IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

CASE NUMBER: FAIS 09071/10-11/MP 1

In the matter between:-

CAREL JOHANNES WEIDEMAN	**1st Complainant**
ANNA MARIA JACOMINA WEIDEMAN	**2nd Complainant**
and	
HUIS VAN ORANJE BEHEREND BEPERK	**1st Respondent**
STEPHANUS JOHANNES VAN DER WALT	**2nd Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO. 37 OF 2002 ('FAIS ACT')

A. THE PARTIES

[1] First complainant is, Carel Johannes Weideman a male retiree of Cullinan, Gauteng. First complainant is married in community of property to the 2nd complainant.

[2] Second complainant is Anna Maria Jacomina Weideman, a female retiree of Cullinan, Gauteng. Second complainant resides at the same address as first complainant.

[3] First Respondent ('the respondent') is Huis van Oranje Beherend Beperk ('HVO'), a public company duly incorporated in terms of South African law, registration number 1995/ 006025/06, with its principal place of business situated at Office 14, Kleinfontein, Uit en Tuis Winkelsentrum, Rayton. At all times material hereto, 1st respondent was an authorised financial services provider in terms of the FAIS Act, with license number 687. The license lapsed on 11 July 2011.

[4] Second Respondent is Stephanus Johannes van der Walt, an adult male and representative of 1st respondent. At all times material hereto, complainants dealt with 2nd respondent as the representative of 1st respondent in terms of the FAIS Act. I refer to the respondents in the determination collectively as respondent. Where necessary, I specify.

B. BACKGROUND

[5] This complaint relates to investments that were made into a public property syndication investment commonly known as Realcor, promoted by an entity known as Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape.

[6] According to the prospectus of Grey Haven Riches Limited (Riches 9), registration number 207/022968/06 the main players are:-

(i) Grey Haven Riches Limited, (Riches 9). The prospectus also refers to

Riches 9 as the Investment Company;

(ii) Midnight Storm Investments 386 Limited, (Midnight) (Reg 2007/019270/06). The prospectus refers to Midnight as the Property Holding Company;

(iii) and Purple Rain Properties 15 (Pty) Ltd t/a Realcor Cape (Realcor) (Reg 1997/004873/07), referred to as the Promoter.

[7] Riches 9 was the first invitation to the members of the public to invest in the scheme. The prospectus opened on 1 November 2008 and expired on 31 January 2009. By then it had not managed to sell all its shares. The directors of Riches 9 were, Deonette De Ridder, (de Ridder) and one Christo Germishuys, an accountant. In came Grey Haven Riches 11 Ltd (Riches 11), registration number (2007/025464/06) on the 11 August 2009. The prospectus refers to Riches 11 as the Investment Company. De Ridder and Ernest Roth were directors of Riches 11. They were also employees of Realcor, the Promoter.

[8] A browse through the prospectus of Riches 11 reveals the following:-

Appointment of directors

[9] The number of directors, the terms of office and the conditions of retirement were to be determined by the Riches 11 at a general meeting. Directors could from time to time appoint one or more of persons from their rank to the office of managing director for such term and remuneration as they 'may think fit'. The remuneration of the directors was to be determined by the directors of

Riches 11 at a general meeting. The directors had unlimited powers to borrow money according to the prospectus.

Management of the business of Riches 11

[10] The Promoter was said to be responsible for the management of the business of Riches 11.

Legal matters:

[11] The services of Andre Heunis Attorneys Inc., trading as Heunis & Heunis Attorneys, 2nd Floor Bloemhof Building, 112 Edward Street, Bellville had been secured, while Abduraghmaan Stellenboom was appointed legal advisor. Ernest Roth was the company secretary.

Trading status and main business

[12] Riches 11, according to the prospectus had commenced trading sometime in 2009 and had one shareholder at the time (of registering the prospectus), one Monica Ripepi, who represented Hope Fountain Investments CC.

[13] The main purpose of the offer was to utilize the funds received from the public and allow them the opportunity to share in profits of the venture. For information regarding the figures and the risks involved, members of the public were referred to an Annexure 'G'. With regard to Midnight, the prospectus states that its main business was to purchase immovable property to enable it to generate profit through management agreements in respects of such immovable properties.

Riches 11 had secured the right to purchase the shares of Midnight immediately upon completion of the hotel known as Blaauwberg Beach Hotel, only in the event the shares were sold in full.

[14] The prospectus further alludes to the fact that the Promoter had already concluded a management agreement with the Radisson Group to manage the hotel. A written copy of the agreement was said to be available at the registered offices of Riches 11.

Loans

[15] The prospectus alluded to a loan in the amount of R25 million rand which was granted to Midnight. The loan had subsequently been paid by funds procured from the public. The purpose of the loan was to 'grant options to the proposed purchasers of the shares of the Investment Company', (Riches 11) and to 'kick start the development and construction of the Blaauwberg Beach Hotel pending the purchase of the immovable property'.

Huis van Oranje

[16] Against the background mentioned which was at all relevant times accessible to the respondents, the complainants were sold several investments from the Realcor group. They aver that they came to know about the Beach Hotel and Realcor from advertisements by the respondent in the print media and on radio. The complainants were promised high returns and were advised that an investment in the Beach Hotel was safe. About one or two years after investments were made, income payments ceased.

[17] The following is an extract of an advertisement placed by the respondent in an Afrikaans newspaper, Die Afrikaner, (translated from Afrikaans to English and attached hereto marked A)

[18] An investment in the Blaauberg Beach Hotel remains very safe and provides the following benefits:

i. *'Interest from 12.5% to possible growth of 30%*

ii. *Investment term starting from 1 year*

iii. *Option to purchase shares*

iv. *Management agreement with the Beach Hotel Group*

v. *5-star hotel*

vi. *International role players*

vii. *Double your investment within 4 years*

- *Minimum investment R10 000'*

Investigations by this Office

[19] From investigations conducted by this Office the following emerged:

The promoter of the investments, was involved in the acquisition and development of commercial properties, which included the Beach Hotel. Realcor at the time held 100 per cent of the shares in Realcor Developments ('Developments'), the development leg of the group, and 100 per cent shares

in Realcor Construction ('Constructions'), the construction side of the business. Constructions held 100 per cent shares in Realcor.

The demise of companies in the group

[20] All the companies comprising the Realcor Group were, pursuant to an investigation commissioned by the Registrar of Banks ('the Registrar') found to have contravened the Banks Act by illegally collecting deposits from the public whilst not registered as a bank. The Registrar duly issued a directive to Realcor in terms of Section 83 of the Banks Act that it repays the funds illegally obtained. A manager was also appointed by the Registrar to manage the repayment process[1]. Due to the Registrar's intervention, the Realcor Group was unable to procure further public funding for its operations, leading to the failure of many of its subsidiaries. Riches 9 and 11 were by resolution, placed under business rescue on 14 June 2011. Both entities were subsequently wound up.

C. THE COMPLAINT

[21] According to the complainants, they invested R573 000 and R265 000 respectively in the investment then known as the Beach Hotel on the advice of the second respondent. Second respondent is alleged to have assured the complainants that their investments were safe.

[1] See also par 11 of judgment by Eloff AJ, Southern Palace 265 (Pty) Ltd v Midnight Storms Investments 386 (Pty) Ltd Western Cape High Court, Case no 15155/2001

[22] They further contend that the risk associated with the investments was never disclosed to them by the second respondent. When the income ceased in November 2011, they sought answers from the second respondent and Realcor. Their efforts to have the income repayments re-instated or recover their capital were all in vain.

D. RELIEF SOUGHT

[23] The complainants eventually lodged a complaint with this office. In the complaint they seek a refund of their capital of R573 000 and R265 000, respectively from the respondents. In essence they state that the respondent, by failing to disclose the risk associated with the investments, violated the provisions of the FAIS Act. Such violation, they claim, led to them suffering financial damage in the amounts they claim.

E. RESPONDENT'S RESPONSE

[24] The complaint was, in terms of Rule 6 (b) of the Rules on Proceedings of this Office, referred to the respondents to resolve. Following this, a notice in terms of Section 27(4) of the FAIS Act was issued, informing the respondent that the matter had been accepted for investigation. The notice also called upon respondents to provide copies of their file of papers and any other documents supporting their case. What follows is a translation of the respondent's response:

24.1 In January 2009, 1st complainant invested an amount of R130 000 into debentures and R300 000 into shares issued by Riches 9. When these

transactions were concluded second respondent made disclosures to the complainants in compliance with the FAIS Act. The second respondent further stated that the 1st complainant had signed a record of advice in terms Section 8(4) of the General Code of Conduct ('the Code'). I comment on the respondent's record in terms of section 8(4) later in this determination.

24.2 In January 2010, the debentures of R130 000 matured. Upon maturity, complainants received an amount of R143 000 which they used to buy shares in Riches 11. The first complainant according to the respondent signed a disclosure document, and an advice record. As a result of the investment into Riches 11, first complainant's investment amounted to R443 000.

24.3 In January 2009, second complainant invested R100 000 in debentures issued by Riches 11 and shares to the value of R165 000 in Riches 9. Second complainant also signed a disclosure document and an advice record.

F. ISSUES

[25] There are three issues that arise for consideration here:-

25.1 Whether respondent acted in a manner which is not in compliance with the FAIS Act and/or negligently whilst rendering financial services to complainants;

25.2 Should it be found that the respondent's conduct was not in compliance with the FAIS Act and or negligent, whether it caused the complainant to suffer damages or financial prejudice; and

25.3 The amount of such damages or financial prejudice.

The investments

[26] According to the respondent's file of papers the following investments were made by the complainants:

'1st complainant

- *Investment date - 09 January 2009*

  Product – purchased debentures in Riches 9

  Amount – R130 000

- *Investment date - 09 January 2009*

  Product – purchased shares in Riches 9

  Amount – R300 000

- *Investment date - 31 January 2010*

  Product – shares in Riches 11

  Amount – R143 000[2]

*Total initial capital invested was **R430 000'***

[2]When 1st complainant's initial investment of R130 000 matured, the supposed maturity value, i.e. R143 000 was converted to shares in Grey Haven 11.

2nd complainant

- Investment date - 09 January 2009

  Product – purchased shares in Riches 9

  Amount – R165 000

- Investment date - 31 January 2010

  Product – purchased shares in Riches 11

  Amount – R100 000

Total capital invested was **R265 000**

Suitability of advice

[27] As mentioned in paragraph 11, the respondent contends that the complainants signed advice records in terms of Section 8(4)(a) of the Code. Section 8(4) of the Code stipulates that where a client has not provided all information requested by a provider for the purposes of furnishing advice, the provider must fully inform the client thereof and ensure that the client understands that –

(i) A full analysis could not be undertaken;

(ii) there may be limitations on the appropriateness of the advice provided; and

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

[28] In support of their response the respondents provided the Office with *inter alia* documents titled 'Adviesrekord ingevolge artikel 8(4) van die Algemene Kode', which translates to Record of Advice in terms of Section 8(4) of the General Code ('Section 8(4) record'). These documents were allegedly completed when the investments in question were made, and purport to be proof of adherence to Section 8(4) of the Code.

[29] In part three of the Section 8(4) records, the following question and answer is contained -

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

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

[30] No particulars were given as to the reason for the complainants refusal to provide the necessary information for a needs analysis to be conducted. When questioned about this, the complainants contended that they were not asked to provide any specific information. In particular, no information was sought relating to their financial circumstances needs.

[31] In part 4 of the Section 8(4) records, the following is contained -

Summary of information on which the advice is based

Client's financial information:

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

[32] The complainants aver that the information contained in part four of the Section 8(4) records, i.e. 'Summary of information on which the advice is based' was already inserted when the second respondent asked them to sign the documents. In other words, they were allegedly requested to sign pre-completed documents. In my view, this contention has merit for the following reasons:

32.1 Upon inspection of the Section 8(4) records, it was noted that this particular part of the form was in print and could not have been filled in at the time the advice was given to the complainants. It was also noted that Part four of the Section 8(4) records completed for both complainants contain exactly the same information and recommendations, (see par 18 and Annexure A1-A4).

32.2 A further glaring anomaly is that the respondents have referred to the section 8 (4) record as their sole defence in all the complaints that were lodged against them to this Office. This prompted the Office to write to the respondents on 30th of May to 2012 in an effort to obtain further details. I reproduce that letter here below: The respondent's response is in bold print:

' Dear Sir / Madam

We refer to the above-mentioned matters.

We kindly need to be provided with the following information in order for us to further assess these complaints:

1. *It appears from our investigations that the representative of Huis Van Oranje, in each of the complaints received by our Office, made use of the provisions of Sect 8 (4) when the financial services were rendered to the complainants. Kindly advise how this is possible as in many of these cases the representatives had access to all the background info regarding these clients, making it possible for risk and needs analyses to be conducted for each of them respectively.*

   ***The clients were given the choice whether they wanted a FNA done and chose not to have it done**.*

2. *It appears section 8 (4) was merely used to circumvent the provisions of the General Code of Conduct. Numerous of the Client Advice Records for different clients contain exactly the same information ('verbatim'). Please comment.*

   This was not the case, as already stated, the clients were given a choice and chose not to have it done.

3. *We also wish to enquire the reason as to why, in an advertisement by Huis van Oranje (see attachment), it is stipulated that the investments in Blaauberg Beach Hotel is a very safe investments when in fact the underlying investments were shares and unsecured debentures, i.e. high risk investments.*

The advert revered to the specific investment and not the type of investment.

4. *Kindly provide proof that it was specifically disclosed to Mr. and Mrs. Weideman that the investments (shares and debentures) made on your advice were high risk investments. In this regards, kindly note that reference to high risk investments contained in volumes and volumes of legal jargon will not suffice.*

As previously proved to you, the contract that the client signed, contained those specific words, printed in bold in plain Afrikaans and not in "volumes and volumes of legal jargon". (Mr and Mrs Weideman is both Afrikaans)

5. *In all of the complaints lodged with this Office, property syndication investments were recommended to complainants. We need to know why Huis van Oranje only recommended to property syndication investments to their clients.*

Property syndication was the only investment type that Huis van Oranje Finansiële dienste limited done, therefore it could only offer property syndication investments.

6. *In the response submitted to our Office in regards to the Weideman complaint you stated that when the debentures matured, the monies paid to the complainants were used to purchase shares. We need to know whether the monies were indeed paid to complainants or whether the debentures were merely converted to shares.*

The debentures matured, whether the money was physically paid into his account or whether to safe on bank charges the proceeds were transferred internally within Realcor, I can not confirm or deny at this stage, I will have to take it up with Realcor.

7. *Please also advise as to why Mrs Van Der Walt completed and signed client advice records pertaining to the investments when the financial service was in fact rendered by Mr Frans van der Walt. Please confirm the relationship between Mr & Mrs Van Der Walt.*

Mr and Mrs van der Walt is husband and wife. I were not present at that time and can only assume that they worked together.

We look forward to hearing from you by 12h00 on the 31st of May 2012.

Yours sincerely.'

[33] In the light of the response provided by the respondents, I come to the conclusion that the pre-completed section 8(4) records in the respondent's file of papers was nothing more than a facade to create the impression that the provisions of the FAIS Act and the Code were adhered to. When respondent rendered financial services to the complainants, he paid lip service to the provisions of the FAIS Act and the Code. I am persuaded that the contents of the Section 8(4) records were not explained to the complainants and that they were unaware of the consequences of affixing their signatures to the said records, i.e. they relinquished their right to have a full analysis conducted for the purposes of the advice given to them[3].

The risk inherent in the investments in Riches 9 and 11

[34] On the first page, the two prospectuses of Riches 9 and 11 carry the warning that the shares on offer are unlisted and should therefore be considered 'risk capital'. In simple terms, in the event something goes wrong, investors could lose their capital or a substantial portion of their capital. I have not seen anywhere in the respondent's papers that he advised the complainants that they were at risk of losing their retirement savings. The claim that complainants signed a record in terms of section 8 (4) of the Code does not assist the respondent as he cannot provide any basis for considering the two entities as investments into which complainants, who are both pensioners, could invest.

[3] See Section 8(1)(b) and Section 8(4)(a) of the Code

[35] I have perused the prospectuses of Riches 9 and 11. Both documents contain no relevant information on the basis of which respondent's conduct of inviting complainants to invest in the two entities could be explained. Having said that, what the documents contain, is sufficient to dissuade anyone in the position such as that of the respondent, from recommending such an investments to his clients. The lack of information and the evidence of a clear conflict of interest in the person of Deonette de Ridder, who appears to be contracting with herself in respect of all the companies involved in the group should have been sufficient warning to the respondent of the extent of risk his clients were facing.

[36] The details contained in the prospectus give a clear indication of the risk members of the public were facing. The prospectuses alluded to the Promoter having been tasked with the responsibility of managing the business of the Investment company. However, the same prospectuses refer to an agreement between the Promoter and Rezidor Hotel group to manage the business of the Investment company. This means the Promoter would have been paid for merely imposing itself as the middle man. The powers of the directors, the scant details surrounding the loans, and the ease with which funds appear to have moved between the entities in the group all evidence the risk investors were facing.

[37] Also, given that the building was nowhere towards completion while investors continued to receive the so called income, should have raised suspicion on the part of the respondent. It is unfortunate that it did not. The probability that the income was actually investment from new entrants into the scheme is

overwhelming. This is why when the Registrar of banks stepped in, income paid to investors ceased. All of these risk issues, which respondent could not identify, only serve to prove one thing, and that is, respondent was completely out of his depth when it comes to assessing the risk inherent in financial product in question. He nevertheless sold the product even though he did not understand it. In his own version, he argues, contrary to objective evidence that the product is in fact a low risk product. This leads one to conclude, he could not have intended to act in his clients' interest in recommending a product he hardly understood. Accordingly, the conclusion that respondent failed to act in his clients' interest is appropriate in the circumstances.

[38] I have no doubt that had second respondent disclosed to the complainants that they were at risk of losing their retirement savings they would not have invested in the two entities.

G. FINDINGS

In the circumstances, I make the following findings.

[39] The respondent failed to adhere to the provisions of the FAIS Act and the General Code in that he requested the complainant to sign pre-completed documents, (styled, section 8(4) records) without explaining the contents of such documents and consequences of signing them.

[40] Contrary to the objective facts and true state of affairs and in violation of Section 3(1)(a)(i), respondents advised the complainants that the investments in Riches 9 and 11 were safe investments. Thus, complainants were not put

into a position wherein they could make an informed decision when they purchased the unlisted shares and debentures.

[41] Second respondent failed to advise complainants appropriately as the Code demands.

[42] Second respondent failed to act with due skill, care and diligence and in the interest of his clients.

[43] On the facts of this matter, but for 2nd respondent's conduct, the complainants would not have invested in the high risk scheme of Realcor.

[44] The first respondent is the licensed provider under whose name the financial services were rendered to the complainants. Second respondent, rendered the financial services to the complainants, whilst being a representative of the respondent. It is necessary that I hold both respondents jointly and severally liable.

H. QUANTUM

[45] The documents provided by complainants support that the first complainant invested an amount of R430 000 and the second respondent R265 000. There is no prospect of recovering this money. I therefore intend to award R430 000 and R265 000, respectively.

ORDER

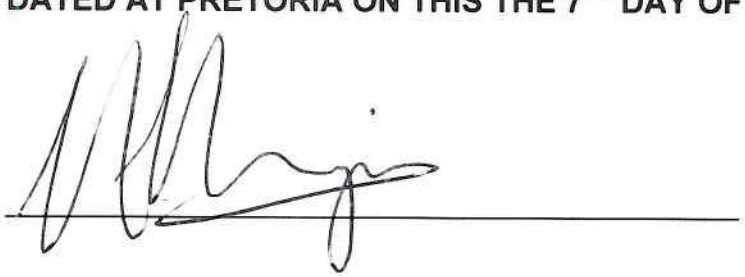
In the premises, the following order is made:

1. The complaint is upheld;

2. Both respondents are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to 1st complainant the amount of R430 000 and 2nd complainant the amount of R265 000;

3. Interest on the aforesaid amounts at the rate of 15.5 %, per annum, seven (7) days from date of this order to date of final payment;

DATED AT PRETORIA ON THIS THE 7TH DAY OF NOVEMBER 2012.



SYDWELL L SHANGISA

DEPUTY OMBUD FOR FINANCIAL SERVICES PROVIDERS