THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS
PRETORIA

CASE NUMBER: FAIS 07189/10-11/ KZN 1

In the matter between:

JOSEPH PETRUS HERMANUS ROBBERTSE **Complainant**

and

MOF VAN NIEKERK MAKELAARS BK **First Respondent**

OCKERT VAN NIEKERK **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 Mr Joseph PH Robbertse, a male pensioner whose details are on file with the Office.

[2] First respondent is Mof van Niekerk Makelaars BK, registration number 2009/219339/23, duly registered in terms of South African Laws. The Regulator's records indicate respondent's address as 69 Pienaar Street, Brits, 0250. Respondent was authorised as a financial services provider on 13 April 2010 with license number 41575. The license is still valid.

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

B. FACTUAL BACKGROUND

[4] On or about 9 July 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.

[5] The agreement constituted an application to purchase debentures to the value of R110 000 in the Blaauwberg Beach Hotel on Erf 19390.

About Realcor

[6] 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").

[7] Midnight Storm Investments 386 Limited[1] ("MSI"), was a public company which owned the immovable property on which the hotel was being constructed.

[1] Registration number 2007/01927/06

[8] Realcor subsidiaries raised money by issuing the investing public with one (1) year and five (5) year debentures and various classes of shares[2]. 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.

[9] 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, 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.

[10] 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.

[11] 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 PriceWaterhouse Coopers ("PWC") in terms of section 12 of the South African Reserve Bank Act[3].

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[2] 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.

[3] Act No 90 of 1989

[12] 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.

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

[14] 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.

[15] At the time of the conclusion of the agreement on 9 July 2010, complainant was a pensioner aged 67. Complainant was employed as a branch manager at SAFFAS and was medically boarded at the age of 58. The investment in Realcor was meant to assist complainant with his basic needs, including rent.

[16] Complainant indicated that he only received three months' worth of interest payments since making the investment and no more. Despite various attempts to complainant has not received his capital. Complainant is of the view that he has lost his capital.

C. THE COMPLAINT

[17] The basis of complainant's complaint 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 in the Realcor investment.

D. RELIEF SOUGHT

[18] Complainant seeks payment of the invested amount of R110 000.

E. RESPONDENT'S RESPONSE

[19] During March 2011, the complaint was referred to respondent, to resolve it with complainant, in terms of Rule 6 (b) of the Rules on Proceedings of this Office. Respondent duly responded on 28 March 2011. The essence of respondent's response appears in the following paragraphs:

19.1 He met with complainant on 9 July 2010 and suggested that complainant invest funds he had in a unit trust (of which complainant was not aware, according to respondent) to provide complainant with additional income.

19.2 An amount of R136 062 was paid out to complainant, of which R110 000 was invested with Realcor. An amount of R23 000 was transferred to an Absa account to provide for emergencies.

19.3 According to respondent, complainant's capital was secure with Realcor.

19.4 Respondent further stated that he acted as a representative of Realcor, under its license.

19.5 In respondent's view, complainant's main complaint is against Realcor.

19.6 Responding an allegation made by complainant, that respondent had refused to speak to him when things turned sour with the investment,

respondent indicated that he merely informed complainant that he preferred all correspondence to be on e-mail.

[20] On 8 December 2015, a notice in terms of Section 27(4) was issued to the respondent, advising that the Office had accepted the matter for investigation and further informing him to provide all documents and or recordings that would support his case, in order for the office to begin investigation. The notice further indicated to respondent that in the event the complaint was upheld, he could face liability.

[21] A further Section 27 (4) notice was issued on 25 August 2016, to which a reply was received from a Mr Deon Pienaar on behalf of respondent on 26 August 2016. It is not clear in what capacity Pienaar wrote the response nor does Pienaar state his interest in the matter. Pienaar wrote a lengthy letter containing sweeping statements, the details of which are completely irrelevant to the issue at hand. I will only deal with the issue of prescription.

F. DETERMINATION

[22] Having received no response from respondent, the matter is determined on the basis of complainant's version, with supporting information. The issues for determination are:

22.1 whether the complaint has prescribed;

22.2 whether the complaint is directed at the appropriate party;

22.3 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

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

G. LEGISLATIVE FRAMEWORK

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

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

23.2 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;

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

Prescription

[24] Section 27 (3) (a) of the FAIS Acts reads as follows:

i. The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or after the date of commencement of this Act but on date more than three years before the date of receipt of such complaint by the Office.

ii. Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first". (my emphasis)

[25] For purposes of determining whether the complaint has prescribed, it is therefore relevant when complainant became aware of the act or omission. Complainant became aware that there was a problem with the investment when he did not receive his monthly income, on 4 August 2010. The complaint was submitted to this office on 17 November 2010, and the complaint form signed on the same date. Therefore, complaint fell within the three year period as required by the provision. This should therefore settle the argument with regards to prescription.

Whether complaint is directed at the appropriate party

[26] I will now deal with respondent's submission that this complaint is directed at Realcor, based on its failure to perform in terms of the contract, and not against respondent. This is incorrect. As can be seen from correspondence from complainant addressed to respondent, complainant is not only aggrieved with the conduct of Realcor, but also with the conduct of respondent and his failure to assist complainant to retrieve the investment he made.

[27] Respondent acted as an authorised representative of Realcor Cape. This much is confirmed by the contract signed between complainant and respondent[4]. 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[5]. The definition of a representative assumes that a person acting as a representative has to exercise the relevant final judgment,

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4 See "Adviesrekord van 'n onderlinge ooreenkoms"

5 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…

decision making and deliberate action inherent in the rendering of a financial service to a client[6].

[28] In *Moore versus Black*[7], 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."

[29] 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

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6 *Nell v Jordaan* FAIS 05505-12/13 GP 1

7 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

Black v Moore Appeal[8]. Appellants, relying on Board Notice 95 of 2003 argued that the responsibility lay not with the appellant as a representative but rested solely 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.*'

[30] Section 13(2)(b) of the Act[9] 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, one of whom is respondent.

Whether complainant was properly advised as required by the Code

[31] The offer made to the public by Realcor was communicated via a prospectus. Thus, respondent's efforts in assessing this investment and the company had to include this document.

[32] In order to get a better appreciation of the risks associated with a property syndication and the kind of disclosures that should have been made in order to

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

9 Financial Advisory and Intermediary Services Act 37 of 2002

properly advise complainants in terms of the FAIS Act, one has to refer to the statutory disclosures contained in the Government Gazette[10], Notice 459 of 2006 (notice 459).

[33] The notice contains minimum mandatory disclosures which must be made by promoters of property syndicates. The disclosures must be included in the prospectus. By extension, any provider who recommends this type of investment to clients, must 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(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."

b) 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:

[10] No 28690

"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) Any direct or indirect interest which the promoter and or any of his or her family member or any other person who is actively involved in the promotion of that syndication has in the property to be purchased, shall be disclosed.

[34] Respondent is on record stating that complainant's investment was safe with Realcor. Respondent saw no risk given the unlisted nature of the instruments and their illiquid nature. On the contrary complainant was informed that the investment was safe and suitable for his circumstances.

[35] 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 notice 459.

[36] I have carefully analysed respondent's responses and cannot find a single reference to the notice. It appears to me 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. In that case, respondent should have immediately ceased advising his clients about this investment.

[37] I have not seen anything in respondent's papers that indicates that he dealt with the requirements of section 2 (d) of the notice, given the overlapping interests in

respect of the directors of the promoter, the investment companies, and the property holding company.

[38] 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."

[39] An examination of Iprobrite's prospectus shows Realcor's utter contempt for the law in so far as their duty to provide details of due diligence carried out in respect of the property. One can easily conclude from respondent's version that he had made no attempt to satisfy himself that the prospectus complied section 3 (c) of notice 459.

About Realcor's / Iprobrite's offer

[40] After thoroughly examining the offer contained in Iprobrite's prospectus, 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 a person at pensionable age. Below, I set out some of the provisions that should have led respondent to dissuade his client against this investment. I comment as I go along:

41.1 At least 50% of the funds raised will be retained by Iprobrite to cover **undisclosed amounts in respect of**, corporate secretarial fees,

professional advisory fees, and '*any other professional bodies'*. The remainder will go to Midnight for the completion of the hotel[11].

41.2 Iprobrite is to be managed by the Promoter (also the property developer). This means that investors' funds will 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. I pause for a moment to note that the undisclosed amounts that were aimed at paying amongst others, 'any professional bodies', must have set the scene for self-help on the part of those controlling investors' funds. 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 investor protection. 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.

41.3 The directors of Iprobrite and Midnight have unlimited powers to borrow money[12].

41.4 At least three of the four directors are common in the Property Holding Company, the Promoter/Property developer, and the investment Companies, (Iprobrite, Grey Haven Riches 9 and 11). Ms Deonette De Ridder, who appears to have been the most dominant spirit behind the

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11 Paragraph 5.2.2 of the prospectus

12 Paragraph 9.10 page 25 of the prospectus

Realcor Empire, even had her family trust - the Deonette Trust - involved in the Realcor business[13]. The question that should have crossed respondent's mind should have been, given the real conflict of interest, which these four directors were bound to face in their daily decision making, who would mind the investors' interests? This shows the directors had no regard for sound corporate governance principles. Investors had no chance in this cesspit.

41.5 Ms De Ridder, in her capacity as managing director of the Promoter/Developer, is responsible for the overall management of construction of the hotel, administration of the investments companies and has been instrumental in the procurement of Radisson Hotel as the operator to operate and manage Radisson Blu Hotel[14]. Yet another red flag that should have dissuaded respondent from considering this as an investment.

41.6 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.

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13 See page 25 of the prospectus.

14 Para 9.13 of the prospectus

[42] 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 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. Respondent gambled what complainants could not afford to lose.

[43] 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;'*

[44] In order to demonstrate compliance with section 8 (1), respondent provided a document entitled "Adviesrekord van 'n Onderlinge Ooreenkoms"[15]. 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.

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.'

[45] According to the information provided in the risk profile analysis, complainant was considered a **conservative** investor. I note from the promises made to investors that investors were meant to receive monthly interest and dividends, long before the business of MSI, the hotel, started operating. Where these supposedly attractive returns came from requires no genius. The entire financial model was nothing but a house of cards.

[46] Respondent did not question where the alleged returns came from. It is this lack of appreciation of the intricacies of the investment which saw respondent violate the General Code. Respondent had no business advising complainant about an

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

investment he could not comprehend. Had respondent conducted himself in the manner demanded by section 2 of the General Code, he would have never recommended the investment to any of his clients because he knew very little, to say the least, to advise anyone on the risk involved. Thus, respondent's conduct was bound to violate section 7 (1) of the General Code. It is abundantly clear from a plain reading of all respondent's documents that the real risk involved in the Realcor investment was never disclosed.

[47] What complainant needed to know was a simple statement to the effect that he could lose his capital in this investments. Complainant also needed to know that respondent had no resources to evaluate the financial soundness and legal viability of this investment. Had these two statements been made clear, the probabilities that complainant would have gone ahead with the investment is zero.

[48] 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. On the contrary, respondent informed complainant that the investment was safe.

[49] Given the aforesaid discussion, 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 and 8 of the Code.

Record of advice

[50] In support of his response, respondent submitted various documents which were signed by complainant.

50.1 Pages 1 – 2 is the "Disclosure of information"[16] which provided information about Realcor and its primary business. It is noted that respondent is registered as a representative of Realcor and that his services are not rendered under supervision.

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

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

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

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

d. There could be restrictions on the appropriateness of the advice and the client should take steps to determine whether the advice is appropriate, taking into account his goals, financial situation and needs;

[16] Translated from Afrikaans

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

50.3 Page 5 is entitled “Financial Information” and contained information about the Absa bank investment to the value of R23 000 as well as the investment in Realcor to the value of R110 000. Total assets were noted as R134 000 with nil liabilities. In addition, limited information is provided about income and expenditure.

50.4 Pages 6 – 9 is the “needs and risk analysis”. Complainant’s goal is noted as, - obtain maximum income **with capital preservation** over 60 months (emphasis supplied). As far as needs were concerned, it was noted that complainant would receive monthly income of 14.5%, of the total investment over a short term.

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

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

[52] It follows that there was no basis for respondent not to conduct the required analysis in order to provide complainant with appropriate advice. Respondent's conduct as evidenced above was a clear attempt to disregard the Code. Section 8 (1) is clear, in that prior to providing advice, a provider **must** take reasonable steps to seek appropriate and available information from the client, conduct an analysis and identify suitable products (own underlining). It was ludicrous of respondent to expect complainant [who had limited exposure to financial products, save for a bank account and unit trusts] to determine suitability of advice provided by respondent. In terms of the law, this was respondent's duty.

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

Did respondent's conduct cause the complainant's loss?

[54] Based on complainant's version, the investment in the hotel was as a result of the respondent's advice. This means, had it not been for respondent's advice, complainant would not have made the investment in Realcor. This answers the test for factual causation.

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

[56] The reasonable foreseeability test did not require that the precise nature, or the exact extent of the loss suffered, or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result; it was sufficient if the general nature of the harm suffered by complainant and the general manner of the harm occurring was reasonably foreseeable.

[57] Given that respondent had carried out no due diligence on the Realcor group, it was negligent of him to advise complainant that the investment was safe. Respondent had no resources to assess this investment. On this basis alone, he should not have advised any client on this investment. That respondent could not see beyond the marketing papers written by Realcor was sufficient for him to foresee that harm may result. Thus, a skilled and responsible FSP, acting according to the Act and the Code, would not have advised complainant to invest in Realcor.

[58] Had respondent done his work according to the Act and the Code, no investment in Realcor would have been made, bearing in mind complainant's age and capacity to withstand the risk of losing his capital. It is easy and convenient to impute loss to director mismanagement or other commercial causes. In this case however, complainant's loss was not caused by management failure at Realcor but respondent's inappropriate advice. That the risk actually materialized, for whatever reason, is not important. Otherwise the whole purpose of the Act and the Code would 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.

[59] The loss suffered by complainant as a result of respondents' inappropriate advice was reasonably foreseeable by respondent. I refer in this regard to S*tandard 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 presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all played a part."

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

60.1 Respondent had no ability to assess the risk in this investment, yet he advised his client that it was a safe investment and suitable for his risk profile.

60.2 As has already been demonstrated, respondent had no idea of the risk involved in this product. To even describe the investment as safe and suitable for a conservative investor was negligent.

60.3 Respondent cannot deny that at the time he advised complainant, there was no apparent means to protect investors against director misconduct or

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

mismanagement. For this reason, harm was not only foreseeable; it was real.

60.4 There is equally no evidence that respondent had carried out any work to acquaint himself with the legal environment in which property syndications operate.

60.5 Respondent had failed to investigate the myriad of companies involved and the several agreements which left control of the all the companies in the hands of one small group of directors.

60.6 Respondent paid no attention to the real conflict of interest in respect of a number of individuals involved in managing the Realcor companies.

60.7 Had respondent adhered to the Code, he would have realised that complainant's circumstances were unsuitable to this type of investment.

60.8 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.

[61] 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 this conduct was the cause of complainant's loss.

H. QUANTUM

[62] Complainant invested an amount of R110 000. There are no prospects of ever recovering the money from the hotel.

[63] Accordingly, an order will be made that respondent pay to complainant an amount of R110 000 plus interest.

I. ORDER

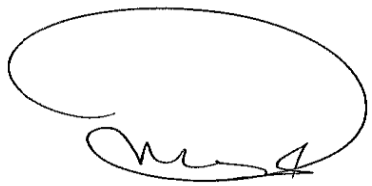
[64] In the premises, I make the following order:

1. The complaint is upheld.

2. Respondent is ordered to pay complainant the amount of R110 000;

3. Interest on the amount of R110 000 at the rate of 10.25%, from the date of determination to date of final payment.

DATED AT PRETORIA ON THIS THE 20TH DAY OF OCTOBER 2016



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OMBUD FOR FINANCIAL SERVICES PROVIDERS