evidence that respondents checked if any rentals were paid from April 2009;
- The rental for the "premises" is merely stated as R13 861 125.00 per month. How this amount is made up and what amount is attributed to each building is not stated;

- There are no financial statements from the lessee, Zelpy 2095 (Pty) Ltd; there was no way of establishing if the lessee was capable of paying the rental in terms of the head lease.
- The lease records that "The first party (HS21) has purchased properties to be registered into the name of the first Party". This suggests that as at 2nd October 2008 there was no confirmation that the leased premises were acquired by the company. There is no evidence that van Wyk checked on this before selling this investment as guaranteed income. In fact, this office knows that HS21 did not take transfer of these properties (I will deal with this again below). This then calls into question the authenticity of this lease agreement. Small wonder that the lessee ultimately breached the contract and the lessee was even substituted with another company.
- Annexure E to the prospectus is a report on the Pro Forma Balance Sheet at 31 October 2013, provided by Van Sitterts (registered accountants and auditors). Paragraph 4 of the report provides as follows:

  "***Profit history***

  No Income Statement is presented as the company has not yet acquired the immovable property on 12 December 2008".

  The head lease was signed on the 2nd October 2008. This too calls into question the viability of the head lease.

  Paragraph 16 of the prospectus invites inspection of purchase agreements at the office of the promoter. There is no evidence that van Wyk took the trouble to inspect the documents.

- The Buy-Back agreement is annexed to the prospectus as “D”. This is equally a useless document that does not actually give the potential investor any material information. The document merely records that the second to fourth parties give an undertaking to purchase the shares sold by HS21 five years from the “individual purchase date”. Exactly how this was to be achieved is not stated. The bulk of the buy-back agreement is made up of useless boiler plate clauses. Even these clauses are drafted in a careless manner as the document is described, in paragraph 7, as a “lease”. Again, a reasonably competent FSP will question the validity of this agreement.
- There are no financial statements from the second to fourth parties and therefore impossible to work out if the promised guarantees are worth anything.

  This office knows that both the head lease and buy-back agreements were soon cancelled.
- In paragraph 2 of the prospectus the following appears:

  “*As soon as sufficient funds are received by* ***“Eugene Kruger & Co Attorneys Trust Account”****, it will be utilised to enable the syndication to* ***take occupation*** *of the properties. These funds will be drawn on the instructions of PIC as per agreement between PIC and the investors. The unencumbered properties will be transferred into Highveld Syndication No.21 Ltd.”*

  This is in blatant contravention of section 2 (a) of notice 459. Investor funds had to be secured in the trust account of an attorney. The money can only

be paid out of trust upon **registration of transfer** of the property. Not on "occupation" of property.

Van Wyk did not question this at all. She should have been concerned about the safety of her client's funds and that the company should not be given unfettered access to it. Nor did she bother to find out why or how the company could possibly be excused from complying with notice 459.

In fact, the FSB, for this very reason, cancelled PIC's license. In this regard see Board of Appeal decision in:

Picvest Investments (Pty) Ltd vs Registrar of Financial Services Providers dated 11th February 2014.

This office knows that investor funds were in fact withdrawn from the attorneys trust account. This was not done upon transfer of properties to the company. How this happened has to be explained by the directors of PIC and the attorney in question.

[36] On a reading of the prospectus, it is very clear that the promised return of 12.5% and the further promise of capital preservation was based solely on the viability of the head lease and buy back agreement. Should any of these contracts fail, or become breached, the promised made to investors would not materialize. There was no guarantee that any of the parties had control over what was to happen to these contracts and there was always a risk of failure. This risk was certainly not explained to complainant. This is a contravention of section 7 of the Code.

[37] On van Wyk's own version she was not licensed to deal with unlisted shares and debentures and she had no experience of this product. On the facts before me,

she was out of her depth but negligently continued to advise her client to invest. Bringing Strydom along was not in the interests of complainant as he represented the product provider and he was certainly not going to give independent or objective advice to complainant. Van Wyk was under a duty to understand this product fully before she recommended it to her client. Although she claims to have carried out “thorough research”, she either did not read the prospectus or if she read it, she did not have the capacity to understand it.

[38] This brings me to the point, made by respondents, that complainant had the prospectus, read and understood it. On the probabilities, even if she read it, she was not going to understand it. Complainant would require the assistance of a competent FSP to explain the contents to her. This is a responsibility which fell to van Wyk.

I now deal with respondents’ defense in more detail.

G. PIC REPRESENTATIVE

[39] Van Wyk was not licensed to sell this product in her own right. She therefore had herself appointed as a representative of PIC, who were licensed. Van Wyk was appointed as a representative in terms of section 13 of the Act. At all material times, complainant approached van Wyk as her financial advisor. Van Wyk was an independent FSP and as such was responsible for the advice given to complainant. There is no dispute that complainant appointed van Wyk and had nothing to do with Strydom, whom she saw for the first time when Van Wyk brought

him along. The fact that PIC undertook to be responsible for van Wyk's conduct, is a requirement of section 13 of the Act, and does not make PIC solely responsible. At all material times, and notwithstanding that she acted as a representative, van Wyk was responsible for the advice given to her client. Van Wyk had to comply with the code, section 8 (1) (a) to (c). The mere appointment as representative of PIC could never exonerate van Wyk from complying with the Code in this regard. Besides, van Wyk accepted the lucrative commission paid by PIC.

There is no merit in this submission.

H. APPROPRIATE PRODUCT

[40] Respondents were called upon to explain why this was an appropriate product for complainant. Van Wyk states that complainant was focused on maximum income and therefore rejected all the products and quotations from other insurance companies. She submits that complainant understood that with higher rewards there were more risks. Complainant was willing to take the risks. However, van Wyk is vague about exactly what risk complainant was willing to accept.

[41] On respondent's own version, quotes from various established insurance companies were also presented together with the PIC investment. It is not unreasonable for a lay client to accept that all of these options presented a similar risk profile and it was acceptable, then, to choose the investment with the highest return. Therefore, it cannot be said that by choosing PIC, over the other options, complainant was agreeing to assume a higher risk.

[42] According to the evidence before me, complainant was willing to take the risk that her money will be locked in for 5 years and will not be available in liquid form. She was willing to leave the funds locked for five years and understood that if she needed the money, she will have to sell her shares. Nowhere on record is there evidence that van Wyk explained that:

a) Property syndication is a high risk investment;

b) There was a risk of losing the whole capital amount; and

c) There was a risk of receiving a reduced income.

[43] As for high rewards, it is not in dispute that complainant was "guaranteed" an income of 12.5%. No other product provider could match this performance. It was equally promised that at the end of the 5th year, complainant will get her capital back. Van Wyk points out that some secured products result in "capital erosion" and do not promise capital preservation. She refers in this regard to living annuities. Van Wyk missed the point; capital erosion is not the same as capital loss.

[44] The evidence established that complainant was not in a position to risk her capital, it was all she had. Van Wyk, at all material times, was alive to this. She was therefore under a duty to advise her client that property syndication was not appropriate for her.

In this regard I find that respondents were in breach of section 2 of the Act.

I. INFORMED DECISION

[45] Respondents contend that complainant was in a position to make an informed decision. To this end, respondents rely on a "Limited Financial Needs Analysis" carried out by van Wyk in terms of section 8 (4) of the Code. This document reveals the following:

a) Client's "specific need" is identified as:

"Income request. Capital guarantee"

b) In the paragraph dealing with "Advice and reasoning of Advisor" the following is noted:

"Client must decide on various companies guaranteed income and guaranteed capital return or go into markets and take a chance on capital return could get better return."

c) Under the heading "Financial product recommended to the client and reason why this product will satisfy the client's needs and objectives" the following is noted:

"(1) Client decides on PIC as income was 12.5% and other companies were less. (2) Client is aware – has to stick for 5 years otherwise no guarantee and someone has to be found to buy the shares. (3) If client passes away before 5 years, aware daughter can't cash in but will still get income for remainder of term."

d) On the last page of this document appears an "Advice Confirmation" where Van Wyk notes, in her own writing, the following:

"- Client needs higher income decided on PIC

- ***Income guaranteed*** *– Head lease agreement*
- ***Capital Guaranteed*** *buy-back agreement*
- *Client aware if she should pass away capital is not accessible – Daughter however will still receive income for remaining term – Unless buyer found (costs involved)*
- *Capital therefore not accessible for 5 years (not necessary) client needs income*
- *Appointment done under supervision of PIC (PIC PI cover.) "*(Emphasis added)

Complainant placed her signature under these notes as confirmation.

[46] The needs analysis confirms the following, in no uncertain terms:

a) Complainant's needs were income and capital guarantee;

b) Complainant did not want to risk her capital in order to get a higher return;

c) Complainant chose PIC because the income of 12.5% was higher than other products;

d) Complainant understood that, in PIC, her capital was inaccessible for five years;

e) That income of 12.5% was guaranteed;

f) That her capital was guaranteed.

[47] However, in truth, when one considers the prospectus:

a) The capital was 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.

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. Respondents, in breach of section 2 of the Code, recommended the PIC product.

J. APPETITE FOR RISK

[48] This office pointed out that the objective facts show that complainant had no appetite for risk. Van Wyk disputes this and submits that complainant was compelled by her need for more income to take risks and that her lack of knowledge should not be equated to risk aversion. This is not supported by the risk analysis dealt with above. By all accounts, complainant had no appetite for risk. The risk, in PIC, as she understood it, was that her capital will be inaccessible for 5 years, this she was willing to accept.

Respondents, on their own knowledge of their client's circumstances, and by their own risk analysis, knew that complainant had no appetite for risk. The PIC product was simply inappropriate and respondents failed to give appropriate advice.

K. RISK IN PROPERTY SYNDICATION

[49] Respondents do not deny that investments in property syndication is high risk and that there is a risk of losing all the capital. However, they state that all investments

contain risk and point to some other failures in the sector. Respondents actually did not answer the point; namely, why did they not advise client that the whole of her capital could be at risk. Instead the record shows that the advice was that the capital was guaranteed although inaccessible for 5 years.

[50] Respondents further submit that complainant's capital was not lost and the company will recover from business rescue. They provide 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.

Section 8 (1) (a-c)

[51] Respondents deny they breached this section of the Code. They point out that this complaint is about product performance and refer to Rule 4(f). In terms of this rule respondents cannot be held liable over an issue of product performance as they had no control over this. This is an issue to be taken up with PIC.

Respondents are misdirected. This complaint is about suitability and appropriateness of the advice and is not about product performance. Respondents merely avoided the issue.

Respondents' submission here amounts to saying that her role was merely to present a requested product. She was not there to give advice. This is not the case. Complainant is a lay person and relied on Van Wyk to give her advice as to the appropriateness of the proposed product.

I have already found, for reasons stated above, that this product was not suitable for complainant's needs and financial profile. Respondents contravened the provisions of section 8 of the Code.

L. PIC DOCUMENTATION

[52] Respondents refer to the documentation completed in making the investment and rely on them as proof of compliance with the Code. Here I deal with some of these documents.

[53] Van Wyk completed a "NEEDS ANALYSIS AND RISK PROFILE" which was part of the PIC application form. The following appears:

a) Under the heading "Investment needs", complainant records that she is retired and needs income from this investment;

b) In a paragraph headed "Specific investment objective", complainant stated "monthly income from day one with capital preservation";

c) Under the heading "Which investment return would you prefer?" complainant states; "12.5%" with **capital secured (conservative)**" ;(Emphasis added)

d) In the next paragraph, relating to previous investment experience, complainant states that her only experience was confined to "cash (money in the bank);

e) Then follows an important question; "Do you have sufficient liquid funds available for unforeseen circumstances?" This is an important question in assessing risk. The form was left blank.

Incidentally, there are other blanks in this form which do not appear to have been fully completed, see section 7 (2) of the Code. Van Wyk nevertheless obtained complainant's signature on it.

[54] This document, after it was completed, made the following clear:

a) Complainant's needs were to receive a monthly income of 12.5% with capital preservation;

b) She had absolutely no experience of investments;

c) At best she was a "conservative" investor.

On van Wyk's own analysis, in the application form, the PIC property syndication was not suitable for complainant's needs. Van Wyk simply ignored the outcome of her own analysis and proceeded to recommend this investment. This too is a contravention of sections 2 and 8 of the Code.

[55] Complainant signed a "SERVICE LEVEL AGREEMENT" and this document calls on the investor to "identify needs". It is significant that complainant filled in "Income **must** be 12.5% **plus** Capital preservation". (Emphasis added)

The PIC investment did not offer this as a guaranteed outcome and was not suitable for complainant's needs. Again, van Wyk ignored this and simply soldiered on.

[56] The next document is an "INVESTMENT PROPOSAL" signed by van Wyk, as advisor. Firstly, van Wyk confirms that this investment is made; "*Arising from the information contained in the requirements and risk determination questionnaire*

and the wide ranging discussions on the Prospectus and Product of PIC Syndications (Pty) Ltd."

Secondly the document confirms that the product features meet the investor's needs being "*Income need 12.5% + Capital presentation preservation"*

There is no evidence that van Wyk actually explained the prospectus to complainant. She did not have the capacity to do so. Nor is there evidence that Strydom gave an explanation.

Again the complainants need for guaranteed income and capital preservation is repeated.

[57] I now turn to an important document, being "ADVICE RECORD OF MUTUAL UNDERSTANDING". This document records that it is a mutual understanding of the investment entered between complainant, as the client, and van Wyk, as an authorised FSP. The following, *inter alia, appears in the document:*

a) The "key features and terms" of the investment are summarised;

b) "*The proposed and agreed investment product is called an investment in unlisted shares*."

c) *"The investment objective of this product is seeking medium to long term capital growth and providing a reasonable level of monthly income for its investors.*

d) *"The investment capital is secured by a buy-back agreement and the income through a head lease agreement as disclosed in the prospectus."*

e) *"…….client understands and accepts the underlying market risks in this regard."*

f) *"…..it is not possible to guarantee the investment capital, nor the targeted return, except where the buy-back and head lease agreements apply."*

g) *"It is recorded that income may fluctuate (except where a head lease is applicable) based on the level of rental income levied from tenants on a monthly basis as well as company expenses."*

The document is signed by complainant and van Wyk.

This document flies in the face of everything complainant expected from this investment and it contradicts all the representations made by Van Wyk. There is no evidence that this document was read by complainant before she signed it or that the contents were explained. If it was explained, I have no doubt that she would not have signed it. I note that complainant had to sign an overwhelming number of documents, all in small print, all at once. It is highly unlikely that she read and understood every page. Complainant states that she did not read everything but trusted her advisor. This is the more probable version.

[58] I now deal with two documents regarding protection of investor funds. The prospectus provided that all funds must be invested in attorney Eugene Kruger's Trust Account. The first document is paragraph 3 of the application form which confirms this fact and points out that the money will be invested in terms of section 78 (2A) of the Attorneys Act; but also states as follows:

"*3.2 The purchase price will remain in such investment until such time as the COMPANY has* ***taken occupation*** *of any of the properties mentioned in the*

prospectus and such investment will at no time form part of the assets of the PROMOTER." (Emphasis added).

As I pointed out above, this does not comply with notice 459. Funds are only paid out of trust "on registration of transfer" of the targeted property, not upon "occupation". The Board of Appeal has already confirmed this. The promoters were acting illegally and respondents failed to notice that complainant's funds enjoyed no protection.

The second document is the letter from Eugene Kruger Attorneys. A letter dated 21st October 2009 is written to complainant confirming that her funds were received into their trust account. The letter also states as follows:

"We will deal with these moneys according to the agreement between our client and yourself on instructions from our client."

This is entirely misleading. This letter had to confirm that funds will only be paid out of trust upon registration of transfer. The attorney was acting illegally and offered no security for investor funds. Regarding the conduct of the attorney I refer to the decision of the Board of Appeal in the above decision off **Picvest Investments vs The Registrar.**

[59] Finally, I refer to a document titled "RISK ASSESSMENT ON PRODUCT INFORMATION". The document starts with confirming the purpose of the assessment; namely; "*to ensure that the investor understands and accept **all** benefits and risks involved in the investment. "*(Emphasis added). The document then calls upon the investor to fill out a questionnaire made up of six questions. All of these questions, with the possible exception of question 4 which advises that

these shares are unlisted, have absolutely nothing to do with risks in this product. The questions merely require complainant to acknowledge that she received the prospectus and deal with the possible sale of these shares.

To the extent that respondent relies on this as an assessment of risk, it is entirely useless.

M. CAUSATION

[60] Respondents aver that van Wyk's advice to invest in PIC was not the cause of complainant's loss. Van Wyk states that she could not reasonably have foreseen that the PIC investment would fail and on that basis the requirement of legal causation was not met.

[61] On the respondents' own version factual causation was established. But for the respondents' advice, complainant would not have invested in an unknown entity such as PIC and her capital would not have been lost.

[62] 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).

[63] 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.

[64] Van Wyk did not pertinently deal with the issue of legal causation fully. She merely suggests that it was not her conduct that "caused" loss to complainant. Significantly, the respondents failed to deal with the law and merely rely on a possible factual finding that the PIC collapse was not reasonably foreseeable and that the cause of the collapse is unknown.

[65] Had the respondents acted according to their own risk analysis and considered the prospectus carefully, they would have realised 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 and it had already expired. 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.

[66] 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.

[67] 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 respondents did their work according to the Act and code, no investment in PIC would have been made, bearing in mind complainant's 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.

[68] 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 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).

[69] 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."

It is appropriate to point out that in addition to these factors one has to take into account, in the circumstances of this case, that 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)

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

N. CONCLUSION

[71] 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 cause of complainant's loss.

O. QUANTUM

[72] 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.

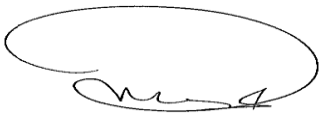
[73] I find that it will be appropriate to order respondents to pay to complainant the capital amount of R550 000 – 00.

P. THE ORDER

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

1. The complaint is upheld;
2. Respondents are ordered to pay to complainant, jointly and severally the one paying the other to be absolved, the amount of R550 000 – 00;
3. Interest on this amount at the rate of 10.25% from a date 14 days from date hereof to date of payment.

DATED AT PRETORIA THIS THE 19th DAY OF MAY 2016.



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NOLUNTU BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS