THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS PRETORIA

CASE NUMBER: FAIS 04381/12-13/ GP 1

FAIS 04382/12-13/ GP 1

In the matter between:

SUSARA GERTRUIDA KRŰGER **Complainant**

and

HUIS VAN ORANJE FINANSIËLE DIENSTE BPK **First Respondent**

STEPHANUS JOHANNES VAN DER WALT **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 Mrs Susara Gertruida Krűger, an adult female pensioner whose particulars are on file with the Office.

[2] First respondent is Huis van Oranje Finansiële Dienste Bpk, 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 lapsed on 11 July 2011.

[3] Second respondent is Stephanus Johannes van der Walt, an adult male and representative of first respondent in terms of the FAIS Act. The regulator's records indicate third respondent's address as Unit 5, Ground Floor, 11 Marco Polo Street, Highveld, Centurion.

[4] At all material times second respondent rendered financial services to complainant.

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

B. FACTUAL BACKGROUND

[6] On 27 August 2009 complainant concluded an agreement with Grey Haven Riches 9 Limited, a public company with registration number 2007/022968/06, promoted by Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape with registration number 1997/004873/07.

[7] The agreement was in connection with the purchase of class B shares in the amount of R300 000 in the Blaauwberg Beach Hotel, Erf 19390[1].

[8] On 4 February 2010, complainant concluded a further agreement with Grey Haven Riches 11 Limited, a public company with registration number 2007/025464/06, promoted by Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape, with registration number 1997/004873/07. This agreement was concerned with the purchase of class B shares in the amount of R1 280 000 in Blaauwberg Beach Hotel.

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

About Realcor

[9] 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, which included Grey Haven Riches 9 Ltd, Grey Haven Riches 11 Ltd, and Iprobrite Ltd (hereinafter, collectively referred to as "Realcor").

[10] Midnight Storm Investments 386 Limited[2] ("MSI"), was a public company which owned the immovable property on which the hotel was being constructed.

[11] Realcor subsidiaries raised money by issuing the investing public with one (1) year and five (5) year debentures and various classes of shares[3]. 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.

[12] 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 was 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 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.

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2 Registration number 2007/01927/06

3 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.

[13] 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.

[14] Pursuant to concerns and allegations raised by members of the public that Realcor was obtaining money from the public unlawfully, the South African Reserve Bank (hereinafter, the “Reserve Bank”), on 21 April 2008, conducted an inspection of Realcor’s affairs through PriceWaterhouseCoopers (“PWC”) in terms of Section 12 of the South African Reserve Bank Act[4].

[15] Through the inspection, the Reserve Bank found that 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. The Reserve Bank further prohibited Realcor from obtaining further deposits from the public, and took steps, by appointing PWC, to ensure that investors’ money was repaid.

[16] Iprobite 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.

C. THE COMPLAINT

[18] Complainant indicated that third respondent was a frequent guest on Radio Pretoria promoting Realcor. In complainant’s words, she concluded that third

[4] Act No 90 of 1989

respondent must be a trustworthy person if he is allowed to stand on public platforms such as radio. She called to make an appointment to consult respondent about investing in Realcor.

[19] At the time, complainant had an investment with AIMS which had become available. She claims she had made it clear to respondent that she required a safe investment and was not prepared to take any risks with the funds, which came from an inheritance of her late husband. She wanted to invest half of the money in the Oranjekas[5], however, respondent persuaded her to invest all her money in Realcor.

[20] During consultations, respondent gathered no financial information from complainant in order to do a proper needs and risk analysis. Although respondent showed complainant brochures of the hotel and informed her that she would be allocated shares from the hotel and receive monthly interest, he failed to disclose the high risk involved in the investment, including the fact that complainant's capital was not guaranteed. Respondent also failed to explain the illiquid nature of the investment to complainant.

[21] Complainant's son, who assisted her with the complaint, indicated that he intervened when he realised that complainant had made a second investment in a large amount. Upon meeting with third respondent and querying the safety of the investments, complainant's son was repeatedly assured that the investment was 100% safe and that the capital was guaranteed.

[5] A "savings and credit corporation", managed by Huis van Oranje. This institution is still in business under the watch of Mr Jan Beyers, a former director of Huis van Oranje.

[22] Complainant further alleges that in rendering financial services to her, second respondent asked her for her personal details, pointed to the various areas for complainant to sign and left with the partially completed application forms. A colleague of second respondent, HJM van der Walt, completed the remainder of the contract in the absence of complainant. Respondent tendered no explanation for this.

[23] Complainant also states that respondent did not disclose to her that he had been paid 7% commission on the R300 000 investment, and 10% on the R1 280 000 investment. She only later found out this information when she received copies of the contracts.

[24] Complainant received interest on her two investments until approximately September 2010, where after payments ceased. Complainant considers her capital to be lost.

[25] From the foregoing factual background, complainant is aggrieved by the conduct of respondent. 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, which includes respondent's failure to appropriately advise complainant and disclose the risk involved with the Realcor investment.

D. RELIEF SOUGHT

[26] In light of the jurisdictional mandate of the Office, complainant has agreed to forego the amount in excess of R800 000, in respect of the second investment.

[27] Complainant's claim therefore is limited to the amount of R1 100 000 in respect of both investments.

E. RESPONDENT'S RESPONSE

[28] During September 2012, the complaints were referred to respondent in terms of Rule 6 (b) of the Rules on Proceedings of this Office, to resolve it with complainant. No response was received from respondents.

[29] On 26 May 2016, notices in terms of section 27 (4) were issued to respondent, advising 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, so the Office can begin with its investigation. The notice further indicated to respondents that in the event the complaint was upheld, they could face liability. Again, respondents failed to respond.

F. DETERMINATION

[30] Having received neither the requested response nor the supporting documentation, the matter is determined on the basis of complainant's version.

[31] The issues for determination are:

31.1 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; and

31.2 in the event it is found that respondent breached the Code and the FAIS Act, whether such breach caused the loss complained of;

31.3 the amount of the damage or financial prejudice.

G. LEGISLATIVE FRAMEWORK

[32] I deem it necessary to first isolate the legislative framework relevant to this matter:

32.1 Sections 13 (2) (b); 16 (1) and (2) of the FAIS Act;

32.2 The General Code of Conduct for Authorised Financial Services Providers and Representatives, in particular, Sections 8 (1) (a) to (c); 8 (2); 8 (4) (a); and 7; and;

32.3 Government Notice 459 (published by means of Government Gazette 28690 of 2006), ("the notice").

Whether the complaint is directed at the appropriate party

[33] The gravamen of complainant's complaint is respondent's failure to appropriately advise her about the inherent risks in the investment.

[34] Respondent acted as an authorised representative of Realcor Cape. This much can be inferred from the contract signed between complainant and respondent[6]. As to whether respondent may be held liable for the financial services rendered whilst acting in his capacity as representative of Realcor, attention should be given to the definition of a representative[7]. The definition of a representative assumes that a person acting as a representative has to exercise the relevant final judgment, decision making and deliberate action inherent in the rendering of a financial service to a client[8].

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6 See "Adviesrekord van 'n onderlinge ooreenkoms"

7 Section 1 Financial Advisory and Intermediary Services Act 37 of 2002 'representative 'means any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial service provider, in terms of conditions of employment or any mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in subsidiary or subordinate capacity…

8 Nell v Jordaan FAIS 05505-12/13 GP 1

[35] In *Moore versus Black*[9], the Appeal Board stated as follows;

"In effect a "representative" executes the very same acts as are expected from the provider when operating alone with the exception of when a representative either:

1. acts on behalf of the provider;

2. Subject to the provider concerned taking responsibility for these acts.

Apart from these two (2) qualifications, a representative acts as if it were a provider.

…The provider is directly regulated by the FAIS Act and by the Registrar. But representatives are, apart from being regulated by the FAIS Act, in effect regulated by the overseeing provider rather than by the Registrar. Such provider clearly has a discretion on how precisely to exercise responsibility over a representative but should ensure in the agreements with the representative that the responsibility covers all aspects, including those duties and obligations imposed by the FAIS Act and the Regulations pertaining to them. The fact that the representative "acts on behalf of" the provider also means that in law, the provider may be held accountable for the acts and omissions of his representative and thus should be regarded as a co-respondent in the event of negligence on the part of the representative."

[36] The question of whether a representative [and not the provider] should be held liable in this context was again dealt with by the Board of Appeal in the second *Black v Moore* Appeal[10]. Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lay not with the appellant as a representative but rested solely

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9 In the Appeal Board of the Financial Services Board, John Alexander Moore and Johnsure Investments CC / Gerald Edward Black, 15 January 2013 at para 59 and 61

10 Decision handed down on 14 November 2014, paragraphs 18 to 23

with the financial services provider. In dismissing the argument, the Board concluded, *'the effect of the Exemption Notice thus allows a representative (due to his minimum experience) to market products subject to a supervisor's guidance. Apart from this exemption, he has to comply with the Code of Conduct.*'

[37] Section 13(2)(b) of the Act[11] states:

"An authorised financial services provider must take such steps as may be reasonable in the circumstances to ***ensure that representatives comply with any applicable code of conduct*** *as well as with other applicable laws on conduct of business*." (My emphasis).

It is clear that there is a duty imposed not only on the provider but also the representative to comply with the provisions of the FAIS Act and Code of Conduct. The complaint is thus directed against the correct parties.

Whether complainant was properly advised as required by the Code

[38] Respondent was invited to demonstrate that he had conducted due diligence on Realcor, prior to advising complainant. In the absence of a response to the contrary, and as will become apparent, respondent conducted no due diligence whatsoever on Realcor.

[39] Had respondent conducted due diligence, he would have learnt of the 2008 inspection by the Reserve Bank, the outcome of which pointed to Realcor's illegal conduct of running the business of a bank without a license. Respondent would have realised there and then that Realcor was not an investment and directed his client elsewhere.

[11] Financial Advisory and Intermediary Services Act 37 of 2002

[40] Respondent had a duty to familiarise himself with the regulatory environment around property syndications. In order to get a better appreciation of the risks associated with property syndications and the kind of disclosures that should have been made by respondent in order to appropriately advise complainant, one has to refer to the statutory disclosures contained in the Government Notice 459 published in Government Gazette 28690 in 2006, hereinafter referred to as 'the notice'.

[41] The notice contains minimum mandatory disclosures, which must be made by promoters of property syndicates. The disclosures must form part of the disclosure document or prospectus, which must be issued by the promoter. By extension, any provider who recommends this type of investment to clients, must be aware of the notice and is obliged to deal with the disclosures when advising their client. The aim, as set out in the Gazette, is to protect the public. Some of the most pertinent provisions of notice 459 are highlighted below:

a) Section 1 (a) states as follows:

"Underlying principles regarding the disclosure document:

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 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."

[42] Information available to this Office points to investors' funds being paid directly into the account of Purple Rain Properties 15 (Pty) Ltd, trading as Realcor, in contravention of section 2 (b) of the notice. Investors were invited to pay money into the account of Realcor[12]. I can only conclude that respondent was not even aware of the existence of the notice. Indeed, had respondent been aware, he would have realised that Realcor's prospectus undermined the provisions of the notice. Yet another indication that respondent had not conducted any due diligence on Realcor.

[12] See in this regard clause 5.10 of the Iprobite prospectus which indicates that money are payable as set out in the application form.

[43] 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."

[44] It is clear that respondent had not satisfied himself that the promoter of this syndication had complied with the provisions of section 3 (c) of the notice.

[45] The two Grey Haven prospectuses made a clear statement that there were no financial statements available since the company was a start-up. What was available, was nothing more than a set of management accounts for a specified period. The management accounts dealt with the issuance of debentures, shares and related costs. It is not clear how the management accounts alone would have assisted respondent in concluding that the investment was sound.

About Realcor's offer

[46] After thoroughly examining the offer contained in the Grey Haven prospectuses, 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 an investor who is at a pensionable age. Below, I set out some of the provisions that should have led respondent to dissuade his clients against this investment. I comment as I go along:

46.1 Grey Haven was to be managed by the Promoter (also the property developer). This means that investors' funds would be managed by the

developer of the immovable property, Realcor Cape. The real beneficiary of the funds was also in charge of managing investors' money, creating an opportunity for self-helping of the funds. In the world of collective investments, of which a property syndication is one, the functions of managing the building project and management of investors' funds are definitely segregated and allocated to different entities. The two functions are never concentrated under one entity and this has to do with the protection of investors. From this point, respondent should have realised that he is not dealing with good stewards of investor funds and kept his clients' money away from this investment.

46.2 The directors of Grey Haven and Midnight had unlimited powers to borrow money[13].

46.3 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[14]. The question that should have crossed respondent's mind should have been (given the real conflict of interest), which of these directors would mind the investors' interests? This shows the

[13] Paragraph 2.3, page 6 of the Grey Haven 11 prospectus

[14] See page 5 of the prospectus.

directors had no regard for sound corporate governance principles. Investors had no chance in this cesspit.

46.4 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 had been instrumental in the procurement of Radisson Hotel as the operator to operate and manage Radisson Blu Hotel[15]. Yet another red flag that should have dissuaded respondent from considering this as an investment.

46.5 The prospectus states that Realcor Developments is in the process of becoming 100% shareholder of issued share capital in the Property 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. There is no mention that respondent took any steps to establish who was behind Realcor Developments.

[47] Before concluding, 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 the SARB prohibiting Realcor from further collecting investor funds. Notwithstanding, Realcor continued

[15] Para 17 of the prospectus

to collect funds from the public, aided by the likes of respondent and even added a premium to its shares. This was by no means an investment.

[48] Turning to respondent's duties in terms of the FAIS Act, 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;'*

[49] In order to demonstrate compliance with section 8 (1), respondent provided a document entitled "Adviesrekord van 'n Onderlinge Ooreenkoms"[16]. This document states:

'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.

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

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.'

[50] Before I deal with the rest of the advice record, a brief comment is warranted on respondent's notes, (para 46). First respondent describes the product sold as *'a venture capital investment'.* This is notwithstanding that Realcor had been ordered by the Reserve Bank, as far back as 2008, to desist from collecting funds from investors.

[51] Having said that, venture capitalists are wealthy experienced individuals, who agree to support start-up companies, in anticipation of superior returns. They (venture capitalists) are fully cognisant of the high risk involved in the venture capital market. They may choose to support a new company either with capital or managerial experience. The point to stress here is, venture capitalists have the capacity to deal with the high risk involved in this type of investment. At the very least, assuming that Realcor had no challenges with the law in anyway, I would expect a provider who advises a client on this type of investment to take steps to satisfy themselves that the investor's profile is suitable to it, as required by section 8 (1). To expect anything less would be undermining the Code. Thus, I find it disturbing that respondent, after luring complainant to this 'safe investment', found it appropriate to hide behind this record. This is nothing short of trickery.

[52] The record of advice deals with three types of products that were considered, namely Realcor Cape, PIC and Sharemax, all three products being property syndications. There is no indication that other investment types were considered. As to why complainants' needs could only be addressed by means of property syndication products, respondent has not explained. The recommendation to invest in Realcor was on the basis that it offered the highest return. This much is noted in the advice record. There is no information evidencing that respondent was concerned with complainant's capacity to absorb high risk. Equally, there is no evidence that respondent was open to consider other types of investments with less risk than property syndications. Respondent's conduct failed to meet the requirements of section 8 (1) (c).

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

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

53.2 information provided in the prospectus was conclusive that investors carried all the risk; and, certain provisions of the prospectus undermined Notice 459;

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

53.4 complainant could lose her capital.

Had these statements been made clear, the probabilities that complainant would have gone ahead with the investments is zero.

[54] It appears from this document and the surrounding circumstances of this case that respondent had taken no time to satisfy himself that complainant understood the advice, in violation of section 8 (2). The provision states that a provider must take reasonable steps to ensure that the client understands the advice and is in a position to make an informed decision.

[55] I conclude that respondent was completely out of his depth and could not have appropriately apprised complainant of the risks involved, in violation of sections 7 of the Code.

Respondent's record of advice

[56] Respondent provided documents 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 meant to be evidence of compliance with the aforesaid section of the Code.

[57] Before I examine the document further, it might be useful to refer to section 8 (4) (a). The section 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 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.

[58] Part three of the 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.

[59] Part four of the record of 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*

[60] On further inspection of this document, it is evident that the above information was already inserted on the document prior to the signature thereof. Certain answers on the form were pre-printed and could not have been a proper response completed in accordance with complainant's circumstances at the time. The only rational conclusion to be made under these circumstances is that the records do not meet the requirements of section 8 (4) (a).

[61] Respondent failed to assess the risk capacity and profile of complainant prior to recommending the said investment. Complainant is a pensioner who invested a

substantial portion of her inheritance and life savings in Realcor. Even when she requested to invest a portion in another investment vehicle, she was persuaded by respondent to place all her eggs in one basket. This is relevant information relating to complainant's circumstances, which does not appear anywhere in respondent's records of advice.

[62] 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. There is no evidence that respondent carried out an analysis at all, nor did he consider any other investments that may have been suitable to complainant's circumstances. 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. The attractive commission to the value of approximately R149 000 on the two investments comes to mind.

[63] I am persuaded that the content of the advice record was not explained to complainant and that she was unaware of the consequences of affixing her signature to the said record. The paucity of information relating to complainant's circumstances suggests that respondent had no intention of providing appropriate advice. If respondent had the intention to give appropriate advice, he would have recommended more suitable products.

[64] The documents are nothing more than a failed attempt to create the impression that the Code had been adhered to.

Did respondent's conduct cause the complainant's loss

[65] Based on complainant's version, the investment in the hotel was as a result of the respondent's advice. I have already mentioned that based on the outcome of the inspection by the Reserve Bank and the violations of Notice 459, respondent should have never recommended the product to anyone. But for respondent's advice, there would be no investment in Realcor. This makes respondent's advice the primary cause of complainant's loss. The next enquiry deals with legal causation. The question is whether, as a matter of public and legal policy, it is reasonable, to saddle respondent with liability for the consequences of the failure of the investment. In simple terms, it can be said that respondent, in giving advice that was inappropriate in terms of the Act and the Code, should have foreseen the resultant collapse of the investment.

[66] It is easy and convenient to impute loss of investors' money to director mismanagement or other commercial causes. In this case however, complainant's loss was not caused by management failure or other commercial influences. If respondent had done his work according to the Act and the Code, no investment in Realcor would have been made, bearing in mind complainant's tolerance for risk. On the strength of the outcome of the Reserve Bank's inspection, respondent should have known that this is not an investment but an illegal venture. Had respondent read the prospectus or disclosure document, he would have realised that the directors of Realcor had no intention of conducting themselves within the law; yet another reason to keep his client's money away from Realcor.

[67] Respondent should have inferred from the overall failure to comply with the notice, on the part of the promoters of the scheme, that this was not an investment. Had

respondent been acting within the law, he would have refused to promote an investment he could not understand. He ought to have been aware that he, owing to his lack of understanding of the product, was in no positon to advise a client of the risks involved. In short, the cause of loss was the inappropriate advice provided by respondent. That the risk actually materialized, for whatever reason, is not the cause of the loss. Otherwise the whole purpose of the Act and the Code would be defeated. Every FSP would ignore the Act and Code in providing financial services to their clients and hope that the investment does not fail. Then when the risk materializes and loss occurs they hide behind unforeseeable conduct of the directors. This will fly in the face of public and legal policy and the provisions of the Act and Code.

[68] The reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered be foreseeable: it was sufficient that the general nature of the harm suffered by complainant and the general manner of the harm occurring was reasonably foreseeable. I refer in this regard to the matter of *Standard Chartered Bank of Canada v Nedperm Bank Ltd*[17] 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

[17] 1994 (4) SA 747 (AD)

presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all played a part."

[69] Information at this Office's disposal points to the following conclusions:

69.1 Respondent failed to note that Realcor's prospectus undermined the law.

69.2 Respondent failed to conduct due diligence on Realcor. Had he done so, he would have been aware of the outcome of the Reserve Bank's inspection of 2008.

69.3 It is an undisputed fact that respondent, prior to advising complainant, had not carried out any work to acquaint himself with the legal environment in which property syndications operate.

69.4 Respondent had no means to evaluate the financial viability of the business proposal, yet he concluded that the investment was safe.

69.5 Respondent failed to advise complainant that by investing in what he described 'venture capital share, he was gambling her investment.

69.6 Had respondent adhered to the Code, he would have realised that complainant's circumstances were unsuitable to invest in Realcor.

69.7 It was respondent's insistence on selling this investment to complainant, regardless of the surrounding circumstances, that saw respondent violate his duty to act in the interests of his client and the integrity of the financial services.

[70] I find that, in advising complainant to invest in Realcor, respondent contravened sections 2; 7 (1) and 7 (2); 8 (1) 8 (2); and 9 of the Code. I also find that respondent's conduct caused complainant's loss.

H. QUANTUM

[71] Complainants invested an amount of R1 280 000 and R300 000. There are no prospects of ever recovering the money from the hotel.

[72] Accordingly, an order will be made that respondents pay to complainant an amount of R1 100 000 plus interest. Please refer in this regard to paragraph 26 for an explanation of the quantum.

I. ORDER

[73] 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 R1 100 000;

3. Interest on the amount of R1 100 000 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 22nd DAY OF NOVEMBER 2016

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NOLUNTU N BAM

OMBUD FOR FINANCIAL SERVICES PROVIDERS